

COMMISSION TO INQUIRE INTO CHILD ABUSE

INVESTIGATION COMMITTEE

PROCEDURAL HEARING HELD IN PUBLIC ON 26th, 29th, 30th & 31st JULY, 2002

**PROVISIONAL RULING OF THE INVESTIGATION COMMITTEE DATED 9th OF
SEPTEMBER 2002**

1. Background to Procedural Hearing

- 1.1 The Investigation Committee (this Committee) is investigating an allegation made by a complainant that, as a child during the 1950's, she suffered abuse, within the meaning of that term in the Commission to Inquire into Child Abuse Act, 2002 (the Act), in a residential institution, which was managed by a congregation of religious sisters and was subject to statutory regulation by the Minister for Education. A member of the congregation, who was involved in the management of the institution during part of the relevant period and whom the complainant implicates in the allegations, is dead. Another member of the congregation who was involved in the management of the institution during the remainder of the relevant period is alive, but she is elderly. Both the congregation and the surviving member of the congregation have been granted legal representation in the proceedings before this Committee. The hearing of the allegations has commenced and this Committee has heard evidence in relation to the allegations over a period of four days. Arising out of the hearing, issues have been raised by the legal representatives of the

congregation and the member as to the power of this Committee to publish findings of abuse –

- (i) identifying a person who is deceased or an institution based on an allegation that children were abused by that person in that institution, and
- (ii) identifying a living person or an institution based on an allegation that children were abused by that person in that institution in circumstances in which, by reason of lapse of time since the events complained of, the person is gravely hampered in his ability to defend himself against the allegations made.

1.2 This Committee is also investigating an allegation made by a complainant that, during the late 1950's as a child, he suffered abuse within the meaning of the Act in a non-residential institution, which was managed by a congregation of religious brothers and was subject to regulation by the Minister for Education. A member of the congregation, who was working in the institution, whom the complainant alleges perpetrated the abuse is dead, as is the Principal of the institution. The congregation has been granted legal representation in the proceedings before this Committee. After the matter was listed for hearing the legal representatives on behalf of the congregation raised issues as to –

- (i) representation for and on behalf of the deceased person against whom the allegations were made,

- (ii) prejudice arising by reason of lapse of time between the date of the alleged incident and the date of intended adjudication, including (*inter alia*) the death of that person and
- (iii) the entitlement of this Committee to make a finding of fact as against a deceased person and the right of the Commission to publish such finding and the right to name any such person in the public domain.

1.3 As the issues raised in the allegations referred to in paragraphs 1.1. and 1.2. are likely to recur in relation to many, perhaps even the majority, of the allegations being investigated by the Committee, it was decided that, in order to avoid repetition and in the interests of consistency, the Committee should attempt to formulate general principles in relation to issues of the type raised to be applied on a “case by case” basis. A procedural hearing was held *in camera* on 3rd July 2002 to hear submissions from the legal representatives of the parties involved in the proceedings on the allegations referred to in paragraphs 1.1. and 1.2. as to the process by which this might be achieved. The Committee decided that procedural hearing would be held in public commencing on 26th July 2002 to hear submissions on the issues set out in an issue paper (the Issue Paper), presented by this Committee’s legal team, the terms of which were agreed by the legal representatives for all the parties. The Issue Paper is annexed to this ruling as an Appendix.

1.4 Prior to the public hearing, written submissions had been received by this Committee from the legal representatives of each of the parties who were being granted representation at the

hearing. The public hearing commenced on 26th July and continued over four days ending on 31st July, 2002. At the public hearing oral submissions were made by the legal representatives for the following parties who had been granted representation in the following order, which was agreed between the parties and this Committee's legal team, namely:

- The congregation referred to in paragraph 1.1 (the first Management Respondent).
- The congregation referred to in paragraph 1.2 (the second Management Respondent).
- The complainant referred to in paragraph 1.1 (the first Complainant).
- The complainant referred to in paragraph 1.2 (the second Complainant).
- The Minister for Education & Science.
- The Attorney General representing the public interest.

This Committee's counsel also made submissions.

2. General Observations

- 2.1 It is not proposed to summarise the comprehensive written submissions which were received from all of the parties, which were developed in the course of the oral submissions at the procedural hearing. Reference will be made, however, to submissions made on behalf of the Management Respondents because the issues to be addressed were raised by them.

- 2.2 In broad terms, the position adopted by first Management Respondent was as follows:
- (a) The rules of natural and constitutional justice prohibit this Committee from publishing findings of abuse which identify a person who is deceased, or an institution, based on an allegation that children were abused by that person in that institution, save in most exceptional of cases.
 - (b) The rules of natural and constitutional justice require this Committee to take into account the prejudice caused to a living person against whom an allegation of abuse is made by reason of the lapse of time since the events complained of, including the non-availability of witnesses. Where the prejudice is such that the living person is gravely hampered in his ability to defend himself against the allegations made, this Committee may not publish findings of abuse which identify the living person or the institution in which the abuse is alleged to have occurred.
 - (c) This Committee may carry out investigations, receive evidence and make findings of a general nature without naming individuals or institutions. Where an issue of prejudice arises, it should be considered at the stage when a complainant has completed his evidence but before he is cross-examined. If it is found that there is prejudice such that the person whose conduct is impugned is greatly hampered in defending himself, the inquiry into the allegations should cease forthwith without a determination being made.

2.3 In broad terms, the submissions made on behalf of the second Management Respondent differed from the submissions made by the first Management Respondent in two major respects. First, the position adopted by the second Management Respondent in relation to

the issue of prejudice caused by the effects of lapse of time was that it is relevant to the making of a determination or a finding of abuse by this Committee identifying a person or institution, rather than to the publication of the determination or finding. Secondly, the point in time at which the issue of prejudice in relation to making a determination falls to be considered is when this Committee has got in all the evidence through its investigations, discovery directions and hearing all witnesses as to the relevant allegations.

2.4 All parties accepted that each determination as to the existence of abuse or otherwise which this Committee is required to make under the Act must be considered on its own merits. It was not suggested that, to adopt the convenient, if imprecise, language which was adopted, there should be a block exemption; rather the approach should be on a “case by case” basis. This reflects the position which the Commission has always adopted in its public pronouncements and has always implemented in practice.

2.5 All parties accepted that, in relation to certain allegations of abuse which it investigates, this Committee will not be in a position to make a determination or finding.

2.6 In the succeeding sections of this ruling the issues raised on the Issue Paper and the submissions will be addressed as follows:

- (a) The core issue is the extent of the statutory mandate of the Commission and the statutory mandate of this Committee. The relevant provisions of the Act which define the parameters of the mandate will be outlined in Section 3.

- (b) Factual matters which it is considered are relevant to a proper consideration of the issues will be outlined in Section 4.
- (c) This Committee's understanding of the constitutional and legal principles which govern the construction of the relevant statutory provisions will be set out in Section 5.
- (d) Section 12 and section 13 of the Act, which define the parameters of the specific functions of this Committee, will be analysed in Section 6.
- (e) The submissions of the Management Respondents as to the proper implementation of the mandate in accordance with fair procedures will be considered under two headings, namely:
 - (i) Fair procedures: *audi alteram partem*; (Section 7), and
 - (ii) Lapse of time: prejudice (Section 8)In reality, the two topics are inextricably intertwined and the division is artificial.
- (f) The conclusions on the issues raised will be summarised in Section 9. It is not considered necessary to answer the questions implicitly posed on the Issue Paper, which was used primarily as an aid to putting structure on the procedural hearing.

2.7 At the procedural hearing this Committee's counsel advised that, having considered the matters raised, this Committee should issue a provisional ruling on the issues, because, apart from the parties who were granted representation at the procedural hearing, there are other parties who have legitimate interests in relation to the issues, who might wish to make submissions on the issues before the ruling is finalised. It is proposed to follow this advice. Accordingly, any party on record with this Committee, who was not represented at

the procedural hearing, may make submissions in writing on this provisional ruling, such submissions to arrive not later than 5 p.m. on Friday 4th October 2002. Such submissions will be considered before a final ruling issues, and, if necessary, the parties who were represented at the procedural hearing will be invited to submit written comments on any submission which this Committee proposes to incorporate in the final ruling. The principles adopted in the final ruling will guide the future proceedings of this Committee but, where the interests of fairness so dictate, will not be applied to a particular decision or determination.

