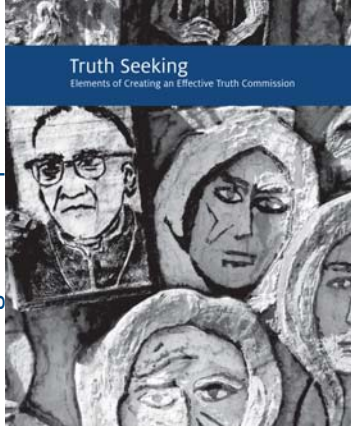


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Chapter 4

The Legal Mandate of a Truth Commission: Objectives, Functions, Competence, and Powers

“2 (1). There is hereby established a juristic person to be known as the Truth and Reconciliation Commission. [. . .]

3 (1). The objectives of the Commission shall be to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past”

Promotion of National Unity and Reconciliation Act 34 of 1995,
South Africa, Chapter 2

Truth commissions are established by a legal mandate, normally by executive decree or a law sanctioned by parliament. Decisions taken by drafters and stakeholders at the start of a mandate shape the future inquiry and its effectiveness. This chapter describes the commission's objectives, functions, scope, and powers.

Objectives of a Truth Commission

The overall objectives of a truth commission are usually stated in the preamble to a mandate and its initial considerations, which should provide guidance to members of the commission. Although mandates may address different objectives, these three aims inform the work of most commissions:

- *Establishment and explanation of facts:* The core function of a truth commission is to ascertain facts. Mandates differ in the scope of those facts, their legal classification, or the depth of the explanation required.
- *Protection, recognition, and restoration of the rights of victims:* This function distinguishes truth commissions from courts of law and advisory panels, placing the rights of victims and their experiences at the center of the commission's work.
- *Positive social and political change:* Some mandates have entrusted commissions to suggest ways for government, civil society, and the public to contribute to reconciliation, reform, democracy, and prevention of recurrence.

Objectives, both complex and nuanced, will depend on the country's political environment. Mandates typically take a modest approach and recognize that a commission's overall objectives are "contributions" for further consideration, rather than imperative. It is essential that a commission's objectives are clear and succinct, to ensure that all participants have realistic expectations about what impact their contributions could have.

Functions

The functions of a truth commission are the activities required to achieve its objectives. Clarifying these activities in the mandate will provide guidance to commissioners as they design their inquiry, allocate resources, and establish the organizational structure necessary to carry out their work.

Some of the functions stated in the mandates of commissions include:

- *Preparing a report that establishes an accurate and impartial historical record of human rights violations:* Truth commissions report on the context, causes, circumstances, nature, and extent of human rights violations set out by the mandate for investigation. An authoritative final report is the main product of a truth commission and should become an important national document. The report of the Argentine National Commission on the Disappeared, "¡Nunca más!"³⁷ is widely used for civic education in that country and reprinted regularly. Reports have evolved over time, from the single book form of the Argentine commission, to large multi-volume collections, abridged versions, audio and video versions, comic books, and versions prepared for specific audiences.
- *Gathering information:* The mandate should authorize the commission to investigate human rights violations, political strategies, local histories, specific cases, and the consequences of abuse. The commission must obtain information on historical events by interviewing witnesses and survivors, examining documents, and visiting places that may contain evidence, such as detention sites and mass graves. A commission needs to be able to perform these duties with the cooperation of government authorities. The most critical of these functions is gathering testimony from those who were directly involved in violations: victims, witnesses, and perpetrators. In order to perform this function effectively, the commission must prepare detailed procedures and protocols for the interviews and databases to record, store, and analyze information.

