

Comments on Draft No. 3.1 – H.96: An act relating to creating the Truth and Reconciliation Commission Development Task Force

March 1, 2022

The International Center for Transitional Justice (ICTJ)¹ welcomes this latest draft of this important legislation under consideration by the House Committee on General, Housing, and Military Affairs (House General Committee) and respectfully submits this memorandum summarizing our comments on Draft 3.1. We offer general comments on the overall approach now being proposed and make specific comments on individual sections of the legislation, including on phrases or words that are repeated multiple times in the draft bill (e.g., “state-sanctioned.”)

We remain available to provide additional assistance as the legislative process moves forward.

I. GENERAL COMMENTS

We are impressed by the House General’s commitment to ensuring that the voices of the communities who have been impacted by institutional, structural, and systemic discrimination in Vermont are being heard and considered during the conceptualization process of this legislation and in the various iterations of H96.

However, we have some general concerns about the current approach taken in Draft 3.1 for making manifest the core principles of public engagement (inclusivity, diversity, collaboration, openness, transparency, and participatory processes) before and during the tenure of the VTRC. In our opinion, the creation of two essentially permanent groups—appointed “stakeholders” and a Selection Panel—as currently envisioned, could negatively impact on the effective functioning of the VTRC. There are a number of reasons for this, some particular to the “stakeholder group,” others particular to the Selection Panel. Both, however, have the potential to impinge on the independence of the VTRC.

These are subjects we know you’ve studied and considered carefully at various times and in different ways. We raise these concerns now because we fear that we may not have been sufficiently clear, during the workshops held on February 9th and our testimony on February 10, 2022, about the limited role of selection panels and the nature of consultative processes during the life of a truth commission, including by key stakeholders.

Number and Role of Appointed “Stakeholders”

The current size and ongoing (“standby”) role of the group of 32 individuals known as “stakeholders” who will be “appointed” by a variety of organizations, entities, and government bodies, represents a significant increase over the last draft and could pose significant challenges to the independent operations of the Commission.

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Number of Appointed Stakeholders: As mentioned before, we’re concerned that the large number of official appointed stakeholders could make it very hard for them to reach a consensus when selecting the members of the Selection Panel. In addition, if these 32 stakeholders continue on in both an official and consultative role after the commissioners are selected, the three-member commission may feel outnumbered, overwhelmed, and possibly even intimidated by the sheer number of stakeholders to whom they must “answer” as they take on the difficult work of a truth commission.

That potential sense of intimidation is only exacerbated by the fact that the stakeholders retain the power to remove and replace members of the Selection Panel which in turn has the power to remove commissioners “for incompetence, failure to discharge the commissioner’s duties, malfeasance, or illegal acts” (§903(2)). That arrangement could end up affecting the independence of the commission, whether because of actual or perceived coordination and interference behind the scenes between the Selection Panel and the appointed stakeholders to monitor and perhaps to second guess the commissioners’ decisions and remove them.

Recommendation: We understand it is quite common for state commissions to have many commissioners, but for the purpose of this work, we would advise at a minimum that the number of stakeholders is reduced to a more workable number, if the decision is made to retain the current structure.

Role of Appointed Stakeholders: It is our opinion that the role that stakeholders are to play *first* during the commissioner selection process and *later* during the VTRC’s tenure could end up complicating and stalling the work of the commission at key moments during the process. It is important to note that the “appointed stakeholders” are mentioned separately from other stakeholders/citizens in the draft, a drafting choice that could be interpreted to accord them special status. Although not specifically denominated an official “group” they have an *official and permanent role* in connection with the selection, removal, and replacement of commissioners as follows:

Official and permanent role

Section	Role	Draft Language
§904(a)(1)	selection of selection panel	The Selection Panel shall be composed of seven members selected on or before September 1, 2022 [Change date?] by a majority vote of the following stakeholders
§904(c)(2)	removal of members of Selection Panel	Members of the Panel may be removed by a majority vote of the stakeholders identified in subdivision (a)(1) of this section for incompetence, failure to discharge the member’s duties, malfeasance, or illegal acts.
§904(c)(3)	filling of vacancies on Selection Panel	A vacancy occurring during the term of a member of the Panel shall be filled by the stakeholders identified in subdivision (a)(1) of this section for the remainder of the unexpired term.

