

## Foreword

On the 26<sup>th</sup> September 2003 the Government announced my appointment as new Chairperson of the Commission to Inquire into Child Abuse to take effect on the resignation of Ms. Justice Laffoy. At the same time I was asked to conduct a review of the working of the Commission having regard to the interests of victims of abuse, the requirement of a timely conclusion to the inquiry function of the Commission consistent with the needs of a proper investigation and so as to avoid exorbitant costs.

In carrying out this undertaking I have had enormous assistance. Ms. Justice Laffoy and her fellow commissioners have given me every assistance. They have allowed me access to all the Commission's facilities and have freely and frequently provided me with help and advice on the many occasions when I needed it. To them a special word of thanks is due. Without their help this review could not have been satisfactorily conducted. The personnel of the Commission were also of immense assistance.

When my appointment was announced Mr. Justice Budd contacted me with good wishes and helpful information. He also offered the help of the Law Reform Commission and introduced me to Professor David Gwynn Morgan, former Director of Research and Mr. Darren Lehane, Legal Researcher. I want to thank them particularly. Professor Morgan's encyclopaedic knowledge of the law of inquiries was immediately available to me, as was his facility in writing on difficult legal topics. The mistakes that remain in this report are however entirely my own.

Ms. Ciara McGoldrick, barrister, was assigned to assist me in researching and preparing this report and I want to record a special word of appreciation for her diligence and efficiency.

The task that I was set was not an easy one. There is of course no simple measure which will bring about the desired result. Any solution to the problems of the Investigation Committee of the Commission will necessarily require some adjustment of existing entitlements but I hope that it will be appreciated by everybody who considers the matter that what is suggested in my report is a scheme which offers the most realistic prospect of a successful conclusion of the important work assigned to the Committee.

A summary of the report is to be found at p71.

November, 2003

## Contents

Chapter 1	The Commission	4
Chapter 2	The First two Years	14
Chapter 3	Numbers and Procedures	20
Chapter 4	The Challenge	26
Chapter 5	Approaches to an Effective Procedure	34
Chapter 6	Suggested Amendments of the Act	43
Chapter 7	The Commission in the Courts	52
Chapter 8	Some Practical Issues	63
Chapter 9	Conclusion	68
Summary		71

# Chapter 1

## 1. The Commission

- 1.1 The Commission to Inquire into Child Abuse came into existence as a statutory body on the 23<sup>rd</sup> May 2000. Its non-statutory predecessor of the same name was announced by the Taoiseach on the 11<sup>th</sup> May 1999 as part of the scheme designed to respond to revelations of institutional child abuse. The measures announced by the Taoiseach included:-

*“...an apology on behalf of the State to victims of child abuse; the setting up a commission to inquire into childhood abuse; expansion nationwide of the counselling services available to assist victims of child abuse; the preparation of a white paper on the mandatory reporting of child abuse; immediate amendment of the limitation laws as they relate to civil actions based on childhood sexual abuse; referral of the question of limitation in other forms of childhood abuse to the Law Reform Commission and priority advancement of legislation to include a register of sex offenders.”*

- 1.2 The Commission and the other measures that were put in place can be seen as fulfilment by the State of its Constitutional obligation under Article 40.3.2:-

*“The State shall... in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”*

- 1.3 On foot of a remit to consider the broad Terms of Reference assigned to it in

order to determine whether they needed to be refined and to make recommendations as to the powers and protections the Commission would need, the original non-statutory commission advised the Government in two reports: the first dated 7<sup>th</sup> September 1999 sought clarification as to the kind of inquiry that was envisaged and the second, on the 14<sup>th</sup> October 1999, recommended a specific statutory basis for the inquiry and suggested the form of the legislation. The Act of 2000 followed the Commission's recommendations closely but not precisely.

1.4 The functions of the Commission as set out in s.4(1) of the Act may be summarised as follows:-

- (i) To provide for persons who suffered abuse in childhood in institutions an opportunity to recount the abuse and make submissions;
- (ii) To conduct an inquiry into the abuse of children in institutions and to ascertain why it occurred and who was responsible;
- (iii) To publish a report setting out its findings and recommendations including in particular recommendations on the steps which should be taken to deal with the continuing effects of abuse and to protect children in similar situations from abuse at the present time and in the future.

1.5 The Commission operates through two Committees known as the Confidential Committee and the Investigation Committee. Each member of a Committee is a member of the Commission. A person may not be a member of both Committees. The Commission chairperson presides over the Investigation Committee.

1.6 The Confidential Committee has essentially therapeutic and listening functions.

It provides the opportunity for victims of abuse in childhood in institutions “*who do not wish to have that abuse enquired into by the Investigation Committee*” an opportunity to recount the abuse and make submissions in confidence. The Committee is empowered to make findings of a general nature based on the evidence it hears and to furnish reports to the Commission. If its report contains findings that are based on the work of the Confidential Committee, the Commission must include a statement that the particular findings are based on findings of the Confidential Committee and that the evidence could not be tested or challenged by any person and that it was not corroborated if that is in fact the case. See s.5(4). This Committee does not carry out any investigation but it listens, receives the evidence, makes findings of a general nature based on that evidence and reports to the Commission.

- 1.7 The Commission carries out its inquiry into abuse of children in institutions during the relevant period through the Investigation Committee. This Committee like the Confidential Committee has a therapeutic function but in addition to allowing victims of abuse an opportunity to tell their story, it must also investigate cases of abuse, determine the nature of the abuse and why it happened, and ascertain the extent to which the institutions, and the way they were managed, contributed to the abuse and to report to the Commission as a whole.
  
- 1.8 The unique function Committee is to inquire into child abuse. But, as just indicated, that is not its only function. Is it intended that the inquiry function is to be paramount? The fact that the listening function appears before that of inquiring may not in itself be an indication of the relative importance of the two functions. Logic would suggest that in the Confidential Committee, listening would be the principal occupation whereas with the Investigation Committee inquiring would be the main activity. However, it is not easy to construe the Act in that way. The Minister for Education & Science, Dr. Woods, said that the

*“telling and listening function, which can be called the therapeutic function of the Commission or the healing forum, is the function to which everything else should be subordinate.” - 516 Dail Debates col. 293.*

1.9 The Confidential Committee serves the needs of those victims who wish for privacy and a therapeutic, non-confrontational approach and the Investigation Committee has to combine the functions of listening in a sympathetic way with carrying out an inquiry into child abuse. No difficulty arises with the Confidential Committee in regard to its functions but the position with its sister committee is less clear. It is worth observing that as far as can be discovered no other inquiry into child abuse in other jurisdictions -- and there have been several of these (see paras 7.14 et seq) -- has had the additional express function of providing a forum for therapeutic telling of victims' stories of abuse. This mixing of purposes may give rise to potential for conflict between the statutory functions of the Investigation Committee.

1.10 The possibility of tension between the functions of the Investigation Committee can be seen more precisely in the words emphasised in s.4(6) of the Act:-

*“In performing their functions the Commission and the Committees shall bear in mind the need of persons who have suffered abuse in childhood to recount to others such abuse, their difficulties in so doing and the potential beneficial effect on them of so doing and, accordingly, the Commission and the Committees shall endeavour to ensure that meetings of the Committees at which evidence is being given are conducted -*

*so as to afford to persons who have suffered such abuse in institutions during the relevant period an opportunity to recount in full the abuse*

*suffered by them in an atmosphere that is as sympathetic to, and as understanding of them as is compatible with the rights of others and the requirements of justice and as informally as is possible in the circumstances.”*

The requirements of the sub-section are imposed on both Committees. But the difficulty applies only to the Investigation Committee. One would expect that the approach taken by a statutory inquiry, in which persons are at risk of being labelled as child abusers or as being responsible for permitting abuse, would be likely to differ from that of a listening forum whose purpose was therapeutic. An inquiry cannot come to its task with preconceived conclusions whereas a therapeutic listener on the other hand takes facts to be true because it is not his function to determine the truth of allegations that are made. The inquirer will be inserting the word “alleged” literally or metaphorically before assertions and allegations, aware that due process imposes requirements not only of form but of substance.

- 1.11 The sub-section seems to impose what is in effect an obligation on the Investigation Committee to hear the accounts of abuse given by persons who come before it and the complainants are to be heard “*in full.*” A person coming to the Investigation Committee as a victim of abuse in childhood in an institution has in effect a right or entitlement to do so. In the statement delivered at the first public sitting of the Commission held on 29<sup>th</sup> June 2000, Miss Justice Laffoy said:

*“The Commission, through its Committees, will hear all persons who come forward to tell of abuse they have suffered in institutions in childhood. No such person will be refused a hearing.”*

- 1.12 At its first public sitting on the 29<sup>th</sup> June 2000 it was stated that the Investigation Committee would conduct its inquiry in two phases. In the first phase it would

investigate particular allegations of abuse. This phase would involve in relation to each survivor's allegation or allegations a preliminary inquiry by an inquiry officer in accordance with the Act, followed by a hearing which would be held in private. If it were established to the satisfaction of the Investigation Committee that abuse occurred, findings to that effect would be made and recorded in an interim report from the Investigation Committee to the Commission. Such findings would be final and not open to challenge in the second phase. The second phase would be conducted in two components, one involving investigation of the context in which the abuse occurred and why it occurred and the attribution of responsibility for it, whether institutional or regulatory. The second component would take a broader view of the legislative framework and the historical and social context in which the abuse occurred. The phased hearings are more fully described in the framework of procedures published by the Investigation Committee on the 11<sup>th</sup> November 2002.

- 1.13 The Act in s.5(5) directed the publication of the Commission's report within a period of two years from the establishment day (23<sup>rd</sup> May 2000) "*or such longer period as the Government after consultation with the Commission, may specify by Order. By Order of the 17<sup>th</sup> April 2002 the period was extended to the 22<sup>nd</sup> May 2005.*"
- 1.14 It is intended that meetings of the Commission and of the Investigation Committee should generally be held in public. Section 7(3) gives power to the Commission to hold a meeting otherwise than in public if it considers it appropriate, "*having had regard to the desirability of holding such meetings in public.*" This provision relating to the Commission is repeated for the Investigation Committee in s.11(3)(b). The exception is a meeting of the Investigation Committee at which evidence relating to particular instances of alleged abuse of children is being given, in which case the meeting is to be held other than in public.

1.15 The two Committees of the Commission are entirely separate. Each makes a report or reports to the Commission which has under s.4 the function of preparing and publishing reports. The Commission is empowered to publish interim reports. S.5(6) of the Act provided:

*“The Commission -  
shall, not more than one year after the establishment day, prepare an interim report on such matters relating to the inquiry aforesaid or otherwise relating to its functions as it may determine, and  
  
may, if and whenever it considers it appropriate to do so, prepare other such interim reports, and sub-sections (2) (3) and (4) shall apply to such interim reports as they apply to the report referred to in those sub-sections.”*

This means that the Commission was required to publish an interim report on its progress within one year and it did so in May 2001. The Commission further reported in November 2001. These reports described the Commission’s progress in its work but did not contain any findings arising out of the work of either the Confidential or the Investigation Committees. The Commission is not confined in interim reports to recording progress in its work or difficulties that it has encountered. It is also entitled under s.5(6)(b) just quoted which brings in sub sections (2) (3) and (4) to make findings as to the occurrence of abuse of children in particular institutions during particular periods and identifying the institution and the persons who committed the abuse, as well as other conclusions relating to the management and supervision of institutions.