37 Supra note 24.

- *Protecting the integrity and well-being of victims:* It is important for a truth commission to gather information from victims and witnesses in a manner that does not pose any danger to their personal safety or their integrity. The commission should ensure that victims are not treated merely as sources, but as valued partners and full citizens, whose human dignity is explicitly recognized. Victims of mass atrocity are generally among the most vulnerable and marginalized groups in society, and a truth commission must assess their needs and solicit their testimony in respectful, caring terms. The commission should create a safe environment for victims to speak about their experiences, which may require mental health support, physical protection, legal information, social services, and in some cases financial support. This network of support should pay specific attention to the needs of women, children, indigenous peoples, and other vulnerable groups. While the commission should always accept testimony in good faith and acknowledge the suffering of victims, it must always treat testimony in an objective manner, as information subject to corroboration.
- *Conducting educational outreach activities:* The commission should be authorized to address the public through communication, the media, and educational/outreach activities. Early truth commissions performed their activities without public involvement. Since the South African experience, it is common now for truth commissions to engage in outreach through partnerships with media, websites, and printed resources. Public hearings have proven to be a powerful outreach activity, providing victims with the opportunity to speak in their own voices and a sense of personal vindication, while also educating the public. The Peruvian Truth and Reconciliation Commission partnered with major universities across the country to recruit and train “Volunteers for Truth.” Thousands of young students across the country provided support for public hearings, helped victims to appear before the commission, and communicated information about the commission’s work.
- *Offering policy proposals to ensure violations are not repeated:* Truth commissions can help prevent the repetition of violations through recommendations that address the causes of conflict and promote respect for the rule of law. At the end of an inquiry, the commissioners should evaluate any institutional responsibility for abuses and recommend any measures or reforms needed to prevent further abuse. Commissions can typically make recommendations to support the rule of law; reform the security sector; promote good governance and fight corruption; improve respect for human rights; and to address the specific challenges faced by vulnerable populations such as indigenous people, children, youth, and women.
- *Supporting the work of the justice system:* A truth commission can play a significant role in tackling impunity, while cooperating with the work of the courts of law through meticulous research and documentation of abuses and violations, and the locations where these took place (for example, some commissions have uncovered grave sites through their investigations). This information can be provided as evidence to national prosecutors. According to country-specific circumstances, criminal prosecutions may be possible where there is a functioning judicial system, sufficient evidence, and political will. Commissions may also make recommendations to remove or bar perpetrators from public office or implement vetting programs as part of reforms of security and justice sectors and other institutions.
- *Promoting communal or national reconciliation:* Many truth commissions are tasked with organizing activities to promote reconciliation, tolerance and healing among individuals, communities, and parties to a conflict. They can provide a forum to hear each other’s grievances, recommend measures for the reintegration of offenders, and organise events to promote understanding and tolerance at the community and national level. In Timor-Leste, the Commission for Reception, Truth and Reconciliation partnered with indigenous communities to reintegrate low-level perpetrators who wanted to return to their homes and make amends with those they offended. In Peru, the Truth and Reconciliation Commission proposed that the best contribution to reconciliation between the government and the citizenry was the reform of state institutions.³⁸

38 Final Report of the Truth and Reconciliation Commission of Peru, August 28, 2003.

Competence

Every legal mandate that sets up a truth commission establishes:

- The types of violations to be investigated
- The time period to be examined
- The parties to be examined
- The territory where violations took place

The legal framework should be strong, but flexible in defining the types of violations and issues under examination in terms that are not exhaustive. This means that the mandate, while identifying certain violations deemed of particular interest, should afford commissioners the possibility of examining other serious conduct. For example, the mandate of the Peruvian commission used the terms “torture and other serious injuries,” allowing the Truth and Reconciliation Commission to investigate sexual violence without the conduct being specifically named in the mandate.³⁹

The time periods and length of time under investigation varies greatly among commissions. Some have examined violations covering periods of up to 40 years, while others have focused on weeks. Longer time periods will require that investigations be more complex, but a commission should also be sufficiently equipped to critically examine the experiences that gave rise to the abuses.

Early commissions, like the Argentinean Commission on the Disappeared, focused only on abuses committed by government agents. However subsequent commissions have demonstrated the value of investigating all violations that have caused suffering to a society, whether the actions of state or nonstate agents, including violent anti-government actors and paramilitaries.

All commissions to date have focused their inquiry on the territory of the country or state that established the inquiry. However, many conflicts or abuses have crossed over borders or involved people from other countries. There may be cases in which a truth commission mandate should include the possible cooperation of other countries in some inquiries.

Powers, Penalties, and Protections

A truth commission should have the necessary powers to conduct effective and independent investigations. It should comply with certain procedures to protect the rights of victims and witnesses during investigations and hearings, and in its general work.

Investigatory powers: A truth commission should be authorized to gather information from any source, including governmental authorities. Some commissions are given powers to compel the production of evidence and testimony. Others have to rely on the cooperation and goodwill of witnesses, organizations, security forces, and government departments. In any case, a commission should develop cooperative relationships with the relevant authorities and civil society.

Ideally, a commission should have the following powers to carry out effective investigations:

- *Power of compulsion:* Such authority should include the power to summon persons to appear before the commission to provide evidence and produce articles or documents where appropriate. Designated commission staff should be able to obtain court orders to search for materials when appropriate.

39 Truth and Reconciliation Commission of Peru (Comisión de la Verdad y Reconciliación), created by Supreme Decree N° 065-2001-PCM, June 4, 2001.

- *Forensic procedures*: A truth commission ought to be authorized to conduct forensic examinations, including exhumations, in accordance with the law, in cooperation with judicial authorities, and respecting the wishes of relatives of the missing or disappeared.
- *Obligation to cooperate*: Everyone, including members of political parties and government officials, should be obligated to cooperate with the commission. They should provide the commission with unrestricted access for any purpose necessary to fulfill the commission’s legal mandate. Secrecy laws, like national security considerations, should not apply to any matter that is the subject of a truth commission inquiry. However, a commission should treat all the information it receives with the utmost care to avoid damaging the privacy and integrity of persons.
- *Conducting public hearings*: The hearings of a commission should be open to both the public and the media, unless the commissioners are satisfied that an open hearing is not in the interest of justice—or could harm someone. Hearings that involve minors must be closed to the public or conducted in a way that ensures the anonymity of the statement-giver. Testimony on sexual violence cases are normally closed to the public, unless adult victims request to testify in public as a means of sharing their story.