- 2.8 In the light of the experience, albeit limited experience, of this Committee in processing, and conducting hearings in relation to, allegations of abuse, the procedures are currently being reviewed. Any amendment proposed to the existing procedures will be published on a provisional basis first, so as to allow parties affected to comment on the proposal.

3. Relevant Statutory Provisions

- 3.1 The Commission's functions and powers are set out in the Act, as amended by the Residential Institutions Redress Act, 2002. While the resolution of the issues raised in the Issue Paper and at the public hearing turns primarily on the proper interpretation and implementation of sections 12 and 13 of the Act, these sections must be considered in the context of the Act as a whole.

- 3.2 In the long title the purpose of the Act is stated as being the establishment of the Commission to Inquire into Child Abuse (the Commission) to-
- (a) investigate child abuse in institutions in the State,
 - (b) enable persons who have suffered such abuse to give evidence to Committees of the Commission, and
 - (c) provide for the preparation and publication of a report by the Commission containing the results of the investigation and any recommendations it considers appropriate for the prevention of child abuse, the protection of children from it and the actions to be taken to address any continuing effects of child abuse on those who have suffered it.
- 3.3 The purposes of the Act identified in the long title are mirrored in section 4, which sets out the principal functions of the Commission, which are to –
- (a) provide, for persons who have suffered abuse in childhood in institutions during the relevant period, an opportunity to recount the abuse and make submissions to a Committee,
 - (b) through a Committee inquire into child abuse in institutions during the relevant period, and, where satisfied that such abuse has occurred, determine the causes, nature, circumstances and extent of such abuse and,
 - (c) prepare and publish reports pursuant to section 5.

Section 10 provides for the establishment of two committees, : the Confidential Committee and this Committee. The scheme of the Act is to provide two distinct forums for hearing evidence of abuse which is within the statutory remit of the Commission and for conducting the mandated inquiry into abuse in institutions during the relevant period. The published report is the report of the Commission. By virtue of section 17, absolute privilege attaches to the report of the Commission.

3.4 In addressing the issues posed on the Issue Paper, it is instructive to compare and contrast the statutory functions of the Confidential Committee with the statutory functions of this Committee. The principal functions of the Confidential Committee, as set out in section 15, are to –

- (a) provide, for persons who have suffered abuse in childhood in institutions during the relevant period and who do not wish to have that abuse inquired into by the Investigation Committee, an opportunity to recount the abuse, and make submissions, in confidence to the Committee,
- (b) receive evidence of such abuse,
- (c) make findings of a general nature, based on the evidence aforesaid, in relation to the matters specified in section 4(1)(b), and
- (d) prepare and furnish reports pursuant to section 16.

- 3.5 Section 16 amplifies the Confidential Committee’s reporting function. The report is a report to the Commission and it is a report based on the evidence received by it and setting out in general terms the finding made by it. It is specifically provided that the report shall not –
- (a) identify, or contain information that could lead to the identification of, persons alleged to have suffered abuse in childhood or persons alleged to have committed such abuse or any institutions or any other persons, or
 - (b) contain findings in relation to particular instances of alleged abuse of children.
- 3.6 Section 11 (2) stipulates that a hearing of the Confidential Committee shall be held otherwise than in public. Section 27 prohibits disclosure of information provided to the Confidential Committee save in very limited circumstances.
- 3.7 The principal functions of this Committee, as set out in section 12, are to –
- (a) provide, for persons who have suffered abuse in childhood in institutions during the relevant period, an opportunity to recount the abuse and make submissions to the Committee,
 - (b) inquire into the abuse of children in institutions during the relevant period,
 - (c) determine the causes, nature, circumstances and extent of such abuse, and
 - (d) without prejudice to the generality of any of the foregoing, determine the extent to which –
 - (i) the institutions themselves in which such abuse occurred,

- (ii) the systems of management, administration, operation, supervision and regulation or such institutions, and
 - (iii) the manner in which those functions were performed by the persons or bodies in whom they were vested, contributed to the occurrence or incidence of such abuse, and
- (e) prepare and furnish a report pursuant to section 13.

As was pointed out in the Commission’s opening statement delivered on 29th June 2000, the Commission interprets section 12(1)(c) of the Act on the basis that the duty thereby imposed applies where the prerequisite stipulated in section 4(1)(b)(ii) is complied with – “where [this Committee] is satisfied that such abuse occurred.”¹

3.8 Section 13 amplifies the reporting function of this Committee. It is required to submit to the Commission a report of the results of the inquiry referred to in section 12, which specifies the determinations made by it pursuant to that section. Sub-section (2) of section 13 provides that the report –

- (a) may, if the Committee is satisfied that abuse of children, or abuse of children during a particular period, occurred in a particular institution, contain findings to that affect and may identify the institution and the person who committed the abuse,
- (b) may contain findings in relation to the management, administration, operation, supervision and regulation, direct or indirect, of an institution identified in the report

¹ Opening Statement, page 15, fn 26.

pursuant to paragraph (a) and, as respects those functions, the persons in whom they were vested and may identify those persons, and

(c) shall not contain findings in relation to particular instances of alleged abuse of children.

- 3.9 Section 14 confers powers on this Committee, *inter alia*, to direct attendance of witnesses, and production and discovery of documents and to seek the assistance of the High Court in compelling compliance with such directions. By virtue of section 18 a witness is afforded the same immunities and privileges as a witness in the High Court. However, section 21 removes the privilege against self incrimination but includes the safeguard that incriminating evidence shall not be admissible in criminal or civil proceedings or before a tribunal.
- 3.10 While section 11 (3) requires that hearings of this Committee at which evidence relating to particular instances of alleged abuse of children is being given shall be held otherwise than in public, this Committee is given a discretion to hold other hearings *in camera* but is reminded of the desirability of holding such meetings in public.
- 3.11 As the provisions of the Act dealing with the functions and powers of the Confidential Committee and, in particular, the words to which emphasis has to been added in paragraphs 3.4 and 3.5 above indicate, the intention of the legislature is that persons who avail of the opportunity to give evidence to the Confidential Committee do so in confidence and, by contrast with persons who choose to testify to this Committee, on the basis that their

allegations are not inquired into. It follows that findings of a general nature only may be based on the evidence received by the Confidential Committee and those findings may only be reported on in general terms in such a way that neither a person making an allegation nor a person nor an institution against whom an allegation is made may be identified, directly or indirectly. By contrast, this Committee, as the words to which emphasis has been added in paragraphs 3.7 and 3.8 above indicate, is required to inquire, to make determinations and, in particular, to make determinations in relation to institutions, systems, and the performance of functions by persons and bodies. The reporting function comprehends the totality of the inquiring function: it is to report of the results on the inquiry, including the determinations made in the course of the inquiry. It is clear that the legislature intended that this Committee would conduct an inquiry of the type usually conducted by a Commission of Inquiry or a Tribunal of Inquiry set up to examine a matter of grave public concern and that it equipped this Committee with the powers to carry out such inquiry. It is also clear that the legislature intended the report of this Committee to record what happened and, to adopt the terminology used in another jurisdiction², identify the “causes and players”. The legislature clearly envisaged that, as a general proposition, unlike the report of the Confidential Committee, the report of this Committee would not merely record findings of a general nature or determinations framed in general terms.

- 3.12 As has been stated the published report is the report of the Commission. Section 5 (1) provides that the report of the Commission shall have regard to the reports submitted by the Confidential Committee and this Committee and shall specify the determinations made pursuant to its

² Supreme Court of Canada: *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System)*[1997] 3 S.C.R. 440, *per* Cory J.

inquiring function. That inquiring function is performed either through the Confidential Committee or this Committee and the determinations are the determinations of the relevant Committee.

Sub-section (3) of section 5, in paragraphs (a), (b) and (d) thereof, contains provisions in relation to the report of the Commission in identical terms to the provisions contained in paragraphs (a), (b) and (c) of section 13(2) in relation to the report of this Committee.

Paragraph (c) of sub section (3) of section 5 provides that the report of the Commission shall not identify, or contain information that could lead to the identification of, persons the subject of abuse in childhood. There is a consistent thread throughout the provisions of the Act in relation to publicly identifying victims of abuse: persons who were the subject of abuse in childhood shall not be identified, directly or indirectly, and findings in relation to particular instances of abuse alleged by persons who testify shall not be reported; and hearings at which evidence of particular instances of alleged abuse is given must be held otherwise than in public.

