

A Position Paper on

Identifying Institutions and Persons under the Commission

to Inquire into Child Abuse Act 2000

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1. Introduction

1.1 This Position Paper examines the issue of identifying individuals in the context of the Commission to Inquire into Child Abuse (hereinafter referred to as the Commission). This includes the naming of individuals as perpetrators of child abuse and naming individuals who were involved in the management, administration, operation, supervision and regulation of these institutions.

1.2 In examining this issue, this Paper adopts the following approach:

First, by way of background, it provides a brief overview of the Commission and its functions;

Secondly, it examines in detail the provisions of the *Commission to Inquire into Child Abuse Act 2000* in an effort to determine the extent of the Commission's power to identify individuals;

Thirdly, it will examine how this issue has been dealt with by other tribunals or commissions of inquiry;

Fourthly, it will outline and discuss the advantages and disadvantages of identifying individuals from a variety of standpoints; and

Finally, the Paper will set out its recommendations and the reasons for same.

2. The Commission to Inquire into Child Abuse: An Overview

2.1 The Commission to Inquire into Child Abuse was first established on an administrative basis on the 11th May 1999.¹ The establishment of the Commission was one of a number of measures introduced by the Government to respond to revelations of institutional child abuse. The *Commission to Inquire into Child Abuse Act 2000* placed the Commission on a statutory basis.² The provisions of the Act have been amended by the *Residential Institutions Redress Act 2002*.³

2.2 The long title of the Act states that the Commission is:

“to investigate child abuse in institutions in the State, to enable persons who have suffered such abuse to give evidence to Committees of the Commission, to provide for the preparation and publication of a report by the Commission containing the results of its 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 and to provide for related matters.”

2.3 The functions of the Commission are set out in section 4(1) of the Act. They may be summarised as follows:-

- (i) to provide, for persons who have suffered abuse in childhood in institutions during the relevant period, an opportunity to recount the abuse, and make submissions;
- (ii) to conduct an inquiry into the abuse of persons during the relevant period and to determine the causes, nature, circumstances and extent of the abuse; and to determine the extent to which-

¹ Iris Oifigiúil 26th May 1999.

² No 7 of 2000.

³ No 13 of 2002.

- a. the institutions themselves in which such abuse occurred,
- b. the systems of management, administration, operation, supervision, inspection and regulation of such institutions, and
- c. 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;

(iii) to prepare and publish reports on the results of the inquiry and on its recommendations in relation to dealing with the effects of such abuse.

2.4 The *Commission to Inquire into Child Abuse Act 2000 (Additional Functions) Order 2001*⁴ bestowed an additional function on the Commission, namely, to conduct an inquiry into the circumstances, legality, conduct, ethical propriety and effects on the subjects thereof of specified vaccine trials conducted in the institutions under investigation during the relevant period. Article 5 confers the powers contained in the 2000 Act, on the Commission, in respect of inquiring into vaccine trials.

2.5 The Commission operates through two Committees known as the Confidential Committee and the Investigation Committee.⁵

2.6 The Confidential Committee is therapeutic in nature. It provides an opportunity for persons who have suffered abuse in institutions during the relevant period, who do not wish to have their abuse inquired into by the Investigation Committee, an opportunity to recount the abuse and make submissions, in confidence, to the Committee.⁶ The Investigation Committee also affords an opportunity for persons who have suffered abuse in institutions

⁴ S.I. No. 280 of 2001.

⁵ See generally Commission to Inquire into Child Abuse *Third Interim Report* (Dublin 2003) chapters 5 and 6.

⁶ Section 15(1)(a).

during the relevant period, an opportunity to recount the abuse and to make submissions to the Committee.⁷ In addition, the Committee has an investigative function, to inquire into the abuse of children in institutions during the relevant period.⁸

2.7 Both the Confidential Committee and the Investigation Committee are required to prepare and furnish reports to the Commission.⁹

2.8 The Confidential Committee is entitled to make findings of a general nature, based on the evidence given to it.¹⁰ A report of the Confidential Committee is not entitled to identify, or contain information that could lead to the identification of witnesses, the individuals or institutions against whom the allegations are made,¹¹ or to make findings in relation to particular instances of alleged abuse.¹²

2.9 The reports of the Investigation Committee may, if the Committee is satisfied that the abuse of children took place in a particular institution, contain findings to that effect and may identify the institution and the person that committed the abuse.¹³ The Investigation Committee may also make findings in relation to the management, administration, operation, supervision and regulation of an institution in which abuse took place and may identify the persons responsible for the management, administration, operation, supervision and regulation of the institution.¹⁴ However, the reports of the Investigation Committee may not contain findings in relation to individual cases of abuse.¹⁵

⁷ Section 12(1)(a).

⁸ Section 12(1)(b).

⁹ Section 16(3) and section 13(3).

¹⁰ Section 16(1).

¹¹ Section 16(2)(a).

¹² Section 16(2)(b).

¹³ Section 13(2)(a).

¹⁴ Section 13(2)(b).

¹⁵ Section 13(2)(c).

2.10 The published report is the report of the Commission.¹⁶ It is to have regard to the findings contained in the reports of the Confidential Committee and the Investigation Committee.¹⁷ The published report may not identify, or contain information that could lead to the identification of persons who have been the subject of abuse, or contain findings in relation to particular instances of abuse.¹⁸ In relation to findings based on the report of the Confidential Committee, the published report must state that the evidence upon which those findings are based could not be tested or challenged by any person and, where relevant, was not corroborated.¹⁹

¹⁶ Section 5(5)(a).

¹⁷ Section 5(1).

¹⁸ Section 5(3)(c) and (d).

¹⁹ Section 5(4).

3. Identification: The Legal Basis

A. The Act

3.1 The preceding chapter has shown that the Confidential Committee is prohibited from identifying the individuals against whom the allegations are made, the institutions in which the abuse is alleged to have taken place and the persons charged with the management, administration, operation, supervision and regulation of the institutions in which the abuse is alleged to have taken place.¹ Therefore, any discussion of the ‘identification of individuals’ must take place within the context of the Investigation Committee and the Commission. As the inquiry into the alleged abuse is undertaken by the Investigation Committee and as the provisions of the Act governing the reports of the Investigation Committee and the Commission are identical, the following analysis of these provisions will take place within the context of the Investigation Committee.