1.16 The Commission is authorised to issue interim reports as its work progresses. In

its first Interim Report of May 2001 the Commission recorded a general approach to interim reporting as follows:-

*“It is the Commission’s view that it would not be appropriate to publish any determinations or findings made during the course of the inquiry into abuse of children in institutions on a piecemeal basis because to do so might give an inaccurate, incomplete or distorted picture of the prevalence of abuse, why it occurred and who was responsible for it. Therefore, to avoid such a possibility, and any unfairness and injustice which might ensue, the Commission does not intend to make public any determinations or findings until after the inquiry or, in the case of the inquiry being conducted by the Investigation Committee, the first phase of the inquiry, has been completed. The Commission appreciates that persons who have already participated, or will participate in the near future, in the work of the Commission may find this approach disappointing and having to wait for a future report frustrating. However, as it is necessary in order to protect the integrity of the Commission’s work, the Commission must ask them to be patient.”*

The Commission accordingly took the view that it would inform the public in interim reports about the work it had carried out and any difficulties encountered and it reserved the right to announce policy recommendations.

- 1.17 Section 4(4)(a) empowers the Government following consultation with the Commission to confer additional functions on the Commission and the Committees. By an Order entitled “The Commission to Inquire to Child Abuse Act, 2000 (Additional Functions) Order, 2001 - S.I.280 of 2001” - the Commission was mandated to conduct an inquiry into certain vaccine trials which were conducted in institutions. The division of the Committee that is inquiring

into vaccine trials is comprised of the chairperson Miss Justice Laffoy and Professor Edward Tempany. Judicial Review proceedings claiming that the Order is *ultra vires* the Act are pending before the High Court. The case is Record No. 2003/782JR - Application Professor Irene Hillary v. The Minister for Education & Science, Ireland, The Attorney General and The Commission to Inquire into Child Abuse, Respondents. It is not proposed in this Review to consider any issues relating to the Vaccine Trials Division first because the problems which require to be considered are entirely separate and distinct, secondly because they relate to the other division of the Investigation Committee, and thirdly because there is a legal challenge to the existence of the Vaccine Trials Division.

- 1.18 S.20 of the 2000 Act provided somewhat vaguely for the payment of a “reasonable amount in respect of the expenses” incurred by a person attending to give evidence or making an oral submission to the Commission or to one of the Committees. Payment was to be made in accordance with a scheme devised by the Minister for Education & Science with the consent of the Minister for Finance and following consultation with the Commission. Provision was made in subsection (4) for the payment of expenses in respect of making discovery by a person in respect of whom an order had been made by the Commission. In such a case, the expenses incurred by the person were to be agreed between the Commission and the person or, in default of agreement, to be determined by a Taxing Master of the High Court. In its first Interim Report in May 2001 the Commission complained that:

*“delay in responding to the Commission’s requests that a viable scheme for payment of legal expenses be made has been the most significant obstacle. In the Commission’s view, the delay was unnecessary and potentially damaging to the credibility and independence of the Commission.”*

The partial scheme that was then considered by the Commission proved to be

unsatisfactory and unacceptable. Negotiations and consultations continued and ultimately it was agreed by the Minister that the costs awarded to parties appearing before the Investigation Committee should be such as are agreed or, in default of agreement, as are taxed by a Taxing Master of the High Court. Reflecting this change, the Act of 2000 was amended by the deletion of s.20 and its substitution by s.20 and 20(A). This change was effected by s.32 of the Residential Institutions Redress Act, 2002.

- 1.19 The Commission drew up Rules of Procedure for the Investigation Committee and these were published at the time of the first public sitting on the 29<sup>th</sup> June 2000. This has been modified by a Framework of Procedures dated 8<sup>th</sup> November 2002. Both documents are available on the Commission's website. The Commission has emphasised that the rules are not to be construed or applied rigidly and they will be operating in a flexible manner to do justice in different circumstances. Appropriate notice would be given where changes occurred.
  
- 1.20 The Act of 2000 was further amended by the insertion of s.23A that was enacted by s.32 of The Residential Institutions Redress Act, 2002. This provided for the engagement by the Investigation Committee of deciding officers to assist the Investigation Committee in carrying out its functions. A panel of experts was to be provided which would supply members to sit in divisions of the Committee with members of the Committee in simultaneous hearings. The idea was that one member of the Investigation Committee would sit with a selected expert from the panel. This matter is further discussed at 4.9 et seq.

## Chapter 2

### 2. The first two years

- 2.1 By way of setting the work of the Commission in its full context, reference ought to be made here to the work of the Residential Institutions Redress Board. The Board has discharged its work smoothly and efficiently and it would appear that the number of appeals to the Review Body has been extremely small.
- 2.2 However, at the start of the Commission's work, it had to draw attention to two major obstacles to progress which had been highlighted in submissions. The first related to the establishment of a compensation scheme for the victims of abuse in institutions. The second concerned legal representation at the proceedings of the Investigation Committee and the making of a scheme providing for payment of the costs of such representation.
- 2.3 In order to make progress with its inquiry function, the Investigation Committee needed the co-operation of victims of abuse. In the first place, the Committee needed the names of persons who wished to give evidence. Secondly, the Committee wanted statements to be furnished either through the solicitors representing the victims or directly to inquiry officers. The solicitors for many victims took the position that, *“Until such time as the issue of a scheme for payment of compensation to their clients was satisfactorily addressed, it would be difficult for them to advise their clients as to whether participation in the work of the Commission was in their personal or legal interest .”* - Second Interim Report, November 2001, p.1.

- 2.4 The Commission took the view that the establishment of a compensation scheme was a policy issue for the Government. On the 3<sup>rd</sup> October 2000 the Minister for Education & Science announced that the Government had agreed in principle to establish a compensation scheme for those who as children were victims of abuse in institutions in which they were resident and in respect of which State bodies had regulatory or supervisory functions. The compensation would be paid on an *ex gratia* basis without establishing any liability on the part of State bodies, but subject to the claimant establishing to the satisfaction of the scheme that he or she had suffered abuse and resulting injury. The nature of the abuse that would attract compensation was to be defined in the Commission's Act.
- 2.5 The scheme announced by the Minister was embodied in the Residential Institutions Redress Act, 2002. The Act provides for the establishment of a board whose essential function is to:-

*“Make awards in accordance with this Act which are fair and reasonable having regard to the unique circumstances of each applicant.”*

- 2.6 Entitlement to an award arises in circumstances set out in s.7(1):-

*“Where a person who makes an application (an “applicant”) for an award to the board establishes to the satisfaction of the board -*

*Proof of his or her identity,*

*That he or she was resident in an institution during his or her childhood, and*

*That he or she was injured while so resident and that injury is consistent with any abuse that is alleged to have occurred while so resident, the board shall make an award to that person in accordance with s.13(1).”*

2.7 The Act applies to people who, as children, suffered abuse in orphanages, industrial schools and reformatory schools. It does not include victims of abuse in day schools. Speaking in the Dail on the 23<sup>rd</sup> November 2001, the Minister said:-

*“The nature of the institutions is also relevant to the decision to pay compensation from public funds to former residents. Unlike ordinary schools, the institutions removed the barriers which normally separate work, play and sleep and controlled every aspect of the child’s life. Residents had little or no say in their lives. In the words of the Kennedy Committee ““the children in care are completely dependent on the residential home staff for all the love, understanding, security and religious formation they need, as well as for support in making their way in life...”” Given the weakness and vulnerability of a child who has been deprived of parental care in such a situation, the authorities mandated in law to protect his or her interests have a particularly onerous responsibility. Failure on the part of those authorities can carry serious consequences for the children who have no other advocate. In the case of ordinary schools, public authorities did not have this level of responsibility and had no authority to exercise it in respect of schools which were privately owned and significantly independent. In the circumstances, the distinction now being made in the provision of financial redress, and in that matter only, between abuse victims in ordinary schools and victims in residential care institutions, is a reasonable one.”*

2.8 An application must be made within three years of the establishment day which is 16<sup>th</sup> December, 2002. The Board may extend this time limit in exceptional circumstances. Applications are heard in private and there is a right of appeal to a

review body. An applicant has one month in which to decide whether to accept the award or to appeal. Acceptance of an award bars civil proceedings arising out of the same or substantially the same acts. Thus an applicant who has a court action for damages for abuse can also apply for an award from the Redress Board. However, when he or she accepts an award the court proceedings can no longer be pursued.

2.9 A question arises as to whether persons who have received awards from the Redress Board will wish to pursue complaints through the Investigation Committee. The Commission was concerned about this and took the view the view that it would be regrettable if valuable evidence was lost by reason of persons pursuing a claim for compensation deciding not to participate in the work of the Commission. It is perhaps inevitable that there will be some loss of applicants who have received awards from the Redress Board. Some victims of abuse may regard themselves as having been sufficiently validated or vindicated by the process of application to the board. Some may feel that the payment of a substantial sum in an award represents a tangible acknowledgement of responsibility which is in itself a matter of satisfaction to them. Some other applicants may have been advised that it would be prudent to make a statement to the Commission in case it subsequently became relevant to the issue of compensation whether somebody had in fact complained to the Commission.

2.10 It is unlikely that persons who have decided not to proceed further with complaints are going to notify the Investigation Committee and the only way of establishing the number of remaining complainants is for the Committee to write to all complainants seeking confirmation of the position.

## **Legal representation and costs**

2.11 At its public sitting on the 20<sup>th</sup> July 2000 the Commission made a number of rulings:-

- (1) Each person who comes to the Investigation Committee to make an allegation or allegations of abuse will be granted legal representation by a solicitor and one counsel of his or her choice for the first phase hearing;
- (2) Each person and/or body against whom an allegation of abuse is made will be granted legal representation by a solicitor and one counsel of his, her or its choice for the first phase hearing;
- (3) Each person or body materially affected by an issue raised in the second phase hearing will be entitled to legal representation; and
- (4) The expenses of legal representation will be defrayed in accordance with the scheme made by the Minister for Education & Science under s.20 of the Commission to Inquire into Child Abuse Act, 2000.

Notice that here each complainant or alleged abuser would have been allowed costs for one counsel only.

2.12 However, section 20 of the Act of 2000, in so far as it relates to legal representation and costs and expenses, was replaced by s.20(A) which was inserted by s.32 of the Residential Institutions Redress Act, 2002. Subsection (2) provides that the Commission may pay such reasonable costs arising out of the representation permitted by the Investigation Committee as are agreed between the Commission or, in default of agreement, as are taxed by a Taxing Master of the High Court. This means that instead of there being a scale of costs laid down by the Minister in a scheme, a party is entitled to recover costs in respect of any particular work to be assessed independently as in the case of a party who was awarded costs in a court action.

2.13 As to the level of representation, i.e. the number of lawyers involved, that is essentially a matter for the Investigation Committee to decide in the particular circumstances. The Investigation Committee provided for that in its Final Ruling of 18 October, 2002, at paras.7.4 and 7.5 and also in the framework of procedures at pages14/15. In hearings dealing with more serious allegations, one would anticipate applications for a high level of representation than is provided generally and it would be reasonable to assume that applications of that kind would be sympathetically considered. This conclusion is fortified by the Judgment of the High Court in **The Commission to Inquire into Child Abuse v. Notice Party A & Ors., [2003] 3 IR 459**. That case does not deal with this point but rather with the question of the number of legal representatives to be permitted at Investigation Committee hearings but the implications of the Judgment would support this conclusion.