Sub-section (4) of section 5 ensures that findings in the published report which are not the product of the inquiry carried out by this Committee are seen to be such. Sub-section (4) provides that, if the published report contains findings that are based on the findings of the Confidential Committee, the published report shall include a statement to that effect and that the evidence on which such findings are based could not be tested or challenged by any person and (if it be the case) was not corroborated. This provision would suggest that it was the intention of the legislature that the testing of evidence, the challenging of evidence by a person

and the corroboration of evidence would be features of the inquiry of this Committee and would be of significance in the decision making process.

3.13 Section 4(2) of the Act provides that the inquiry mandated in section 4(1) shall be conducted in such a manner and by such means as the Commission considers appropriate. Section 7(4) provides that the Commission shall regulate, by standing orders or otherwise, its procedure and business and there is a similar provision in relation to the Committees in section 11(4).

3.14 In section 1(1) of the Act “abuse” is defined, in relation to a child (i.e. a person who has not attained the age of 18 years), as meaning –

- (a) the wilful, reckless or negligent infliction of physical injury on, or failure to prevent such injury to, the child,
- (b) the use of the child by a person for sexual arousal or sexual gratification of that person or another person,
- (c) failure to care for the child which results in serious impairment of the physical and mental health or development of the child or serious adverse effects on his or her behaviour or welfare, or
- (d) any other act or omission towards the child which results in serious impairment of the physical or mental health or development of the child or serious adverse effects on his or her behaviour or welfare.

This Committee recognises that the definition of “abuse” encompasses a broad spectrum of types of conduct, which along the spectrum are of varying degrees of gravity so as to attract a greater or lesser degree of public condemnation, if found to exist. This Committee also recognises that there is inbuilt in paragraphs (c) and (d) of the definition a threshold which is not a low threshold.

3.15 In section 1 of the Act the expression “relevant period” is defined as meaning the period from an including the year 1940, or such earlier year as the Commission may determine, to and including the year 1999 and such later period (if any) as the Commission may determine.

4. Factual Matters

4.1 The Commission has imposed and is adhering to a deadline of 31st July 2001 for receipt of requests to testify as to abuse to the Commission. As the Commission has already made public,³ this Committee received 1,957 requests to testify to it. An analysis of the requests discloses that:

- 3.8% of the requests came from persons in the age range 70 years plus in July 2001, each of whom attained the age of 18 years at least 53 years ago.
- 18.6% of the requests came from persons in the age range 60 to 69 years in July 2001, each of whom attained the age of 18 years at least 43 years ago.

³ Second Interim Report of the Commission (November 2001), Appendix C.

- 34.4% came from persons in the age range 50 to 59 in July 2001, each of whom attained the age of 18 years at least 33 years ago.
- 28.2% came from persons in the age range 30 to 39 years in July 2001, each of whom attained the age of 18 years at least 23 years ago.

4.2 Less than one third of the persons who signified a wish to testify to this Committee had, by the end of March 2002, submitted a statement detailing the allegations in accordance with the Act.⁴ A final date for submission of statements was imposed. No complainants' statements are being accepted after 30th June 2002 save in exceptional circumstances. The current position is that approximately 1,800 complainants are proceeding. The non-availability of the majority of complainants' statements until the relatively recent past has meant that a meaningful review of the procedures for processing and hearing allegations could not be conducted earlier.

It is believed that the age profile, which the analysis set out in paragraph 4.1 reflects, applies to the complainants who are proceeding. While it has not been possible to analyse the age profile of persons against whom allegations are made, the persons holding management positions in the institutions or the officers who performed the functions of the regulatory authority on a day to day basis, in so far as they are alive, the assumption must be that they are considerably older than the complainants. This Committee is aware, and the examples cited by counsel for the first Management Respondent in his submissions bear this out, that many of the persons against whom complainants have made allegations are dead, as are persons who, at the relevant time, were involved in the management of or were working in institutions in respect of which

⁴ Section 23.

allegations are made. Moreover, this Committee is aware that certain persons against whom allegations are made, while still alive, are, as this Committee has accepted, incapable of giving instructions to respond to an allegation or of testifying.

- 4.3 Counsel for the first Management Respondent disclosed that the Congregation for whom he acts is facing in excess of 400 complaints. He emphasised that only a minority of the allegations are of a sexual nature and, even in that minority, an allegation against a member of the congregation is rare, most of such allegations being against a male person connected with or visiting the institution. The majority of the allegations which the congregation he represents are responding to relate to alleged excessive use of corporal punishment and the alleged existence of a harsh, uncaring and unloving regime in an institution. It is the view of this Committee that, in applying the Act, and, in particular, paragraphs (c) and (d) of the definition of abuse, in determining whether conduct or a state of affairs which it has been established occurred or existed constitutes abuse, the conduct or state of affairs must be measured against the prevailing norms and standards of the relevant time.
- 4.4 Counsel for the second Management Respondent disclosed that it is estimated that in excess of 30% of the complaints to which the Congregation she represents will have to respond (believed to be in excess of 700) include an allegation of sexual abuse. She emphasised the difficulty inherent in making a determination where the allegation is of sexual abuse involving private acts between two persons, particularly where the person against whom the allegation is made is dead.

- 4.5 As has already been made public,⁵ the types of institution which predominate in the requests to testify to the Investigation Committee are industrial and reformatory schools. Most of those schools closed more than 30 years ago.
- 4.6 The foregoing facts have been set out because this Committee considers that it should approach the issues under consideration here against the current factual reality of the inquiry it is conducting.

5. Principles Governing Interpretation and Implementation of the Act

- 5.1 The Commission and its Committees must act within the law. Their statutory functions must be fulfilled and their powers exercised in accordance with constitutional principles.
- 5.2 There is a presumption of constitutionality operating in favour of the Act, being an Act passed subsequent coming into force of the Constitution.⁶

It was contended on behalf of the first Complainant that the submissions made on behalf of the first Management Respondent amount to an oblique challenge to the constitutionality of the Act and the fact finding system created by the Oireachtas, in that the arguments advanced amount to saying that the powers conferred by the Act could never be exercised in the case of dead or elderly Respondents by reason of lapse of time which, if correct, would mean that for all practical purposes this Committee could never investigate an allegation of abuse dating

⁵ Second Interim Report, page 6

⁶ McDonald v Bord na gCon [1965]I.R.217

from (say) the 1950's, thus defeating the express statutory mandate conferred on this Committee.

The reply on behalf of the first Management Respondent was that this contention is unsustainable: the first Management Respondent does not suggest that the provisions of the Act are unconstitutional, but rather that there is both a constitutional and an un-constitutional way of operating the provisions and that the constitutional interpretation must be preferred. The constitutional interpretation, it was submitted, requires regard to be had to fair procedures and natural justice, including issues such as prejudice caused by delay. It was unequivocally put on the record on behalf of the first Management Respondent that the arguments advanced on its behalf do not constitute a direct or indirect challenge to the constitutionality of the Act and that the first Management Respondent has no objection to the Act itself, provided that it is operated in accordance with natural and constitutional justice.

Similarly, counsel on behalf of the second Management Respondent stated that the submissions made on behalf of the second Management Respondent do not in any way constitute a challenge to the constitutionality of the Act; in so far as the Constitution is invoked in relation to the Act it is for the purpose of indicating that this Committee must, in adopting its procedures, in fixing its rules and when dealing with the adjudication process itself, conform to constitutional principles.

This Committee has considered it prudent to record the foregoing submissions as a preface to emphatically stating that the validity of the Act of 2000, or any provision of it, having regard to

the provisions of the Constitution may only be reviewed by the High Court in proceedings in which such validity is challenged.

5.3 It flows from the presumption of constitutionality of the Act that, if in respect of any provision thereof two or more constructions are reasonably open, one of which is constitutional and the other or others are unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction.⁷ In such circumstances, the Act must be implemented in accordance with the constitutional construction.