3.2 The functions of the Investigation Committee are set out in section 12(1) of the Act. They may be summarised as follows:-

- (i) to provide, for persons who have suffered abuse in childhood in institutions during the relevant period, an opportunity to recount the abuse, and make submissions;
- (ii) to conduct an inquiry into the abuse of persons during the relevant period and to determine the causes, nature, circumstances and extent of the abuse;
- (iii) to prepare and furnish reports.

3.3 Section 13 deals with the report of the Investigation Committee. Section 13(1) provides that “the Investigation Committee ***shall*** prepare a report in writing of the results of the inquiry referred to in section 12 and ***shall*** specify in it the determinations made by it pursuant to that section.” Section 13(2) deals with the contents of the report. It provides that the report:-

¹ Paragraph 2.6.

- (i) may, if the Committee is satisfied that the abuse of children occurred in a particular institution, contain findings to that effect and may identify the institution and the person who committed the abuse,
- (ii) may contain findings in relation to the management, administration, operation, supervision and regulation, direct or indirect, of an institution identified in the report pursuant to paragraph (a) and, as respects those functions, the persons in whom they were vested and may identify those persons, and
- (iii) shall not contain findings in relation to particular instances of alleged abuse of children.

3.4 It is clear that there is both a mandatory and a discretionary element to the reporting required by section 13 of the Act.

3.5 Section 13(1) is mandatory in nature. It provides that the Investigation Committee “shall” prepare a report in writing setting out the results of the investigation and the conclusions reached by the Committee in respect of its functions pursuant to section 12. The Oxford English Dictionary defines “shall” as a verb expressing an instruction or command. Therefore, section 13(1) contains no element of discretion. The report must contain the results of the investigation and the conclusions reached by the Committee in respect of its functions pursuant to section 12.

3.6 Section 13(2) is discretionary in nature. It provides that the report “may,” if the Investigation Committee is satisfied that abuse occurred in a particular institution, contain “findings” to that effect. It also provides that the report “may” identify the institutions in which the abuse took place, the individuals who committed the abuse and the persons responsible for the management, administration, operation, supervision and regulation of the institutions in which the abuse took place. The Oxford English Dictionary defines “may” as a verb expressing a possibility. It defines “findings” as a “conclusion reached as a result of an inquiry, investigation, or trial.” Therefore, section 13(2)

affords the Investigation Committee a discretion to identify the institution in which the abuse took place or the individual who committed the abuse.

3.7 Therefore, section 13 differentiates the duty to prepare in writing a report of the results of the investigation, which is mandatory, from the manner in which these results are presented, which is discretionary.

3.8 *Accordingly, it would seem that the Committee and by extension the Commission is under no mandatory legal duty to identify the institutions in which the abuse took place, the individuals who committed the abuse, and the persons responsible for the management, administration, operation, supervision and regulation, of the institutions in which the abuse took place but rather has a discretion to do so.*

B. The Discretion

3.9 In the previous section, it was established that the Committee has a discretion to identify once it is satisfied that abuse occurred in a particular institution. This part will briefly outline the legal principles governing the exercise of that discretion.²

3.10 There is case law to the effect that when statute confers a discretion on a body, the body on whom that discretion is conferred *must* exercise that discretion.³ In exercising that discretion, the body may not exercise a single or rigid policy as to how they intend to exercise that discretion.⁴ However, they *can* adopt general rules or guidelines as to how they intend to exercise the discretion provided that those general rules or guidelines do not limit the scope or the exercise of the discretion.⁵

² Paragraph 3.6.

³ *Fajjonu v Minister for Justice* [1990] 2 IR 151. See generally Hogan & Morgan *Administrative Law in Ireland* (Round Hall Sweet & Maxwell 1998 at pp 668-678.

⁴ *Re N (a Solicitor)* Unreported High Court, 30th June 1980.

⁵ *Mishra v Minister for Justice* [1996] 1 IR 189, 205.

- 3.11 *Accordingly, it would seem that the Commission is obliged by the terms of the Act to exercise its discretion to identify and that in exercising that discretion it may not adopt a rigid policy, which fetters the exercise of that discretion. However, the Commission may adopt a general policy as to how it intends to exercise its discretion to identify.*
- 3.12 *Having stated the general proposition arising from the Court decisions, it has nevertheless to be acknowledged that it is not easy to say what precisely and practically this means the Commission and the Investigation Committee must do on this issue. The circumstances in which a discretion is to be exercised are important. A body exercising a power to decide whether a person is entitled to a social welfare benefit is not the same as a public inquiry and the exercise of a discretion and the nature of a discretion are bound to be different. A rule that may be clear in one context cannot be presumed to be equally obvious in another.*
- 3.13 *What is clear at the very least is that the Act envisages that individuals and institutions will in some circumstances be identified by the Commission when it is reporting.*

4. Identification: Policy and Practice to Date

A. Policy of the Pre-Statutory Commission

4.1 The Commission initially considered the issue of identification in 1999 when, in its pre-statutory form, it was asked to examine its terms of reference with a view to making recommendations as to whether the terms of reference needed to be altered and as to the powers and protections it required to carry out its task.

4.2 In its Initial Report, published on the 7th September 1999, the Commission stated that, while it accepted that:

“The general public and, in particular, the victims of abuse, expect the Commission to ascribe and, where appropriate, apportion responsibility. Moreover, by their terms the Government’s broad Terms of Reference suggest that it is part of the Commission’s remit to identify the persons responsible for committing abuse, in that they require the Commission to establish the motives and perspectives of the persons committing abuse...It is the Commission’s view that it is neither necessary or desirable that the Commission should have the power to make specific findings of fact in relation to specific allegations of abuse, given that criminal or civil proceedings may be pending in relation to matters which the Commission is investigating while the investigation is ongoing.”⁶

4.3 The Commission developed this point in its Final Report, published on the 14th October 1999. In this, the Commission stated that:

“The legislation should also provide that the Investigation Committee is precluded from making specific findings of fact in relation to specific allegations of abuse, although it is open to it to make findings of fact in relation to general allegations that abuse was prevalent in a particular institution at a particular time with, if appropriate, consequential

⁶ *Initial Report* (September 1999) Paragraph 3.3 – 3.4.

