

# **TOWARDS REDRESS AND RECOVERY**

**REPORT TO THE MINISTER FOR EDUCATION AND SCIENCE**

by

**THE COMPENSATION ADVISORY COMMITTEE**

**appointed under section 14 of the Residential Institutions Redress Bill, 2001**

**January 2002**

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## Membership of the Committee

<b>Mr. Sean Ryan, S.C.</b>	<b>Chairman.</b>
<b>Dr. Helen Cummiskey</b>	Consultant Psychiatrist – Adult, Child and Adolescent, Dublin.
<b>Dr. Marion Gibson</b>	Consultant Director of Staff Care Services, South and East Belfast Health and Social Services Trust, Consultant in Psychological Trauma Management. Dr. Gibson was a member of the Northern Ireland Criminal Injuries Review Group (Chairman: Sir Kenneth Bloomfield) 1998 – 1999.
<b>Professor Desmond Greer</b>	Professor of Common Law, Queen’s University, Belfast. Professor Greer was also a member of the Northern Ireland Criminal Injuries Review Group, and
<b>Professor Martin McHugh</b>	Recently retired Professor of Psychology, National University of Ireland, Galway.

The Minister for Education & Science,  
Marlborough Street,  
Dublin 1.

15<sup>th</sup> January, 2002

Dear Minister,

On the 30<sup>th</sup> August 2001 you appointed me to chair the Committee established for the purposes of preparing a report in accordance with section 14 of the Residential Institutions Redress Bill. I now have pleasure in presenting you with that report, which is unanimous and which has been completed at the earliest date consistent with proper examination of the relevant considerations.

The members of the Committee came from diverse backgrounds but have worked together amicably and assiduously. Medical and psychiatric expertise was provided by Dr. Helen Cummiskey. Dr. Marion Gibson has international experience in the field of social work. Professor Desmond Greer in addition to his legal expertise has extensive knowledge of compensation schemes in many parts of the world. Professor Martin McHugh brought detailed knowledge of psychological issues to the Committee. We were massively assisted in our work by Ms. Suzanne Brennan who was seconded from the Department of Education & Science to act as clerk to the Committee. A special word of thanks is due to Ms. Brennan for the efficient unflappability with which she coped with our many requests for assistance.

During the course of our deliberations, the Committee received written and oral submissions from many people and I would like to take this opportunity to record the Committee's deep appreciation of the advice and assistance which we were given. It is inevitable that our recommendations will not satisfy everyone but the Committee hopes that all will consider that their views have been given due consideration.

Our recommendations seek to achieve fair and reasonable redress in a way which draws an appropriate balance between conflicting objectives - the need for consistency while being sensitive to individual circumstances, the need for a degree of predictability while maintaining flexibility. We have done our best to do the very difficult job which you gave us and we hope that our report will be of assistance to you in drawing up the regulations for the Redress Board. It is the Committee's fervent hope that its recommendations will be considered to have addressed a serious, even intractable problem with the sincerity and sympathy to which all those involved in this unfortunate tragedy are entitled.

Yours sincerely,

**SEAN RYAN**

## Guide to the Report and Summary of Recommendations

1. Since An Taoiseach's apology on 11 May 1999 to those who as children had suffered abuse while in residential institutions under State supervision, a number of measures have been introduced. In Chapter 1 (Background to and remit of the Committee), we set out the background to the Government's decision to establish a separate Residential Institutions Redress Board which will make redress payments to each person who was abused. Before this is done, however, the Minister for Education and Science wishes to make regulations, to be approved by the Dail, setting out the way in which the redress payments are to be determined by the Board. The purpose of this Report is to consider how appropriate financial payments in respect of abuse and its effects may be determined, and to advise the Minister for the purpose of making such Regulations.
2. It is *not* our purpose to make any findings with regard either to the nature or to the extent of the abuse which occurred. That is the function of the Commission to Inquire into Child Abuse, chaired by Miss Justice Laffoy. The inquiry which that Commission is undertaking into the prevalence of abuse, why it occurred and who was responsible for it, provides an invaluable opportunity to establish the facts, not only with a view to discovering what really happened, but also in order to make a unique contribution to the protection and welfare of children in the future. We share with the Commission the hope that the setting up of a separate Redress Board will not have an adverse effect on this essential inquiry. For our purposes we approach the issue of redress awards on the assumption that applicants will have satisfied the Redress Board of the necessary elements of abuse and injury so as to qualify for redress. We emphasise that in presenting our recommendations we are making no appraisal of the legitimacy of any particular allegations.
3. For the purposes of our own deliberations, however, it was essential to have some first-hand information as to the views of individual survivors and of survivors' organisations, and to hear submissions from their legal representatives. In Chapter

- 2 (The proceedings of the Committee), we set out the steps which we took to obtain written and oral submissions from those directly concerned, and from others who could give us relevant advice and information.
4. The general context of the Committee's work is set out in Chapter 3, where we summarise the findings of the Kennedy Report on the Reformatory and Industrial Schools Systems, and trace more recent developments with particular reference to the preliminary work of the Commission to Inquire into Child Abuse. It seems unlikely that the Laffoy Commission will be in a position to publish before 2005 a final report setting out the nature and extent of the abuse which occurred from 1930 onwards and to present a comprehensive account of its long-term effects on survivors. There is, however, already in existence a substantial body of scientific literature on the physical, psychological and psychiatric sequelae of child abuse, and in Chapter 4 (The nature and effect of institutional child abuse) we provide an extensive summary of the results of the research which has been undertaken both in this country and elsewhere. We complement these scientific findings with an account of some of the actual experiences reported to us by those who made personal submissions to the Committee.
  5. In Chapter 5 (The concept of redress envisaged in the Bill) we explore the legal background to the concept of redress with particular reference to the provisions of the Residential Institutions Redress Bill, other special compensation schemes in this country and elsewhere and the principles upon which damages for personal injuries are assessed by the courts. With these in mind, we then set out in Chapter 6 (Guidelines for assessing the amount of redress: The options) five possible ways in which legislative regulations might give guidance to the Redress Board in terms of the amount of redress which should be paid in the circumstances of each individual case.
  6. The Committee's advice to the Minister is set out in Chapter 7 (The Committee's conclusions and recommendations). At the outset, we explain that no amount of

money can truly compensate those who have been abused. And we agree with the Government that it is vital that a comprehensive package of services and other forms of assistance is put in place for the benefit of survivors. But we acknowledge that the award of appropriate financial redress can provide some tangible recognition of the seriousness of the hurt and injury caused to the survivors of child abuse, and that it may enable some survivors to pass the remainder of their years with a degree of comfort which would not otherwise be readily attainable.

7. The central and most difficult part of our task was to devise a scheme by which redress payments could be made to persons who had suffered different categories of abuse and injury. We consider it essential that the scheme should, in the words of the Bill itself, provide redress which is "fair and reasonable having regard to the unique circumstances of each applicant". It is also essential that the scheme is one which may be operated with a suitable degree of predictability, sensitivity and flexibility, and that it ultimately provides payments which are, and are seen to be, comparable with amounts awarded in respect of other types of serious personal injury.
8. From the submissions made to the Committee and our analysis of the scientific literature, we concluded that there are four basic areas to be considered. First, there is the severity of the abuse itself. Secondly, the extent of the physical and mental injury suffered by the applicant. Thirdly, the psycho-social sequelae of the injury, and finally, the loss of opportunity resulting from the abuse and its effects. We concluded that the best way in which all four areas may best be taken into consideration is to apply a "weighting scale" in which the Redress Board, on the basis of the evidence, will determine the weighting to be given in each particular case, according to the following scale:

**Weighting scale for evaluation of severity of abuse and consequential injury**

Constitutive elements of redress	Severity of abuse	Severity of injury resulting from abuse		
		Medically verified physical/psychiatric illness	Psycho-social sequelae	Loss of opportunity
Weighting	1-25	1-30	1-30	1-15

9. We envisage that the Redress Board will first consider the severity of the abuse suffered by the individual applicant and make an appropriate award on a scale of 1-25, with 25 representing the most severe form of abuse. The Board will then, by reference to the medical evidence, assess on a scale of 1-30 the severity of the physical and/or psychiatric illness suffered by the applicant as a result of the abuse. It will next perform the same task with regard to what we have called the "psycho-social sequelae" of the abuse, and finally, on a scale of 1-15, assess the loss of opportunity suffered by the applicant. To assist the Redress Board in this task, we set out in Chapter 7 two lists of factors (which are not intended to be exhaustive) to be taken into account in the making of these assessments. Having made a determination in respect of each element of redress, the Redress Board will then aggregate the individual assessments to arrive at an overall total which will reflect all relevant aspects of the injury suffered by the applicant.
  
10. The question then to be determined is the amount of the redress to be awarded having regard to the Redress Board's overall determination of the severity of the case. We believe that the appropriate level is to be found in what the courts might award by way of general damages on the principles enunciated by the Supreme Court in the 1984 case of *Sinnott v Quinnsworth Ltd.* and by the courts in

subsequent cases (as we explain in Chapter 5). For this purpose, we consider that the level of redress may be divided into five broad "bands", depending on the Redress Board's overall assessment of the severity of the abuse and injury suffered by the applicant, as follows:

***Redress Bands***

Redress Band	Total weighting for severity of abuse and injury/effects of abuse	Award payable by way of redress
V	70 or more	€200,000 - €300,000
IV	55-69	€150,000 - €200,000
III	40-54	€100,000 – €150,000
II	25-39	€50,000 – €100,000
I	Less than 25	Up to €50,000

11. We propose that the Redress Board should be entitled to go outside the parameters of this scheme in exceptional cases; but in all such cases, it may be that the Board should be required to give specific reasons for doing so, in order to ensure that all relevant considerations may be taken into account should the award become subject to the kind of review envisaged in the Bill.
  
12. The evidence which we received suggested that in a number of cases children were abused in circumstances which caused added hurt, fear and humiliation as a result of the general manner or context in which the abuse occurred. In the courts, such matters are recognised by the award of "aggravated damages" by way of additional compensation due to a person for the added injury which he or she has suffered. We consider that it should also be open to the Redress Board, without going into any question of fault on the part of any person or institution, to make

such an additional award where it is satisfied that it is appropriate to do so, having regard to the circumstances of the abuse suffered by the applicant. We further recommend that no additional award on the principle of aggravated damages should exceed 20 per cent of the redress payable under the scheme which we have recommended.

13. We recommend that no additional redress should be payable on the principle of punitive or exemplary damages.
14. Finally, we recommend that the Redress Board should be empowered to make an additional award to cover the reasonable costs of medical treatment which the applicant has received in the past, or should, on the basis of the medical evidence available to the Board, receive in the future, for the effects of the injury which he or she has suffered.
15. To summarise. In each particular case, the Redress Board should, on the basis of the evidence available to it, determine the weighting which appropriately reflects the severity of the abuse and of its effects in relation to the individual applicant. This assessment will indicate the relevant redress band, and the Board will normally locate the redress within that band according to its assessment of the case. In exceptional cases, the Board may go outside this scheme where this is necessary in order to make an award which is "fair and reasonable" in the circumstances of that case. To this award, the Board may add:

(1) An amount not exceeding 20 per cent of the redress award where it considers it appropriate to do so having regard to the principle of aggravated damages;

(2) An amount to cover the reasonable costs of medical treatment which the applicant has received or will receive.