5.4 In applying the so called “double construction” doctrine, the interpretation or construction of the Act in conformity with the Constitution cannot be pushed to the point where the interpretation would result in the substitution of the legislative provision by another provision with a different context, as that would usurp the functions of the Oireachtas.⁸ A statutory provision which is clear and unambiguous cannot be given an opposite meaning. One may not do violence to the plain meaning of the words in the Act.⁹

Counsel for the first Management Respondent relied on the decision of Henchy J. in McMahon v Leahy¹⁰ as emphasising the need for the decision-maker to have regard to constitutional values, even where the express terms of the statute might appear to require him or her to proceed to a conclusion in an automatic way, and quoted the following passage from the judgment, at page 541, adding the emphasis which appears in the following quotation:

⁷ McDonald v Bord na gCon, page 239

⁸ East Donegal Co-operative v Attorney General [1970]317 at page 341

⁹ In re Haughey [1971] I.R.217 at page 254

¹⁰ [1984] I.R.548

“But where...a post-Constitution statute authorises the making of an order in stated circumstances, the legislative intent must be held to comprehend the authorised order will not be made, even though the stated circumstances are shown to exist, if it is shown that the order would necessarily infringe the constitutional right of the party against whom it would operate. The [presumption of constitutionality] carries with it not only the normal presumption that the laws enacted by the National Parliament are not repugnant to the Constitution but also the presumption that the provisions of such laws will not be administered or applied in a way that will infringe constitutional rights. The presumption of constitutionality extends to both the substance and operation of a statute; it is a presumption that admits of rebuttal only by a contrary intention appearing in the terms of the statute itself”.

Counsel for the second Management Respondent relied on the same passage in her submissions.

In their analysis of the submissions of the first Management Respondent, counsel for the first Complainant, in their written submissions, suggested that disaffection with the clear and expressed statement in the Act that the relevant period runs from 1940 until 1999 is at the root of the submissions made on behalf of the first Management Respondent and that, in effect, that it seeks to ignore this clear legislative statement.

The position maintained by the first Management Respondent is that the statutory remit of this Committee must be exercised in accordance with natural and constitutional justice, which do not permit this Committee to ignore issues of prejudice caused to persons against whom allegations are made, notwithstanding its explicit statutory remit to inquire into abuse during the designated period.

This Committee considers that, in delimiting the duration of the inquiry which the Commission is mandated to conduct and report the results of, the Act is clear and unambiguous and is reasonably open to one construction only: that it extends from at least 1940 to 1999. In the light of the principles outlined at the commencement of this paragraph, it cannot construe the Act in such a way as to effectively ignore part of its mandate. As it must, in accordance with the principles set out in paragraph 5.1, it presumes that its clear mandate in relation to the entirety of the relevant period, as defined in the Act, is constitutional.¹¹

5.5 The presumption of constitutionality carries with it not only the presumption that the constitutional interpretation or construction is the one intended by the Oireachtas, but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by the Act are to be conducted in accordance with the principles of constitutional justice.¹² Indeed, there is express recognition of this in section 4(6) of the Act, which directs the Commission, in the performance of its functions, to act in a manner compatible with the requirements of justice.

¹¹ Hegarty v O'Loughlin [1990]I.R 148

¹² East Donegal Co-operative v Attorney General at page 341

The Committee is bound to act fairly and judicially in accordance with the Constitution.¹³ In fulfilling its statutory mandate to inquire and report, the Committee must apply fair procedures,¹⁴ as has been acknowledged in its public statements.¹⁵

Subject to fulfilling the requirements of fair procedures, there is no rule of law which requires the Committee to apply rules of evidence applicable in a court of law.¹⁶ However, from the outset the Commission has publicly declared the principles in relation to the taking of evidence which this Committee will apply. As the Commission stated in the opening statement,¹⁷ all witnesses who give evidence to this Committee shall be required to give evidence on oath. In making findings of fact, this Committee will –

- (i) apply the standard of proof applicable in civil proceedings in a Court, that is to say, proof on the balance of probabilities, and
- (ii) the findings will be based only on evidence which would be admissible in a Court, so that, in making findings, this Committee shall not rely on hearsay.

While this Committee does not regard it as pertinent to the issues which arise in the Issue Paper, as the matter was debated in the course of the procedural hearing, it records that it considers that, in applying the civil standard of proof, which, as it is entitled to do, it has

¹³ Loftus v Attorney General [1979] I.R. 221

¹⁴ Goodman International v Mr. Justice Hamilton [1992]2 I.R. 542

¹⁵ For example, at the second public sitting of the Commission held on 20th July 2002 - transcript at page 46

¹⁶ Goodman International v Mr. Justice Hamilton *per* Costello J. at page 565

¹⁷ Opening statement, page 8

adopted, it should do so in the manner outlined in the judgment of Henchy J. in Banco Ambrosiano v Ansbacher & Company.¹⁸

This Committee's understanding of the application of fair procedures to a public inquiry and, in particular, to the inquiry and reporting function reposed in it will be outlined later in this ruling after setting out its understanding of the proper interpretation of its remit under sections 12 and 13.

6. Proper Interpretation of Sections 12 and 13 of the Act

6.1 This Committee is mandated to provide a forum in which allegations of abuse are recounted and submissions made to the Committee. No party objects to this Committee hearing evidence. It is the manner in which the evidence is used by this Committee which is in controversy. As has already been indicated earlier, in paragraph 4.1 and 4.2, the deadlines for receipt of requests to testify to this Committee as to abuse and for submission of statements detailing allegations of abuse have passed.

6.2 This Committee is mandated to conduct an inquiry into abuse in institutions during the period from at least 1940 to at least 1999. The mandate includes an obligation to make determinations, where it is satisfied that abuse has occurred, in relation to the causes, nature, circumstances and extent of such abuse, including attributing responsibility to or apportioning responsibility between –

(i) the institutions,

¹⁸ [1987] 1 I.L.R.M. 669 at page 700 *et seq*

- (ii) the systems of management and regulation of the institutions, and
- (iii) the manner in which the systems were implemented by the persons and bodies charged with their implementation.

This Committee rejects the submission that identifying institutions and personnel who worked in, managed or regulated institutions is a minor aspect of its functions. On the contrary, the manifest intention of the Oireachtas is that it should be an integral part of the inquiry.

In setting out the provisions of section 12(1) earlier, emphasis has been added to the key words. It is the view of this Committee that the Oireachtas specifically directed this Committee to address the following questions:

- Did abuse occur in institutions between 1940 and 1999?
- If so, when did it occur?
- If so, of what type?
- If so, to what extent?
- If so, why did it happen?
- Where does responsibility lie for the occurrence of the abuse?
- Does it lie within the institutions?
- Were there systems in place in the institutions or externally to protect children against abuse?
- If there were, were they adequate?
- If there were, did they fail, and, if they did, why?

- To what extent did personnel within the institutions or externally contribute to the occurrence of the abuse?

While the foregoing is not intended to be an exhaustive list of the questions which this Committee is required to address, it highlights the focus of the inquiry.

The focus of the inquiry is on institutions, perpetrators, personnel who were working in and were responsible for managing institutions, and personnel charged with responsibility for regulating institutions, which are the subject of allegations of abuse during the time frame stipulated. The focus is not on persons who allege they were abused or their specific allegations.

- 6.3 This Committee is mandated to report in the manner set out in section 13. Any suggestion that the legislature intended the reporting mandate to be of lesser importance than the mandate to inquire is not tenable. Both functions are principal functions set out in section 12. The substantive provision which defines the nature of the report is section 13(1): it is a report of the results of the inquiry, encompassing the determinations made in the course of the inquiry. The provisions of sub-section (2), which specify matters which the report must not contain and matters which the report may contain, are subsidiary to the substantive requirement that the report should record the results of the inquiry and the determinations made in the course of the inquiry. The provisions of sub-section (2) are wholly consistent with the provisions in section 12 which define the nature of the inquiry, the results of which form the substance of the report. Paragraph (c), which is directory, precludes reporting findings in relation to particular instances of alleged abuse. This is consistent with section 12, where the focus is on the

institution and the personnel in and charged with responsibility for the institution, rather than on the individual making the allegation. Paragraphs (a) and (b), which are permissive, allow for the reporting of findings as to:

- the existence of abuse, or the existence of abuse during a particular period,
- the identification of the institution in which that abuse occurred,
- the identification of the person who committed the abuse, and
- the management and regulation of the institution and the identification of personnel concerned in the management and regulation.

The focus in these provisions, again, is on the institution and the personnel in and charged with responsibility for the institution during the time span stipulated, with express recognition that, in the case of an institution, in the context of making findings, part only of the time span may be relevant.

Reporting on the results of the inquiry conducted in accordance with section 12 must of necessity involve identifying the institutions, individual perpetrators and personnel involved in management and regulation the subject of the determinations made in accordance with section 12. While paragraphs (a) and (b) of sub-section (2) confer an element of discretion on this Committee, in that it may desist from reporting certain findings identifying institutions, identifying perpetrators of abuse and identifying personnel involved in management and regulation, this does not diminish the overriding obligation imposed on this Committee to report on the results of its inquiry and the determinations it makes in the course of the inquiry.