*findings ascribing responsibility to persons in the institution or the body running the institution, or the statutory or other bodies charged with the duty of regulating the institution.”*⁷

4.4 In his Review of the Commission, Mr Sean Ryan SC (as he then was) was of the view that it is clear from the Final Report that the Commission did not envisage that it would be empowered to make specific findings of individual responsibility for perpetrating abuse. In his view, what the Commission was referring to was the making “of consequential findings relating to persons in positions of authority in the institution or outside it who had supervisory functions.”⁸

4.5 *Accordingly, it would appear that the policy of the pre-statutory Commission was to make general as distinct from specific findings of abuse and it would follow from this, not to identify individuals who committed abuse in specific cases.*

B. Policy of the Statutory Commission

4.6 The policy pursued by the Statutory Commission in relation to the issue of identification takes its cue from the identification provisions of the *Commission to Inquire into Child Abuse Act 2000*. These provisions were examined in detail in Chapter 3.

4.7 The Commission first mentioned the issue of identification at its First Public Sitting on 29th June 2000.

“The results of the Investigation Committee’s inquiries will be reports, interim and final. *It will be open to the Investigation Committee to reach conclusions, which will be recorded in its reports as findings, where it is appropriate to do so on the evidence, that abuse occurred in a particular institution during a particular period and to name the*

⁷ Paragraph 1.2.

⁸ Ryan Report (November 2003) at paragraph 7.21.

institution and the person who committed the abuse.” (Emphasis added.)⁹

4.8 It outlined its approach to the issue in a little more depth in the Final Ruling of the Investigation Committee on 18th October 2002.

“The reporting function comprehends the totality of the inquiring function: it is to report on the results of 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 an inquiry. *It is clear also that the legislature intended the report of this Committee to record what happened and, to adopt the terminology used in another jurisdiction, identify the “causes and the players.”*”¹⁰
(Emphasis added)

4.9 Some guidance as to what is meant by the phrase “*players*” may be gleaned from the following statement.

“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.”¹¹ (Emphasis added)

⁹ Commission to Inquire into Child Abuse *Third Interim Report* (December 2003) Appendix A at p 241.

¹⁰ Paragraph 3.11 of the Final Ruling.

¹¹ Paragraph 8.6.

4.10 *Accordingly, it would appear from its statements to date that the Commission has adopted a very clear policy in favour of identifying the institutions in which the abuse took place, the individuals who committed the abus, and the persons responsible for the management, administration, operation, supervision and regulation of the institutions in which the abuse took place.*

5. Identification: Procedural Implications

5.1 Section 13(2) provides that the Investigation Committee may, if the Committee is satisfied that the abuse of children occurred in a particular institution, contain findings to that effect and may identify the persons responsible for the management, administration, operation, supervision and regulation of the institution.

5.2 The ability of the Committee to identify institutions or individuals has had a significant impact on the procedures which have been adopted by the Committee. The reason for this may be said to be the possible impact that such an identification might have on an individual's constitutional right to a good name.

5.3 The constitutional right to a good name derives from Article 40.3.2°, which provides:-

“The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

5.4 In *Re Haughey*,¹ the Supreme Court outlined the four minimum protections which the State must afford an individual whose good name is under attack at an inquiry:

- (i) the person accused should be furnished with a copy of the evidence which reflected on his or her good name;
- (ii) the person accused should be allowed to cross-examine, by counsel, his or her accuser;
- (iii) the person accused should be allowed to give rebutting evidence; and
- (iv) the person accused should be permitted to address the tribunal, again by counsel in his or her own defence.²

¹ [1971] IR 217.

² [1971] IR 217 at 263.

5.5 In *Murphy v Ardagh*,³ Hardiman J stated “[t]ribunals of inquiry are clearly capable of affecting the right to one's good name; they are not sterile.”

5.6 In the context of the Investigation Committee's investigations, in *Re Commission to Inquire into Child Abuse*,⁴ Kelly J stated:

“The allegations which have been made against respondents before the Investigation Committee of the applicant are in many cases of a most serious nature. A finding in favour of a complainant against an individual or institutional respondent would be of enormous significance.

In the case of an individual vowed religious, a finding of in particular sexual abuse of a minor placed in his care would demonstrate truly evil conduct, a woeful breach of trust, behaviour directly at odds with the vows taken, to say nothing of any infringements of the criminal law. In the case of a respondent which is a religious congregation, such conduct would be shameful and in conflict with the fundamental purpose of such a congregation. Truly, therefore, it can be said that the respondents to complaints are at risk of their good name and reputation being jeopardised.” (Emphasis added.)

In this case, the High Court struck down an attempt by the Commission to limit the number of legal representatives present at the evidentiary hearings of the Investigation Committee as a breach of the parties constitutional right to fair procedures.

5.7 These protections are reflected in the procedures of the Investigation Committee which provide that every person whose good name is under attack at the inquiry has the following rights.

(i) To be furnished with a copy of the evidence which reflected on his or her good name;

³ [2002] 1 IR 385, at 451 – 452.

⁴ [2002] 3 IR 459, 475.

- (ii) To be allowed to cross-examine, by counsel, his or her accuser;
- (iii) To be allowed to give rebutting evidence; and
- (iv) To be permitted to address the tribunal, again by counsel in his or her own defence.

5.8 The practical implications of this are as follows: By adopting a policy whereby individuals may be identified in a report, persons who committed abuse or persons who were involved in the running of institutions, all of these persons or bodies are entitled to fair procedures. This means that every case before the Investigation Committee is converted into an adversarial process where witnesses are examined, cross-examined and re-examined. As such, it would not be unreasonable to assume that every case will take the same length of time as a criminal trial concerning the same subject matter, say 3-4 days. At present, there are approximately 1,700 cases listed for investigation; if each case took 4 days for investigation and the Committee sat every day of the year, it would take approximately 18 years to clear the caseload.