2.15 It follows that in any consideration of the likely costs which are going to be incurred in future hearings conducted by the Investigation Committee, the safer assumption in the case of the more serious allegations is that two counsel will be permitted and that appropriate costs will be recovered either by agreement or on taxation. The implications of this are considered at para 4.4 et seq.

## Chapter 3

### 3. Numbers

- 3.1 The task of the Investigation Committee is formidable by any standards. It is to investigate child abuse alleged to have taken place in more than 100 institutions in respect of some 1,712 complainants over a period of sixty years. Many if not most of the complainants name or identify multiple alleged abusers, sometimes in different institutions. The oldest victim was born in 1926. Those accused of abuse are older than the complainants and some of them are dead, some left their congregations many years ago and some have not been traced. Those who are alive and traced include persons who are confused or not in a condition to defend themselves. These features partly explain the difficulty and complexity of the work to be done and make the Investigation Committee's functions probably the most challenging ever to have been the subject of an Irish public inquiry.
- 3.2 Most of the complainants were in industrial or reformatory schools and accuse more than one person of abuse. On analysis of the figures it appears that the vast majority of complaints are in respect of a relatively small number of institutions and individuals. Of the 1,712 complainants 1,312 make complaints in respect of 20 institutions.
- 3.3 Complaints were made against 1195 alleged individual abusers. The total number of complaints made against those individual respondents is 4,128. The overall number of complaints against individual respondents in respect of the 20 institutions giving rise to the largest number of complaints is 3,192, which is 77% of all complaints against individual respondents.

- 3.4 At the time of the suspension of the work of the Investigation Committee it had completed hearings in the cases of twenty-one complainants. A further 19 had been part heard by the Committee.

## **Procedures**

- 3.5 The Investigation Committee has devised rules of procedure for its work which are contained in Rules of Procedure and a subsequent Framework of Procedures (published on the 11<sup>th</sup> November 2002) which are available on the Commission's website. The procedural rules are designed to ensure compliance with the general law as to fairness of procedures and others are mandated by the provisions of the Act.

- 3.6 S.4(1)(b) of the Act requires the Commission acting through the Investigation Committee to inquire into the abuse of children in institutions during the relevant period and "*where it is satisfied that such abuse has occurred,*" to determine the causes, nature, circumstances and extent of such abuse. The phrase italicised appears in slightly different form in s.5(3)(a) and s.13(2)(a). The Commission has interpreted that expression as creating a preliminary factual issue which has to be decided before proceeding further to inquire into causes and responsibilities. It follows that in any case where the Investigation Committee first satisfies itself that abuse has taken place there will have to be at least one further hearing beyond that at which the particular instances of alleged abuse are in issue. And of course further hearings may also be required in cases where, for instance, a question of context arises in determining whether particular conduct amounted at the time to abuse.

- 3.7 S.11(3)(a) provides that a meeting of the Investigation Committee at which

evidence in relation to particular instances of alleged abuse is being given shall be held otherwise than in public. The Act envisages that some or indeed most of the proceedings of the Committee will be heard in public except for occasions when the Committee is hearing evidence relating to particular instances of alleged abuse of children. This requirement of privacy may be contrasted with a trial of a serious sexual offence in which the proceedings are open to the public but there is a ban on identification of the victim and indeed of the accused unless and until there is a conviction, with the proviso that even on conviction the court has a discretion to prohibit identification of the accused if that might lead to identification of the victim.

- 3.8 The application of this provision has another consequence. To take an example, if there are three complainants who allege that they were abused by a particular teacher, in the Committee's view, it is not open to it to hear those cases together when complainants two and three would be present at the evidence given by complainant number one. The case of complainant number one is heard entirely separately from the others. This ruling has consequences not only in regard to the likely duration of the work of the Investigation Committee but also on the question of equality of information. Complainant number one does not know what number two has said nor what the alleged abuser has responded to the complaint of number two. Neither do his legal representatives, at least officially. If it is the case that complainant number two has the same representation as complainant number one, that poses a difficulty for the lawyers in trying to exclude from their minds as confidential what has been revealed to them in the other case or cases. On the other side, the teacher who is the alleged abuser has the materials that have been generated in all the cases against him so that he is in a position to cross-examine each complainant on a basis that is derived (entirely legitimately) from a consideration and a comparison of the allegations and statements made by the other complainants.

3.9 S.13(2)(c) provides that the report of the Investigation Committee “*shall not contain findings in relation to particular instances of alleged abuse of children.*” This is the same as the restriction on the Commission’s report which is contained in s.5(3)(d). It is not entirely clear what the provision means and it would be helpful if it could be clarified. It would seem appropriate for the report of the Investigation Committee and of the Commission to contain findings to the effect that abuse of children occurred during a particular period in a particular institution and it may wish to name the institution and the persons who committed the abuse. But, how is it going to do this especially in regard to persons who have committed abuse if it is prohibited from mentioning specific incidents? From a victim’s point of view, it does not seem to be a satisfactory validation of his or her experience to say that this unnamed victim was abused in a particular institution by a particular person without saying what the nature of the abuse was. Bearing in mind the variety of meaning of the word “abuse” as defined in the Act, it may be a very disappointing result for a victim to have his or her experience validated in this quite limited way. In addition, as between perpetrators of abuse, it may well be thought that it is unacceptable to describe everybody as an abuser without being more specific as to which kind of abuse he or she committed. It would certainly be in the interest of a serial sexual abuser or one who committed deliberate acts of physical violence to have associated with his or her all others who were criticised for failures which would properly be located at the other end of the scale of heinousness. The more horrible or frequent the abuse committed by a particular abuser, the more his or her interest is in having as many other listed as abusers whose crime are at the lowest end of the scale of moral outrage. Looking at the third interest in all this, which is the public interest, again it seems that there is justification if not actually a requirement for separation of the different categories of abuse so that the public will know what was occurring in the relevant institutions. What was actually happening is also relevant to the recommendations about the future.

3.10 This prohibition seems wholly inconsistent with s.5(3)(a) and s.13(2)(a) which

permit the identification of particular persons who committed abuse. Since the Act in these sub-sections makes specific provision for hearings at which evidence relating to particular instances of alleged abuse is given, the Act expressly contemplates the hearing of evidence of particular instances of abuse with the possibility of detailed rebutting evidence and thus findings in respect of such instances would not be regarded as inappropriate absent a specific prohibition to that effect.

3.11 Section 13(2) drew a critical comment from the High Court. In *The Commission to Enquire into Child Abuse v. Notice Party A & Ors.*, 2002 3 IR 459 at p.473/4:-

*“The task of the applicant is not assisted by poorly drafted legislation under which it has to operate. What for example is one to make of section 13(2) of the Act? At subsection (a) thereof it provides that the report of the applicant may if it is satisfied that abuse of children, or abuse of children during a particular period, occurred in a particular institution, contain findings to that effect and may identify the institution and the person who committed the abuse. But subsection (c) provides that the report “shall not contain findings in relation to particular instances of alleged abuse of children”. This is but one of a number of instances of obscure draftsmanship which does nothing to assist the applicant in its difficult task”.*

We return to this question at paragraph 6.16

### **Divisions/Sub-committees**

3.12 The Act envisages that a committee may want to act in divisions. This appears to be somewhat unreal in view of the numbers involved: of the six members of the

Commission including the chairperson, two are members of the Confidential Committee and so excluded from the Investigation Committee; one is assigned to the vaccine trials unit; and the remaining three, including the chairperson of course, are members of the Investigation Committee. The Act implies that a division of a committee will have more than one member and this is what one would expect in the absence of express provision to the contrary. It would seem that there is need for a power to have a division or sub-committee of the Investigation Committee comprising one member of the Committee. It would not be usual or normal for the Investigation Committee to sit in three divisions of one each but where non- controversial material was anticipated that might be entirely appropriate and efficient. If during the course of such a hearing conducted by one member of the Investigation Committee some issue arose which was likely to give rise to controversy or about which there was some conflict of evidence, at that stage the division could suspend its operation and simply transfer the further hearing of the issue to the Investigation Committee as a whole. This matter is further considered at paragraph 6.14.

### **The victim's option to withdraw**

3.13 Section 19 gives a person who is giving evidence of abuse to a Committee the right to withdraw from the Committee at any time and to give evidence to the other Committee. If that happens, the Committee from which the witness has withdrawn disregards for all purposes except for proceedings for a perjury offence or an obstruction offence. In certain circumstances this could be unfair on another party to the Inquiry. For example, if a complainant had made concessions in the course of cross-examination which were of advantage to a respondent it would be unfair to deprive the latter of the benefit of the evidence if it had to be ignored entirely, which is the sequel provided by the section in the event of the exercise of the option by a complainant. It might be better if this provision were qualified so as to give the Investigation Committee discretion whether to allow a

witness entirely to withdraw from giving evidence. This matter is further considered at paragraph 6.17.

## Chapter 4

### 4. The Challenge

- 4.1 The essential problem with the Commission is the work of the Investigation Committee. And the essential problem of the Investigation Committee is one of case management. How can the allegations made by 1,712 complainants, or whatever reduced number is left when complainants are lost, be handled within a reasonable time and at reasonable cost? Obviously there are practical as well as legal issues and each has to be considered. Having said that, if there is no method by which the allegations can be fitted into a procedural structure that can accommodate them, there is no solution. On the other hand, if a procedural framework can be devised which will enable the core purposes of the Act to be achieved, the question becomes one of how legally that procedural structure can be erected by adaptation of the existing scaffolding.
- 4.2 A solution is suggested in this review which it is believed meets the criteria in the Terms of Reference, is fair and reasonable to victims and respondents and which will incidentally result in reduction of expenditure. It must be acknowledged of course that any measures that are adopted in dealing with the situation will work much more efficiently with the co-operation of the various parties and it is hoped that they will find the recommendations acceptable.
- 4.3 The first issue to be confronted is simply one of numbers. With 1,712 persons opting to give evidence to the Investigation Committee the question arises as to how long it will take to process their complaints. The Committee's listening function alone involves a substantial time commitment. If half a hearing day were to be allowed for each person to give evidence of the abuse he or she wished to describe, that would take up more than four years.

4.4 When further time is allowed for hearings in which evidence of complaints is tested by cross-examination by respondents, and rebutted by evidence, the projected duration of Phase 1 of the inquiry must be multiplied. The Commission had found that the first two cases involving major industrial schools which had been heard at that time had taken four days and two and a half days respectively. Even if these hearings were unrepresentative and if the average duration ultimately proved to be shorter, it is clear that with the existing programme of work and procedural arrangements many years would pass before the Investigation Committee could complete its work and even longer before the full mandate of the Commission could be fulfilled.

4.5 The Committee's procedures envisaged the following sequence of hearings:-

- (a) A preliminary hearing attended by the lawyers for the purpose of ascertaining areas of agreement and dispute, procedural questions and issues of admissibility of evidence. Witnesses would not testify at this hearing.
- (b) The hearing of evidence as to the particular incidents of abuse alleged by the complainant. Individual respondents would give evidence at this phase and any other relevant witnesses would also be heard.
- (c) If a question arose about whether the conduct alleged by the complainant constituted abuse in the context of the time in which it happened, that question would be considered at this phase with the assistance of appropriate evidence. This issue would not arise in every case but only in those where the context was relevant.
- (d) If the Committee was satisfied that abuse had in fact occurred, this

phase would consider the responsibility of supervisors and managers of the institution and also the role of departmental inspectors and others. If the Committee decided that abuse had not taken place, this phase would not arise.