16. In the course of obtaining evidence and in our own deliberations a number of related points were raised which may strictly lie outside our terms of reference, but which seemed to us worthy of note. Accordingly, we make a brief reference to these points in Chapter 8. The most important of these matters in our view is the need for some mechanism for making an "interim" payment as quickly as possible to two particular categories of applicant, namely, those over the age of 60 and those who are seriously ill. We recommend that as soon as the Redress Board reaches a preliminary decision that a person qualifies for redress, it should make an immediate payment of €10,000 to such applicants.
  
17. In the Appendices to our report will be found (i) details of the survivors' organisations which made submissions to us; (ii) some of the Rules and Regulations which applied to industrial and reformatory schools; (iii) details of four alternative approaches to the assessment of redress or compensation used in other jurisdictions, and (iv) summaries of some recent Irish court awards of damages for personal injuries.

## Chapter 1

### BACKGROUND TO AND REMIT OF THE COMMITTEE

#### The background to the setting up of the Committee

- 1.1 Following a number of disclosures and considerable public debate and concern, An Taoiseach, Mr Bertie Ahern T.D., made a special statement on the 11<sup>th</sup> May 1999 in which he made, on behalf of the State and of all citizens of the State, "a sincere and long overdue apology to the victims of childhood abuse for our collective failure to intervene, to detect their pain, to come to their rescue", and went on to outline a number of measures, including the setting up of a commission on childhood abuse, chaired by Miss Justice Laffoy. The Commission to Inquire into Child Abuse Act, 2000, which became law in April 2000, in particular required this Commission, which we hereafter refer to as "the Laffoy Commission", to conduct an inquiry into the abuse of children in residential institutions and, where satisfied that abuse had occurred, to find out why it had occurred and who was responsible for it. The Commission is charged with publishing a report setting out its findings and its 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.
- 1.2 The Laffoy Commission published its first interim report in May 2001 in which it recorded that "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 has been completed." In other words, an accurate and complete picture of the nature and

scope of child abuse in residential institutions will not be available until the Laffoy Commission publishes its final report, probably in 2005.

- 1.3 Prior to the setting up of the Laffoy Commission, a number of claims for damages were lodged in the High Court against the Department of Education and Science and/or various religious congregations. One of the measures announced by An Taoiseach, which led to the enactment of the Statute of Limitations (Amendment) Act, 2000, was that the limitation period for cases arising from institutional child abuse would be extended to facilitate such claims. To the best of our knowledge, none of these claims has been determined by the Court, although some have been settled out of court, on terms which have not been disclosed but apparently without any admission of liability on the part of any of the defendants. In July 2000 a firm of solicitors, on behalf of a number of solicitors who represent many - but not all - survivors of institutional child abuse, contended that "the significant role to be played in the work of the [Laffoy] Commission by the Department of Education, its personnel and resources" constituted an unacceptable conflict of interest, particularly in the light of a denial of liability by that Department in civil proceedings brought by survivors. It was also contended that the Laffoy Commission could not lead to finality on the issue of compensation for an individual survivor. The essence of the submission was a request that the Commission make an interim report "calling for the provision of an appropriate scheme of compensation to survivors in respect of their losses". Until such time as the issue of such a scheme of compensation was satisfactorily addressed, it was stated that it would be difficult for individual solicitors to advise their clients as to whether participation in the work of the Laffoy Commission was in their personal or legal interest.
- 1.4 The Laffoy Commission decided that the establishment of a special compensation scheme was a policy issue for the Government. While it was a matter on which the Commission could properly make a recommendation, it would (understandably) not do so without hearing any evidence or submissions and, in particular, evidence of the extent of the blame that might legitimately be ascribed to State agencies in

relation to matters being investigated by the Commission. But the Commission recognised that, having regard to the context in which it had been established, "the State might, as a matter of policy, be prepared to commit in principle to the establishment of an appropriate body ... to deal with compensation issues". Accordingly the Commission wrote to the Minister for Education and Science in July 2000 stating that the matter represented potentially a significant barrier to the effective conduct of the business of the Commission. It expressed no view on the merits of the solicitors' submission, but indicated that should the Government decide to set up a special compensation scheme, "the Commission would be in a position to deal with the issue of the modalities of a compensation scheme at an earlier stage in the conduct of its business".<sup>1</sup>

- 1.5 On 3 October 2000 the Minister announced that the Government had agreed in principle (i) to establish a special compensation scheme to compensate those who as children were victims of abuse while in the care of institutions in which they were resident and in respect of which State bodies had regulatory or supervisory functions; (ii) that "abuse" for the purpose of such compensation would be defined as in the Commission to Inquire into Child Abuse Act, and (iii) that 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. Issues concerning the establishment, funding and operation of the scheme would be the subject of further consideration and decision in the near future. But, as the Laffoy Commission later pointed out, the Government decision did not envisage that Commission having a role in advising on the modalities of the compensation scheme, a "lost opportunity" which the Commission regretted.<sup>2</sup>

- 1.6 In February 2001 the Minister announced that the Government had agreed to his proposals for a compensation scheme. In particular, the scheme was to be

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<sup>1</sup> Commission to Inquire into Child Abuse, *Interim Report* (May 2001).

<sup>2</sup> Commission to Inquire into Child Abuse, *Second Interim Report* (November 2001).

established under statute, and would remain open to receive claims for three years from the date of its establishment; the compensation awarding body would be chaired by a retired or serving senior judge, and the validation of claims by the compensation body would be conducted in a non-adversarial way. Compensation would be paid for current and subsisting damage caused by abuse and for past injury, from which the claimant has now recovered, where objectively it can be established that such injury exists or existed; compensation would *not* be paid for loss of earnings, but the legislation would provide detailed criteria for awards, including the amount of awards for different kinds of abuse and its effects, with criteria to be determined by an expert group to be appointed during the drafting stage of the Bill, and the High Court would have no role in reviewing the amount of awards in individual cases. The compensation scheme would be open-ended, with the Government committed to providing from public funds such moneys as are necessary, with a contribution from religious congregations as and if agreed.

1.7 These details were set out in the Residential Institutions Redress Bill presented by the Minister for Education and Science on 11 June 2001. Sections 14 and 15 of the Bill provided for the appointment of this Committee in the following terms:

"14. Where the Minister has appointed persons with appropriate medical and legal expertise to be members of a committee, whether before or after the passing of this Act, for the purposes of preparing a report -

(a) on the amount of awards for categories of abuse, including severity of abuse and categories of injuries, and

(b) on advice and recommendations generally in respect of such awards, including advice on the range of the amount to be paid in an award having regard to the category of the abuse and injury,

the Minister shall cause the report to be published as soon as practicable.

15. (1) The Minister shall make regulations specifying the amount to be paid for abuse and injuries and shall, when making such regulations, have regard to the report referred to in section 14.

(2) Without prejudice to the generality of the foregoing, the Minister shall specify in the regulations -

(a) categories of abuse, including categories of severity of abuse,

(b) categories of injuries,

(c) amounts to be paid in an award for such abuse and injuries, and where appropriate, the range of such amounts having regard to the severity of the abuse and injuries."

1.8 As the Laffoy Commission has pointed out, there is no direct interface between the redress scheme set out in the Bill and the work of the Commission. In particular, it is possible that the redress scheme "will not provide for payment of compensation to all persons who come within the remit of the Commission's inquiry". It is the Commission's view that "it would be regrettable if those excluded [from redress] were discouraged from participating in the work of the Commission", and this Committee strongly agrees with this sentiment. The Laffoy Commission has also expressed concern that the setting up of a special redress scheme might have another adverse effect on its work:

"It is hoped that the value of an inquiry into the prevalence of abuse, why it occurred and who was responsible for it will be recognised by all concerned and will encourage those who can assist the inquiry to come forward. It is the Commission's 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 to the Commission".

This Committee shares this view, and reiterates the Laffoy Commission's view that "The Commission's hearings provide survivors of institutional child abuse with a unique opportunity to tell of their experiences in the past and, in doing so, to contribute to the betterment of child care and the protection and welfare of children in the future".

### **The Committee's terms of reference**

1.9 The Committee was appointed on 30th August 2001 by Dr. Woods, the Minister for Education and Science, to carry out the following functions:

"(a) to consider how financial awards, other than awards in respect of loss of earnings, can be determined in respect of abuse (as defined in section 1(1) of the Residential Institutions Redress Bill, 2001) and its effects,

(b) to provide an interim progress report to me if required by me to do so, and

(c) to present to me a report referred to in section 14 of the Residential Institutions Redress Bill, 2001.

In carrying out its functions the Committee -

(a) shall have regard to the procedures to be adopted in making awards, as provided for in the Residential Institutions Redress Bill, 2001,

(b) may consult with such persons as it considers appropriate, and

(c) shall carry out its functions in an efficient manner and at the earliest date consistent with proper examination of the matters referred to it."

Although not required to do so by the Minister, the Committee provided an interim report on its work on the 26<sup>th</sup> November 2001.

- 1.10 Having been appointed "before ... the passing of this Act", the Committee is being required to make its recommendations before the terms of the legislation setting up the redress scheme have been finally settled, and it is clear from the second stage of the Bill that a number of amendments will have to be considered at the committee stage. It is, therefore, necessary for the Committee to emphasise that this report is being written on the basis of the Bill as it stands on 15 December 2001, and that any subsequent amendments to these provisions may have a significant effect on the recommendations made in this report.

## Chapter 2

### THE PROCEEDINGS OF THE COMMITTEE

- 2.1 In August 2001 the Committee issued an advertisement in the national press in Ireland announcing the setting up of the Committee and its terms of reference, and stating that the Committee is "now seeking written submissions from any interested persons or groups", but explaining that "submissions should be relevant to issues of compensation only". The press notice clearly stated that "All submissions will be treated in strictest confidence" and that any person who wished to do so could make a submission anonymously. The notice finally stated that "The Committee may invite persons or groups who have made submissions to meet them".
- 2.2 As a result of this notice, the Committee received 43 written submissions from individuals (some of whom are resident outside the State), in addition to submissions from the principal survivors' organisations, from the Bar Council, and from eight firms of solicitors representing the interested parties. Having considered all these submissions, the Committee decided that it was essential to offer to meet a number of persons or groups in Ireland and England, in particular representatives of the principal survivors' groups whose membership comprises many hundreds of survivors. The Committee also decided to invite a number of solicitors to make oral submissions to the Committee. These meetings were held in Dublin, Cork and London during October, November and early December. In November, the Committee also had an oral and written submission from Dr. Eoin O'Sullivan, Lecturer in Social Policy in Trinity College Dublin, and a joint author (with Mary Raftery) of *Suffer the Little Children: The Inside Story of Ireland's Industrial Schools*, published in 1999.
- 2.3 The Committee is extremely grateful to those survivors who told us of experiences which were at times distressing for them to recall, and to the solicitors and others who provided information, illustrative (and anonymous) medical and psychiatric

reports, and witness statements made to the Gardaí, all of which provided invaluable assistance to the Committee in its deliberations and in the making of the recommendations contained in this Report. The evidence presented to the Committee has been accepted in good faith and with due respect to the persons who gave it. But we wish to point out that the Committee has had to deal with a variety of perspectives, and has been obliged at all times to remember that it has not heard all the relevant evidence. Our brief, we believe, was to listen and to attempt to understand, but not to judge. The full nature and extent of institutional child abuse will only become known when criminal proceedings and claims for damages have been determined by the courts and the Laffoy Commission has presented the findings of its Investigative Committee. Until such proceedings have been completed, it is essential in the interests of natural justice to remember that those who stand accused of child abuse must be given all appropriate opportunity to defend their good names.