If, absent paragraphs (a) and (b), a doubt might have been expressed as to the power of the Committee to identify institutions, perpetrators and other personnel, the presence of these paragraphs rules out any such doubt.

Fairness and justice may require that institutions and individuals be identified. A general finding that abuse occurred, say, in the 1950's in a particular type of institution known to be under investigation would be unfair to institutions of that type in respect of which there was no evidence of abuse in that period and to the personnel associated with those institutions. A finding that boys were sexually abused in a particular institution, say, during the 1960's, without naming the perpetrator where it is possible to do so, would be unfair to personnel working in the institution during that period against whom no allegations of such abuse were made.

- 6.4 While the published report is the report of the Commission, as regards the mandate of this Committee, the report provided for in section 12 (1)(e), the content of which is delimited by section 13, forms the basis of the Commission's report. In so far as the mandate of this Committee is concerned, there is consistency between sub-section (3) of section 5 and sub-section (2) of section 13, with the additional proscription on the identification in the published report of any person subject of childhood abuse (section 5(3)(c)). In relation to the reporting remit of the Commission, in so far as it relates to the mandate of this Committee, there is an imperative to preserve the anonymity of victims of abuse, but, subject to that, to report in a meaningful way on the matters which this Committee is mandated to inquire into and make determinations in respect of.

6.5 It is to be inferred from other provisions of the Act that the legislature envisaged the identity of institutions, individual perpetrators and other personnel implicated in abuse the subject of this Committee's remit coming into the public domain before the publication of the Commission's report. The Act envisages a two-phased inquiry. First, an inquiry as to the existence of abuse in institutions, the framework of which is the evidence of persons making allegations of abuse, must be conducted. Secondly, when the existence of abuse has been established, an inquiry must be conducted into the broader picture: how much abuse occurred, why it occurred and who was responsible for or contributed to its occurrence. The Act, in section 11(3)(b), encourages this Committee to hold hearings, other than hearings or parts of hearings at which evidence relating to particular instances of alleged abuse is being given, in public. It is reasonable to infer that the legislature envisaged that the second phase of the inquiry would be conducted through public hearings, as is proposed,¹⁹ and that the identity of institutions and personnel the subject of findings made in the first phase would come into the public domain in the course of the second phase.

6.7 In summary, this Committee's statutory mandate to inquire relates to abuse of children in institutions over the entire period from at least 1940 to at least 1999. The Committee is required to make determinations in the course of the inquiry, but the focus of the determinations is not what happened to a particular child or particular children during that period, but rather what happened in an institution during the period or part of the period and why it happened. The determinations which this Committee is required to make, of their nature, necessitate identifying the perpetrator of abuse, the institution in which the abuse

¹⁹ Opening statement, page 16

occurred, and the persons, or group of persons, or corporations involved in the management and administration of the institutions and the persons or organisations charged with their regulation. It is an inevitable consequence of the two-phased structure of the inquiry, necessitated by the requirement that the Committee be satisfied that abuse occurred before embarking on the remainder of the inquiry, that institutions and individual perpetrators would be the subject of findings which would identify them at the end of the first phase and that their identity would become public in the second phase, if those hearings are held in public.

This Committee's statutory mandate to report relates to the results of its inquiry and the determinations it has made in the course of the inquiry and, in general, necessitates naming institutions, individuals perpetrators, persons, groups of persons and corporations the subject of its determinations.

The Commission's statutory mandate to report, in so far as it relates to the part of its mandate to inquire carried out through this Committee, is the same as the Committee's mandate to report, subject to the proscription on publishing the identification of a person the subject of abuse in childhood.

- 6.8 The Act is not reasonably open to the construction that the legislature intended the report of the Commission, in so far as it reflects the outcome of the inquiry mandated to be conducted through this Committee, merely to record findings in general terms and without identifying any persons or institutions in the manner in which the Confidential Committee is required to report on the outcome of its mandate.

6.9 In practical terms, what emerges from the foregoing analysis is that the unit of inquiry is the institution during the relevant period or part or parts of the relevant period and that the organisation of the business of this Committee and, in particular, the first phase of it, must take account of this. It is proposed to deal with each institution, or where appropriate each institution in respect of a particular period, for example, while under the management of a particular manager, on a modular basis.

7. Fair Procedures – *Audi Alteram Partem*

7.1 It is recognised that, in the context of an inquiry, such as the statutory inquiry which this Committee is mandated to conduct, which is empowered to make and publicise findings, a person involved in the process whose conduct is impugned as part of the investigation must be afforded a reasonable means of defending himself. The minimum protection which such a person must be afforded is that –

- (a) he should be furnished with a copy of the evidence which reflects on his good name;
- (b) he should be allowed to cross-examine, by counsel, his accuser or accusers;
- (c) he should be allowed to give rebutting evidence; and
- (d) he should be permitted to address, again by counsel, the Committee in his own defence.²⁰

²⁰ In Re Haughey *per* O’ Dalaigh C.J. at page 263

7.2 In the course of the inquiry being conducted by this Committee a person may be impugned by reason of an allegation of abuse being made against him, or by being implicated in an allegation of abuse, or otherwise by the possibility of an adverse finding being made against him arising out of the allegation. A person or body in such a position is referred to as a “Respondent” in the proceedings before this Committee. The policy of the Commission²¹ is to grant a person or body implicated in the investigation of an allegation in the first phase of its inquiry legal representation by solicitor and counsel. The Rules of Procedure of this Committee provide that a Respondent is entitled to –

- (a) a statement of the allegations made against him,
- (b) cross-examine persons giving evidence against him,
- (c) testify himself, and
- (d) make submissions.

7.3 While it was not suggested by any party that the implementation of the policy and the Rules of Procedure presents any difficulty in relation to granting representation in the case of a living person or a body corporate, in the light of the questions raised on the Issue Paper and the submissions made at the procedural hearing, the position of certain categories of persons who might be the subject, directly or indirectly, of adverse findings by this Committee requires to be specifically addressed. These categories are –

- an unincorporated group of individuals, such as a religious congregation,
- a deceased individual who, if alive, would be a Respondent,

²¹ Publicly announced at the second public sitting held on 20th July 2000 – transcript at page 6

- a living individual who is incapable of giving instructions or testifying, and
- an individual believed to be living who cannot be traced.

7.4 In relation to unincorporated groups of individuals, it is considered that a body or organisation such as a religious congregation is distinguishable from other groups, for example, boards of management, which will subject to scrutiny during the course of the inquiry.

This Committee proposes, in future, to adhere to its existing practice of granting collective representation in proceedings before this Committee to a religious congregation which had management responsibility at the relevant time for an institution in which it is alleged that abuse occurred. As it was submitted at the procedural hearing that the rationale underlying the decision of this Committee to grant representation to the first Management Respondent in connection with the investigation of institutions which at the relevant time were managed by that congregation is incorrect in law²², such representation is granted not necessarily as a matter of right. This Committee expresses no view on the former or current structure or legal status of that congregation or the legal or constitutional rights of any congregation or its past members. However, it is recognised that the congregations of religious who had managerial responsibility for the institutions which come within the remit of this Committee are perceived in the State as having a distinct charism and mission and a distinct reputation which adheres to the members of the congregation. Moreover, it is recognised that historically they have been, and currently they are, associated in a distinctive manner with the institutions. By reason of that association, where an institution is under investigation by this Committee, whether or not

²² In so far as it was stated in a letter sent in April 2001 to the solicitors for the first Management Respondent that the requirements of constitutional justice require the collective representation be granted.

past or present members are also under investigation, the process is potentially injurious to the reputation of the congregation, which, in effect, means that it is potentially injurious to the reputations of the current members of the congregation. Having regard to the obligation of this Committee to act fairly it is considered appropriate that a congregation of religious in such a position should be afforded protection analogous to the protection afforded to a living person against whom allegations are made which are likely to reflect on his good name. Therefore, this Committee will continue to afford the first Management Respondent and the second Management Respondent and any other congregation in a similar position the minimum protection outlined in paragraph 7.1 above. It is anticipated that the adoption of this approach will assist in eliciting the true facts.

This Committee adopts, and will continue to adopt, a different approach in relation to Boards of Management of schools. When it emerges, in the course of preliminary investigation under section 23 of the Act, that the current Board of Management of the school did not have management responsibility at the relevant time, it is recognised that the current members of the Board of Management could not be properly implicated in any determination of this Committee or the subject of an adverse finding. The current Board of Management (represented by the current chairperson) ceases to be involved in the process, save to the extent that it may be necessary to seek discovery or production of documents.