- (e) When the Investigation Committee had completed its work, the Commission would have to consider making recommendations as to the alleviation of abuse and its prevention in future and this would entail further hearings of a general nature at which evidence would be considered.

4.6 The preliminary meeting and the hearing as to the specific complaints would be individual to the particular complainant. A debate about the context of abuse would probably be conducted on a fairly general basis concerning a number of complainants. Similarly with the supervisory and inspection issues one would expect there to be joint hearings but it is not entirely clear that that would always be possible consistent with the decision by the Commission as to the requirement for privacy of hearings.

4.7 Even looking at the hearings as to particular instances of abuse, it is quite clear that the Committee could not hope to reach an end of its inquiry before many years had elapsed. It was suggested that it might take 11 years for the whole of the work of the Commission to be completed but, without substantial changes, it seems to me that even this estimate would be optimistic. A glance at the facts outlined above will reveal why.

4.8 The members of the Commission and the Investigation Committee, victims' groups, the respondents and all the legal representatives would probably be in broad agreement as to the situation that obtains at present. And they and the

public would be in agreement that the situation is unsatisfactory and the prospect unacceptable.

4.9 The issue of the duration of the Commission's work is of the greatest importance to all those who are concerned with its work and also to the public interest. It is in every interest that the work should be completed as soon as possible. The task therefore is to find a method by which this can be achieved consistent with the objectives of the Commission and the interests of all parties.

4.10 The situation in essence therefore is that:

- (1) The number of complaints (even if it is thought likely to reduce as discussed at 3-);
- (2) The individual hearings of cases;
- (3) The phases envisaged by the rules of procedure

combine to produce a result which is unacceptable in terms of time and cost.

4.11 It is not in anybody's interest to have to wait for the Commission's report for a long number of years. Victims of abuse are not young. The age profile was tabulated in the Commission's first Interim Report of May 2001. 34 of the complainants were over 70. Individual respondents are older. Some are dead and others untraced. Some are incapable of defending themselves against allegations.

4.12 It is not in the public interest that there should be a long delay. Recommendations should be made as early as possible and implemented as appropriate. There is also a public interest in seeing the victims of child abuse vindicated where the

evidence justifies it and in seeing those who are accused of abuse cleared of allegations of which they are innocent.

- 4.13 Time is clearly a major issue but the question of cost also arises. While the search for justice and truth is not to be curtailed by budgetary considerations, it is legitimate in the public interest that value for money should be sought and exorbitant cost avoided. If it is possible to devise a means whereby the Commission's work can be done within a reasonable time and with increased efficiency, without sacrificing the interests of the parties, there should be a saving of expenditure as an incidental benefit. The approach in this review is to endeavour to improve the working of the Investigation Committee but the goal has not been set of saving of money as an end in itself, still less has it been sought to balance expense against the interests of justice. Having said that, as with the interests of the parties, the public interest in avoiding exorbitant expense is served by a timely conclusion to the Commission's work.
- 4.14 It is not easy to estimate the costs that would be incurred if the Committee's processes went unchanged. A sum of €150 million to €200 million was mentioned in a press release by the Minister on the 20<sup>th</sup> December, 2002 and in correspondence between the Department of Education & Science and the Commission but it is not clear whether that is realistic. One indication of the possible cost is the total sum claimed by legal representatives of parties to a hearing which took one day in respect of a single allegation of physical abuse in a national school involving one complainant and one respondent. The total sum claimed by legal representatives of the parties to the hearing, not including the costs of representing the State or those of the Investigation Committee's own lawyers, was €50,000.
- 4.15 The sum stated above must be treated with caution. First, the costs are those claimed, not what will ultimately be agreed or allowed on taxation or costs. Some

reduction is to be expected. Secondly, too few cases have been heard and too few bills of costs received to enable general conclusions to be drawn. At the same time, if hearings are of longer duration the amounts sought and recovered can be expected to be greater.

4.16 What can safely be said, however, is that the legal costs involved in 1,712 individual cases usually involving at least three separately represented parties will be a very large sum. When additions are made for multiple hearings, the overall expenditure would be truly alarming. The possibility (one hopes remote) even exists that the costs paid out to legal representatives could amount to a significant proportion of what is awarded to victims by the Redress Board.

4.17 The Commission publicly acknowledged these problems in its second Interim Report in November 2001. It had earlier made suggestions in correspondence as to the steps it saw as being necessary. The Commission sought increased resources so that the Investigation Committee could work in three or four divisions simultaneously, and proposed the appointment of deciding officers “to assist the members of the Committee”. The proposal was that a panel of experts (deciding officers) would be assembled from whom would be recruited members to sit with personnel of the Investigation Committee in divisions. Deciding officers under the Act are to have expertise in law, medicine, psychiatry, psychology or social work and were to be appointed subject to conditions determined by the Minister for Education & Science with the concurrence of the Minister for Finance. The purpose of appointing deciding officers was to assist by filling the gap in expertise when the Investigation Committee divided into three or four divisions. The plan was for one member of the existing Investigation Committee to sit with one recruit from the panel of deciding officers. The scheme has not been put into effect.

4.18 It is worth emphasising that the difficulties that were being acknowledged and

addressed by the Commission:

- (a) Were not of its making and
- (b) Could not have been assessed until the cohort of complainants and respondents could be measured.

- 4.19 The Commission's proposal of using outside experts to help the Investigation Committee with its work was accepted by the Government and legislative authority was provided by s.32 of the Residential Institutions Redress Act 2002, which inserted a new section in the Commission's 2000 Act, s.23A.
- 4.20 The scheme was for three or four panels each comprising one member of the Investigation Committee and one deciding officer. A panel would be assigned to a module of the inquiry, i.e., to the investigation of a particular institution.
- 4.21 Having different panels, of the inquiry, each chaired by a senior lawyer sitting with another expert(s), hearing and deciding cases in institutions would inevitably give rise to problems of cohesion and consistency of approach. Victims and respondents would be conscious of variations in style and even in substance as between panels. Inconsistent rulings on similar points could be made. All this assuming the formidable practical problems could be overcome.
- 4.22 In response to this it might be pointed out that different judges hear cases which are similar in some degree whether in respect of issues or evidence or points of law and that there can be perceived inconsistencies of approach or result. On the other hand, litigants will almost always have a right of appeal, which is not available to a party to an inquiry. Furthermore, an inquiry is essentially a unitary

concept and each of its decisions should reflect to some extent the approach of its chairperson. It may be said that inquiry panels each chaired by a senior lawyer with another expert or other experts have a greater capacity for divergence than individually run tribunals.

- 4.23 A review of the work of the Commission conducted by the Attorney General reported to the Government in February 2003. The examination concentrated on the work of the Investigation Committee and had the benefit of full co-operation from the Commission. The review addressed the problems that are here identified here. But its conclusion was that the Commission should adopt a method of selecting cases that would be sufficiently wide, objective and representative to enable the Investigation Committee to fulfil one of its core mandates, namely, the inquiry function. The Attorney General's study proposed further investigation, consultation and analysis for the purpose of defining the objective criteria that would be employed to identify the cases to be heard. The Commission for its part was willing to assist in the work of clarifying the tests.
- 4.24 When the concept of selection was mooted with victims' representatives it did not find favour. While there was a readiness all round to acknowledge the problems facing the Investigation Committee, the idea of "sampling" the cases was seen as an unacceptable attenuation of the entitlements of victims of abuse to bring their experiences to the Commission via the Committee of choice. And it has to be accepted that the proposal would indeed have deprived a large number of complainants of the opportunity to participate directly in the inquiry process. Thus, the plan did not come to be adopted or refined as it might have been if its reception had been less hostile.
- 4.25 The position is therefore that the Commission's proposal of multiple simultaneous divisions, despite having been authorised by statute, was not put into practice. Neither was the Attorney General's method of selection adopted. Each plan was

directed to solving the same problems which remain to be confronted.

## Chapter 5

### 5. Approaches to an effective procedure

- 5.1 Any suggestions that are made in this draft report must be regarded as tentative until it is known what proposals are forthcoming from the parties to the work of the Investigation Committee. Before deciding finally on the changes in procedure to be recommended it is intended to hold a procedural meeting on a relatively informal basis to get the parties' views, as to how the work can be completed in a time and manner consistent with the criteria in the Terms of Reference of the review.
- 5.2 Devising a solution is made more difficult by the background to this review. There is unease among the parties and their legal representatives about the circumstances which gave rise to Miss Justice Laffoy's resignation. Victims of abuse are concerned that their interests may be sacrificed or compromised in pursuit of completing the work of the Commission without huge costs. Respondents have anxieties that the Investigation Committee and ultimately the Commission might approach the work on the basis that there was indeed widespread and systematic abuse of children in every institution under consideration.
- 5.3 We know from the Christian Brothers litigation in the High Court **Michael Murray and David Gibson v. The Commission to Inquire into Child Abuse, The Minister for Education & Science, Ireland & The Attorney General** (unrep. - 17<sup>th</sup> October 2003, Abbott J. which is discussed in some detail in **Chapter 7**) that they are particularly concerned, as are other respondents' groups, about investigation of complaints of abuse that are made against people who are

dead or incapable of responding whether by reason of infirmity of mind or simply because there was a long delay between the alleged events and the present. The declarations which resulted from the High Court action are a reflection of these concerns.

5.4 Honouring the rights of persons against whom allegations are made has the consequence that proceedings take a longer time to complete. But it must be remembered that these rights are not simply there to afford protection to persons against whom serious allegations are made and who may be severely criticised if the allegations are proven. That is a primary purpose but it is not the only one. The quality of an investigation and the validity of any report following from it are dependent on the integrity and fairness of the investigation process. There is accordingly a public interest in seeing that the Investigation Committee carries out its work thoroughly and in accordance with fair procedures.

5.5 It is not likely that any of the interests represented before the Committee is going to dispute the general propositions stated above. Our legal authorities are clear on the entitlement of persons who are in danger of having serious criticisms made against them in a report of an inquiry. They are specified in a series of cases beginning with **In re Haughey [1972] IR 217** and most recently set out in the High Court and Supreme Court Judgments in **the Abbeylara Case, Maguire & Ors. v. Ardagh & Ors. [2002] 1 IR 385**. The Investigation Committee decided that these entitlements would be respected not only in the case of individual respondents who are alive but also for the representatives of deceased persons or disabled respondents and also for the institutions in which the abuse is alleged to have occurred. No proposals can be put forward accordingly which conflict with the exercise of these rights.

5.6 No inquiry of this kind can predict that every decision is going to be correct.

There are inevitably going to be victims who feel that they have been let down by the process because their experiences have not been validated by decisions of the Investigations Committee. Any proper investigative process must keep in mind the dangers and difficulties of reviewing events that took place a long time ago. Mr. Justice Abbott in the **Murray/ Gibson case** has drawn attention to difficulties that undoubtedly exist in proving allegations of abuse that took place a long time ago. On the other hand, it can be argued that a reluctance to make clear findings in properly proven cases is unfair to those who worked in institutions without ever being guilty of abuse and who gave dedicated service over the years.