5.9 *Accordingly, because the Committee said it would exercise its discretionary power, the result is that every person whose good name or reputation may be infringed by such identification has the right to the full panoply of constitutional protections as set out in Re Haughey thereby transforming each case before the Investigation Committee into a mini-trial.*

5.10 In addition, if the Committee has the power to identify individuals as perpetrators of child abuse, it could have an impact on proposals to hear complaints against a number of different respondents together, or to hear a number of different complaints against a respondent at the same time.

5.11 It could be argued by analogy with an accused's right to fair procedures under criminal procedure that a respondent's right to fair procedures would be infringed unless his case was heard separately from anybody else's case or unless each allegation against him or her was heard separately.

5.12 In criminal cases, the prosecution can join several counts in the same indictment as long as they are founded on the same facts or form part of a series of offences of the same or a similar character. Section 6(3) of the *Criminal Justice (Administration) Act 1924* provides that where the court is of the opinion that the person accused may be prejudiced or embarrassed in his or her defence by reason of being charged with more than one offence in the same indictment, the court may order a separate trial of any count or counts in the indictment. Similarly, two or more persons charged with the same offences, or separate offences arising out of the same incident are generally tried together. However, there are exceptions to this rule. A trial judge has the power to order separate trials whenever justice so requires.⁵ In his review, Mr. Justice Ryan discusses the possibility that more time could be required for the Investigation Committee to deal with applications for separate hearings made on behalf of respondents who asserted that their interests were jeopardised by joint hearings.

5.13 However, it should be noted that this is not to say that such a claim would be successful. Every day individuals are tried together or tried in respect of a number of different counts without any risk of prejudice to their constitutional or statutory rights. In addition, it remains to be seen whether the courts would allow a respondent before the Investigation Committee to claim the rights just mentioned as the Commission is not a criminal trial, or a tribunal, which determines legal rights and remedies.

5.14 *Nevertheless, the possibility remains that because the Committee has a discretionary power to identify individuals, a person whose good name or reputation may be infringed by such identification could argue that he or she should have the right to have his or her case heard separately from everybody else's case or to have each allegation against him or her heard separately.*

⁵ *Attorney General v Joyce* [1939] IR 526.

6. Identification: Comparisons with other Inquiries

6.1.1 In this chapter it is proposed to examine a number of other tribunals or commissions of inquiry with a view to establishing, first, how they dealt with the issue of identification and second, where the information is available, the public reaction to that approach. In light of the subject matter of the Commission to Inquire into Child Abuse's investigations, the emphasis will primarily be on tribunals or commissions of inquiry of a similar nature.

A. Waterhouse Inquiry (United Kingdom)

6.2 The Tribunal of Inquiry into the Abuse of Children in the Former County Council Areas of Gwynedd and Clwyd (Waterhouse Inquiry) was established on 30th June 1996, following resolutions of both Houses of Parliament of the United Kingdom on 20th June 1996.⁶ It was a tribunal established pursuant to the *Tribunals of Inquiry (Evidence) Act 1921*. Sir Ronald Waterhouse, a retired High Court Judge, was appointed to chair the tribunal. Ms Margaret Clough, a retired civil servant and Mr Morris Le Fleming, former Chief Executive of Hertfordshire were appointed as ordinary members of the tribunal.

6.3 The Inquiry's terms of reference required it first to inquire into the abuse of children in the former county council areas of Gwynedd and Clwyd since 1974. Secondly, to examine whether the agencies and authorities responsible for child care could have prevented the abuse or detected its occurrence at an early stage. Thirdly, to examine the response of the relevant authorities and agencies to allegations and complaints of abuse excluding scrutiny of decisions whether to prosecute named individuals. Fourthly, to consider whether the relevant caring and investigative agencies discharged their functions appropriately and, in the case of the caring agencies, whether they

⁶ See generally, Tribunal of Inquiry into the Abuse of Children in the Former County Council Areas of Gwynedd and Clwyd since 1974 *Lost in Care* (1999) part 1.

are doing so now; and to report its findings and to make recommendations to the Secretary of State for Wales.

- 6.4 The Inquiry took the view that it was not its function to reach conclusions in respect of each case of alleged abuse, which emerged from the evidence. Such an approach it felt would result in the Inquiry conducting a series of criminal or quasi-criminal trials. This Inquiry was of the view that the format and procedure of a tribunal of inquiry would be unsuitable for such an approach.⁷
- 6.5 The Inquiry sat for 201 days to hear evidence and submissions. 264 witnesses gave oral evidence and 311 witnesses gave written evidence. The inquiry first heard evidence of alleged abuse. It then heard the evidence of those involved in the administration of the bodies in question as well as the police. The Inquiry adopted an adversarial approach.
- 6.6 The Inquiry adopted the following approach as to procedures:⁸ At the first hearing, the Inquiry decided to grant anonymity to complainants of physical and sexual abuse and the persons against whom the allegation was or was likely to be made. Complainants were given a full opportunity to put relevant matters based on their own special knowledge to persons against whom they made allegations. Equally, the persons against whom the allegations were made had the opportunity to have their cases made as they wished against the persons who had made the allegations.
- 6.7 At the conclusion of the evidence, counsel and solicitors prepared full written submissions, including any recommendations that their clients wished to make. The Inquiry read these submissions and then heard final oral submissions, limited to 30 minutes for each party or group of parties. Counsel to the Inquiry then made a final oral submission supplemented by a detailed written submission.

⁷ Tribunal of Inquiry into the Abuse of Children in the Former County Council Areas of Gwynedd and Clwyd since 1974 *Lost in Care* (1999) p. 55.

⁸ Tribunal of Inquiry into the Abuse of Children in the Former County Council Areas of Gwynedd and Clwyd since 1974 *Lost in Care* (1999) Appendix 4.