- 7.5 In relation to a deceased individual who would have been a Respondent if alive, it is noted that there is no definitive decision of a Court of competent jurisdiction on whether the constitutional protection of a citizen's good name and the concomitant right to fair procedures extends to a

deceased person and that doubts have been expressed as to the existence of such protection in deceased persons in judicial pronouncements. ²³Nonetheless, this Committee, having regard to its obligation to act fairly and with a view to pursuing such lines of inquiry as will elicit the full and true facts, intends, in the case of a deceased person under investigation who was a member of a religious congregation at the date of his or her death, to allow the congregation, through its own representation, to represent the interest of the deceased person also. However, if it were to become apparent that, if such deceased person were alive, there would be a conflict of interest between him and the congregation, in such case this Committee will treat the situation as if the deceased person were not a member of the congregation at death.

Where a deceased person, who is under investigation by this Committee, was not a member of a religious congregation at the date of death, this Committee will seek to ascertain whether there exists a person who, if he or she were allowed to represent the interest of the deceased, could assist in the ascertainment of the true facts and achieving a fair determination, and, if so, will allow such person to represent the interest of the deceased person.

As it was submitted at the procedural hearing that the rationale underlying the approach hitherto formulated by this Committee in relation to deceased persons whose conduct is under investigation is incorrect in law,²⁴ such representation is granted not necessarily as a matter of

²³ Hilliard v Penfield Enterprises Ltd. [1990] 1 I.R. 138;
McDonnell v Brady & Ors [2001] 3 I.R. 588

²⁴ In so far as it was stated in a letter sent in July 2001 to the solicitors for the first Management Respondent that there is a constitutional imperative to safeguard and vindicate the good name of a deceased person.

- right. The purpose of the representation is to enable the interest of the deceased person to be protected against an unfair determination through cross-examination and submissions.
- 7.6 In relation to a living individual who is incapable of giving instructions or testifying, this Committee proposes to continue to adopt the approach hitherto adopted. Independent medical or psychiatric assessment may be required before a determination is made that the individual is incapable. If such a determination is made, this Committee will allow participation in the proceedings before it by a party to represent such person, who will be granted legal representation by solicitor and counsel. The individual, through the party and the legal representatives retained by the party, will be afforded the protection outlined in paragraph 7.1 above.
- 7.7 In relation to an individual who is believed to be alive but cannot be traced, this Committee will take all reasonable steps to establish whether the individual is alive or dead and, if alive, his current whereabouts. Where it is not established that the individual is dead and it is not possible to trace him, he will not be represented in the proceedings before this Committee. Regard will be had to this factor in determining whether a finding of abuse should be made against him.
- 7.8 The main thrust of the submissions made on behalf of the first Management Respondent (which were adopted on behalf of the second management Respondent) in relation to the application of the doctrine *audi alteram partem* was that a party is not effectively represented or heard in a process, such as the process of this Committee, unless he is in a position to

meaningfully partake in the process and, in particular, conduct a meaningful and effective cross-examination. While it was not suggested by any party that, by the procedures it has adopted, this Committee has inhibited, or will inhibit, the right to cross-examination where such exists, it has noted and will have regard to the *dictae* in the judgments delivered in the Supreme Court in Maguire and Ors.v Ardagh and Ors. (the Abbeylara Case)²⁵ relied on by counsel for the first Management Respondent, which emphasise the importance of the right of a person to cross-examine those whose evidence may affect his right to his reputation. In particular, it is noted that it is not permissible to adopt a practice which would seriously erode the value of cross-examination as it has been traditionally understood,²⁶ or to deny to persons whose reputations and livelihoods are brought into issue the full power to cross-examine fully, as a matter of right, and without reasonable hindrances.²⁷

- 7.9 The gravamen of the case made on behalf of the first Management Respondent in relation to the observance by this Committee of the principle *audi alteram partem* in the performance of its inquiring and reporting functions overlaps with the argument advanced on its behalf on the effect of lapse of time, which will be considered later in this ruling. While, in essence, it encompasses the application of the principle to living persons involved in the process as of right, as well as its application to persons absent from the process, for example, by reason of death, it will be considered here in the context of making findings about persons who are absent from the process.

²⁵ Unreported, 11th April 2002

²⁶ *Per* Keane C.J. at page 161

²⁷ *Per* Hardiman J. at page 103

It was argued, in reliance on the decision of the Supreme Court in the *Abbeylara* case as to the nature of the *Abbeylara* Inquiry, and the reasoning which underpinned the decision, that observance of fair procedures and the principle *audi alteram partem* creates an entitlement to cross-examine which is real and substantial and not just notional. The argument advanced by counsel was that, as the *Abbeylara* Inquiry had assumed a function of making findings of fact, the Supreme Court held that it was “an adjudicative inquiry.”²⁸ Moreover, it was argued, the Supreme Court identified the nature of fact-finding: it is “a rigorous analytical process leading to factual conclusions.”²⁹ A body such as this Committee, which is empowered to make findings of fact, exercises an adjudicative function and certain consequences flow from this, it was argued. If the lapse of time since the occurrence of events being investigated is such that the evidence cannot be tested in an adjudicative manner, a conclusion cannot be formed. To hear one side only does not comply with fair procedures; both sides must be heard in a meaningful way. If there is no factual evidence to test the account given by a person making allegations, the capacity to make determinations is hampered because of the effects of passage of time, and the absence of witnesses. Cross-examination of a witness impugning the conduct of a party absent from the process by reason of death or otherwise is mere “window dressing” Naming should only follow where there has been an adjudication based on a testing of the evidence. Even if an allegation is true, if it cannot be tested, it cannot be satisfactorily established sufficiently in the exercise of the adjudicative function so as to be pronounced as being a fact. Facts must be established, not merely asserted. There must be a real forensic analysis of the evidence.

²⁸ *Per* Denham J. at page 28

²⁹ *Per* Hardiman J. at page 23

7.10 It is acknowledged that the statutory function to determine issues of fact and to publish findings conferred by the Act on this Committee is in substance what the Supreme Court described as an adjudicative function and that the inquiry being conducted is what the Supreme Court characterised as an adjudicative inquiry. However, it is not accepted that it follows that this Committee is always precluded from making a determination of abuse where the person against whom the abuse is alleged is dead or, alternatively, is so precluded unless there are exceptional circumstances, for example, that it can be proved that, during his lifetime, the person was convicted of a criminal offence or made an admission in a disciplinary or like inquiry in relation to the conduct complained of. Moreover, it is not accepted that the making and publication of findings against a deceased person should, in principle, be the exception rather than the norm. In civil litigation, a court is not precluded from making a finding which attributes blame to a deceased person.

The evaluation or assessment process which precedes a determination or finding is not dependent on there being accounts of the incident or state of affairs on which the allegation is based from two or more proponents to weigh in the balance. There are many ways in which the credibility of a witness and the reliability of his account may be tested. Irrespective of the stance adopted by any party who is represented in the process, this Committee considers that there is an onus on it to test the recollection and the veracity of a witness. This flows from the obligation to act fairly.

7.11 It is the Committee's understanding that, as a matter of law, it is not precluded from making a determination and publishing a finding that a person who is now deceased during his or her

lifetime perpetrated abuse within the meaning of the Act on a child in an institution, merely because the deceased person cannot be afforded the opportunity to give his account, possibly supported by corroboration or objective evidence, and to have the person making the allegations cross-examined by reference to his account and any such supporting evidence. *A fortiori*, it is not precluded from making a determination in such circumstances which identifies the institution. Similarly, the absence of a person from the process because of inability to trace his whereabouts does not preclude the making of a determination and the publication of a finding of abuse by that person. However, it is recognised that a high degree of caution must be exercised in evaluating evidence and in making a determination in relation to the conduct of a deceased person, who did not have an opportunity in life to answer the allegation of misconduct, or in relation to the conduct of a person who may be alive but is untraceable and unable to invoke his constitutionally guaranteed right to protect his good name.

8. Lapse of Time: Prejudice

8.1 Counsel for both Management Respondents, who also represent individual members of the respective congregations, submitted that the obligation of this Committee to adopt fair procedures requires it to embrace, not only the principle *audi alteram partem*, but also the well established jurisprudence of the superior Courts on the issue of prejudice arising from a significant lapse of time between the occurrence of alleged incidents and a trial to determine criminal responsibility or civil liability in relation thereto. However, save in one respect, they differed on the application to this Committee of the principles to be deduced from the jurisprudence.