The commission’s criteria for selecting victims to testify should be publicized. All people invited to testify should be fully briefed beforehand on the procedures and any corresponding rights or duties. Victims should receive appropriate medical, psychological, or emotional support services.

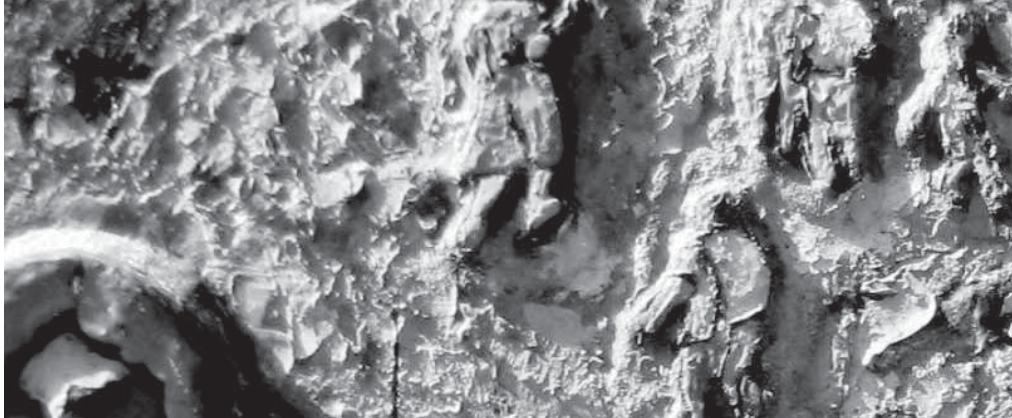
The commission should also contact victims after their testimony to ensure that their well-being was not compromised and to offer counseling if necessary.

- *Procedural Rights*: Procedural fairness must be respected by a truth commission, particularly when publishing findings and recommendations:
 - *Right to be heard*: Whenever a commission contemplates making a decision or recommendation that may be detrimental to anyone, that person, along with any associated victim, should have an opportunity to make representations and/or appear at a hearing, as much as this is practically possible.
 - *Right against self-incrimination*: If a witness is compelled to appear before the commission and answer questions that may be incriminating, such answers should not be admissible as evidence against that person in any subsequent legal proceedings. A commission should only use this procedure when such information is necessary and justifiable to achieve its objectives and when a person has refused to answer on the grounds of self-incrimination. This measure is sometimes referred to as “use immunity.”
 - *Right to legal representation*: Any person who is questioned by an investigator or called before a commission should be entitled to legal representation, even if indigent. A commission should appoint a legal representative if it is satisfied that it is in the interests of justice.
- *Witness Protection*: A witness protection program should be established for essential witnesses when there are clear threats to their safety. Effective protection of witnesses and information is vital, especially when a commission is investigating sensitive matters and powerful people. Witnesses who are fearful may not tell the full truth, may fabricate information to protect themselves and their families, or avoid the commission altogether.

Where a commission cannot provide full witness protection, it should be able to guarantee the strictest confidentiality with respect to the identities of sensitive witnesses.

- *Penalties*: Provision should be made for punishment of offenses committed against the truth commission, including the obstruction of the commission in the performance of its duties, willfully giving false information, failing to obey a subpoena, disclosing confidential information, and destroying evidence or archives.

- *Protections for Commissioners:* Commissioners and staff members should enjoy a measure of protection for conduct carried out in good faith during the course of their work. No commissioner, member of staff, or person who performs any task on behalf of the commission should be liable with respect to anything reflected in any report, finding, point of view, or recommendation made or expressed in good faith. This protection hinges on commissioners and staff members doing their jobs diligently and in accordance with the principles of procedural fairness.
- *Publicity of report:* The truth commission should be authorized to issue its final report publicly through the media, internet, libraries, and archives. Restricting access to the report to a high authority, like the president, and entrusting that authority with dissemination will weaken the impact of the commission. Before a truth commission begins operations, it needs to go through a preparatory phase—typically a period of three to six months—when it reviews its legal mandate, develops internal administrative procedures, engages in public outreach, and recruits essential staff.



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Eduardo González and Howard Varney, eds., *Truth Seeking: Elements of Creating an Effective Truth Commission*. (Brasília: Amnesty Commission of the Ministry of Justice of Brazil; New York: International Center for Transitional Justice) 2013.

75 pages.

This publication is also available in Arabic, French, Portuguese, and Spanish.