- 5.7 Having discussed these general considerations and bearing in mind also the problems identified in Chapter 4, a scheme of procedure is now considered that would seem to be a basis for carrying out the work of the Investigation Committee.
- 5.8 As with any large task, the first approach is to see how the work may be divided up into smaller units. The Committee has already decided on division into units by institution. That seems entirely sensible: the institution is an obvious subdivision. The biggest unit is Artane which was the largest industrial school in Britain or Ireland. One can regard Artane as a microcosm of the work of the Investigation Committee as a whole. If a solution can be found for dealing with Artane, one can expect that the method will work for the other institutions that have to be investigated. For this reason it is proposed to consider Artane in a little detail.
- 5.9 Three hundred and fourteen complainants were resident in Artane. Almost every complainant names more than one respondent. The managers of the school are the Christian Brothers and they are obviously concerned with every complainant. Similarly the Department of Education & Science is also a respondent in each

case. The relevant period is from 1939. This is still a very large unit and the Committee could not undertake a joint hearing dealing with all the complainants and all the respondents. The Investigation Committee must sub-divide the Artane phase of its work further.

- 5.10 A further obvious division is into decades i.e., 1939 to 1949, 1949 to 1959, 1959 to 1969. Some complainants will span more than one decade but that will not defeat the exercise because the person may be assigned so to speak to the decade which gives rise to more of his complaints than the other. Artane complainants can be sub-divided by decade as follows:- 1940's - 93, 1950's - 182; and 1960's - 136. (The total number is greater than 314 because some complainants were in Artane for periods which overlap decades so that, although assigned to a single decade for the purpose of a hearing, the same person will be included in statistics for two decades.) There is logic to starting with the earliest decade. To take the 1940's we have 93 complainants and presumably between 150 and 200 individual brothers who are respondents.
- 5.11 A decade will fall naturally into further units. A particular brother who was in charge during a period of - say - 4 or 5 years will be concerned with most if not all of the complaints during that period. When the complaints are analysed in more detail with a view to this kind of sub-division, further criteria for deciding which cases go together will emerge.
- 5.12 Ultimately, if one takes for example the 1940's, one might have 9 or 10 separate units with some 10 complainants each and a larger number of individual respondents. Hearings would then be scheduled to deal with those units of complainants/respondents. Each hearing would be a separate unit contributing to the overall picture of the decade which would be complete when all the units were finished.

5.13 Before embarking on the hearings in relation to a particular period the Investigation Committee should exercise a function or power in regard to complaints of preliminary examination in regard to complaints. By looking at the documentation, it can carry out something like a triage of the complaints so as to eliminate complaints which had no prospect of being proven in evidence. This could arise for a variety of reasons but perhaps particularly with complaints which are obviously internally inconsistent or in conflict with what appeared to be a body of undisputed evidence or for instance where it seemed from the discovered material that the person named in the complaint simply was not for example a member of the particular order. In that case, a process could be devised for contacting the complainant's solicitor and suggesting that it might be an appropriate case to go to the confidential Committee. There might be an obligation to alert the respondents to the existence of such cases so as to enable them if they wanted to do so to assert on the basis of the particular complaint that other allegedly similar complaints were unfounded. The particular details are not of importance here but the point that emerges is that the Committee should do some kind of preliminary review of the complaints and this would result in some reduction of those that actually go to a hearing. Procedures can be devised to protect the interests of everybody involved.

5.14 Each unit would of course be comprised of multiple allegations arising from the 10 or so complainants. The procedure would work similarly to a civil or criminal trial in which multiple plaintiffs or complainants made allegations against a number of different defendants or accused. Proceeding by way of joint hearings is a natural arrangement which has been used for several centuries in all jurisdictions in joint criminal trials and is accepted as being just to both sides. The Committee would carefully weigh the evidence and come to conclusions about the specific allegations made against individual respondents and as to the other levels of responsibility which are envisaged by the

Act. If a specific complaint was made out in the course of evidence, the Committee would say so. If it was simply not possible to make a clear finding, the Committee would not do so. There could be circumstances where the Committee while not disbelieving a complainant would nevertheless feel it was unsafe to arrive at a conclusion that an individual respondent was guilty. In an appropriate case the Committee might reject the complaint on the basis that it did not believe it. And it would also deal with the other levels of responsibility as appropriate to that particular unit of inquiry. With one unit of ten complainants completed, the Committee would proceed to the next unit.

- 5.15 When all the complainants in the particular decade or other period had been heard, the Committee would amalgamate its findings in the different units and would produce an interim report to be sent to the Commission and intended for publication.
- 5.16 As the Committee proceeds through its work if it does so in the manner here suggested, there will be a reduction in the time taken in hearings. The lawyers will get used to the procedure. They will see how the Committee operates. If points have arisen in previous hearings and have been accepted by the Committee or indeed have been rejected by them, they can be made at subsequent hearings in shorter form or not made. Evidence can be taken in written form (a procedure which has worked in similar inquiries in other parts of the world). Witnesses can where appropriate be offered for cross-examination on the basis that their statements are accepted in evidence. (These improvements are described in the recent consultation paper of the Law Reform Commission on Public Inquiries Including Tribunals of Inquiry (2003) paras 7.44-7.49). Witnesses who are giving repeat evidence of matters that are already well known to everybody in the inquiry can be dispensed with. Non-controversial evidence can be heard by individual members of the investigation Committee and they can report back and the transcript will be available. If it is the case that there is overwhelming

evidence of a particular state of affairs which is alleged to have existed by a number of complainants, the remaining complainants in that unit can simply be offered for cross-examination, with no need to examine them in chief. The cross-examination process will become more focused and briefer. Obviously there can be no curtailment of the right of cross-examination but people can be reminded that the Committee has been over that ground before and that it is perhaps unnecessary to engage in long challenges which are repetitious. One would hope in a word that the participants in the process in addition to becoming accustomed to it would also gain confidence that the Committee's approach was fair and reasonable and consistent.

- 5.17 The essence of this suggested procedure is that the work be divided up into smaller units which have logical basis for selection; that there are joint hearings of manageable portions of the work; there will be interim reports from the Commission based on findings by the Investigation Committee in units of a decade or so; the process will become more streamlined.
- 5.18 The operation of the modified procedure as proposed can now be considered in a little more detail.

(1) The Committee should write to complainants asking if they wish to proceed with their complaints. The information that the Commission has is that some people will not wish to pursue their complaints through investigation by the Committee. A number of people will have received compensation awards from the Redress Board and will regard that as a sufficient vindication of their case histories. Others may have been advised that it would be prudent to make a statement to the Laffoy Commission at a time when the Redress Scheme was not in place. For these and other reasons, some complainants may not want to go before the Investigation Committee and so some reduction in numbers can be anticipated here.

(2) The Committee should write to solicitors for complainants in cases where it is felt that there is no realistic prospect of a finding of abuse placed on the particular complaint. In that event it will be suggested that the victim should consider transferring to the Confidential Committee. It is not to be thought that victims will have their complaints rejected at this stage as being unreliable or untruthful. These cases will be those where it is clear from the written material that there is no prospect of a positive finding emerging. If the Investigation Committee is satisfied of the situation, it is only fair to potential witnesses to tell them that. But of course, if complainants which to ignore this advice and continue with the hearing, the matter will be reconsidered.

(3) Joint hearings will take less time than individual trials for all complainants. A precise figure cannot be put on how long each unit is going to take to be heard. As time goes on, when the parties get used to the process the hearings will speed up. Where rights are at stake, people cannot be coerced into procedures that are less protective of their clients simply because that would be more expeditious. But they can be encouraged to take sensible measures which are conducive to the interests of clients as well as efficiency. For example, if there are ten victims intended to give evidence in the course of a particular inquiry unit, it could be suggested that it would be in their interests to be represented by a single team of lawyers and that would make obvious sense particularly if one group was already representing the largest number of those victims. Nobody would be forced to accept that suggestion but it would make such clear sense that it is hard to see why there would be any objection. Arrangements could be made between the various solicitors so as to make sure that no one lost out.

(4) Changes made to the manner in which hearings are conducted will save

time. The former method adopted by the Investigation Committee was that the members conducted the questioning of witnesses who were then cross-examined by parties challenging the evidence. The work of questioning witnesses is more efficiently done by counsel for the inquiry whose training and experience are to perform that very function. There is also an issue of principle relating to the function of an inquiry in that it is more satisfactory that the persons who are conducting the inquiry should stand back from it. Such a change could also save time. Questions by counsel would be more focused and it does not of course exclude questions coming from the members of the inquiry panel as they think appropriate. A reduction of time even in a relatively small measure but which applies to every witness or even every victim who is heard will have a substantial cumulative effect.

5.19 It is impossible to say with certainty how much of an impact these changes will have on the duration of the inquiry. As is stated at the beginning of this chapter, there may be other changes which are required in order to see that the work of the Committee can be accomplished. It seems clear that the Committee simply cannot succeed if it continues on the basis of the statutory footing if that is unaltered and on the basis of its existing procedures. The conclusion of this review is that the work can be done. If the Investigation Committee gains the respect and trust of the participants, there is no doubt that it can succeed.

5.20 It is also impossible to say how much will be saved in costs if the recommended measures are adopted. There will certainly be considerable reductions because of a somewhat reduced caseload and joint headings instead of individual hearings. What cannot be predicted is the impact of intangible factors such as experience of the Investigation Committee in action and some degree of confidence on its method. But, it hardly needs repetition that there can be no attenuation of the right of those who are at risk of unfavourable findings being made.



## Chapter 6

### **6. Suggested amendments to the Commission to Inquire into Child Abuse Act, 2000**

6.1 It seems desirable to amend the Act as little as possible because so much work has already been done on the basis of the existing legislative scheme. There is clear need, however, to amend the provisions identified in the previous chapter as being critical to the duration of the inquiry function of the Investigation Committee and also to clear up some other areas of confusion or difficulty. The need for legislative change is generally recognised. In the Attorney General's Report to the Government on the Review of the Laffoy Commission, which was commissioned in December 2002, certain amendments to the 2000 Act are recommended. The Commission itself suggested changes and made submissions to the Attorney General on 29<sup>th</sup> January 2003 and 12<sup>th</sup> February 2003.

6.2 Further, in and around the time of the preparation of the Attorney General's report consultations were held by the Department of Education and Science with survivor support groups and while those groups shared the concerns regarding expediting the process they felt that no changes should be made for a period of one year at which point the impact of the Residential Institutions Redress Board could be assessed.

### **Phased hearings**

6.3 The first issue that presents itself is the requirement for phased hearings. As already discussed at paragraph 3.6 et seq above this derives from Section 4(1)

which provides that the:

*“principal functions of the Commission are, ... through a Committee*

- (i) to inquire into the abuse of children in institutions during the relevant period,*
- (ii) where it is satisfied that such abuse has occurred, to determine the causes, nature, circumstances and extent of such abuse ...”*

6.4 For the reasons specified at paragraph 3.6 above the words *“where it is satisfied that such abuse has occurred”* should be deleted. The Commission identified this provision in its submissions to the Attorney General as a likely source of additional cost and delay in the fulfilment of its remit and felt that consideration could be given to this amendment (see p4 of letter from Commission to the Attorney General’s Review Group dated 29/1/03). The Report of the Attorney General referred to above also favours this approach (see p29 of the Attorney General’s report).