- 2.4 The Committee met in Belfast on one occasion, to enable the members to consult the Compensation Agency for Northern Ireland in relation to its experience in handling claims for child abuse made under the Criminal Injuries Compensation (N.I.) Order 1988. Individual members of the Committee also had discussions with psychiatrists, the Criminal Injuries Compensation Authority for Great Britain, and other parties who could assist its work.
- 2.5 The Committee also obtained information relating to the method of assessing compensation in similar cases in other jurisdictions, including Northern Ireland, England, Scotland, Canada and the United States, as well as making its own inquiries concerning matters relating to civil claims for damages for personal injuries within the State. Extensive research and reading of the available literature was also undertaken in an attempt to gain a better understanding of the short-term and long-term effects of child abuse. In this regard, the Committee received a most helpful written submission from the National Counselling Service.

- 2.6 The Committee met on 18 occasions to discuss the information which it had received and to consider the recommendations which it should make. The first two meetings were held in the premises of the Department of Education and Science; but since the Committee was independent of that Department, and was very anxious to be seen by all interested parties to be completely independent in its deliberations, all subsequent meetings were held in the King's Inns or in other suitable venues outside the Department.
- 2.7 The Committee wishes to reiterate that it is *not* part of its remit to determine the validity of claims of institutional child abuse; that is the sole responsibility of the Laffoy Commission and the courts. Nor is it the Committee's function to determine the redress payable in individual cases; that will be responsibility of the Residential Institutions Redress Board, to be established under section 3 of the Bill, or the courts. It *is* the Committee's function to make recommendations as to the general amounts of such awards, and the basis on which they are assessed, in cases which proceed under the redress scheme envisaged in the Bill. In making these recommendations, the Committee has, to the best of its ability, taken into account all the information and representations which it has received on these matters. It is beyond doubt that its recommendations will not be considered satisfactory by all those who are likely to be affected by them; but it is the Committee's fervent hope that it will be considered to have addressed a serious and, indeed, intractable, problem with all due sincerity and sympathy for all of those involved in this unfortunate tragedy.

## Chapter 3

### CONTEXT

#### The Kennedy Report

3.1 It was the experience of children in reformatory and industrial schools which first gave rise to public concern.<sup>1</sup> In 1970 the Kennedy Report<sup>2</sup> explained that all these schools were certified by the State as suitable for the reception of children who had been found guilty of criminal offences or were in need of care for a wide variety of other reasons principally laid down in the Children Act 1908. By section 44 of that Act, both types of school were intended to provide industrial training for children in institutions in which the children were "lodged, clothed, and fed, as well as taught". The legislation provided for State inspection of these schools and for grants from public funds for the maintenance of children committed to their care. In 1922, there were 4 reformatories and 52 industrial schools,<sup>3</sup> with a resident population in the region of 7,500 children; by 1969 there were only three reformatories (containing 104 children) and 29 industrial schools (with a total of 1,952 children). The children in the reformatories ranged from 13-18 years of age in the case of boys and from 11-17 years of age in the case of girls; the industrial schools catered for boys and girls from the age of a few months to 19 years. From 1924 (Ministers and Secretaries Act, 1924) both reformatories and industrial schools were the responsibility of the Minister for Education, whose statutory functions included (i) issuing a certificate of approval of an industrial school; (ii) approving the rules and regulations for each certified industrial school; (iii) certifying the number of children

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<sup>1</sup> For a general survey, see Raftery, M. and O'Sullivan, E., *Suffer the little children: The inside story of Ireland's industrial schools* (Dublin, 1999). See also O'Sullivan, E., "Juvenile justice and the regulation of the poor: 'restored to virtue, to society and to God'" in I. Bacik and M. O'Connell (eds.), *Crime and poverty in Ireland* (Dublin, 1997).

<sup>2</sup> *Reformatory and Industrial Schools Systems Report* (Prl. 1342, 1970), prepared by a Committee set up in 1967 and chaired by District Justice Eileen Kennedy. Although the terms of reference of this Committee were originally restricted to reformatory and industrial schools, the Minister subsequently agreed that the Committee's inquiries should include all children in care (see *Report*, p. vii).

<sup>3</sup> See the list in Raftery and O'Sullivan, *Suffer the Little Children*, pp. 397-400.

for whom accommodation was provided in the school, and (iv) ensuring that each school was inspected at least once a year.

3.2 Many of the reformatories and industrial schools were managed and staffed by members of religious congregations, and the Kennedy Report underlined the point that "if it were not for the dedicated work of many of our religious bodies, the position would be a great deal worse than it is now". But "the fact remains, however, that the present system is far from satisfactory". Part of the problem was that "the system of inspection ... has, so far as we can judge, been totally ineffective.... [T]he statutory obligation to inspect these schools at least once a year has not always been fulfilled, but even if it had this would not have been sufficient". Nor was the system of medical inspection satisfactory: "For many years the Department of Education employed a Medical Officer whose function it was to look after industrial schools and reformatories. Some years back the post became vacant and has not since been filled". The capitation grants paid by the Department were also inadequate: "the managers in charge of the schools were faced with the task of running the institutions on a totally inadequate financial provision and were forced to supplement their incomes by whatever means possible to enable their work to continue". The Report then comments that "What was worse was that the services available to the children were, of necessity, of a rather limited nature. When the cost of necessities had been deducted there was little if any left over for provision of those extra compensatory facilities which are considered necessary for the rehabilitation of deprived children." In addition, "no grants were made available for maintenance, renovation or modernisation of premises".<sup>4</sup>

3.3 There were a number of consequences of this state of affairs. First of all:

"[A] very high proportion of the children in care in the schools are generally backward. This backwardness is noted in the area of attainments, intellectual ability and in certain specific areas such as perceptual and

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<sup>4</sup> *Kennedy Report*, pp. 13, 28 and 29.

spatial ability. Indeed the indications are that there may be a certain number of the children who are mentally handicapped. In general it would appear that the children have poor linguistic skills and are poor readers.... Almost half of the children tested in the schools fell markedly below the average in each test given."<sup>5</sup>

Research conducted for the Kennedy Committee concluded that many of the children suffered from deprivation, and led the Report to observe that "Deprivation may result in many handicaps, which affect the child's full development. Research has shown that a most important factor in childhood and later development is the quality and quantity of personal relationships available to the child ... The child who has not experienced good personal relationships will, in time, be lacking in emotional, social and intellectual stability and development". The Kennedy Committee found that the schools were "inadequately staffed", and that "most of those working in industrial schools and reformatories have no proper qualifications for their work"; on the contrary, "there appears to be a tendency to staff the schools, in part at least, with those who are no longer required in other work rather than with those specially chosen for child care work". As a result, "no adequate system of vocational training exists in the reformatories to provide the children leaving with saleable skills to enable them to take their place in society". The Kennedy Committee also underlined "the absence of personal records containing even minimal information in respect of the children .... On occasions it cannot even be ascertained where or when a child was born, whether he was baptised, or who his parents were".<sup>6</sup>

- 3.4 Conditions in two institutions were so unsatisfactory that the Kennedy Report recommended that they should be closed down. The boys' reformatory at St. Conleth's in Daingean, which was run by the Oblates of Mary Immaculate, was located in a building which was "basically old and completely unsuitable .... The kitchen and refectory ... are depressing and decayed.... the toilets were dirty and

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<sup>5</sup> Ibid., p. 11.

<sup>6</sup> Ibid., pp. 12, 14, 15, 22 and 38.

insanitary. The showers were corroded through lack of use and the hot water system was so inadequate that the boys seldom if ever washed in hot water... The boys were ill-dressed and dirty and there was a general air of neglect about the place." Conditions in Marlborough House were even worse, and the Report recommended that it should be closed "forthwith".<sup>7</sup>

- 3.5 The overall impact of their findings led the Kennedy Report to recommend the abolition of "the institutional system of residential care" and its replacement by "group homes which would approximate as closely as possible the normal family unit"<sup>8</sup>. This recommendation has been implemented by the gradual changes in child care which have taken place since 1970.

### **More recent developments**

- 3.6 In the language of the Bill, the Kennedy Report was primarily concerned with matters which might constitute "abuse" in the form of neglect, failure to care or emotional abuse. There was little or nothing in the Report about conduct which might amount to physical or sexual abuse of children, in reformatories and industrial schools or in any other residential institutions. But during the 1990s there was increasing evidence that these forms of abuse had also occurred. In particular, allegations of sexual and physical abuse were made against a number of members of staff at Madonna House, a residential centre established in 1955 for children of various ages and run by the Religious Sisters of Charity. Criminal investigations undertaken by the Garda Síochána led to the conviction of one member of the staff for a number of indecency offences committed during the period 1985-1990; in the case of similar allegations made against another member of staff, the Director of Public Prosecutions directed that there should be no prosecution. A voluntary inquiry "to review the operation of Madonna House in the light of allegations of misconduct made against certain members of staff", established in 1993 by the

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<sup>7</sup> Ibid., p. 42.

<sup>8</sup> Ibid., p. 16.

Sisters of Charity with the assistance of the Department of Health, led to the publication of a report in May, 1996.<sup>9</sup> However, the Office of the Attorney General advised that this report could not be published in full because of the need to protect the identities of certain parties and to avoid interference with ongoing criminal investigations and legal proceedings. Accordingly, the published version of the report was considerably abridged and provided no further evidence on the allegations which had been made. By this time, however, Madonna House had been closed.

3.7 The issue was also brought to public attention by further revelations of abuse in orphanages, industrial schools and other state-regulated institutions in newspaper articles, media programmes such as RTE's documentary series "States of Fear", and a number of other publications.<sup>10</sup> It appears to have been the cumulative effect of these revelations which led An Taoiseach, in his statement of 11 May 1999, to acknowledge that "too many of our children [in institutional care] were denied ... love, care and security. Abuse ruined their childhoods and has been an ever-present part of their adult lives, reminding them of a time when they were helpless. I want to say to them that we believe that they were grossly wronged, and that we must do all we can now to overcome the lasting effects of their ordeals".

3.8 As we have already indicated, it is the task of the Commission to Inquire into Child Abuse to determine the full nature and extent of child abuse of all kinds which occurred from the 1930s onwards. In its second interim report, the Laffoy Commission reported that it had, before the closing date of 31st July 2001, received 3,149 requests to give evidence. The Commission has now provided details of the applications which it has received, and which give the first reliable profile of the likely persons who will apply for redress.

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<sup>9</sup> *Report on the Inquiry into the Operation of Madonna House* (Dept. of Health, May, 1996).

<sup>10</sup> See especially Raftery and O'Sullivan, *Suffer the little children* and Brown, D.C., Moloney, A. and Taylor, M., "Examining issues of child abuse in Irish foster children", *Ir. J. Psychology* (2000), 21 (1-2), 32-49.

*Analysis of persons giving evidence to the Laffoy Commission*

	Confidential Committee (1,192)	Investigation Committee (1,957)	Total (3,149)
Men	650	1,406	2,056 (65%)
Women	542	551	1,093 (35%)
60 years of age or older	301	440	741 (24%)
Resident outside the State	378	670	1,048 (33%)

- 3.9 A significant majority of all "complainants" have indicated that they wish to give evidence about their childhood experiences in residential care, primarily in industrial schools or reformatory schools. But the Commission estimates that it will not complete the first phase of its work before June 2004 (assuming that its caseload remains static and is not reduced as a result, for example, of withdrawal from the process of persons who obtain compensation from the Redress Board). It will probably not be until some time in the year 2005 "at the earliest" that it will be in a position to publish its final report, which will include its findings, where it is appropriate to do so on the evidence, that abuse occurred in a particular institution during a particular period, to name the institution and the person who committed the abuse and to explain why the abuse occurred. The Commission has also reported that it intends to commission research into the long-term effects of institutional child abuse - the results of which will presumably only become available in its final report.
- 3.10 What all this means is that there will not be a comprehensive and authoritative picture either of the long-term effects of institutional child abuse, nor of the nature and extent of that abuse, before 2005.