6.8 On 30th September 1999, the Inquiry submitted its Report. This reached a number of definite conclusions and made a number of detailed recommendations for reform. In relation to the difficult question of naming individual abusers, the Inquiry adopted the following approach. Because of the gravity of such a finding, the Inquiry only made a finding of abuse in respect of those who had already been convicted of sexual offences against children in care. Matters such as a lack of corroboration and delay meant that the Inquiry could not safely conclude that other individuals had definitely abused children in their care.⁹

6.9 However, the Inquiry did identify the following in its Report:

- a) those persons who have already been the subject of the relevant court proceedings;
- b) individuals against whom a number of complaints had been made with the Inquiry's assessment of them;
- c) other persons who featured prominently in the evidence;
- d) a limited number of persons whom it was in the public interest to identify in order to deal with rumours; and
- e) those who while not the subject of allegations of abuse were in positions of responsibility and did not have the benefit of the anonymity ruling.¹⁰

6.10 A critical difference has to be noted between the legal procedures governing the Waterhouse Inquiry and that of the Investigation Committee in that the former was permitted to restrict legal representation on behalf of more than 100 persons liable to criticism to one team consisting of two Counsel , who pointed out that “attention to each individuals case was inevitably restricted .” (ibid paragraph 6.03)

B. Forde Inquiry (Queensland)

⁹ Tribunal of Inquiry into the Abuse of Children in the Former County Council Areas of Gwynedd and Clwyd since 1974 *Lost in Care* (1999) paragraph 6.15.

¹⁰ *Ibid* paragraph 6.16.

- 6.11 In August 1998, the Minister for Families, Youth and Community Care established a Commission of Inquiry, under the *Commissions of Inquiry Act 1950*, to examine whether there had been any abuse, mistreatment or neglect of children in Queensland institutions between 1911 and 1998 and to make recommendations as to how such abuse, mistreatment or neglect could be avoided in future. The Commission was chaired by Ms Justice Leneen Forde. The Order establishing it required the Commission to “make full and faithful report and recommendations in relation to the subject matters of the Inquiry and transmit same to the Minister” by 1 March 1999. This time-period was extended and the Commission presented its report on the 31st May 1999.
- 6.12 The Commission’s terms of reference required it to “make full and careful inquiry without undue formality” into: (a) whether any unsafe, improper or unlawful care or treatment of children occurred in such institutions and (b) whether any breach of any relevant statutory obligation occurred during the course of the care, protection and detention of children in such institutions. In an effort to resolve these matters as soon as possible, the Commission’s terms of reference required it to examine the outcomes of any previous investigations and to be aware of and to take into account the scope of any current investigations or proceedings by other authorities into similar matters.
- 6.13 There were two major thrusts of the Inquiry: first, an investigation into institutional abuse that occurred in the past, based on oral and written evidence and from archival research; second, a review of the current systems, which included reviews of legislation, policy and practice, evidence from public and private hearings and inspections of facilities.
- 6.14 The process involved widespread consultation. Hundreds of letters, paid advertisements and public meetings throughout the State informed interested parties of the existence of the Commission. Inquiry staff conducted 166 interviews, 31 with institutional staff, past and present, and the remainder with former residents. In addition, 105 residents and staff gave evidence in private. There were two main reasons for holding these hearings in private. First, the

sensitive and private nature of the evidence led many witnesses to request full confidentiality. Secondly, while the Commission was conducting its inquiry, there was a substantial amount of civil litigation and outstanding criminal proceedings in relation to the subject matter of some of the evidence. The Commission felt that public hearings would have prejudiced these proceedings, and that persons named adversely in public hearings would be unjustifiably prejudiced if evidence was taken before an opportunity to respond was given. In addition to hearings and interviews, the Commission received evidence in the form of written submissions from 151 other individuals and organisations. To ensure full coverage of the matters contained within the terms of reference, the Inquiry commissioned a number of studies to examine a broad range of matters relevant to the inquiry, for example to provide context, and to inform the Commission about current developments in the field of institutional child abuse.

6.15 The Commission concluded that abuse, mistreatment and the neglect of children had occurred in many Queensland institutions between 1911 and 1998. It also made a number of recommendations as to how such abuse, mistreatment or neglect could be avoided in the future. The Government issued a response to the report, accepting most of the recommendations contained in the report and promising widespread reform in the field of childcare. A compensation tribunal was set up to cater for the victims of abuse.

6.16 The Commission did not investigate cases of alleged abuse with a view to making findings of guilt or innocence in respect of alleged abusers. Where it possessed sufficient evidence to ground a criminal prosecution, disciplinary proceedings, or a charge of official misconduct, the Commission's terms of reference required it to refer the matter to the appropriate authorities. While a few abusers are named, this was done only where there was sufficient corroborative evidence and individual examples are used only as evidence of general trends or problems. In other cases, the passage of time, the fact that a number of alleged abusers were dead and the difficulty in obtaining corroborative evidence meant that detailed findings could not be made.

However, it was possible to make general findings on the nature of the abuse of children that took place in the institutions under investigation and the report contains a detailed examination of a number of the institutions under investigation.

- 6.17 It is obvious from this brief summary of the Queensland Inquiry that there are some differences between that jurisdiction and ours on issues of procedural fairness to those liable to criticism and to questions of evidence. The Forde Investigation did nevertheless draw attention to difficulties that are encountered when examining events that happened many years in the past.

C. Stratton Inquiry (Nova Scotia)

- 6.18 The Stratton Inquiry was established in 1994 to inquire into incidents and allegations of sexual and other physical abuse at five named institutions in Nova Scotia between 1956 and the mid-1970s. This non-statutory Inquiry was part of a three-stage process. The first stage was an independent review of current practices to ensure that present policies and procedures prevent any recurrence of abuse of any nature. The second stage was an investigation into what actually happened at the named institutions. The third stage was the establishment of a compensation tribunal for the victims of abuse.

- 6.19 The Stratton Inquiry's terms of reference stated that its purpose was as follows:

- (1) to investigate the incidents of sexual and physical and other abuse of residents that occurred or are alleged to have occurred at the institutions;
- (2) investigate and determine the practices and procedures in place at the institutions that either permitted or hindered the detection of abuse of residents;
- (3) investigate and determine whether any employees in the institutions were aware of the abusive behaviour of staff towards residents; and

(4) investigate and determine what steps, if any, were taken by employees or officials in reference to any such abuse.

