COMMISSION TO INQUIRE INTO CHILD ABUSE

INVESTIGATION COMMITTEE

Respondent: Department of Education & Science

Issue raised at Procedural hearing on 5th December, 2003 (held in private)

Ruling dated 10th December, 2003

1. The Issue

The issue addressed in this ruling is whether there has been proper compliance with a direction for discovery made by the Chairperson of the Investigation Committee (the Committee) on 10th March, 2003 directing the Secretary General of the Department of Education & Science to make discovery on oath of certain documents. In purported compliance with the direction, an affidavit of discovery sworn by the Secretary General was submitted to the Committee on 27th June, 2003 together with copies of the documents scheduled in the affidavit in respect of which privilege was not claimed.

2. **The Relevant Statutory Provision**

The direction for discovery was made by the Chairperson pursuant to the powers conferred by section 14(1) of the Commission to Inquire into Child Abuse Act, 2000. That provision empowers the Chairperson, for the purposes of the functions of the Committee, to –

> "(d) direct in writing any person to make discovery on oath of any documents that are or have been in the possession or control of the person relating to any matter relevant to the functions of the Committee and

> to specify in the affidavit of documents concerned any documents mentioned therein which the person objects to produce to the Committee and the grounds for the objection; and the rules of court relating to the discovery of documents in proceedings in the High Court shall apply in relation to the discovery of documents pursuant to this paragraph with any necessary modifications…"

It is the view of the Committee that the obligation of a person to whom a direction to make discovery issues pursuant to section 14(1) of the Act is to furnish an affidavit of discovery in the form prescribed by the rules of court relating to discovery of documents in proceedings in the High Court and to complete the affidavit in accordance with the principles laid down in the jurisprudence of the Superior Courts, and, in particular, the principles governing the listing of relevant documents. Documents which "have been" in the possession or control of the deponent are to be treated in the same manner as documents which have been, but are not currently, in the possession or power of a deponent making an affidavit of discovery pursuant to an order of the High Court.

3. The Discovery Direction

The direction dated 10th March, 2003 was a focused direction which required the Secretary General to make discovery on oath of:

> "All documents within the meaning of that expression in the Act of 2000 and records of whatever nature that are or have been in the possession or control of the Department in relation to the existence, or possible or suspected existence, or occurrence, or possible or suspected occurrence, of abuse of children, whether sexual, physical or emotional abuse, or neglect during the period from and including 1936 to the date of swearing of the affidavit of discovery in any of the following institutions, that is to say:
>
> (a) an industrial school,
>
> …
>
> (m) any other institution in which children were placed and were resident and in respect of which a public body has or had a regulatory or inspection function,
>
> and the action taken in respect of such abuse or possible or suspected abuse, either specifically in relation to abuse or suspected abuse or generally."

In addition to an industrial school, the direction listed eleven other types of residential institution.

As over a period of approximately eighteen months prior to the issue of the direction, issues had arisen between the Department and the Committee in relation to the making of discovery, the direction was accompanied by a letter dated 10th March, 2003 from the Committee's legal team outlining what was required. In the letter, it was stated, *inter alia*, that, in accordance with the

commitment given to the Committee at a hearing that morning, 10th March, 2003, the affidavit should comply with the rules and principles applied by the Superior Courts in relation to making discovery. There followed an explicit statement in the following terms:

> "Any documentation no longer available should be **itemised** and its absence **explained**".

It was also stated in the letter that it was the intention of the Chairperson to issue a discovery direction requiring discovery of all other documents of general application, that is to say, relating to or affecting more than one institution, which are relevant to the work of the Committee later that week and to issue directions for discovery of other documents which are institution related, commencing with three named industrial schools shortly thereafter. In fact, the further discovery directions did not issue.

4. Application to Vary the Direction

On 31st March, 2003 the Committee sat in public to hear an application by the Department to vary the direction of 10th March, 2003. That application was initiated by a letter of 14th March, 2003 from the Chief State Solicitor. The grounds on which the variation was sought were set out in a written submission lodged with the Committee on 27th March, 2003.

At the hearing, Counsel on behalf of the Department withdrew the application for variation, but sought an extension of time within which to comply with the discovery direction. At the hearing, the period for compliance with the direction was extended to 27th June, 2003 and the direction was varied so as to exclude

from its ambit files which the Department opened in connection with its response to the Commission in respect of the complaints of particular Complainants. In the submissions by Counsel for the Department, it was acknowledged that the Department was under a duty to comply with the discovery direction in the manner prescribed by the High Court rules.