## Chapter 4

### THE NATURE AND EFFECT OF INSTITUTIONAL CHILD ABUSE

#### The psychological and psychiatric consequences of abuse and neglect

##### *Introduction*

4.1 The abuse of children received relatively little attention until the publication of Kempe's classic paper on the "battered child" in 1962.<sup>1</sup> Then Finkelhor reported a high rate of sexual abuse in childhood within the general population in North America in 1979,<sup>2</sup> and it was found that some of the highest rates of sexual and physical abuse in childhood were reported by psychiatrically-hospitalised patients.<sup>3</sup> Much of this early literature concerning the abuse of children addressed the issue from an intra-familial perspective. But the concept of institutional abuse of children in out-of-home care was subsequently defined as "any system, program, policy, procedure or individual interaction with a child in placement that abuses, neglects or is detrimental to the child's well-being".<sup>4</sup> Recent research by O'Reilly and Carr<sup>5</sup> and by Browne, Moloney and Taylor<sup>6</sup> shows that there has been little systematic exploration of the extent of institutional child abuse in Ireland, and that we lack precise knowledge of its prevalence and incidence. Accordingly, the proposal by the Commission to Inquire into Child Abuse to undertake a major study is to be welcomed.

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<sup>1</sup> Kempe, C.H. et al., "The Battered Child Syndrome", *J. Am Med. Ass'n.* (1962),181,17-24.

<sup>2</sup> Finkelhor, D., *Sexually Victimized Children* (New York; The Free Press; 1979).

<sup>3</sup> Bryer, J. et al., "Childhood sexual and physical abuse as factors in adult psychiatric illness", *Am. J. Psychiatry* (1987), 144, 1426-1430; Carmen, E. et al., "Victims of violence and psychiatric illness", *Am. J. Psychiatry* (1984), 141, 378-383.

<sup>4</sup> Gil, E., "Institutional abuse of children in out-of-home care", *Child and Youth Care Rev.* (1982), 4 (1-2), 7-13.

<sup>5</sup> O'Reilly, G. and Carr, A., "Child sexual abuse in Ireland: A synthesis of two surveys", *Ir. J. Psychology* (1999), 20, 1-14.

<sup>6</sup> Browne, D.C., Moloney, A. and Taylor, M., "Examining issues of child abuse in Irish foster children", *Ir. J. Psychology* (2000), 21 (1-2), 32-49.

- 4.2 Traumatic experiences in childhood are known to be associated with immediate and long-term psychological sequelae. A severe trauma, even if only caused by a single event, can result in long-lasting effects.<sup>7</sup> Each person will respond differently to the same event, as a result of individual differences in resilience,<sup>8</sup> personality, coping strategies, support structures and, most importantly, pre-traumatic states. Children who are placed in care are an already vulnerable group. The reason for, or indeed the method of, placement may in itself have been traumatic. Many children were, for example, placed in care due to the death of a parent, and the removal from or loss of the child's primary care-taking person and attachment figure would have had significant consequences for the child. Studies by McKeown<sup>9</sup> and O'Higgins<sup>10</sup> also point to poverty and deprivation as significant factors which contributed to children being placed in care. Some children were born in care or were placed there as infants and remained in care throughout their childhood and adolescent years. In many cases there was no way out for the child, little or no contact with family or siblings and little contact with the world outside the institution. This was particularly so in the period before the Kennedy Report was published in 1970.
- 4.3 When abuse takes place in such circumstances, the child's sense of powerlessness and helplessness is magnified. No child expects to be placed in the care of adults and abused, whatever the reasons for their placement. The *Report on the Inquiry into the Operation of Madonna House*<sup>11</sup> referred to the closed nature of institutions and how institutional abuse was treated as a problem of the individual rather than as an institutional one<sup>12</sup>. Societal belief systems

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<sup>7</sup> Terr, L.C., "Childhood trauma: An outline and overview", *Am. J. Psychology* (1991), 148, 10-20.

<sup>8</sup> Mrazek, P.J. and Mrazek, D.A. "Resilience in Child Maltreatment Victims: A conceptual exploration", *Child Abuse and Neglect*, (1987), 11, 357-366.

<sup>9</sup> McKeown, K., *The North Inner City of Dublin: An Overview* (Daughters of Charity; Dublin; 1991).

<sup>10</sup> O'Higgins, K., *Family Problems- Substitute Care: Children in Care and their Families* (Dublin ; ESRI; 1993).

<sup>11</sup> *Report on the Inquiry into the Operation of Madonna House* (Dept. of Health, May, 1996).

<sup>12</sup> Wardhaugh, J. and Wilding, P. "Towards an explanation of the corruption of care" *Critical Social Policy*, (1993), 13, (1), 4-31.

about institutional care<sup>13</sup> and, in the past, the absence of procedures or policies for documenting and investigating institutional abuse<sup>14</sup>, all act as barriers to the reporting of such abuse. In the case of many survivors, older people in particular, it is unlikely that any support or treatment was available to them, even if they did disclose the abuse and were believed. It is recognised in the literature that the immediate aim of treatment should be to modify the child's environment so that the child is safe from further abuse<sup>15</sup>. In addition, it has been reported that good supportive relationships with parenting figures, family and friends can protect against some of the ill-effects of abuse<sup>16</sup>. Most survivors would not have experienced any such support and suffered the ill-effects of abuse for a great number of years without recognising their symptomatology or its origins.

- 4.4 It was indicated to the Committee that it was in many cases difficult or impossible to make effective complaint about sexual abuse because of disbelief by those in charge, threats, physical violence, the fact that the abuse may have been perpetrated by one or more persons, feelings of shame and embarrassment etc. Even when children had left the institutions they were inhibited from seeking help or even acknowledging their experiences.
- 4.5 In our analysis of child abuse, we follow the four-fold classification which is not only adopted in the 2001 Redress Bill, but is also adopted in the Guidelines on Child Abuse published by the Department of Health and Children in 1999.

## Physical Abuse

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<sup>13</sup> Rindfleisch, N. and Rabb, J. "How much of a problem is resident mistreatment in child welfare institutions?", *Child Abuse and Neglect*, (1984), 8, 22-40.

<sup>14</sup> Hughes, W.H., Patterson, W.J. and Walley, H., *Report of the Committee of Inquiry into Children's Homes and Hostels*. (Belfast: HMSO; 1986).

<sup>15</sup> Green, A.H., "Child sexual abuse: Immediate and long-term effects and intervention", *J. Am. Acad. Child and Adolescent Psychiatry*, (1993), 32, 890-902.

<sup>16</sup> Tsai, M. *et al.*, "Childhood molestation: Variables related to differential impact on psychosexual functioning in adult women", *J. Abnormal Psychology* (1979), 88, 407-417.

- 4.6 Physical abuse is defined in “Children First”<sup>17</sup> as “any form of non-accidental injury or injury which results from wilful or neglectful failure to protect a child”. In general, the more severe the physical abuse the more harmful its psychological effects on the victim. Clearly, too, bodily disfigurement resulting from scars, fractures or other injuries serves as a permanent reminder of the original pain, fear and humiliation suffered<sup>18</sup>.
- 4.7 Abuse-related experiences find expression in many different ways. According to Green,<sup>19</sup> physical abuse in childhood has two components: “(a) the immediate physical and psychological assault which is superimposed on (b) the long-term harsh and punitive child-rearing style accompanied by lack of empathy. This situation may be complicated by central nervous system impairment, the consequence of head trauma incurred at the time or which may antedate the abuse.” The nature of the climate of childcare within the institution is thus a very significant factor for consideration. But it is not possible to collate, in any standard way, the direct relationship between the type of event or events and subsequent clinical manifestations.

#### *Acute effects of physical abuse*

- 4.8 The child’s physical and psychological boundaries may be breached by the event, leading to immediate severe post-traumatic symptomatology<sup>20</sup>. The age and developmental stage of the child, the frequency and severity of the abuse, and the relationship between the perpetrator and abuser all tend to influence the effects of the abuse. Children may show symptoms of anxiety, nightmares,

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<sup>17</sup> Department of Health, *Children First: national guidelines for the protection and welfare of children* (Stationery Office, Dublin, 1999).

<sup>18</sup> McHugh, M., “Disabled Workers; Psychosocial Issues” in Davidson, M.J. and Earnshaw, J. (eds.), *Vulnerable Workers: Psychosocial and Legal Issues* (New York; Wiley and Sons; 1991), chap. 4.1.

<sup>19</sup> See Green, A.H., “Children traumatised by physical abuse” in Eth, S. and Pynoos, R. (eds.), *Post-Traumatic Stress Disorder in Children* (American Psychiatric Press; Washington, D.C; 1985), chap. 7.

<sup>20</sup> Wolfe, D.A., *et al.*, “Child maltreatment: Risk of adjustment problems and dating violence in a community sample of adolescents”, *J. Am. Acad. Child and Adolescent Psychiatry* (2001), 40(3), 282-89.

bedwetting, avoidance symptoms, aggression, traumatic play, panic states, hyper-vigilance, painful feeling states, depression with feelings of helplessness, hopelessness, fear of abandonment and/or annihilation, anger and retaliatory rage. In severe situations, the trauma may be so overwhelming as to result in loss of ego boundaries, psychotic disorganisation and narcissistic injury<sup>21</sup>. The child may receive further punishment for expression of such distress.

### *Chronic effects of physical abuse*

- 4.9 The cumulative effects of physical abuse in childhood in an environment of harsh and punitive care-taking and in the absence of treatment or any ameliorating circumstances have serious implications for future adjustment<sup>21</sup>. The defences adopted by the child in such circumstances persist into adulthood and are carried out into the adult world. The child becomes isolated from his or her feelings or learns not to show feelings. When such children reach adulthood they are likely to experience difficulty in forming and maintaining relationships with partners, children and others and are likely to recreate aggressor-victim type relationships. Some will avoid relationships as much as possible and live quite isolated existences. The “hypervigilant, frozen, mistrustful child is often transformed into the suspicious, hypersensitive adult paranoid”<sup>21</sup>. He or she may misinterpret situations and react in a violent manner in what are safe surroundings. This reaction may result in difficulties with authority in the workplace and, in particular, with the law, which may result in criminal charges and even imprisonment.
- 4.10 It may, however, prove very difficult to establish a direct link between the abuse and the criminality to the exclusion of all other factors. Horwitz et al.<sup>21</sup> go so far as to claim that, when other stressful life events were taken into account, “childhood victimization had little direct input on any lifetime mental health outcome”. However, this conclusion tends to overlook the possibility that the

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<sup>21</sup> Horwitz, A.V., *et al.*, "The impact of childhood abuse and neglect on adult mental health: A prospective study", *J. Health and Human Behaviour* (2001), 42(2), 184-201.

maltreatment itself makes it more probable that certain stressors will subsequently be encountered. Downes and Harrison<sup>22</sup> note that many studies show that physical abuse in childhood appears to engender feelings of anxiety and depression, which can lead to substance abuse in later life. Horwitz et al.<sup>23</sup> concur to the extent that they found that 641 men and women who had been abandoned and neglected as children displayed more anxiety and depression (and also compulsive behaviour) than did matched controls. However, the men by contrast with the women did not have a higher rate of problems with alcohol<sup>23</sup>. Penelope Leach<sup>24</sup> is on less disputable ground when she cites evidence that “the more that small children are hit the more likely it is that they will fail to fulfil the intellectual potential predicted for them by earlier cognitive testing.”