8.2 Counsel for the first Management Respondent alone invoked the “lapse of time” jurisprudence to advocate that observance of fair procedures requires that there should be in place a procedural mechanism to terminate the investigation of allegations where prejudice is manifested. He suggested that the procedures of this Committee should provide that at a particular interim point in the process there should be a determination that no finding will be published, that point being immediately after this Committee has heard the complainant’s evidence but before the person or body against whom the allegation is made is required to cross-examine the complainant or adduce rebuttal evidence.

8.3 Counsel for both Management Respondents invoked the “lapse of time” jurisprudence to identify prejudice which it is contended is a consequence of lapse of time, which renders adjudication impossible and precludes this Committee from adjudicating in the course of the process. They differed, however, in relation to the particular adjudication which is affected; whether it is -

- (a) the determination that abuse occurred, the contention of the second Management Respondent, or
- (b) the decision to publish a report of such a finding, the contention of the first Management Respondent.

The prejudice contended for is the inability of the individual against whom the allegation is made, or the congregation which managed the institution at the relevant time, to participate in a

meaningful way in the process and to effectively defend himself or itself in a meaningful way. The factors giving rise to this inability, the impact of which may vary depending on the antiquity of the allegations, were stated to include -

- the dimming, distortion and loss of memory,
- the non-availability of the alleged perpetrator,
- the non-availability of other relevant witnesses by reason of death, incapacity, untraceability, non-compellability on account of absence from the jurisdiction, or otherwise
- non-availability of relevant documents,
- absence of physical evidence, for example, the alteration of the *locus in quo*.

As has been stated, this argument overlaps with the argument on the application of the principle *audi alteram partem*, the basis of which is that, if the person whose conduct is impugned is hampered in effectively testing or challenging the evidence against him, the principle is not observed.

8.4 The point on which there was agreement was that, in the application of “lapse of time” jurisprudence to this Committee, the fact that the process of this Committee is a recently established statutory inquisitorial process must be recognised. It was acknowledged that the element of establishing culpability for delay or the consequences of lapse of time in initiating a civil claim or a criminal prosecution, which is a feature of the jurisprudence, does not apply. Therefore, it was submitted, in the context of this process, the only issue for consideration is the existence or otherwise of such prejudice, which is to be ascertained by analogy to the

approach adopted in civil cases (applying the test whether there is a substantial risk that it is not possible to have a fair trial),³⁰ or in relation to a prospective criminal trial (applying the test whether there is a real and serious risk of an unfair trial.)³¹ The relevant test in this inquisitorial process was posited in terms of various formulae: is there a real and substantial risk that this Committee will get the wrong result because of the effects of lapse of time; has lapse of time rendered it unsafe to conclude that abuse took place?

- 8.5 This Committee rejects the submission that its procedures should provide for consideration of the issue of prejudice after taking a complainant's evidence. The procedural consequence of the successful invocation of the "lapse of time" jurisprudence by a party, usually the defendant, in a civil action, or the accused facing a criminal trial, is the making of an order to dismiss the civil action or prohibit the further prosecution of the criminal charges. While such a consequence is appropriate in an adversarial process, which is, in effect, a contest between two adversaries in which the substantive law determines the rules of engagement, for example, where the burden of proof lies, it is wholly incompatible with the nature of an inquisitorial process which is established by statute to investigate facts. It is the view of this Committee that, as a general principle, in order to properly fulfil its statutory mandate, it must carry out a preliminary investigation of each allegation, obtain discovery and production of all documents relevant to the issues raised on the allegation, hear the person who makes the allegation, procure the attendance of and hear all other witnesses whose testimony is relevant and pursue all lines of inquiry to establish the true facts. To do otherwise would be an abrogation of its mandate. However, this Committee does not rule out the possibility that, in exceptional

³⁰ *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459

³¹ *P.C. v D.P.P.* [1999] 2 I.R. 25

circumstances, it may terminate its investigation without making any determination in accordance with section 12 at an earlier stage. The passage of a significant period of time since the abuse is alleged to have occurred, even coupled with the death in the intervening period of an alleged perpetrator or other person who might be able to testify as to the facts, would not constitute such exceptional circumstances.

While the procedure suggested by the first Management Respondent may appear superficially attractive, to the extent that a complainant would not be subjected to cross-examination if the person whose conduct is impugned successfully pleads prejudice as a bar to proceeding with the inquiry, by forgoing compelling available witnesses to answer questions, this Committee might effectively enable a body in the position of the first Management Respondent to dictate the course of the inquiry

- 8.6 An adjudication made pursuant to the Act must be made in accordance with constitutional justice. The “lapse of time” jurisprudence is of relevance to the adjudicative process of this Committee in so far as it gives guidance as to the circumstances in which lapse of time gives rise to a degree of prejudice which interferes with the ability of a fact-finder to achieve fairness. However, where, as in the established jurisprudence, prejudice as a consequence of lapse of time is raised as an issue with a view to halting an adversarial process, the Court, in deciding whether the process should be halted, is concerned with the assessment of risk: in the case of a civil action, whether there is a substantial risk that it is not possible to have a fair trial; in the case of a criminal trial whether there is a real and serious risk of an unfair trial. As has been stated, it is considered that it would be an abrogation of its statutory mandate if this Committee were not, as

a general rule, to bring the investigation of allegations to conclusion, in the sense of exhausting the capacity to gather relevant evidence. Adopting this approach, the process will have been completed when the issue of prejudice in relation to the making of a determination falls to be considered. Such consideration will not be a speculative operation. It will be a matter of evaluating all of the evidence and all relevant factors, including, if present, factors identified in the “lapse of time” jurisprudence as giving rise to prejudice, and assessing the weight to be attached to the evidence in the light of such factors, with a view to deciding whether a finding may be made which is not unfair or unjust.

Therefore, a test predicated on risk is not appropriate. It is the view of this Committee that the correct test is whether it is unsafe to make the determination. However, this test is to be applied in the context that the statutory mandate of this Committee clearly envisages that determinations that abuse occurred, which identify perpetrators, institutions and personnel working in and charged with responsibility for institutions will be made arising out of incidents which existed a long time ago, even sixty year ago in some cases. In giving due weight to that clear mandate, as it must do, this Committee believes that the existence of prejudice founded on the antiquity of the allegations which renders the making of a determination directed by section 12 of the Act unsafe must be the exception rather than the norm.

- 8.7 As the analysis of sections 12 and 13 of the Act set out earlier and summarised in paragraph 6.7. indicates, it is the view of this Committee that the focus of the inquiry it is mandated to carry out relates to what happened in a particular institution during the stipulated period (1940 to 1999) or part of that period, and is not on individual allegations of abuse. The determinations which this

Committee is obliged to make as to the occurrence of abuse as a preliminary step to investigating the broader picture – why abuse occurred and the attribution of responsibility for its occurrence – are determinations about a particular institution, an individual or individuals who perpetrated abuse, and other personnel working in and charged with responsibility for the institution during the stipulated period or part of the stipulated period, not determinations about specific allegations of abuse. It follows that the issue of prejudice to a person or body which may result from the making of a determination falls to be considered, not in relation to each particular allegation of abuse or the allegations of a particular complainant, but by reference to the unit of the inquiry which is the subject of the determination – the particular institution within a particular time frame. It is at the point in time when this Committee is considering whether to make the determination which it is obliged to make in relation to that unit, that the issue of prejudice falls to be considered. Accordingly, prior to making a determination which will form the basis of the second phase of its inquiry, this Committee will conduct all its investigations, obtain discovery and production of all relevant documentation, and hear all relevant evidence in relation to the institution, or in relation to the institution in the relevant time frame. It will consider submissions made on behalf of any person or body asserting that the making of a determination against him or it would result in unfairness or injustice and any contrary submissions offered by any other interested party. The decision whether to make the determination or not will be based on the totality of the evidence adduced in relation to the institution and its personnel, or the institution and its personnel within the relevant time frame, or in relation to the person alleged to have perpetrated the abuse, as the case may be. The totality of the evidence means such documentary evidence as is available and the sworn testimony of all complainants, respondents, and all other witnesses who testify in respect of that module of the inquiry. In deciding whether

to make the determination, this Committee will have due regard to the factors which are alleged to give rise to actual prejudice. In particular, if the person who is alleged to have perpetrated the abuse is absent from the process, in evaluating the available, evidence the implications of the non-availability of the account of the absent party will be weighed in the balance and, as has been stated, a high degree of caution will be exercised.