5. The Affidavit

The form of affidavit prescribed by the Rules of the Superior Courts, 1986 (Form No. 10 in Appendix C) requires the deponent to include the following averments:

> "4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.
>
> 5. The last mentioned documents were last in my possession or power on [*state when*].
>
> 6. That [here state what has become of the last mentioned documents, and in whose possession they now are].
>
> 7. Accordingly to the best of my knowledge, information, and belief, I have not now, and never had, in my possession … any deed, … or any other document whatsoever … other than and except the documents set forth in the said first and second schedules hereto."

The affidavit submitted in purported compliance with the direction of 10th March, 2003 was not in conformity with the prescribed form in that:

- Paragraphs four, five and six of the prescribed form were omitted in their entirety.
- Paragraph seven was varied by the omission of the words "and never had".
- It contained no second schedule.

The affidavit was accompanied by a letter dated 27th June, 2003 from the Chief State Solicitor, which summarised the manner in which the schedule was structured. The covering letter did not disclose that the affidavit departed from the prescribed form.

On 28th October, 2003, Counsel to the Committee wrote to the Chief State Solicitor outlining the deficiencies in the affidavit. In a response dated 4th November, 2003 from the Chief State Solicitor, it was stated as follows:

> "While the Department is well aware that the rules of Court relating to the discovery of documents in the High Court applies to discovery directed by the Investigation Committee pursuant to the provisions of section 14(1)(d) of the Commission to Inquire into Child Abuse Act, 2000 that section also provides that such rules shall apply '… with any necessary modifications …'. In the light of the difficulties existing within the Department's records as hereinbefore set out it is clear that an affidavit of discovery taking the standard form cannot be sworn on the Department's behalf and any affidavit sworn must be modified to take these difficulties into account"

The difficulties referred to in that passage were summarised earlier in the letter as follows:

> "A. The Department is aware that gaps exist in its records particularly in relation to industrial and reformatory schools.
>
> B. Where gaps have been identified the Department cannot say what records existed or what became of the missing records and so cannot identify any person or body to whom they may have been handed over.
>
> C. There may be other gaps in the records of which the Department is unaware simply because the documents are not there now and there is no evidence that they ever existed in the first place.
>
> D. The Department is not in a position to offer any explanation with regard to missing records other than to state that full and extensive searches have been carried out of its records in ensuring compliance with the discovery direction of 10th March, 2003.
>
> E. All of the foregoing arises in the circumstances of the antiquity of the Department's records where the Investigation Committee is seeking records spanning the period 1936 to date"

It was proposed in the letter to furnish an affidavit to the Committee dealing with the foregoing matters.

6. The Hearing

A procedural hearing of the Committee was held in private on 5th December, 2003 to deal with, *inter alia*, the issue.

At the hearing two alternative submissions were made on behalf of the Department:

(a) That because, as it was contended, it was not possible for the Secretary General to swear an averment in relation to relevant documents which were once, but no longer are now, in the possession of the Department, the omission of the second schedule from the affidavit was justified.

(b) Alternatively, if the affidavit was deficient and not in compliance with the direction, the jurisprudence of the Courts indicates that the proper course of action is not to punish the party making discovery but to direct that a further affidavit be sworn. In support of this proposition, Counsel for the Department cited the decision of the Supreme Court in Murphy – v – J. Donoghue Limited and others [1996] 1 I.R. 123.

On the question of the impossibility of deposing to absent documents, Counsel for the Department relied on the fact that a Principal Officer of the Department had given sworn testimony to the Committee at a procedural hearing held on 20th January, 2003 in which he stated:

> "I accept it appears that such files should exist. The reason we undertook the searches and visited the premises, was to ensure

> that there were no premises which the Department operates from or previously operated from, where these files are, so this is why we wrote to former members of staff as well. If perhaps something did happen to files, if files were destroyed, I don't know …
>
> We have no other documentation that we have not made available to the Commission, we have not been able to establish anything further".

Counsel to the Committee submitted that *prima facie* there had been a failure to comply with the Rules of the Superior Courts in a substantive, and not merely a technical, respect. The unilateral departure from the prescribed form of affidavit was not justified by the jurisprudence. The oral testimony of an official of the Department given to the Committee prior to the issue of the direction for discovery relied on by the Department did not remedy the situation. The legal requirement was that the Secretary General should have dealt with the absent documents in the affidavit for discovery.