- 4.11 Some people who were abused as children maintain a victim identity throughout their lives. Ertem et al.<sup>25</sup> question evidence that individuals who are physically abused are more likely to abuse their own children. Nevertheless, a number of studies<sup>26</sup> indicate that physical abuse in childhood predisposes victims to marital conflict later, perhaps because of an acquired inability to empathize with others, as Ornduff et al.<sup>27</sup> suggest. Some victims of physical abuse develop personality disorders, and it has been suggested by Terr<sup>28</sup> that the more serious character changes are associated with more severe and cumulative traumata.

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<sup>22</sup> Downes, W.R. and Harrison, L., "Childhood maltreatment and the risk of substance problems in later life", *Health and Social Care in the Community* (1998), 6(1), 35-46.

<sup>23</sup> Widom, C.S., et al., "Alcohol abuse in abused and neglected children followed-up: Are they at increased risk?" *Journal of Studies in Alcohol* (1995), 56(2), 207-217.

<sup>24</sup> Leach, P., "The physical punishment of children: Some input from recent research", *J. Child Centred Practice* (1999), 7(2), 17-58.

<sup>25</sup> Ertem, I.O. et al., "Intergenerational continuity of child physical abuse: How good is the evidence?", *Lancet* (2000), 356(9232), 814-819.

<sup>26</sup> Coid, J. et al., "Relation between childhood sexual and physical abuse and risk of revictimisation in women: A cross-sectional survey", *Lancet* (2001), 358(9280), 450-454; Belt, W. and Abidin, R.R., "The relation of childhood abuse and early parenting experiences to current marital quality in a non-clinical sample", *Child Abuse and Neglect* (1996), 20(11), 1019-1030.

<sup>27</sup> Ornduff, S.R. et al., "Childhood physical abuse, personality and adult relationship violence: A model of vulnerability to victimization", *Am. J. Orthopsychiatry* (2001), 148, 10-20.

<sup>28</sup> Terr L.C., "Childhood trauma; An outline and overview", *Am. J. Psychiatry* (1991), 148, 10-20.

4.12 Some of the reports from survivors recalled physical beatings, especially those involving nudity, which they believed had sexual overtones. Victims could also have been subjected to other forms of sexual abuse. Rodriguez et al.<sup>29</sup> showed that a history of concurrent abuse of both kinds might increase the risk of post-traumatic stress disorder. Moreover, in his review of the long-term effects of child sexual abuse, Beitchman<sup>30</sup> concludes that “force or the threat of force may interact with sexual abuse to produce effects (e.g. multiple personality disorder, suicidality) that are unique to this combination or that are rare in the presence of either experience alone”. Anderson et al.<sup>31</sup> confirm that multiple personality disorder is associated with being the victim of extremely severe and concurrent physical and sexual abuse.

#### *Physiological effects of physical abuse*

4.13 Many survivors to whom we spoke referred to their perception of a link between the abuse and physical conditions such as gastro-intestinal problems, joint disease and skin conditions. This connection has been discussed in the literature.<sup>32</sup>

### **Sexual Abuse**

4.14 Sexual abuse is defined in “Children First”<sup>33</sup> as occurring “when a child is used by another person for his or her gratification or sexual arousal or for that of others”.

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<sup>29</sup> Rodriguez, N. et al., "Tension reduction and PTSD adult survivors of sexual abuse", *Paper presented at the Annual Meeting of the Int'l Society of Traumatic Stress Studies, Los Angeles* (1992).

<sup>30</sup> Beitchman, J. H. et al., "A review of the long-term effects of child sexual abuse", *Child Abuse and Neglect* (1992), 16(1), 101-118.

<sup>31</sup> Anderson, G., Yassenik, L. and Ross, C., "Dissociative experiences and disorders among women who identify themselves as sexual abuse survivors", *Child Abuse and Neglect* (1993), 17, 677-686.

<sup>32</sup> See e.g. Sigal, J.J., Rossignol, M.A. and Perry, J.C., "Some psychological and physical consequences in middle-aged adults of underfunded institutional care in childhood", *J. Nervous and Mental Diseases* (1999), 187(1), 57-59.

<sup>33</sup> Department of Health, *Children First: national guidelines for the protection and welfare of children* (Stationery Office, Dublin, 1999).

Examples of child sexual abuse are stated to include the following:

- "(1) exposure of the sexual organs or any sexual act intentionally performed in the presence of the child;
- (2) intentional touching or molesting of the body of a child whether by a person or object for the purpose of sexual gratification;
- (3) masturbation in the presence of the child or the involvement of the child in an act of masturbation;
- (4) sexual intercourse with the child, whether oral, vaginal or anal;
- (5) sexual exploitation of a child, including inciting, encouraging, propositioning, requiring or permitting a child to solicit for, or to engage in, prostitution or other sexual acts....
- (6) consensual sexual activity involving an adult and an under-age person. In relation to child sexual abuse, it should be noted that, for the purposes of the criminal law, the age of consent to sexual intercourse is 17 years."

### *The consequences of sexual abuse*

- 4.15 There have been a number of reviews of research on the sequelae of child sexual abuse.<sup>34</sup>
- 4.16 Specific short-term sequelae as identified by Beitchman et al.<sup>35</sup> are as follows:
- (1) Inappropriate sexual or sexualised behaviour; in children this may take the form of masturbation, sexual play, seductive behaviour, sexual aggression, precocious sexual knowledge.<sup>36</sup>
  - (2) The more frequent the sexual abuse and the longer the period over which it occurs the worse its effects.<sup>37</sup>

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<sup>34</sup> Beitchman, J.M., et al., "A review of the short-term effects of child sexual abuse", *Child Abuse and Neglect* (1991), 15, 537-556; Beitchman, J.M., et al., "A review of the long-term effects of child sexual abuse", *Child Abuse and Neglect* (1992), 16, 101-118; Cahill, C., Llewelyn, S.P. and Pearson C., "Long-term effects of sexual abuse which occurred in childhood: A review", *Br. J. Clinical Psychology* (1991), 30, 117-130; Finkelhor, D., "Early and long-term effects of child sexual abuse: An update", *Professional Psychology: Research and Practice* (1990), 21, 325-30; Knutson, J.F., "Psychological consequences of maltreated children: Putative risk factors and consequences", *Annual Review of Psychology* (1995), 46, 401-431; McIntyre, D. and Carr, A., "The effects of child sexual abuse", *J. Child Centred Practice* (1999), 6(1), 87-126; Smith, M. and Bentovim, A., "Sexual abuse" in M. Rutter and I. Hersov (eds), *Child and Adolescent Psychiatry: Modern Approaches* (3<sup>rd</sup> ed., Blackwell Scientific; Oxford; 1994); Trickett, P.K. and McBride-Chang, C., "The developmental impact of different forms of child abuse and neglect", *Developmental Rev.* (1995), 15(3), 311-337.

<sup>35</sup> See above, note 34.

<sup>36</sup> Kolko, D.J., Moser, J.T. and Weldy, S.R., "Behavioural/emotional indicators of sexual abuse in child psychiatric in-patients", *Child Abuse and Neglect* (1988), 12, 529-541.

(3) Child sexual abuse involving violence and/or penetration (vaginal, anal or oral) is the most traumatic form.<sup>38</sup>

Non-specific indicators are similar to the acute effects of physical abuse and may amount to a full-blown post-traumatic stress disorder (see paragraph 4.8 above).

4.17 Long-term effects identified by Beitchman et al. in their 1992 review<sup>35</sup>, and subsequently confirmed by later studies, are as follows:

(1)

- a) anxiety and fear;<sup>39</sup>
- b) depression and substance abuse;<sup>40</sup>
- c) suicidal tendencies - especially if subjected to force during the abuse;<sup>41</sup>
- d) revictimization;<sup>42</sup> and
- e) sexual hyperfunction.<sup>43</sup>

(2) In both sexes greater trauma results from -

- a) post-pubertal abuse than from pre-pubertal abuse;<sup>44</sup>
- b) abuse of long duration;<sup>45</sup>

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<sup>37</sup> Friedrich, W.N., Urquiza, A.J. and Beilke, R.L., "Behavioural problems in sexually abused young children", *J. Pediatric Psychology* (1986), 11, 47-57.

<sup>38</sup> Elwell, M.E. and Ephroos, P.H., "Initial reactions of sexually abused children", *Social Casework* (1987), 68, 109-116.

<sup>39</sup> Stein, J.A. et al., "Long-term psychological sequelae of child sexual abuse: The Los Angeles epidemiological catchment area study", in G.E. Wyatt and G.J. Powell (eds.), *Lasting Effects of Child Sexual Abuse* (Newbury, CA; Sage; 1998).

<sup>40</sup> Downes, W.R. and Harrison, L., "Childhood maltreatment and the risk of substance problems in later life", *Health and Social Care in the Community* (1998), 6(1),35-46.

<sup>41</sup> Briere, J. and Runtz, M., "Suicidal thoughts and behaviours in former child sexual abuse victims", *Canadian J. Behavioural Science* (1986), 18, 413-423.

<sup>42</sup> Wind, T.W. and Silvern, L., "Type and extent of child abuse as predictors of adult functioning", *J. Family Violence* (1992), 7, 261-281.

<sup>43</sup> Saunders, B.E. et al., "Child sexual assault as a risk factor for mental disorder among women: A community survey", *J. Interpersonal Violence* (1992), 7, 189-204.

<sup>44</sup> Murphy, S.M. et al., "Current psychological functioning of child sexual assault survivors", *J. Interpersonal Violence* (1998), 3, 55-79.

<sup>45</sup> Kendall-Tackett, K.A., Williams, L.M. and Finkelhor, D., "Impact of sexual abuse on children ; A review and synthesis of recent empirical studies", *Psychological Bulletin* (1993), 113, 164-80.

- c) abuse involving force or the threat of force;<sup>46</sup>
- d) abuse involving penetration of bodily orifices.<sup>47</sup>

(3) Male victims tend to show disturbed sexual functioning when they reach adulthood.<sup>48</sup>

4.18 Subsequent reviews, in particular that by MacIntyre and Carr<sup>49</sup>, confirm the following additional findings:

- (1) Adults who were sexually abused as children commonly experience difficulties with interpersonal relationships;<sup>50</sup>
- (2) Compared with non-victims, sexual abuse survivors are more prone to develop agoraphobia, obsessive compulsions and panic states;<sup>51</sup>
- (3) Guilt, self-blame and lack of trust in others are commonly noted in child victims;<sup>52</sup>
- (4) Among adolescents with a history of sexual abuse, females are more likely to develop behavioural disturbance of an internalised nature (e.g. eating disorders, mood disorders with suicidal tendencies), whereas males tend to exhibit behavioural disorders of an externalising nature (such as delinquency or sexual risk-taking behaviour);<sup>53</sup>

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<sup>46</sup> Fromuth, M.E., "The relationship of childhood sexual abuse with later psychological and sexual adjustment in a sample of college women", *Child Abuse and Neglect* (1988), 10, 5-15

<sup>47</sup> Black, M., Dubowitz, H. and Harrington, D. "Sexual abuse: Developmental differences in children's behaviour and self-perception", *Child Abuse and Neglect* (1994), 16, 85-95.