And a “consultative” *function* at other times during the mandate of the VTRC. We note that the draft as currently written singles out the §904(a)(1) stakeholders for special mention in some of the provisions and includes phrases such as “in consultation with the stakeholders identified in subdivision 904(a)(1)” and “work in consultation with” the §904(a)(1) stakeholders which could create some ambiguity about whether those consultations are somehow different from those to be accorded other stakeholders and perhaps are even mandatory.

Consultative role

Section	Role	Draft Language
§902(b)(2)	consultations in connection with the selection of committee members	Each committee shall consist of the commissioners and citizen [different term?] members appointed by the commissioners in consultation with appropriate stakeholders.
§906(a)(1)	establishing committees	establish, in consultation with the stakeholders identified in subdivision 904(a)(1) of this chapter and other stakeholders in the commissioners' discretion, committees to examine institutional, structural, and systemic discrimination [caused or permitted by State laws and policies that has been] experienced by each of the following populations in Vermont
§906(a)(2)	determining the scope and objectives of the work to be carried out by each committee	determine, in consultation with the stakeholders identified in subdivision 904(a)(1) of this chapter [, historians, social scientists, experts in restorative justice,] and other stakeholders in the commissioners' discretion, the scope and objectives of the work to be carried out by each committee established pursuant to subdivision (1) of this subsection
§906(a)(7)	ensure that the work of the Commission is open, transparent, inclusive, and meaningful	work in consultation with the stakeholders identified in subdivision 904(a)(1) of this chapter [, experts in restorative justice,] and, in the commissioners' discretion, other stakeholders to ensure that the work of the Commission is open, transparent, inclusive, and meaningful

Given the ambiguities around the scope of the appointed stakeholders' role(s), the commissioners of the VTRC may feel obliged to undertake prolonged consultative processes to meet the standard set in §901(2) which defines consultations as a "meaningful and timely process of seeking, discussing, and considering carefully the views of others in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement."

Recommendation: To mitigate those risks, we advise that—

- The role of the stakeholders should be limited to a purely consultative one, like that accorded all other stakeholders with an interest in the work of the VTRC. A list of "appointed" stakeholders should not be included in H96.
- The composition of the Selection Panel should be defined in H96 along the lines of the selection panel in Australia and consist of 5 representatives from trusted institutions. The specifics of this selection panel could be elaborated separately, with this bill focusing on the attributes and qualities of commissioners and that the process will be an open application process.

Instead to ensure that the VTRC is inclusive and representative of the different populations that have suffered institutional, structural, and systemic discrimination in Vermont, both past and present, new provisions might be drafted and added to H96 that describe the objectives, mandate, and composition of each of the **individual committees**, discussed in greater detail below. These amendments to the draft would have the advantage of prioritizing inclusivity in the actual operations of the VTRC rather than in the creation of the Selection Panel. The §904(a)(1) stakeholders could still be consulted in the ordinary course during the Selection Process,

consistent with the protocols established for all other interested parties in the selection process. The same would be true during the tenure of the VTRC.

They could participate alongside all other interested parties and stakeholders in all phases of the VTRC's work, including by participating during public hearings, submitting research in response to committee requests, advising on the scope and objectives of the committees' work, commenting on the final report(s), etc.

Selection Panel

Likewise, we suggest that the Selection Panel is a temporary body, focused just on the selection process. In the event of vacancies for cause, sickness, death, etc., the House General Committee could conduct a selection process for the replacement rather than maintain a standing body for that purpose.

Composition and mandate of the committees

As we mentioned during the workshops, it is not unusual for truth commissions to establish committees either permanently or on an ad hoc basis. The types and functions of these committees, units, or additional bodies differ greatly by context and according to the functions and needs of the commission. In some instances, these bodies have been defined in advance by legislation; in other instances, additional committees or units have been established by the commission in response to a determined need.