In his submissions, Counsel to the Committee relied on the judgment of the Supreme Court delivered on 12th December, 2001 by the Chief Justice in Flood – v – Lawlor [2002] 3 I.R. 67 as the primary authority on the obligation to make discovery in the context of a tribunal or a commission of inquiry. He referred to the passage in the judgment of the Chief Justice (at pages 79 and 80) in which the rationale for the proposition that a sentence imposed for contumelious disregard of the orders of a tribunal is not exclusively coercive in nature is

explained: the remedy is there to advance the public interest in the proper and expeditious investigation of matters within the remit of the tribunal and so as to ensure that all persons who are required by law to give evidence, whether by oral testimony or in documentary form, to the tribunal comply with their obligations fully and without qualification. He also pointed to the importance attached by the Chief Justice (at page 80) to requiring a deponent in an inquisitorial process to deal, not only with documents in his possession at the date of the order, but also documents no longer in his possession or power: without such requirement and the format of Form No. 10, the powerful weapon of discovery would be seriously diluted.

Referring to the passage in the judgment of the Chief Justice (at page 84) in which, while recognising that the rules as to discovery of documents no longer in the parties' possession or power should not be construed in a manner that would be unduly burdensome or unduly impracticable, it was held that that did not justify the use of the formula adopted by the defendant in the case under consideration in relation to the second schedule, Counsel to the Committee submitted that the failure to address documents which had been in the possession of the Department in the affidavit of the Secretary General was a significant and serious matter having regard to –

(a) the history of the events leading to the making of the direction for discovery,

(b) the fact that no case was made at the time of the making of the direction that there would be an impossibility in producing an affidavit in the

prescribed form and no variation was sought before the affidavit was sworn, and

(c) no affidavit as to impossibility has been sworn by the deponent, the Secretary General.

In summarising his argument, Counsel to the Committee submitted that no issue as to concealment arises. The issue is the failure of the Department to do what had been required to be done in the direction: to produce an affidavit in compliance with the Rules and to bring to the attention of the Committee any difficulties it might have by way of seeking a variation or a derogation from the basic obligation. Counsel submitted that there had been a breach of the Department's obligations.

7. Determination

It is the view of the Committee that the affidavit submitted on 27th June, 2003 does not properly comply with the direction for discovery made on 10th March, 2003 and does not fulfil the obligations of the deponent under the Act for the following reasons:

(a) The affidavit does not conform in form or in substance with the requirements of the Rules of the Superior Courts.

(b) The unilateral departure from the Rules was not justified, given the clear and unambiguous terms of the direction itself and the explicit recital of the requirements of the Committee in the letter of 10th March, 2003, which accompanied the direction. In particular, the fact that the Committee had received oral evidence from a Principal Officer of the Department on 20th

January, 2003, as to difficulties which the Department had, did not excuse or justify the failure to comply with the requirements of the Committee.

(c) The effect of the unilateral departure from the Rules was that the Committee was being told that the Department would give to the Committee the documents listed in the schedule in respect of which privilege was not claimed, but not any assurance whatsoever as to any relevant documents which at any time were, but no longer are, in the possession or control of the Department.

(d) The affidavit proffered in the letter of 4th November, 2003, even if sworn by the Secretary General, would not have remedied the deficiencies in the affidavit submitted. A blanket averment to the effect that –

- there are gaps in the Department's records,
- where there are apparent gaps, it is not possible to say whether records existed,
- if records existed, it is not possible to say what happened to them,
- there may be other missing records of which the Department has no knowledge, and
- no explanation can be offered for the absence of records,

without making any distinction between documents which may have been in the possession or control of the Department in 1942 and documents which may have been in the possession or control of the Department in 1952, or 1962, or 1972, or 1982, or 1992, or 2002, on any objective assessment, could not be regarded as an adequate means of ensuring that the purpose of discovery was not frustrated. The time span of the discovery direction is commensurate with the time span of the inquiry which the Committee is mandated to carry out

under the Act. The fact that some records which are relevant are of some antiquity does not absolve the deponent from the requirement to deal with all relevant documents which have been, but are not now, in the possession or control of the Department.

The Chairperson directs the Secretary General to make further and better discovery and to submit an affidavit of discovery on foot of the direction of 10th March, 2003 which complies with the requirements of Order 31, Rule 13 and Form 10 in Appendix C of the Rules of the Superior Courts, 1986 on or before 28th February, 2004.

Ms. Justice Laffoy Chairperson	Dr. Imelda Ryan Ordinary Member	Mr. F. Lowe Ordinary Member