<sup>48</sup> Roesler, T.A. and McKenzie, N., "Effects of childhood trauma on psychological functioning in adults sexually abused as children", *J. Nervous and Mental Disease* (1994), 182, 145-50.

<sup>49</sup> MacIntyre, D. and Carr, A., "The effects of child sexual abuse", *J. Child Centred Practice* (1999), 6(1), 87-126.

<sup>50</sup> Elliot, D.M., "Impaired object relationships in professional women molested as children", *Psychotherapy* (1994), 30, 79-86.

<sup>51</sup> Ernst, G., Angst, J. and Foldenyi, M., "The Zurich study; xcii: Sexual abuse in childhood; Frequency and relevance for adult morbidity; data of a longitudinal epidemiological study", *European Archives of Psychiatry and Clinical Neuroscience* (1993), 242, 293-300.

<sup>52</sup> Mannarino, A.P., Cohen, J.A. and Berman, S.R., "The children's attributions and perceptions scale; A new measure of sexual abuse-related factors", *J. Clinical Child Psychology* (1994), 23, 204-211.

<sup>53</sup> Chandy, V., Blum, R.W. and Resnick, M.D., "Gender-specific outcomes for sexually abused adolescents", *Child Abuse and Neglect* (1996), 20, 1219-1232.

(5) Wind and Silvern<sup>54</sup> noted the emergence of severe psychological disturbance in female survivors when their children reached the age at which the mothers had first been sexually abused. This is an example of the long-term “sleeper” effects of abuse.

(6) Those who have been sexually abused are more likely to experience personality disorders - in particular, multiple personality disorder<sup>55</sup> and borderline personality disorder.

(7) The coping strategies adopted can ameliorate or intensify the effects of child sexual abuse<sup>56</sup>.

### *Physiological Effects of Sexual Abuse*

4.19 Evidence is now accumulating that child sexual abuse may have long-term consequences for physical health. For example, Walker et al.<sup>57</sup> have examined the relationship between sexual abuse in childhood and irritable bowel syndrome, and Heritage<sup>58</sup> and Walker<sup>59</sup> have associated it with pelvic pain in some women survivors. An additional stressor for male and female survivors is the possibility of sexually transmitted diseases, and for women survivors pregnancy is an obvious risk.

### *Summary of Effects of Sexual Abuse*

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<sup>54</sup> Wind, T.W. and Silvern, L, "Type and extent of child abuse as predictors of adult functioning", *J. Family Violence* (1992), 7, 261-281.

<sup>55</sup> Coons, P.M. and Milstein, V., "Psychosexual disturbances in multiple personality: Characteristics, etiology and treatment", *Journal of Clinical Psychiatry* (1986), 47, 106-110.

<sup>56</sup> Leitenberg, H. et al., "A retrospective study of long-term methods of coping with having been sexually abused during childhood", *Child Abuse and Neglect* (1992), 9, 521-526.

<sup>57</sup> Walker, E.A. et al., "Paediatric diagnoses, sexual and physical victimization and disability in patients with irritable bowel syndrome or inflammatory bowel disorder", *Psychological Medicine*, (1995), 25(6), 1259-1267.

<sup>58</sup> Heritage, C., "Working with childhood abuse survivors during pregnancy, labor and birth", *J. Obstetrics, Gynaecology and Neonatal Nursing* (1998), 27(6), 671-677.

<sup>59</sup> Walker, E.A. et al., "Medical and Psychiatric symptoms in women with childhood sexual abuse" *Psychosomatic Medicine* (1992), 54(6), 658-

4.20 The contribution of sexual abuse to the development of psychological and psychiatric difficulties in childhood, adolescence and adulthood is well established. Child victims and adult survivors of sexual abuse share common symptoms such as anxiety, depression, dissociation, acute/chronic post-traumatic states and abnormal sexual behaviour. The same dynamic of dominance and submission pertains in victims of sexual as of physical abuse, with attendant consequences as described above. Symptoms may become chronic. They may be repressed or partially repressed only to resurface at times of stress. There is a link between eating disorders (such as bulimia and anorexia nervosa) and sexual abuse. Somatization reactions are also associated with sexual abuse. Personality disorders, difficulties with identity formation, sexuality, and intimate relationships have been documented. Women and men are likely to suffer from depression, low self-esteem and guilt as a result of sexual abuse. Women in particular suffer from what has been described by Sgroi as “the damaged goods syndrome”.<sup>60</sup>

## **Neglect**

4.21 Neglect is defined in “Children First”<sup>33</sup> in terms of "omission, where a child suffers significant harm or impairment of development by being deprived of food, clothing, warmth, hygiene, intellectual stimulation, supervision and safety, attachment to and affection from adults, medical care." In addition, "harm" is defined as "the ill-treatment of the health or development of a child". Whether it is "significant" is determined "by his/her health and development as compared with that which could reasonably be expected of a child of similar age". This document also reminds us that neglect can become evident in a variety of ways over a period of time rather than at one specific point.

4.22 A difficult question arises as to the extent to which failure to care or other acts or omissions are to be assessed by reference to standards prevailing at the time

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<sup>60</sup> Sgroi, S., *Handbook of Clinical Intervention in Child Sexual Abuse* (Lexington, MA; Lexington Books; 1982).

when they occurred. In some instances the conduct or neglect will be so clear as to lead to an obvious answer; but we anticipate that there will be other instances where difficult issues arise by reference to standards prevailing at the time, including the living conditions when poverty was common, and norms of behaviour (including attitudes to corporal punishment).

- 4.23 The institutions, whether reformatory or industrial schools, were obliged by law and by the Rules and Constitutions of the religious orders running them to provide a specified amount of education for the children in their care<sup>61</sup>. A frequent complaint to the Committee was that in various instances there was a failure to fulfil that obligation.
- 4.24 It has to be acknowledged that many of the children already had such severe educational problems at the time of their admission that their ultimate attainments might have been considered limited.
- 4.25 Because they had grown up pre-admission in conditions which were not conducive to normal development, they needed, in the view of the Kennedy Report, to be “over-compensated” for this. Instead they often found themselves in a situation where in the past there had been
- a) a lack of pre-school education in some institutions which had an intake of young children;
  - b) a dearth of proper facilities for special and remedial education;
  - c) a shortage of suitably qualified teachers; and
  - d) little provision for educational assessment or vocational guidance<sup>62</sup>.
- 4.26 Impoverished vocabulary and cognitive impairment can result from living in an unstimulating environment, whereas – given appropriate instructional techniques

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<sup>61</sup> See, for example: *Rules and Regulations for the Certified Industrial Schools in Ireland* (Dept of Education, 1931; with regard to Letterfrack Industrial School); *Rules and Constitutions of the Society of Religious Brothers* (Dublin: Blundell; 1832); *Rules and Constitutions of the Religious called Sisters of Mercy* (Dublin: Duffy; 1863).

and aids – children with learning difficulties as profound as those identified in Appendix F of the Kennedy Report<sup>62</sup> could have had their occupational potential boosted.

4.27 Moreover, though some of the pupils undoubtedly were capable of benefiting from it, secondary-level schooling does not seem to have been readily available for children in these residential institutions.

4.28 So, throughout the ability range of the children, lack of appropriate educational opportunities may have existed. If this can be shown to have occurred, and to have had a significant effect on the development of the children concerned, it must be considered serious neglect.

4.29 The possible adverse effects of physical neglect are many and diverse. Obvious examples are stunted growth, digestive disorders, arthritis, bronchitis, and a general susceptibility to infection. If children were put to work which was inappropriate for their age or which exposed them to risks of injury, and in circumstances where they were inadequately trained or protected, such omissions also constitute neglect.

## **Emotional Abuse**

4.30 Emotional abuse occurs when a child's need for affection and approval are not met. Examples of emotional abuse are constant criticism, stigmatisation, or subjection to a climate of fear and apprehension by their care-givers. "Children First"<sup>33</sup> defines emotional abuse in terms of the following indices, noting that no one indicator is conclusive:

- Rejection
- Lack of praise and encouragement
- Lack of comfort and love

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<sup>62</sup> *Reformatory and Industrial Schools Systems Report* [The Kennedy Report] (Prl. 1342; Dublin: Stationery Office; 1970). See, in particular, Appendix F; para 7.2; Table 20, p.99; and Table 21, p.100.

- Lack of attachment
- Lack of proper stimulation (e.g. fun and play)
- Lack of continuity of care (e.g. frequent moves)
- Serious over-protectiveness
- Inappropriate non-physical punishment (e.g. locking in bedrooms)
- Family conflicts and/or violence
- Every child who is abused sexually or physically or is neglected is also emotionally abused
- Inappropriate expectations of a child's behaviour relative to his/her age and stage of development.

To the extent that some children in residential institutions were publicly belittled and ridiculed by being called, for example, "stupid dunces" or "smelly wet-the-beds", stigmatisation can be said to have occurred. There were also allegations of colour and racial prejudice being expressed towards certain pupils. Application of pejorative labels to children tends to undermine their self-confidence, and generates such a sense of worthlessness in them as to condemn even the brightest pupils to low-status occupations.

- 4.31 The emotionally abused child will generally be miserable. Physically, he or she may not thrive; emotionally, he or she may become either unusually clinging and dependent on others or withdrawn and unable to show affection. There has long been recognition that, in extreme cases of deprivation of love, the child may become a sociopath or, in Bowlby's phrase, an "affectionless thief".<sup>63</sup>
- 4.32 Many of the survivors who were in contact with the Committee related how their experience of repeated assaults on their self-esteem had resulted in lifelong negative impact on many aspects of their adult life. Feelings of low self-worth had made the establishment and development of interpersonal relationships difficult. Some of the survivors related how their early experiences of being deprived of a nurturing relationship had made them unable to respond to the emotional needs of their partners or their children. One report which we received told of how a survivor had used excessive working hours as a technique to avoid

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<sup>63</sup> Bowlby, J., *Forty four Juvenile Thieves: Their Characters and Home Life* (London: Bailliere, Tindall and Cox; 1946).

contact with his own children; this person also felt that his provision to them of material wealth was in some way a substitute for emotional support. Traumatic memories of their time in a reformatory school meant that some hesitated to have children through fear that they would not be able to bond with them.

- 4.33 As is explained in Chapter 7, it must be remembered that neglect, in the sense of failure to care, or emotional abuse will not constitute 'abuse' within the meaning of the Bill unless it results in 'serious impairment of the physical or mental health or development of the child or serious adverse effects on his or her behaviour or welfare'.

#### **Other associated psycho-social consequences of abuse and neglect.**

- 4.34 It is obvious from this evidence that the impact of abuse and neglect on children in an institutional setting has a long-term effect on the functioning of such children when they leave care and face life as adults. In the contacts which we had with survivors, their solicitors and those working in the fields of treatment and support, other psycho-social issues became particularly evident. These issues are reflected in the research findings,<sup>64</sup> but it may be helpful to consider their particular effect in the context of the negative experience of institutional care reported in individual submissions made to this Committee by some of the survivors in person.