South Africa's Truth Commission established three separate committees: the Committee on Human Rights Violations, the Committee on Amnesty, and the Committee on Reparations and Rehabilitation. The law that established South Africa's Truth and Reconciliation Commission—the Promotion of National Unity and Reconciliation Act 34 of 1995, which was included in your packet of materials at the workshop—defined the composition of each committee and its powers, duties, and functions.

H96 need not necessarily define all of the committee's powers, duties, and functions. That may be left to the Commission itself, in consultation with the stakeholders. However, because the committees will be the locus for much of the work undertaken by the VTRC, it may be good to consider setting at least some minimum parameters in H96 relating to the composition of the individual committees. This approach has the advantage of allowing the House General Committee to take account of the concerns and needs raised during the legislative process for instance by individual stakeholders like Susan Aranoff, the Vermont Developmental Disabilities Council, about the composition of the committees.

In South Africa's 1995 TRC for instance, they spelled out the following in relation to the Committee on Human Rights Violations, including by setting a maximum number of committee members:

12. Committee on Human Rights Violations

There is hereby established a committee to be known as the Committee on Human Rights Violations, which shall in this Chapter be referred to as the Committee.

13. Constitution of Committee

- (1) The Committee shall consist of-
 - (a)(i) a Chairperson; and (ii) two Vice-Chairpersons, who shall be commissioners designated by the Commission;
 - (b) such other commissioners as may be appointed by the Commission; and
 - (c) not more than ten other members.

(2) The Commission shall appoint, as the members referred to in subsection (1)(c), South African citizens who are fit and proper persons and broadly representative of the South African community and shall, when making such appointments, give preference to persons possessing knowledge of the content and application of human rights or of investigative or fact-finding procedures.

(3) Any vacancies in the Committee shall be filled in accordance with this section.

14. Powers, duties and functions of Committee

(1) In addition to the powers, duties and functions conferred on, imposed upon and assigned to it in this Act, and for the purpose of achieving the objectives of the Commission, referred to in section 3 (1) (a), (c) and (d) -

(a) the Committee shall-

- i) institute the inquiries referred to in section 4 (a);
- (ii) gather the information and receive the evidence referred to in section 4 (b);
- (iii) determine the facts contemplated in section 4 (d);
- (iv) take into account the gross violations of human rights for which indemnity has been granted during the period between 1 March 1960 and the date of commencement of this Act or for which prisoners were released or had their sentences remitted for the sake of reconciliation and for the finding of peaceful solutions during that period;
- (v) record allegations and complaints of gross violations of human rights;

(b) the Committee may-

- (i) collect or receive from any organisation, commission or person, articles relating to gross violations of human rights;
- (ii) make recommendations to the Commission with regard to the matters referred to in section 4 (f), (g) or (h);
- (iii) make information which is in its possession available to a committee referred to in Chapter 4 or 5, a subcommittee or the investigating unit;
- (iv) submit to the Commission interim reports indicating the progress made by the Committee with its activities or with regard to any other particular matter in terms of this Act;
- (v) exercise the powers referred to in Chapters 6 and 7.

(2) The Committee shall at the conclusion of its functions submit to the Commission a comprehensive report of all its activities and findings in connection with the performance of its functions and the carrying out of its duties in terms of this Act.

II. COMMENTS ON SPECIFIC PROVISIONS

- *Phrase “state-sanctioned”*

The House General Committee is considering whether to include the phrase “state-sanctioned” in various provisions in the legislation. In our opinion, the phrase is open to interpretation and is likely to introduce ambiguity into the draft and possibly complicate decisions around what can be or cannot be examined or addressed by the VTRC. For instance, could the phrase be interpreted to limit the VTRC’s mandate to examining only institutional, structural, and systemic discrimination that was formally approved, endorsed, authorized by the State? Or will the VTRC also be considering forms of discrimination that the State has not acted against?

Recommendation: Since the concept of State responsibility extends to both “the acts and omissions which can be attributed to the State,” a distinction the draft already recognizes in §906(a)(1) with the inclusion of the phrase “caused or permitted by State laws and policies,” it might be best to delete the phrase.