6.5 Sections 5 and 13 also require amendment in this regard. Section 5 is concerned with the report of the Commission and subsection (3)(a) thereof provides that the report of the Commission

*“(a) may if the Commission is satisfied that abuse of children, or abuse of children during a particular period, occurred in a particular institution, contain findings to that effect and may identify the institution and the persons who committed the abuse.”*

This paragraph should be deleted and replaced with the following paragraph:

*“(a) may contain findings that abuse of children, or abuse of children during a particular period, occurred in a particular institution and may identify the institution and the persons who committed the abuse.”*

6.6 A similar amendment will be required in respect of section 13 which concerns the report of the Investigation Committee. Section 13(2)(b) provides that the report

*“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 effect and may identify the institution and the persons who committed the abuse.”*

This paragraph should also be replaced with the following paragraph:

*“may contain findings that abuse of children, or abuse of children during a particular period, occurred in a particular institution and may identify the institution and the persons who committed the abuse”.*

6.7 These amendments will enable the Investigation Committee to conduct its inquiry as a whole in one phase in respect of any particular institution and period. The Commission has interpreted the relevant provisions as mandating a phased inquiry in which as a preliminary matter the existence of abuse has to be established. It is of course logically necessary to establish the fact of abuse before inquiring into causes and responsibilities. Most inquiries where facts need to be established will proceed in that way. But it greatly adds to the length of an inquiry process if separate formal phases have to be arranged rather than dealing with all issues at the one hearing and in the natural order which logic suggests.

## **Right of Complainant to recount abuse in full**

6.8 Each complainant is entitled to recount in full details of the abuse suffered by him or her before the Committee of choice as discussed Chapter 1. This is arguably the greatest stumbling block if the Commission is to fulfil its remit in any reasonable timeframe. It was identified by the Commission as a core issue for the purposes of the Attorney General's review. It was felt that the Committee should have a wider discretion in relation to which cases need to go to full hearing. This right of each complainant to recount his or her abuse in full derives from section 4 (6) of the Act which provides as follows:

*“In performing their functions the Commission and the Committees shall bear in mind the need of persons who have suffered abuse in childhood to recount to others such abuse, their difficulties in so doing and the potential beneficial effect on them of so doing and, accordingly the Commission and the Committees shall endeavour to ensure that meetings of the Committees at which evidence is being given are conducted -*

*(a) so as to afford to persons who have suffered such abuse in institutions during the relevant period an opportunity to recount in full the abuse suffered by them in an atmosphere that is as sympathetic to, and as understanding of, them as is compatible with the rights of others and the requirements of justice, and*

*(b) as informally as is possible in the circumstances.”*

6.9 The word Committees should be replaced with the words “*Confidential Committee.*” The phrase “*as is compatible with the rights of others and the*

*requirements of justice*” is unnecessary and inappropriate in the section as amended because the occasion which requires such qualification is the inquiry by the Investigation Committee. Consequently when the Investigation Committee has been removed from the provision, it follows that the qualification should also go. It is scarcely necessary to remark that witnesses, whether complainants or respondents or others, will be entitled to expect from the Investigation Committee to be treated with respect and dignity quite independently of any statutory injunction.

- 6.10 At present there is a limitation on the Investigation Committee’s power to decide who is going to give evidence. This restricts its capacity to decide how to conduct the inquiry in a way which appears to be unique among public inquiries in Ireland or elsewhere. Moreover, this is not compatible with an efficient inquiry. Once it has been determined which complainants in fact wish to proceed with their complaint before the Investigation Committee, no doubt many if not most of the remaining complainants will be called to the Investigation Committee hearings but it is essential nevertheless that the inquiry keeps control of its own investigation. It must be independent in its functions which of course means independent of the victims as well as the Government and the respondents. It is specifically stated at Section 3(3) that the Commission and its members shall be independent in the performance of their functions. This is scarcely consistent with section 4(6). It would appear that there is simply no means of achieving the goals in section 4(6) while conducting an investigation into matters of great controversy. There is bound to be some element of hostility which will be reflected in the questioning on cross-examination by respondents and in some cases the atmosphere will be fraught. Witnesses who participate in an inquiry are entitled to be treated with dignity and respect and that is what will happen but this sub-section is an unnecessary and unhelpful reflection of a confusion of roles which ought to be clarified.

6.11 What is proposed here is not that there should be selection criteria for cases that will come before the Investigation Committee for consideration. Rather, the Committee requires a capacity to come to a conclusion in respect of a particular complainant that it would be impracticable or unfair or unreasonable to put him or her to the ordeal of being examined and cross examined in respect of allegations which were of such a nature as to be unlikely ever to be able to ground a finding of abuse. This is naturally a sensitive and difficult issue. Every complainant is understandably going to feel that his or her complaint is entitled to a particular adjudication. And it is not possible to list specific criteria which will be applied in determining which complaints will not proceed to a hearing. Neither is it to be suggested that this category of complainants will be large in number. The essential point is that there are likely to be complainants whose allegations are incapable of leading to a proper finding of abuse. While it is invidious to try to establish a list of tests, it can be suggested that a reasonable decision by the Investigation Committee could be made and ought to be made in circumstances where a complainant's statement, and other written materials whose accuracy was not in doubt, disclosed fundamental inconsistencies or impossibilities. Without an analysis of specific complaints it is not possible to give further examples. It should perhaps be mentioned that any decision not to hear the evidence of a complainant would have to taken in the light of the interests of other parties to the inquiry.

### **Joint hearings**

6.12 Currently when evidence is being given in relation to instances of alleged abuse this evidence must be given in private. Section 11 concerns meetings and procedures of the committees, subsection 3(a) of which provides that:

*“A meeting of the Investigation Committee, or a part of such meeting, at which evidence relating to particular instances of alleged abuse of*

*children is being given shall be held otherwise than in public.”*

This subsection should be replaced with the following:

*“A meeting of the Investigation Committee, or a part of such a meeting, at which evidence relating to particular instances of alleged abuse of children is being given, may, if the Committee considers appropriate, having had regard to the desirability of holding such meetings otherwise than in public, be held in public.”*

A new sub-section - 11(3)(c) should be added as follows:-

*“A meeting of the Investigation Committee, or a part of such a meeting at which evidence relating to particular instances of alleged abuse of children is being given may, if the Committee considers it appropriate be held otherwise than in public but with such access thereto by such persons deemed by the Committee to have a sufficient interest in the meeting.”*

- 6.13 These amendments will enable joint hearings take place which are attended by victims and their representatives and respondents and their representatives other than those who are the subject of the evidence at any particular time as the Investigation Committee deems appropriate.

### **Divisions of a Committee**

- 6.14 There is currently no provision for a single member division of a Committee. Section 11(6)(a) provides:

*“A Committee may, if and whenever the Chairperson so determines,*

*act in divisions each of which shall consist of such members of that Committee as the Chairperson may determine.”*

The word “*members*” should be replaced by “*member or members*” to enable a division of the Committee consist of a single member. The need for this amendment is discussed at paragraph 3.12 above. Essentially, it is proposed that the Investigation Committee should be empowered to sit in divisions of one which would be useful when dealing with non-controversial matters and of a dispute arose at such a hearing, the matter could be adjourned to the Committee proper.

### **Recounting abuse**

6.15 Section 12 concerns the functions of the Investigation Committee. Subsection (1) provides:

*“The principal functions of the Investigation Committee are, subject to the provisions of this Act -*

*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 to the Committee  
...”*

There are two possibilities here. One is simply to delete this paragraph. The alternative is to introduce a qualification as follows:-

*“to provide, as far as practicable for persons .....”*

## **Particular instances of abuse**

- 6.16 Section 13(2)(c) provides that the report of the Investigation Committee “shall not contain findings in relation to particular instances of alleged abuse of children”. Section 13(2)(c) should be deleted.

This matter has been discussed at paragraph 3.17 et seq. The Act expressly envisages that complainants will give evidence of particular instances of alleged abuse and it seems accordingly inconsistent with the purposes of the Act and particularly with the provisions of Sections 5(3)(a) and 13(2)(a) to have this prohibition. While an amendment of section 5(3)(a) is here proposed that suggested amendment is irrelevant to the recommendation made here. In other words whether section 5(3)(a) is or is not amended as recommended above, the inconsistency between its terms and section 13(2) remains and requires to be removed.

## **Right of complainant to withdraw**

- 6.17 Section 19(1) provides that “...*a person who is giving or is to give, evidence to a Committee of alleged abuse suffered by the person in childhood may at any time cease giving, or decline to give, evidence to that Committee and, if he or she does so, may give evidence to the other Committee of the alleged abuse.*”

This subsection should be amended by the insertion after the words “*at any time*” the words “*with the consent of the Committee and subject to the rights of others and the requirements of justice*”.

This matter has been discussed at paragraph 3.14 and no further comment is required.



## Chapter 7

### 7. The Commission in the Courts

- 7.1 The case brought by the Christian Brothers against the Commission and the State raises issues of great importance for the work of the Investigation Committee. Michael Murray and David Gibson v. The Commission to Inquire into Child Abuse The Minister for Education & Science, Ireland & The Attorney General was heard by Mr. Justice Abbott who delivered judgment on the 17<sup>th</sup> October 2003. The action sought declarations that rulings made by the Investigation Committee in a decision given on the 18<sup>th</sup> October 2002 were erroneous. In the judgment which he delivered in October, Mr. Justice Abbott rejected the plaintiff's claims but he gave certain limited declarations. The case was subsequently listed for mention on Monday 10<sup>th</sup> November 2003 where some discussion took place as to the effect of the October judgment. The Judge acknowledged that he had not decided the constitutional issue that was raised in the case and the matter has been adjourned pending a further judgment dealing with the plaintiffs' arguments that the Act setting up the Commission is unconstitutional. Whatever way the constitutional issue is decided, it seems likely that there will be an appeal to the Supreme Court.
- 7.2 The question at the heart of this case arises in every investigation into child abuse. It concerns how to make judgments about events that happened a long time ago. The particular formulation of the issue may vary but the problem is essentially the same.
- 7.3 The Investigation Committee in its ruling of the 18<sup>th</sup> October 2002 sets out the background to the issue. A complainant alleged that she suffered abuse as a child

during the 1950's in a residential institution which was managed by a congregation of religious sisters and 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 members 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.”*

7.4 A second complaint was also being investigated at the time. This concerned a child also in the 1950's who alleged that he suffered abuse in an institution managed by the Christian Brothers and again subject to regulation by the Minister. In this case, the person named by the complainant as the perpetrator of

the abuse is dead and so also is the principal. The Christian Brothers 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 the Committee to make a finding of fact as against the deceased person and the right of the Commission to publish such findings and the right to name any such person in the public domain.

7.5 The Investigation Committee took the view that the issues raised in these two cases were going to arise in many others and they convened a procedural hearing which ultimately resulted in the ruling of the 18<sup>th</sup> of October 2002. The Committee summarised its conclusions at the end of a long and detailed ruling as follows:-

*“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.”*

- 7.6 The Committee rejected the submissions that there should be some earlier stage of its hearings at which it would decide whether to disallow allegations of abuse where respondents were dead or untraceable or alive but unable to give instructions or where he or she was prejudiced by reason of lapse of time in the preparation or presentation of the case. It was also unsuccessfully contended that the principles applicable in a court of law in dismissing civil or criminal cases because of delay should be applicable in the Committee’s work.
- 7.7 It is not necessary to discuss here the detailed arguments and submissions to the Investigation Committee and the Court. Neither is it necessary to analyse the judgment of Mr. Justice Abbott. What is important to notice is the potential effect of the ultimate judgment in the case on the proceedings of the Investigation Committee. It should also be recognised that the basic issue is going to arise in hearings before the Committee even if the courts reject the challenge of the Christian Brothers to the Committee’s ruling.
- 7.8 If the Christian Brothers’ action succeeds in whole or in part, the work of the Investigation Committee will be curtailed to a greater or lesser extent. If parts of the Act of 2000 were declared invalid having regard to the provisions of the

Constitution, that might very well put an end of the Investigation Committee as a whole and might even threaten the entire Commission. Obviously that would depend on the precise terms of the court's ruling. One can however safely say that a decision that part of the Act was unconstitutional would fundamentally undermine the work of the Committee.