#### *Lack of aftercare*

- 4.35 When young adults were released from institutions at 16 years of age, problems reportedly arose as a result of the absence of any system or practice of after-care. From the age of 16 to 18 years (at which time the responsibility of the

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<sup>64</sup> See especially Gilligan, R., "The developmental implications for children of life in public care: Irish and international perspectives", *Ir. J. Psychology* (2000), 21 (3-4), 138-153; and O'Sullivan, E., "Census data: Overview of children in the care of the RSM and staff profile", Appendix J, pp 138-144, in Clarke, M., *Lives in Care: Issues for Policy and Practice in Children's Homes* (Dublin: Sisters of Mercy and the Children's Research Centre; 1998).

institution ended), placements were arranged, often in farms for the boys and in domestic service for the girls. Some girls were even employed on such work within religious orders' institutions and remained there for many further years without entering wider society. We received many reports of "slave labour" situations, with little financial payment and no ability to escape. In spite of the reportedly harsh regimes of the institutions, some said that they returned seeking help because of the miserable existence to which they were exposed on placement. Several found little sympathy, some told of being punished and returned to the placement without any further investigation of its suitability.

- 4.36 While release was to be welcomed after many years of residency, the lack of preparation in basic life skills rendered the young people vulnerable to perils which existed in the outside world. Few had experienced handling money, travelling in public transport, making telephone calls, filling in forms, shopping or cooking. As a result, many former residents of these institutions attracted those who would exploit them. These facts are seen by many survivors as a major contributory factor to lives of crime, homelessness and substance abuse.

### *Social identity*

- 4.37 Many children lose a sense of their social identity in institutions because of the social isolation resulting from what Gilligan<sup>64</sup> describes as being confined to an "in-care ghetto" where little association was encouraged with the outside world. Many children lost their family identity due to their removal from parents or substitute caregivers by "the cruelty man". Some were rejected by single mothers or removed from them due to the mother's alleged inability to cope. It sometimes happened that children lost contact with their families because of marital break-up or relocation, which resulted in a further diminution of social identity. The Committee heard several accounts of what appeared to survivors to

be attempts by the institutional care system to separate family members. These included not being allowed to see relatives who requested visits, not being told that efforts were being made by relatives to regain their family, and the withholding of birth certificates until the time of their discharge from the institution. We also heard allegations of sibling links being systematically broken by separation in different institutions, with no information being shared with other family members who were also in care. Some responders remember a further sense of rejection when would-be adoptive or foster parents did not choose them when they were displayed in a line-up. Some of the staff involved would use such rejection as a further means to denigrate the children and damage self-esteem. Such occurrences meant that former residents had to create a false family history in an attempt to normalise the situation. Several survivors linked their discussion on the loss of personal identity with the fact that they had also lost the opportunity of developing a faith identity. This was due to their early negative experiences in the care of some of the religious orders being alien to the concept of a loving God.

### *Gender identity*

4.38 Children learn of their gender identity by a process of normal life-programming, which relies heavily on role models. Parents teach their children not only by role-modelling, behaviour moulding and direct teaching - but also by positive reinforcement during the years of puberty. Children brought up in institutional care, especially in single sex institutions, had little opportunity for such normal experiences. Role models amongst religious orders, with their vows of chastity, were not indicative of general life experiences. The Committee received reports of instances where negative punitive actions were actively taken to characterise sexual maturity as "sinful and part of the work of the Devil". Some said there was a practice of "binding" or "beating" the breasts of young girls to discourage natural development. Menstruation was not explained and caused acute anxiety and a life of negative association with normal sexual activity. Boys were

punished for any acts associated with their maturation process. Gender identity problems were deepened if the adult role models were also sexual abusers. One report told of a survivor of buggery whose total ignorance of sexual matters meant that he attempted anal sex with the first woman with whom he formed a sexual relationship.

- 4.39 These problems led to many vulnerable young people being exploited by sexually abusive adults in general society. Some girls became pregnant and their children in turn became institutionalised because of the mothers' inability to care or provide for them. Such experiences not only produced a cross-generational process of institutionalisation, but also perpetuated the low self-esteem of survivors. The low self-esteem was exacerbated by the threats by some of the Nuns that the children would "turn out as bad as their mothers". We received many comments on how normal family relationships had been marred by the survivor's inability to give or receive love. The perverse nature of early experiences has directly pervaded the next generation.

### *Exile*

- 4.40 The Committee went to England to meet both representatives of professionals working in support of survivors and of survivor groups which have been established in the United Kingdom since the apology by An Taoiseach. From these contacts we learned that many of the survivors had felt the need to move to England soon after they left institutions in Ireland. Some had tried to establish a new identity by linking up with family members who were already established in the United Kingdom. Some suffered rejection when already impoverished families could not take in another young person. Such rejection often led to a life of vagrancy and homelessness. Some had fled to get away from the harsh conditions of their work placements between the ages of 16 and 18 years old. These survivors felt that they were fugitives and lived in fear of the Church or

other authorities catching up with them. Many of the people we talked to felt a sense of alienation from Ireland and a loss of their national identity.

- 4.41 Many had reconstructed new identities for themselves that included false histories. They spoke of how some had been enabled to improve their educational standards and had succeeded at work. Others had got jobs but were denied promotion because of their poor education. One respondent told of how she had to refuse offers of promotion, as she did not want to expose her low level of literacy. One man went home at lunchtime to get his English wife to complete the reports that his work required and which he was unable to write. Many reported racial prejudice and a feeling of being neither British nor Irish. Since An Taoiseach's apology, the truth of the past was now being told in some cases with mixed reactions from their "English" families. This group of survivors, some of whom were of mixed race, felt that they had unique problems as a result of their exile in the United Kingdom, although their early institutional experiences were similar to those of the non-emigrants. Some of the more elderly seek to return to Ireland "to end their days" in their homeland.

### **Concluding observations**

- 4.42 The effects of child abuse are wide-ranging and may continue to have an impact over a lifetime.
- 4.43 We have been impressed by the dignity and openness with which many of those who have personally suffered such effects felt that they could entrust us with their painful memories and experiences, either in written or oral form. Such memories often evoked emotional distress in people who came to meet us and whose ages ranged from thirty to eighty years old. We were also impressed by the presence of those whose silence reflected the intensity of their reactions to their past experiences. An Taoiseach's apology had given credibility to their experiences, experiences that had long been suppressed and hidden, and which have shaped the rest of their lives.

- 4.44 The apology itself had re-awakened painful memories and we heard of many former residents who were now having to deal with the emotional impact of their early history and the need to disclose their past to relatives and friends. Some have made better adaptations to life than others; some have benefited from therapy, while others have not. It has often been family and friends who have had to deal with the painful reactions to these memories and the publicity which has attended recent disclosures. In this way the impact of the current situation is affecting past, present and even future generations.
- 4.45 Many responders asked for "Justice" as well as "Redress and Recovery". These people have the option of pursuing their cases through the Investigative Committee of the Laffoy Commission. They did, however, suggest that the Redress Board should consider, as a means of aiding their sense of redress and recovery, the possibility of including an individualised apology in the letter which delivers their redress payment. In this way, the process of redress may, in conjunction with treatment, help to meet the needs of those who have been victimized: "Psychologically speaking, paying compensation can play an important role in processes of opening space for ... addressing trauma and ritualising symbolic closure"<sup>65</sup>.

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<sup>65</sup> Hamber, B. and Wilson, R. "Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies", *Paper presented at the Traumatic Stress in South Africa Conference, Johannesburg, 27-29 Jan. 1999.*

## Chapter 5

### THE CONCEPT OF REDRESS ENVISAGED IN THE BILL

#### The nature of "compensation" for personal injury

- 5.1 At the outset we should make two simple points: there is no "right" or "just" level of compensation or redress for child abuse, and the effects of child abuse cannot be measured by the kind of mathematical formula used, for example, to measure deafness. Both the general level of compensation, and the amount payable in any individual case, are matters of judgment, taking all relevant considerations into account. In this chapter we seek to complement Chapter 4 and to complete our attempt to identify all the relevant factors which should inform this judgment.
- 5.2 The meaning of the term "compensation" or "redress" is far from straightforward, and has been used to describe many different types of recompense. But lawyers generally consider compensation as being a method of seeking to replace something of which a person has been deprived. In the context most familiar to lawyers, the law of tort, compensation for personal injury has two primary purposes - to make good measurable financial losses or expenses incurred as a result of an injury, and to make reasonable amends, in so far as this is possible by means of monetary payments, for pain and suffering and loss of amenities which are a consequence of the injury. But this form of compensation is, in theory at least, only available if the injury in question has been caused by someone else's fault, and it is the case that many persons who suffer injury of one kind or another fail to obtain tort compensation for this and other reasons.
- 5.3 A different notion of "compensation" is to be found in the social welfare system. Here monetary "compensation" is provided at a much lower level than tort, and primarily in respect of financial needs only; in addition to these cash benefits, however, the State also provides a wide range of personal social services. And

unlike tort compensation, entitlement to social welfare benefits and services does not depend on proof of "fault" on the part of someone else.

- 5.4 The differences between these two contrasting concepts of compensation have been summarised as follows:

"Tort offers 'full compensation', social security a good deal less. Tort pays compensation for pain and suffering [and loss of amenities], social security does not - though it does pay something for some disabilities. Tort compensates in money alone, welfare programmes provide a variety of benefits other than money. Tort pays lump sum compensation; social security payments are nearly all made periodically. Tort depends in practice on liability insurance; social security is financed by a mixture of personal insurance and taxation.... Above all, tort claims are in the main confined to cases in which fault can be proved against someone covered by liability insurance; in the social security system fault is irrelevant."<sup>1</sup>

- 5.5 In the present context, we are *not* primarily concerned with what has been called "equivalent" compensation designed to put an injured person back to the financial position he or she would have been in had the injury not occurred - by making payments "equivalent" to the loss of earnings and/or the expenses incurred as a result of the injury.<sup>2</sup> Rather our concern here is with compensation as a form of solace designed to provide some degree of comfort to the victim for his or her injury and to make some attempt to put right the wrong which he or she has suffered. Nor are we concerned with the question of "fault"; section 6(4) of the Bill provides that "an applicant [for compensation] shall not ... be required to produce ... any evidence of negligence on the part of a person ... the employer of that person or a public body", and section 4(3) adds that when an application for compensation is being

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<sup>1</sup> *Atiyah's Accidents, Compensation and the Law* (6th ed. by P. Cane, 1999), p. 9.

<sup>2</sup> Some jurisdictions do, however, attempt to apply a kind of "equivalent compensation" principle to the assessment of general damages on a *per diem* basis. Thus, in Denmark, section 3 of the Damages Liability Act 1984 (as amended to 1 January 1996) provides that "Damages for pain and suffering shall be paid, from the date when the injury occurred until the general health condition of the injured person has become stable, at the rate of DKK 150 for each day on which the injured person has been confined to bed and of DKK 70 for each day on which the injured person is ill without being confined to bed". But the section goes on to provide that this scale is not to apply "in special circumstances" and in particular when the total damages exceed DKK 22,500.

considered, "the Board (a) shall not address any issue of fault or negligence ... and (b) shall not make a finding of fact relating to fault or negligence ...".<sup>3</sup>

5.6 The concept of compensation may also have to be seen in the context of vindicating feelings of distress or outrage, and the punishment and deterring of gross misconduct. In the law of tort, such matters are recognised in two ways. Aggravated damages may be awarded, in addition to "ordinary" compensation, "to compensate a plaintiff for added hurt, distress or insult caused by the manner in which the defendant committed the wrong giving rise to the plaintiff's claim, [or by the defendant's conduct subsequent to the wrong, including the conduct of legal proceedings]".<sup>4</sup> As Finlay CJ explained in *Conway v Irish National Teachers' Organisation* [1991] 2 IR 305, aggravated damages are awarded "in part [by way of] a recognition of the added hurt or insult to a plaintiff who has been wronged, and in part also a recognition of the cavalier or outrageous conduct of the defendant".<sup>5</sup> Exemplary or punitive damages, on the other hand, are designed "to punish the defendant and to deter both the defendant and others from engaging in conduct that is extremely malicious or socially harmful ...; in the context of the Constitution, the particular purpose of exemplary damages is to vindicate and defend individual constitutional rights, to punish the defendant's disregard of them and to deter their breach".<sup>6</sup> To quote Finlay CJ in *Conway* once more, such damages "mark the

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<sup>3</sup> Section 11(11) further provides that "an award made under this Act shall not be construed as a finding of fact that a person ... carried out the acts complained of in the application".