6.20 The Investigation was carried out in private. The complainants who came forward were invited to tell the Inquiry something of their personal history and then to describe, in as much detail as was possible, their experiences at the residential institutions under investigation. Their statements were then read back to them, signed and witnessed.

6.21 Significantly, the report did not name the complainants or the alleged abusers save where they had been convicted of sexual misconduct in relation to residents of the institutions under investigation, but it did contain findings in respect of the specified institutions.

D. Hughes Inquiry (Newfoundland)

6.22 The Hughes Inquiry was established in 1989, pursuant to the *Public Inquiries Act 1970*, to inquire into the response of the Newfoundland criminal justice system to allegations of child abuse by members of the Christian Brothers at Mount Cashel Orphanage.

6.23 The procedure adopted by the Inquiry may be summarised as follows. The proceedings were televised, apart from a number of in camera hearings. Steps were taken to ensure the identity of the witnesses and alleged abusers was protected. Counsel for the Commission prepared the evidence with the assistance of Commission investigators. This included interviewing all the witnesses before they were called and acquainting them with the line of questioning which was subsequently applied to them. Counsel for the Commission then called the witnesses before the Commissioner, where the oath was administered and questions were put in reasonably close observance of the rules of court, although there is no strict exclusion of the use of the technique of cross examination by Commission Counsel at any time. Finally, any participant with standing, either through counsel or in person, was invited to put questions to the witness with Counsel for the Commission able

in the end to put such questions as necessary to clarify the additional evidence adduced. This procedure, although closely analogous to what obtains in court, did not confine the Commissioner to considering only the evidence that he or she has heard in public and the Commissioner made subsequent inquiries to clarify the oral evidence.

6.24 The report concluded that abuse had taken place at Mount Cashel Orphanage and concluded that the Christian Brothers, both priests and the Superintendent of the Orphanage had committed acts of abuse against the persons in their care. However, the report was *not* published until the completion of the criminal trials of all the former Brothers of Mount Cashel who had been accused of abuse.

6.25 If a person accused of abuse in the inquiry had been acquitted in a court trial, it would presumably have been impossible to identify him as a perpetrator of acts that were the subject of criminal charges. As to other wrongful acts not tried in court, there would have been considerable debate about the propriety and validity of making findings

E. Conclusions

6.26 *A number of general observations may be made based on the comparative analysis contained in this paper. First, many of the inquiries, which have been conducted in relation to child abuse, have been reluctant to identify and apportion blame to individuals, save those who have been convicted of child abuse in relation to the institutions under review. The majority of these inquiries **had the power to do so** but did not citing delay, a lack of corroboration, or a desire not to prejudice criminal prosecutions as the main reason for not doing so. (Waterhouse, Stratton and Hughes) Other inquiries, such as the Forde Inquiry were reluctant to name individual abusers because they felt that their main purpose was to make findings and recommendations of a general nature and not to make determinations, or reach conclusions in respect of specific allegations of abuse.*

7. Identification: The Pros and Cons

7.1 This Chapter will examine the arguments for and against the identification of individuals who committed abuse and persons who were involved in the management, administration, operation, supervision and regulation of the institutions in which the abuse took place.

7.2 However, before proceeding to examine this issue, it must be stressed that the identification of individuals is not a core purpose or function of the Commission. There is no legal obligation or duty to “name and shame.” The power to “name and shame” is ancillary to the Commission’s obligation to publish reports. The Commission has a discretionary power, if it is satisfied that the abuse of children took place in a particular institution, to publish findings to that effect and to identify the institution and the person that committed the abuse. However, it is important to note that the Commission could exercise its discretion not to identify the relevant institution or individual in every single case.

7.3 Having reiterated that point, we proceed to the next question, which is this: if we accept that legally, identification is not a core function of the Commission, should it be viewed as such in practice, *ie* what value or benefit springs from identification both for the victim of abuse and for society at large. In answering this question, this chapter will examine first the purpose of the Inquiry and then consider the *pros* and *cons* of identifying individuals in light of this. It is proposed to consider this in three different sections, each of which deals with a category of persons or bodies that may be identified in the report.

A. Functions of the Commission

7.4 The functions of the Commission were outlined in Chapter 2. They may be summarised as follows:

- (i) to provide, for persons who have suffered abuse in childhood in institutions during the relevant period, an opportunity to recount the abuse and make submissions;
- (ii) to conduct an inquiry into the abuse of persons during the relevant period and to determine the causes, nature, circumstances and extent of the abuse;
- (iii) to prepare and publish reports on the results of the inquiry and on its recommendations in relation to dealing with the effects of such abuse.

7.5 This section will consider the question of whether the Commission, in carrying out these functions, should be concerned with investigating and reporting on the *general* or the *specific*.

7.6 This clash between the general and the specific is a question that has spawned a great deal of debate and commentary in the wider field of tribunals of inquiry.

7.7 In Ireland, the Law Reform Commission in its recent “Consultation Paper on Public Inquiries Including Tribunals of Inquiry”, examined this question in some depth. The Law Reform Commission was of the view that the function of a public inquiry is:

“to ascertain authoritatively the facts in relation to some particular matter of legitimate public interest, which has been identified by the terms of reference.”¹¹

In carrying out this function, the Law Reform Commission was of the view that the emphasis of the tribunal or commission of inquiry should be on the general rather than the specific. It recommended that:

“Where appropriate, the inquiry report would emphasise the flaw or malfunctioning in the institution, big business or profession involved rather on the sins of an individual wrongdoer.”¹²

¹¹ Law Reform Commission, *Consultation Paper on Public Inquiries Including Tribunals of Inquiry* (2003) at paragraph 1.03.

¹² *Ibid* at para 10.07.

7.8 The Law Reform Commission was aware of the fact that many people felt that one of the core functions of tribunals or commissions of inquiry was to apportion blame and responsibility for the wrong that has occurred to specific individuals. However, the Law Reform Commission was of the view that where this view is widely held in relation to a particular issue, the appropriate forum for investigation should be the courts and not a tribunal or commission of inquiry.