- 7.9 Assuming that the Act is not found to be unconstitutional, there remains the possibility that the Brothers might succeed in some or all of their other claims. Again one has to say that the impact on the Investigation Committee's work of some such success would depend on the terms of the ruling but any decision in favour of the Christian Brothers is going to exclude a substantial body of cases from consideration. And there could also be consequential effects. For example, if it were to be decided that there should be no findings made by the Investigation Committee and thereafter by the Commission which identified dead persons as perpetrators of abuse, the question would arise as to whether that applied not only to individual abusers but also to persons whose alleged abuse was managerial or supervisory.
- 7.10 The arguments before the Investigation Committee on this issue and subsequently before the High Court concerned not only the question of identifying individuals but also whether institutions could be named in circumstances where there was some frailty of the process because of the death or non-availability of witnesses. And the Committee specifically referred to institutions in its summarised conclusions. The contention put forward by the congregations and accepted by the Investigation Committee is that institutions have a distinct identity which is capable of being damaged by adverse findings. For that reason, while not accepting the entitlement of the institutions to be given representation as a matter of law, the Committee nevertheless granted it. The possibility has to be considered that the courts might prohibit the naming of institutions in addition to individuals. Obviously, if the Committee is prohibited from naming individuals,

that will remove a body of cases. If the courts were to prohibit naming of institutions, there would be an even more radical reduction but the impact would not simply be on the number of cases that was available to be considered.

7.11 The inquiry into child abuse can survive a prohibition on naming individuals. But it cannot survive a prohibition on naming institutions. The Investigation Committee would be entirely toothless in its capacity to inquire and would be confined to reporting that abuse of a particular kind happened on some occasion somewhere in Ireland. A restriction of that kind would be entirely fatal to the Investigation Committee. It would mean that the Investigation Committee had no more power than the Confidential Committee and the latter body would be doing the work of processing the complaints with a view to producing a report.

7.12 The possibilities in regard to this case brought by the Christian Brothers are -

- (i) That there will be no interference with the Committee's work,
- (ii) That there will be some interference which will not fatally undermine the functions and
- (ii) That it will spell the end of the Investigation Committee.

7.13 An unfortunate consequence of this pending action before the courts is that it is in practical terms impossible to consider the wisdom or usefulness of removing the power to name individual perpetrators whether they are alive or dead. This matter was not therefore discussed in the chapter dealing with proposals for reducing the time of the inquiry. The question of course is bound to come up for consideration at the inquiry even if the courts entirely reject the Christian Brothers' challenge.

7.14 This issue has been encountered by other inquiries. The Forde Commission of Inquiry in Queensland which reported in 1999 described the problem thus:-

*“A number of witnesses to the Inquiry have described severe and prolonged trauma. In some cases, up to fifty years have elapsed between the abuse and the disclosure to the Inquiry. We recognise that this raises questions about the accuracy of these memories. The issue was also raised by the witnesses who feared that they would not be believed. After reviewing the literature, we conclude that there is no completely accurate way of determining the validity of abuse reports without corroboration. There are many factors that can influence the accuracy of memories. We have been guided by the substantial literature that recognises delayed recall and dissociation but caution the reader that the detail of witnesses’ memories cannot be automatically interpreted as a literal, historical reality. In many cases, we have heard similar accounts corroborated by several witnesses, and archival material has provided substantial corroboration of the broad thrust, if not the detail, of witnesses’ evidence.”*

7.15 The Forde Commission referred cases that might result in criminal prosecution to the police. In regard to other allegations of abuse,

*“the passage of time, the fact that a number of alleged perpetrators are now deceased and the difficulty in obtaining corroborative evidence meant that detailed findings could not be made. It has been possible, however, to make general findings on the nature of the abuse of children that took place in institutions within the Terms of Reference of the Inquiry.”*

7.16 The Commission reflected on the accuracy of recollection.

*“Experts continue to debate the validity of recovered and repressed memory. An examination of the relevant literature reveals that many factors can influence the accuracy of memories. Even with corroboration there is no totally reliable way of determining the validity of reports of abuse following a significant lapse of time. The Inquiry was aware of the problems associated with trauma, memory and the accuracy of recall on the part of witnesses. Similarly, the Inquiry was informed by recent work in the field of disclosure of childhood abuse.”*

- 7.17 The Inquiry chaired by Sir Ronald Waterhouse into child abuse in North Wales in the period from 1974, published its report “Lost in Care” in 1999. Addressing the problem being considered here the report says at para.6.09 -

*“We should say at once that we accept without reservation the gravity of a finding of sexual abuse and it will be apparent from our report that there are very few such findings in our report except those that we make in respect of persons who have already been convicted of sexual offences against children in care. The reasons for this are that the allegations against other specific individuals have in general, been very few in number, have not been corroborated and are so distant in time that, in our view, no one could safely conclude that the abuse had occurred without the risk of grave injustice to the alleged perpetrator. In respect of those individuals who have already been convicted of relevant offences against children in care, however, our approach has been that, in the absence of a successful appeal, the convictions are evidence that the offences were committed and that it has not been within our jurisdiction to question the correctness of those convictions, unless (possibly) fresh evidence were to be tendered going to the root of the convictions.”*

7.18 The Inquiry in a subsequent paragraph detailed its policy somewhat differently:-

*“6.16 In our judgment, however, we would be failing in our duty if we did not identify in our report:-*

- (a) Those persons who have already been the subject of relevant court proceedings*
- (b) Individuals against whom a significant number of complaints have been made, with our assessment of them;*
- (c) Other persons who have figured prominently in the evidence, whether or not they have been the subject of substantial complaints;*
- (d) A limited number of persons who should be identified in the public interest in order to deal with current rumours; and*
- (e) Persons who have not been the subject of allegations of abuse but who were in positions of responsibility and whose acts and omissions are relevant to our full Terms of Reference, including council officials and police officers, but who have not had the benefit of any anonymity ruling by the Tribunal.”*

7.19 It would appear that the Commission in its pre-statutory role was not in favour of identifying individual perpetrators of abuse. The Commission had the function of reporting on its Terms of Reference. Its first report was on the 7<sup>th</sup> September 1999. At para.3.4 the Commission says:-

*“It is the Commission’s view that it is neither necessary nor desirable*

*that the Commission should have power to make specific findings of fact in relation to specific allegations of abuse, given that criminal and civil proceedings may be pending in relation to matters which the Commission is investigating while the investigation is ongoing.”*

7.20 The Commission produced a further and final report on the 14<sup>th</sup> October 1999 in which it deals at para.7.2 with the Investigation Committee:-

*“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 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.”*

7.21 It seems clear from this recommendation that the Commission did not envisage that it would be empowered to make specific findings of individual responsibility for perpetrating abuse. The Committee was rather thinking of consequential findings relating to persons in positions of authority in the institution or outside it who had supervisory functions.

7.22 The fact that the Commission was of one view on this matter does not mean that the Government and the legislature could not enact a different provision but the point is not entirely without significance, if only because it probably is the reason why there is a prohibition on findings in relation to particular instances of alleged abuse of children, which as already observed would appear to be quite inconsistent with the capacity to name individual perpetrators.

7.23 My conclusion about this issue is that even if the matter is not determined in the pending proceedings, it could nevertheless happen that there would be some restriction of the number of cases because of the caution which the Investigation Committee has already said will guide its approach to the hearing of abuse allegations. It is worth recalling also Mr. Justice Abbott's observations at pages 103/4 of his judgment about the issue of corroboration where he drawn attention to the qualification that must be made in any general findings made by the Confidential Committee and published by the Commission if they are not corroborated by a specific statement to that effect. By the same token, the Investigation Committee if faced with allegations which could not properly be tested in the Committee's view and which were uncorroborated would obviously have to behave with considerable hesitation.

7.24 A final point here is that the option of dealing with institutions rather than individuals could be considered in the event that the recommendations made in chapters 5 and 6 proved to be ineffective. It is inappropriate in proved to be present circumstances to consider a statutory change which would prohibit the naming of individuals. Neither could the Investigation Committee consider that possibility while it is engaged in litigation which is defending the power to name persons even if they are dead or incapacitated or prejudiced.

## Chapter 8

### 8. Some Practical Issues

- 8.1 Prior to the suspension of the work of the Investigation Committee the Commission's complement of lawyers was a senior counsel, 4 junior counsel, 4 document counsel and inquiry officers. Following the suspension of the Investigation Committee's work in September 2003 there was a shortage of immediate work for counsel and some ceased to be engaged and returned to private practice. When the Commission is again operating in preparation for and in conducting hearings replacements will have to be recruited. Senior Counsel Ms. Deirdre Murphy has indicated her intention to leave the Commission on the retirement of Ms Justice Laffoy. It is proper to record the loss this represents to the work of the Investigation Committee. While it is impossible not to sympathise with Ms. Murphy's decision and the reasons for it, it is nevertheless a disappointment that she is unable to continue to make her valuable contribution. Obviously, Ms Murphy's departure leaves a vacancy which has to be filled as quickly as possible.
- 8.2 Of the four junior counsel who previously worked with the Investigation Committee only Ms. Anne Reilly remains and happily she is willing to continue which is a source of great satisfaction to the Commission as a whole. Two document counsel are continuing with the Commission and again this is extremely welcome and is conducive to the resumption of inquiry work by the Investigation Committee as soon as possible. Prior to the suspension there were three inquiry officers of whom one remains.

- 8.3 In the circumstances there is need to recruit additional counsel to fill vacancies and that will be done as early as possible. Of more immediate concern however, is the absence in the Commission's team of an experienced solicitor. The absence of such a professional is evident to any outside reviewer but it is also a lack which is felt by the existing chairperson and legal team. It is imperative that such a person be recruited as a matter of priority. A solicitor will organise the work of the Investigation Committee, prepare for hearings, be responsible for correspondence and co-ordinate the legal work carried out by the other lawyers.
- 8.4 In the initial stages, it is proposed not to fill vacant junior counsel positions or to recruit a further document counsel. Where research or analysis of documentary materials is required that will be done by the existing team with the help where necessary of paralegal researchers working under the supervision of the lawyers. The cost of engaging a solicitor will be more than off-set by savings in the other areas described. However, when the work requires additional legal expertise to be engaged that will be done to fill the full compliment of the pre-existing authority. If it is necessary to go beyond what has already been approved it is anticipated that sanction will be immediately forthcoming. Delays in sanctioning extra personnel or facilities will have an immediate effect in postponing important work in circumstances where the time element is crucial.
- 8.5 It is of course understandable that there should be some capacity for supervision of the expenditure demands of the Commission. The measures that are recommended in this review will save substantial expense but it is inevitable that further demands are going to be made. Against this background it is recommended that there ought to be a method whereby requests involving extra expenditure can be processed rapidly. In this respect it is suggested that there should be a small ad hoc group which can be assembled at very short notice to which requests can be referred. The membership of this group should be comprised of a senior official from the Attorney General's office who is familiar

with the work of tribunals, a senior official of the Department of Education and Science who has no connection otherwise with the matters the subject of investigation by the inquiry and a senior official from the Department of Finance. This group would be expected to familiarise itself with the work and personnel of the Investigation Committee. It is hoped that excessive formality can be avoided and that Commission requests will be fast-tracked thus avoiding unnecessary disputes and recriminations and misunderstandings which tend to cause frustrations all round.