8.8 It is recognised that a factor which the Commission must always be mindful of in deciding whether to make a determination that abuse occurred identifying an institution or individuals is the consequence of such a finding. Moreover it is recognised that the determination should be framed in such a way as to ensure that the consequence is not disproportionate to the substance of the finding. Therefore, it is proposed, in making a finding, to specify the nature of the abuse found and such factual detail as is permitted as will obviate an erroneous impression as to the gravity of the conduct or state of affairs found. It is considered that the proper interpretation of the Act, and, in particular, section 12 and section 13 thereof, allows for a degree of flexibility in formulating determinations and findings to enable this Committee to avoid unfairness or injustice in making determinations and findings.

8.9 It is the view of this Committee that the mandate it has been given by the Oireachtas requires it to lean in favour of making specific determinations which identify institutions and individuals, rather than general or non-specific findings. As the issue was raised at the procedural hearing, this Committee considers it appropriate to record that it considers that, if, in relation to a particular institution, aggregating the evidence of credible complainants in relation to that institution tends to the conclusion that, as a matter of probability, a deceased person perpetrated

the abuse at a particular time in that institution and there is no contrary evidence, the appropriate determination, in fulfilment of the Committee's statutory mandate, is a determination which identifies the deceased person and the institution.

8.10 As a general rule, if this Committee makes a determination which identifies a particular institution or a particular individual, the report of this Committee will record the finding made, including the identity of the institution or the individual, with a view to publication in the Commission's report to the public. Apart from the prohibitions contained in the Act on recording findings in relation to particular instances of alleged abuse in the report of this Committee (section 13 (2) (c)), and in the published report of the Commission (section 5(3)(d)), it is recognised that there may be circumstances in which the interests of justice require that a determination which identifies a particular institution or a particular perpetrator of abuse should not be made public in a manner which identifies the institution or the individual, as the case may be, either in the course of the second phase of the work of this Committee or through a published report. It is not possible to anticipate the various circumstances which might indicate that publication would be unfair. By way of illustration, one example suggested at the procedural hearing – a situation in which this Committee is satisfied that abuse occurred in a particular institution at a particular time but cannot be satisfied as to the true identity of the perpetrator because the perpetrator was remembered by a “nick name” only – might be a case in which the institution would be identified in a published finding but not the perpetrator. Practical considerations may also dictate whether findings which are tangential to the core issues under consideration are published.

8.11 It is recognised that issues may arise as to childhood trauma and memory. This Committee will hear expert evidence on these issues where it is considered necessary.

8.12 As has been stated in the general observations set out earlier, it is considered that the argument based on the application of the principle *audi alteram partem* and the argument based on prejudice arising from the antiquity of the allegations are inextricably bound together. In substance, there is one argument: that many of the events being investigated happened so long ago that a person whose conduct is impugned in the course of the inquiry, whether present or absent, cannot effectively defend himself, whether the allegation is true or false. Indeed counsel for the first Management Respondent, when analysing the “lapse of time” jurisprudence,³² submitted that facing a matter at a far remove in time is inherently unfair. Furthermore, he submitted that a lapse of time is intrinsically prejudicial to fairness in adjudicating on facts to arrive at an informed and determined conclusion which the public can rely on as having been established in evidence, although not fatally prejudicial. However, while it was suggested that the presumed prejudice may not be fatal, the import of the submissions is that, in reality, it is a *fait accompli*. No procedures or measures were suggested which might be adopted to countervail the prejudice. The only remedy suggested was that this Committee must desist from making the determination.

If the argument advanced on behalf of the Management Respondents were to prevail, viewed against the factual background outlined earlier, in all likelihood the outcome, in relation to the majority of institutions which are the subject of the allegations being investigated, would be that this Committee would be unable to make findings containing a sufficient degree of specificity to

³² In particular, the judgment of Hardiman J. in *J.O.C. v D.P.P.* [2000] 3 I.R. 478

enable it to embark on the main investigation as to how much abuse occurred and why it occurred. If the argument were to prevail, the investigation would effectively cease *in limine*. In short, the intention of the Oireachtas manifested in the Act would be frustrated.

This Committee considers that the argument cannot prevail because, in accordance with the principles outlined earlier, which govern the proper interpretation of its statutory functions, this Committee cannot ignore its clear statutory remit. It is not within its competence to embark upon a process of investigation and reporting of a type which the clear language of the Act does not admit of and which is fundamentally at variance with the clear intention of the Oireachtas as reflected in the words of the Act and, in particular, of sections 12 and 13.

9. Summary of Conclusions on Issues

- 9.1 This Committee is not prohibited by law from making a determination or making public, either through a public hearing in the second phase of its work or in a published report of the Commission, a determination or finding that abuse occurred which identifies a person who was absent from the process by reason of death or otherwise as responsible for the abuse or identifying the institution in which the abuse occurred.
- 9.2 In considering whether to make a determination or finding which identifies a person as being responsible for abuse and/or identifies the institution in which the abuse occurred, where the passage of time between the events alleged to constitute the abuse and the determination is significant, this Committee will consider the question of prejudice flowing from the effects of a

passage of time before making the determination or finding. The test which will be applied is whether it is unsafe to make the determination. The test will be applied against the clear statutory mandate that determinations and findings identifying parties and institutions should be made. The issue of prejudice will be considered at the end of the evidence gathering phase on the issue as to whether abuse occurred in relation to the particular institution, or the particular module in relation to the institution, or the particular individual.

- 9.3 Where a determination or finding of abuse, identifying a person or persons and/or an institution is made, as a general rule, the determination or finding will be made public in the course of the second phase in the work of this Committee and through the published report of the Commission.

Appendix

Issue Paper agreed at procedural hearing held *in camera* on 3rd July, 2002.

- (A) The principles applicable to the exercise of its jurisdiction to consider, make findings in, and, ultimately, publish findings in respect of, complaints of abuse, where, by virtue of lapse of time, the death or other unavailability of a Respondent, or Respondents, the death or unavailability of material witnesses, or any other relevant factors, the Respondent may contend that there is a complete or partial limitation upon the entitlement of the Commission to exercise its full jurisdiction in respect of such complaint:
- I. Under each heading it will be necessary to consider whether there is a complete or partial limitation as to any, or all, of the jurisdiction to:-
- (a) hear and consider the evidence;
 - (b) make findings in respect of the matters, the subject of the evidence;
and
 - (c) publish any such findings.

II. In respect of individual Respondents, it will be necessary to consider whether there is a complete or partial limitation upon the jurisdiction of the Commission under any, or all, of the above headings, where that individual Respondent is:-

(a) dead;

(b) untraceable after reasonable effort;

(c) alive, but unable to give instructions; or

(d) asserts that by virtue of lapse of time that Respondent is prejudiced in the preparation and presentation of his or her case.

III. In respect of managerial Respondents and the Department, it will be necessary to consider whether there is a complete or partial limitation upon the jurisdiction of the Commission under any, or all, of the above headings by virtue of the fact that:-

(a) the persons alleged to be directly responsible for any abuse are unavailable under any of the headings set out at II above;

- (b) the persons who exercised managerial control at the relevant time are unavailable, or prejudiced, under any of the headings set out at II above; or
 - (c) where there are more than one person in either or both categories, some, but not all, of the persons are so affected.
- (B) In any cases where, as a matter of principle, the Commission may be persuaded that there is a limitation upon the exercise of its jurisdiction, the determination, insofar as it is possible at this stage, of each of the factors or considerations which should be taken into account by the Investigation Committee in making a determination as to whether or not to exercise any, or all, of its jurisdictions in respect of the complaint:

Under each of the above headings (that is to say, under (A) above) it will be necessary to consider, *inter alia*, the following:-

- (a) Whether there are circumstances which should operate as an absolute bar to the exercise of any of the jurisdictions referred to;

- (b) In circumstances where there is not an absolute bar (if any), but where there remains a discretionary jurisdiction not to exercise such a jurisdiction, the broad factors that should be taken into account under each heading.

And, in particular, the extent to which any, or all, of the following factors may be relevant under any specific heading:-

- (i) The principles applicable to prohibition in respect of either criminal or civil claims or prosecutions in relation to analogous matters;
- (ii) The impact (if any) of the inquisitorial nature of the Commission's hearings on any factors;
- (iii) The nature of any prejudice which would need to be established before the exercise by the Commission of its jurisdiction (if there be one) not to consider, or report on, or publish, findings in respect of matters within its remit; and
- (iv) any other factors which the parties may wish to urge.