7.9 The Law Reform Commission supported this view by pointing out the implications of pursuing a policy of identifying individual wrongdoers. It pointed out the procedural implications that such a policy would have on the inquiry. In addition, the Law Reform Commission pointed out the damage “such a policy would have on downstream criminal proceedings”. They noted that:

“Satisfying the twin demands of carrying out a public inquiry in order to ‘clear the air’ in a public fashion and of holding the guilty to account, presents a dilemma, because it is the publicity generated by a tribunal which jeopardises criminal prosecutions brought on foot of what it discovers. The Salmon Commission Report went so far as to say:

“In any event, it has long been recognised that from a practical point of view it would be almost impossible to prosecute a witness in respect of anything which emerged against him or her in the course of a hearing before a Tribunal of Inquiry.”¹³

7.10 The Law Reform Commission concluded that the ideal form of public inquiry was:

“a private, low-key inquiry which focuses on the wrong or malfunction in the system and not the wrong-doer.”¹⁴

¹³ Law Reform Commission, *Consultation Paper on Public Inquiries Including Tribunals of Inquiry* (2003) at paragraph 11.34.

¹⁴ Law Reform Commission, *Consultation Paper on Public Inquiries Including Tribunals of Inquiry* (2003) at paragraph 10.16

7.11 *Accordingly, it would appear that tribunals or commissions of inquiry should be concerned with the general rather than the specific, and to quote the Law Reform Commission their primary task should be to “discover what happened and why” not to assign blame “which is best left to a criminal trial.”*

7.12 *Applying this to the Commission to Inquire into Child Abuse, this Paper takes the view that the emphasis of the inquiry should be on what happened and why rather than on making findings of abuse in individual cases. A major purpose of any Inquiry like this is to learn from the past so as to protect children from abuse in future. Concentration on investigation of specific cases detracts from this important function*

B. Identification: Some Pros and Cons and Consequences

Victims

7.13 While the Commission is empowered to identify an individual as an abuser, many people do not realise that the Commission is precluded from making findings of abuse in respect of individual cases.

7.14 The Commission can nevertheless name the individuals it concludes have committed acts of abuse without referring to specific instances of abuse. A major purpose of any inquiry like this is to protect children from abuse in future. Concentration on investigation of specific cases detracts from this important function.

Naming is Not a Core Function

- 7.15 There is no legal obligation or duty to “name and shame.” The power to “name and shame” is ancillary to the Commission’s obligation to publish reports. However, it is important to note that the Commission could exercise its discretion not to identify the relevant individual in every single case.
- 7.16 In addition to this, it must be stressed that the purpose of the Commission should be to focus on the wrong or malfunction in the system and not on the individual wrongdoer.
- 7.17 As the Act specifically precludes the Commission from making findings in individual cases, we see that it is not a function of the Commission to adjudicate in respect of every single case. Moreover, if the Commission were to exercise its discretion to name some individuals as abusers it could be argued, successfully in the view of this Paper, that such individuals would only be named to provide example or detail to the overall function of the Commission in relation to reporting, which is to set out “what happened and why” and not to assign blame.

Adverse Effect on Victims

- 7.18 A policy of identifying individuals may inadvertently have a number of negative implications for victims.
- 7.19 First, because a policy of identifying and apportioning responsibility holds open the possibility of some abusers being exposed, it may victimise those whose abusers are not exposed. Such persons may well feel rejected by the Committee as the naming of a person will be viewed by many as akin to a verdict of “guilty” and a failure to name as one of “not guilty”. Many victims may take the view that the Committee, which was set up to hear their stories, having heard their side of the story and then heard the respondent, believed the latter and found him or her “not guilty”.

7.20 Secondly, some victims might feel rejected and discriminated against by virtue of the fact that their abusers were not named but other abusers were, despite the fact that the abuse perpetrated against the first category of persons was far more heinous than that perpetrated against the second category. They might feel that their abusers ‘got away with it’ whereas other abusers did not. This reinforces the feeling that the Committee has heard their side of the story and then heard the respondent and accepted the evidence of the latter.

7.21 Thirdly, because the Committee has a discretionary power to identify individuals, every person whose good name or reputation may be infringed by such identification has the right to the full panoply of constitutional protections as set out in *Re Haughey*, thereby transforming each case before the Investigation Committee into a mini-trial. Included among these rights is the right to cross-examine the complainant. This means that the victim will have to undergo an examination by the Investigation Committee, cross-examination by **all** the persons whom the evidence affects, for example, the body responsible for running the institution and any person who could be named in the report, as well as examination by the victim’s counsel. It should be noted that an attempt by the Commission to limit the number of counsel present at sittings of the Investigation Committee was struck down in *Re Commission to Inquire into Child Abuse*.¹⁵ Such repetitive cross-examination could be gruelling and time consuming and leave many victims feeling stressed and possibly victimised by aggressive questioning.

Delay

7.22 As was pointed out in chapter 5 and at paragraph 7.21, because the Committee has a discretionary power to identify individuals, every person whose good name or reputation may be infringed by such identification has the right to the full panoply of constitutional protections as set out in *Re Haughey*, thereby transforming each case before the Investigation Committee into a mini-trial. As such, it is probable that every case may take the same length of time as a

¹⁵ [2002] 3 IR 459.

criminal trial concerning the same subject matter, say 3-4 days. At present, there are approximately 1,700 cases listed for investigation; if each case took 4 days for investigation and the Committee sat every day of the year, it would take approximately 18 years to clear the caseload.

- 7.23 Delay by the Investigation Committee could lead to protests and even legal challenges by individuals awaiting hearings.

Effect on Proposals to hear allegations in Groups

- 7.24 As was pointed out in paragraph 5.14, the power to identify individuals could have a detrimental effect on any proposals to hear complaints against a number of different respondents together, or to hear a number of different complaints against a respondent at the same time.

Adverse Pre-Trial Publicity

- 7.25 The identification of an individual and the publicity which may result from such identification, may result in any subsequent criminal proceedings against that individual being struck out on the grounds of adverse pre-trial publicity. In *D v DPP*,¹⁶ Denham J stated:

“Fair procedures incorporate the requirement of a trial by jury unprejudiced by pre-trial publicity. The applicant is entitled to a jury capable of concluding a fair determination of facts as presented at the trial.”¹⁷

Thus, the victim may very well be deprived of his or her ability to have his or her abuser tried, convicted and sentenced by the criminal justice system as a result of the latter’s identification in the Commission’s report, something which carries no penal sanction.