## **Interim**

8.6 It is inevitable that there will be delay in recommencing hearings by the Investigation Committee. The further judgment that is awaited in the Murray/Gibson litigation discussed in Chapter 7 is likely when delivered to be the subject of an appeal to the Supreme Court. An application should be made if and when that happens for the earliest possible date so that the Investigation Committee's position is clarified as soon as possible. On any view however, there is going to be a period of a number of months into 2004 during which the cloud of uncertainty represented by this litigation is going to hang over the Committee's work. A further occasion of delay is the proposed amendment of the Act of 2000. It is impractical to suggest that there could be amending legislation processed and enacted before the Murray/Gibson litigation is determined. There will thus be a further hiatus before any new scheme of work can be implemented. The question is how the Investigation Committee's can be progressed in the interim.

8.7 First a step which is necessarily going to take time to complete is corresponding with each of the complainants to ascertain whether he or she wishes to pursue complaints through the inquiry process of the Investigation Committee. Obviously time will have to be allowed for the receipt of replies. This step would

have to be taken even if there were no external causes of delay.

- 8.8 Another obvious step is for consultation to take place with the parties to the Committee's work. If their consent can be secured to the thrust of the reform proposals that will ensure to the success of the inquiry when it resumes. The process of consultation is therefore of great importance. It would be hoped that such contacts would promote the building of confidence in the fairness and efficacy of the reforms. It can be assumed that the parties will make observations in the form of written submissions and they will require consideration. Recruitment of necessary personnel is another step which can be proceeded with in this interim period. These steps however necessary will not engage the Committee and its staff sufficiently.
- 8.9 It would be most satisfactory if hearings could be arranged in respect of complaints which were not affected by the Christian Brother litigation. It would seem in principle possible to devise units that would be suitable for hearing according to this criterion. For example, if an individual respondent had pleaded guilty to a number of serious acts of abuse and had been sentenced, that would appear to be a suitable subject for an inquiry by the Committee in respect of which it would of course be necessary to proceed in accordance with the rules devised under the present legislation. Such a method of proceeding will of course be attended by some of the disadvantages that are identified in this review but that is unavoidable. The important point is that the Investigation Committee would be able to move into activity central to its function and affording relief to admitted victims of abuse.
- 8.10 Another area of work is the preparation for hearings in cases arranged according to institutional model. This would involve examination of the files prepared by the inquiry officers and correlated with discovered materials so as to lead to preliminary views as to whether the cases would be capable of giving rise to

definite findings of abuse.

- 8.11 Prior to the suspension of its work the Investigation Committee had prepared for hearings in respect of Newtownforbes Industrial School. In this institution the number of complainants was 6. A date had been fixed for the commencement of hearings before the Committee. While this unit is very small in comparison with other industrial schools it would have afforded experience and useful lessons might have been learned. It is hoped that this is a hearing which could proceed albeit according to the existing procedures on a basis unaffected by the pending litigation.
- 8.12 In its framework document the Commission announced an intention to conduct a hearing into memory. The purpose of this session was intended to consider the effects of lapse of time, trauma and other issues on the memory of participants. This is an area which has been the subject of consideration by other inquiries into child abuse as the paragraphs cited in Chapter 7 from the reports of some of those inquiries make clear. This is an area which can be considered. It would be imprudent to commit the Investigation Committee at this stage to a particular form of inquiry into issues relating to memory because it is important to try to avoid an adversarial debate in which parties sought to recruit experts to support their side of the argument. It would be preferable to devise a mode of hearing which would be more directed to achieving a consensus view rather than putting the Investigation Committee in the position of deciding between the testimony of similarly experts giving essentially opposing evidence. This may be a somewhat pessimistic view of one particular view of memory hearing but it would be the least satisfactory manner of approaching the question and a better path to enlightenment is worth taking some time to seek. The point however is that this is another area which can be considered as a useful subject of investigation during the unavoidable period of uncertainty.

## Chapter 9

### 9. Conclusion

9.1 The Commission to Inquire into Child Abuse is an ambitious centrepiece in a generous package of reliefs for victims of child abuse. It was intended to provide succour and validation to people whose plight was ignored by the State for most of their lives. Its founding legislation sought to marry the benefits of therapeutic telling of experience with those of vindication of complaints. The problems of implementing the Act are created by excessive ambition: the Act tries to do too much and at the same time.

9.2 It was to be anticipated that respondents who themselves or whose members were accused of child abuse would defend themselves with vigour and tenacity. It is after all quite a different thing to admit personal, individual culpability than to participate in a general confession that some abuse happened at some time in an institution. Not all religious responded in the same way but there was a general resistance to the claims of widespread abuse made by the complainants.

9.3 The inquiry process is peppered with legal rules. Our courts have for many years placed the protection of individual rights very high in the legal order and the inquiry method is necessarily circumscribed as a result. Built-in safeguards prolong the course of a statutory investigation in Ireland. The result of an inquiry conducted in accordance with high standards of legal protection of human rights ought to be superior to one that is dedicated to lesser goals. One hopes that is the case. The point of Constitutional and legal protections is not only the respect for the individual's good name or other rights, although it certainly is that, but also the beneficial dividend in the quality of the resulting decisions.

- 9.4 The ambition of the scheme and purposes of the 2000 Act; the legal demands of fair procedures; and, finally the number of complainants opting for the inquiry side of the Commission, meant that the resources of the inquiry were going to be stretched to breaking point. It took time to discover the problems, which in retrospect can be seen to have been inherent from the beginning. The vastness of the undertaking only became apparent when the number of complainants opting for the Investigation Committee was known.
- 9.5 Even before the publication of the Second Interim Report the Investigation Committee and the Commission were acutely conscious of the difficulty of the inquiry mission. They suggested multiplying the Committee divisions by three or four so as to get through the phase 1 part of the inquiry. Extra resources were sought from the Department of Education and Science. Then began the exchanges that led to the Attorney General's review of the Committee. The events that followed culminating in the announcement of her resignation by Miss Justice Laffoy are not a matter for this review.
- 9.6 In more recent times the Investigation Committee has lived with the threat of radical change to its mission. And the cloud of uncertainty created by earlier and pending litigation was never far away. In the meantime growing public unease and dissatisfaction from some victims' groups have been manifested.
- 9.7 In the result, the problems of the inquiry function are not a matter of dispute. The challenge is clear and has not changed. The issue essentially is how to reconcile the prerequisites of an inquiry (both legal and practical) with the interests of victims, the need for a timely conclusion and the avoidance of exorbitant costs. That is the challenge which this review addresses.

- 9.8 The problem presents itself ultimately as one of case management. The solution proposed here requires a relatively modest parcel of amendments to the Act of 2000. It would be hoped to adjust the procedures fairly radically in the interest of simplicity without compromise of fairness.
- 9.9 The medicine is not, however, without side effects. There is a price to be paid for effectiveness. Some loss of entitlements of victims has to be acknowledged. But it was never going to be fully possible to reconcile a listening/ therapeutic function with a mission to inquire. Furthermore, a process which was protracted and hugely costly would inevitably give rise to call for it to be terminated and the money spent on more pressing needs of the community. And victims who have waited long should not be deprived of the opportunity of solace.
- 9.10 All in all these proposals give hope of success to a worthy project whose early and unnatural demise ought to be preventable. The objectives of doing justice in respect of child abuse and making recommendations for the future and for the alleviation of the problems of victims are worthy of the efforts of all those concerned with the work of the Commission. But reality has to be faced in focusing on what must be done to achieve this result.
- 9.11 In addition to acceptance of change and of some loss of entitlement, another ingredient of a successful revival plan is the trust of the participants in the inquiry process. Recent events have unfortunately undermined that feature of the relationship between the Commission, the parties, the State and the public. It is hoped that the proposals here advocated will enable the work of the Investigation Committee to resume quickly and to begin once again to earn this vital component of the project.

## Summary

1. The Commission to Inquire into Child Abuse was established on a statutory basis by the Act of 2000. Its principal functions are -
  - (a) To provide a forum for victims of abuse to recount their experiences in a sympathetic forum.
  - (b) To enquire into abuse of children in institutions.
  - (c) To report on its findings and make recommendations for the future.
2. The Commission operates in two separate divisions by a Confidential Committee and an Investigation Committee. The former is intended to be mainly therapeutic and the latter investigatory.
3. For the first two years the work of the Commission was impeded by delays caused by the absence of a compensation scheme and issues of legal representation and costs.
4. The Investigation Committee has embarked on hearings in the cases of only 40 complainants out of a workload of 1,712. In its second Interim Report the Commission sought extra resources with a view to having four divisions of this committee working simultaneously. Following this request the Attorney General conducted a review of the Investigation Committee and it was agreed by the Government and the Commission that changes were needed. Proposals were made by the Commission for legislative changes which were accepted by the

- Attorney General but there remained the fundamental issue of finding a means of reducing the number of cases to be heard.
5. There are major problems facing the Investigation Committee. If it were to continue unchanged there would be no prospect of its work being completed in reasonable time (which is of importance to both victims and alleged witnesses) or at acceptable cost.
  
  6. In order to overcome the problems of the Investigation Committee -
    - (a) Amendments are needed to the Act so as to focus the Committee on its core function to enquire into abuse of children in institutions.
    - (b) Procedural changes are required which will enable allegations to be heard in groups.
    - (c) Interim Reports should be published as the work proceeds.
    - (d) Trust needs to be established in the fairness of the hearings.
  
  7. Changes that are suggested in this report do not include sampling whereby conduct or responsibility in respect of child abuse is determined by reference to findings as to some only of the victims..
  
  8. What is proposed in essence is that:-
    - (a) Cases will be grouped in logical units for hearings together.
    - (b) Preliminary examination by the Investigation Committee will seek to eliminate cases where there is no realistic prospect of a finding and sympathetic measures will then be taken to direct victims to the Confidential Committee where appropriate.

- (c) Parties will be encouraged but not obliged to engage the same legal team where that is in their interest.
- (d) Interim Reports will be published so that parties and the public will be able to follow the work of the Investigation Committee.
- (e) Knowledge of the operation of the Investigation Committee will enable parties to concentrate more specifically on the issues that affect them and will reduce the time spent on issues previously considered.
- (f) The therapeutic function of the Investigation Committee will be reduced so as to concentrate on the inquiry function.
- (g) Not every victim will be required to give evidence and in some instances statements made to inquiry officers will be taken as sufficient unless respondents want to challenge them.

9. The Commission began life on a non-statutory basis four and a half years ago. The imperative now is to get the inquiry working efficiently and to seek co-operation from all the parties. The steps advocated here are not a magic formula but they will it is believed have a significant effect on the operation of the Investigation Committee. As the work proceeds, it should be possible to move more quickly. The changes proposed are modest and respect the principles and purposes underlying the legislation establishing the Commission.

10. As the work of the Investigation Committee proceeds, experience may suggest further steps that are needed.

11. The case brought by the Christian Brothers may have important consequences for the Investigation Committee's work but specific recommendations arising out of that litigation cannot be made at this stage.