¹⁶ [1994] 1 ILRM 435.

¹⁷ *Ibid* at p 442.

Conclusions

7.26 *Given that the Committee is given a statutory discretion to identify individuals and that the law relating to the exercise of discretionary power precludes the adoption of a strict policy not to identify certain classes of individuals under the current legislation, a person being investigated by the Investigation Committee will be able to claim the full panoply of Re Haughey rights. However, this Paper is of the view that because of the procedural implications that accrue to such a policy, the Committee should re-examine the way in which it deals with individual respondents.*

7.27 *Similar considerations of policy and practicality suggest that the Commission should not name individuals who were responsible for the management of institutions.*

8. Conclusions

8.1 *This Paper is of the view that the Commission's major function should be to focus on the wrong or malfunction in the system and not on the individual wrongdoer. However, because the possibility exists under the Act of individuals being identified, they are entitled to insist on the full panoply of Re Haughey Rights.*

8.2 *The Act of 2000 should be amended to delete the section requiring the Commission to exercise its discretion in relation to the identification of individuals; because of this, the Commission should pursue a general policy of not naming individuals and these respondents would not be entitled to insist on their Re Haughey rights because their constitutional rights would not be at risk. Authority for this proposition may be derived from Stokes v Minister for Public Enterprise.¹⁸ Here, under a procedure established by regulations, a draft report into an aeronautical accident had been furnished to the applicant (who was the widow of a pilot involved in an accident). The applicant contended that, as a matter of constitutional justice, she had a right to see all records pertaining to the investigation. This contention was rejected by the High Court, on the basis that:*

“...the object sought to be achieved by this report is the improvement of air safety and the prevention of future accidents and incidents. Not merely do the Regulations require that the investigation and the report which derives from it is not concerned with apportioning blame or liability but the draft report does not in fact attempt to do so.”¹⁹

8.3 *The task of making recommendations for the future is of immense importance. It is of concern to victims of past abuse to see that it does not happen again. Society is interested as much in future prevention as in analysis of the past. The function is best fulfilled by ascertaining what institutional and systems*

¹⁸ High Court (Kelly J) July 3 2000.

failures led to the wrongs of the past, rather than by concentrating on searching for the truth in a multiplicity of discrete instances.

9. Summary of Conclusions and Recommendations

- 9.1 *The Committee and, by extension, the Commission is under no mandatory legal duty to identify the individuals who committed abuse, or the persons responsible for the management, administration, operation, supervision and regulation of the institutions in which the abuse took place but rather has a discretion to do so. (Paragraph 3.8)*
- 9.2 *The Commission must exercise its discretion to identify but in doing so, should not adopt a rigid policy which fetters the exercise of that discretion. However, the Commission may adopt a general policy as to how it intends to exercise its discretion to identify. (Paragraph 3.11)*
- 9.3 *It would appear that the policy of the pre-statutory Commission was to make general, as distinct from specific findings of abuse and it would follow from this, not to identify individuals who committed abuse in specific cases. (Paragraph 4.5)*
- 9.4 *It would appear from its statements to date that the Commission had a stated policy in favour of identifying the institutions in which abuse took place, the individuals who committed the abuse and the persons responsible for the management, administration, operation, supervision and regulation of the institutions in which the abuse took place. (Paragraph 4.10)*
- 9.5 *Because the Committee has a discretionary power to identify institutions and individuals, this results in every person whose good name or reputation may be infringed by such identification having the right to the full panoply of constitutional protections as set out in *Re Haughey*, thereby transforming each case before the Investigation Committee into a mini-trial. (Paragraph 5.9)*
- 9.6 *Nevertheless, the possibility remains that because the Committee has a discretionary power to identify individuals, a person whose good name or reputation may be infringed by such identification could argue that he or she*

should have the right to have a case heard separately from everybody else's case or to have each allegation heard separately. (Paragraph 5.14)

9.7 *A number of general observations may be made based on the comparative analysis contained in this paper:*

*First, many of the inquiries which have been conducted in relation to child abuse, have been reluctant to identify and apportion blame to individuals, save those who have been convicted of child abuse in relation to the institutions under review. The majority of these inquiries **had the power to do so** but did not, citing delay, a lack of corroboration or a desire not to prejudice criminal prosecutions as the main reasons for not doing so. (Waterhouse, Stratton and Hughes)*

Other inquiries, such as the Forde Inquiry, were reluctant to name individual abusers because they felt that their main purpose was to make findings and recommendations of a general nature and not to make determinations, or reach conclusions in respect of specific allegations of abuse. (Paragraph 6.26)

9.8 *It would appear that tribunals or commissions of inquiry should not be used as surrogates for the regular criminal process. They should be concerned with the general rather than the specific and to quote the Law Reform Commission, their primary task should be to "discover what happened and why" not to assign blame "which is best left to a criminal trial." (Paragraph 7.11)*

9.9 *With regard to the Commission to Inquire into Child Abuse, this Paper takes the view that the emphasis of the inquiry should be on what happened and why rather than on making findings of abuse in an individual case and on the lessons to be learned for the future (Paragraph 7.12)*

9.10 *This Paper is of the view that because of the procedural implications consequent on a policy of naming individuals, the Committee should re-examine the way in which it deals with individual respondents. (Paragraph 7.26)*

- 9.11 *This Paper is of the view that the Commission's major function should be to focus on the wrong or malfunction in the system and not on the individual wrongdoer. (Paragraph 8.1)*
- 9.12 *The legislation should be amended to delete the section requiring the Commission to exercise its discretion in relation to the identification of individuals. Because of this, the Commission could pursue a general policy of not naming individuals and these respondents would not be entitled to insist on their Re Haughey rights because their constitutional rights would not be at risk. (Paragraph 8.2)*
- 9.13 *The function of making recommendations for the future is better achieved by the proposed approach. (Paragraph 8.3)*