<sup>4</sup> Law Reform Commission, *Report on aggravated, exemplary and restitutionary damages* (LRC 60-2000), p. 86.

<sup>5</sup> See also *FW v BBC* (1999), where Barr J accepted as correct the law of aggravated damages as set out in the Law Reform Commission's Report of 1998: "Aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interests or personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant. It is because aggravated damages are awarded on the basis of loss to the plaintiff that they are categorised as compensatory. However, the requirement that the defendant's conduct must have been exceptional in order for aggravated damages to be awarded, underlines the compensatory nature of aggravated damages, and suggests that they are, in part at least, awarded with reference to the moral quality of the defendant's actions."

<sup>6</sup> *Ibid.*, p. 5. The Law Reform Commission considered that "the present common law position, which leaves open the recovery of exemplary damages for a wide range of tort cases, should be retained, and that the further development of the law regarding the availability of exemplary damages should be left to the courts, informed by the circumstances of each case". *Cf.* for criticism of the present law on grounds of its uncertainty, B.M.E. McMahon and W. Binchy, *Law of Torts* (3rd ed., 2000), pp. 1124-35.

court's particular disapproval of the defendant's conduct ... and its decision that it should publicly be seen to have punished the defendant for such conduct".

- 5.7 As already explained, this Committee is not in a position to know in detail the circumstances in which abuse occurred in residential institutions; but it must be a distinct possibility that there were some cases at least in which a court, satisfied that a defendant was guilty of negligence or some other tort, would consider it appropriate to include in its award an element of aggravated and/or punitive damages.
- 5.8 Within this general context, the State has in the recent past taken widely differing views as to the level of "compensation" payable for pain and suffering and loss of amenities. In the case of persons diagnosed positive for Hepatitis C resulting from the use of Human Immunoglobulin Anti-D or from receiving a blood transfusion or blood product within the State (and certain other persons identified in the 1997 Act), compensation "shall be made on the same basis as an award of the High Court calculated by reference to the principles which govern the measure of damages in the law of tort ... and including ... consideration of an award on the basis which reflects the principles of aggravated or exemplary damages".<sup>7</sup> A police officer who is injured in the performance of his or her duties (or in certain other circumstances), on the other hand, is entitled to "such sum as the judge [of the High Court] thinks reasonable having regard to all the circumstances of the case"<sup>8</sup> - a formula which we understand to be interpreted in practice as equivalent to tort damages.<sup>9</sup> A

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<sup>7</sup> Hepatitis C Compensation Tribunal Act, 1997, s. 5(1). By s. 5(3) "an award in respect of aggravated or exemplary damages may be made ... where a claimant establishes a legal entitlement to such against a relevant agency or the Minister". By s. 11(4) a claimant who accepts an award or offer of settlement from the Tribunal in respect of general and/or special damages ("ordinary" compensation) may apply to a special fund (the "Reparation Fund") for an amount "in lieu of the Tribunal assessing and awarding aggravated or exemplary damages"; by s. 11(6), "the amount paid out of the [Reparation] Fund shall amount to 20 per cent of the total amount of the award or settlement referred to in subsection (4)".

<sup>8</sup> Garda Siochana (Compensation)(Amendment) Act, 1945, s. 2.

<sup>9</sup> Although it is curious that a recommendation in Commission on the Garda Siochana, *Report on Remuneration and Conditions of Service* (Prl. 933, 1970), para. 1170 to make this explicit appears to have been rejected.

prison officer injured as the result of a criminal assault in the course of his or her duties qualifies for compensation on much the same basis as tort damages, save that compensation is expressly *not* payable "by way of exemplary, vindictive or aggravated damages".<sup>10</sup> But any other person who is injured as the result of a crime of violence only qualifies for compensation for loss of earnings and/or medical and other reasonable expenses resulting from the injury; since 1986, nothing at all is payable by the State in respect of compensation for pain and suffering or loss of amenities<sup>11</sup> - unless, of course, the victim succeeds in a tort claim against a defendant with the financial means to pay tort damages. We may finally mention the Scheme of Compensation for personal injuries suffered at the Stardust, Artane on 14 February 1981, which provided that "Subject to the limitations and restrictions contained elsewhere in this scheme, the compensation to be awarded by the tribunal will be on the basis of damages awarded under the Civil Liability Acts, except that compensation will not be payable by way of exemplary, vindictive or aggravated damages ...".

- 5.9 In short, with the exception of the general Scheme of Compensation for Personal Injuries Criminally Inflicted (a non-statutory scheme), the State has generally adopted as appropriate the notion of "compensation" as developed by the courts in tort actions for personal injuries.

### **The concept of "redress" envisaged in the Bill**

- 5.10 The Residential Institutions Redress Bill as currently drafted contains no explicit reference to tort damages<sup>12</sup> and, unlike earlier special statutory and non-statutory

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<sup>10</sup> *Scheme of Compensation for Personal Injuries Criminally Inflicted on Prison Officers* (Pl. 7282, 1990).

<sup>11</sup> *Scheme of Compensation for Personal Injuries Criminally Inflicted* 1974, as amended in 1986 (Pl. 3920, 1986). Awards in respect of pain and suffering and loss of amenities were made in cases which arose before 1986. Thus, a woman aged 28 who was sexually assaulted by three men in August 1981 received an award of £50,000, primarily in respect of pain and suffering and loss of amenities.

<sup>12</sup> With the exception of section 19(1)(b), which provides that "any payment in respect of an award under the Act shall be treated in all respects as if it were a payment made following the institution, by or on behalf of the applicant to whom the payment is made, of a civil action for damages in respect of personal injury".

compensation schemes, has little to say as to the level of compensation. The long title of the Bill, however, does refer to "the making of financial awards *to assist in the recovery of*" victims of child abuse (emphasis added). Section 4(1) then states that the proposed Redress Board "shall make awards in accordance with the Act which are fair and reasonable having regard to the unique circumstances of each applicant", and section 11(2)(b) provides that an award made by the Board "shall include an award for medical expenses which have been incurred by the applicant in respect of treatment received for the effects of the injury concerned". The remaining references to compensation refer more to the establishment of guidelines than to the level of compensation. Section 6(1) provides that a person qualifies for an award if he or she satisfies the Board of:

- " (a) proof of his or her identity,
- (b) that he or she was resident in an institution during his or her childhood,
- (c) that he or she was abused while so resident, and
- (d) that he or she was injured as a consequence of the abuse referred to in *paragraph (c)*,"

Section 14 envisages that there will be different awards for categories of abuse, including severity of abuse and categories of injuries. Section 15 provides that the Minister "shall make regulations specifying the amount to be paid for abuse and injury", and that these regulations shall specify (a) categories of abuse, including categories of severity of abuse, (b) categories of injuries, and (c) amounts to be paid in an award for such abuse and injuries, and where appropriate, the range of such amounts having regard to the severity of the abuse and injuries".

- 5.11 As a result of the wording of the Bill, a question arises as to whether an applicant must satisfy an additional requirement of injury above and beyond proving that abuse occurred. The definition of "abuse" in section 1(1) of the Bill is divided into four parts dealing respectively with what might be termed physical abuse, sexual abuse, neglect and another unspecified area which would include emotional abuse. Paragraph (a) of the definition refers specifically to physical injury. Paragraphs (c) and (d) refer to "serious impairment of the physical or mental health or development

of the child or serious adverse effects on his or her behaviour or welfare." Section 1 further provides that "injury" includes "physical or psychological injury and injury that has occurred in the past or currently exists" and it is clear that categories (a), (c) and (d) in the definition of abuse include injury within this meaning. Although injury is not expressly mentioned in the definition of sexual abuse at section 1(1)(b) it is scarcely possible to argue that sexual abuse could have taken place without causing some injury to the victim within the meaning of the definition of "injury" in the same section. The contents of Chapter 4 dealing with the effects of sexual abuse on children reinforce this conclusion.

- 5.12 The Committee concludes accordingly that there is not a requirement for some additional proof over and above evidence of abuse which an applicant is obliged to prove in order to establish entitlement to compensation under the scheme of the Bill. The reference to injury in addition to abuse would appear to refer to the ongoing effects of sexual and other abuse. In other words, the reference to injury in sections 6 (1)(d) and 9 (4)(d) is to a present condition or injury in distinction to injury which occurred in the past. The terms of section 10(1) of the Bill support this interpretation, as do sections 14 and 15, which envisage awards for categories of abuse in addition to categories of injuries. A contrary approach would involve the necessary implication that there could be sexual abuse without any injury, a notion which would be difficult to maintain even on a purely theoretical basis and which would be contrary to the terms of the Bill and utterly repugnant to the spirit of redress contained in it. The approach taken by the Committee is consistent with paragraph (a) of the Terms of Reference which refer to financial awards in respect of abuse (as defined in section 1 (1) of the Residential Institutions Redress Bill, 2001) and its effects.

### **Damages in the courts**

- 5.13 Having regard to the terms of section 4 (1)(a) and in the absence of provision to the contrary, the Committee felt obliged to have regard to the law of damages for

personal injuries. Here the immediate difficulty is that there is no "High Court" standard for personal injury arising from institutional child abuse - or, indeed, for any other kind of personal injury.<sup>13</sup> However, McMahon and Binchy<sup>14</sup> refer to a study undertaken for the Department of Enterprise and Employment in 1996,<sup>15</sup> which found that for 30 leg injury cases, the bulk of the general damages clustered in the range £10,000-£35,000; for 45 back injuries, the bulk of the awards were in the same range; and in 48 neck injury cases, the bulk of the awards were in the region of £20,000. The Report concluded that "The examination of the above cases indicates a marked overall consistency by the High Court in award levels for general damages in each category". The Report then commented:

"This suggests that there is already an implicit or informal guideline in operation, possibly referring to previous award levels for similar personal injury cases.... It is suggested that the concept of judicial guidelines [as in England and Wales], drawn up under the direction of the judiciary and based on the principles enunciated by Chief Justice O'Higgins in the *Sinnott* case, presents the most useful approach to improving the method of assessment in personal injury awards."<sup>16</sup>

No such guidelines have yet been published.<sup>17</sup> However, in *O'Brien v Mirror Group Newspapers Ltd.* [2001] 1 IR 1, Geoghegan J. (at p. 42) states:

"In the case of personal injuries an appeal court can determine with some confidence what would be the range of awards which a reasonable jury (or nowadays a reasonable judge) might make...This the appeal court can do because although every personal injury case is different from every other personal injury case there are also great similarities. A broken hip case relates to some extent at least to every other broken hip case. A loss of an

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<sup>13</sup> Cf. *Guidelines for the Assessment of General Damages for Personal Injuries* published by the Judicial Studies Board for England and Wales, and for Northern Ireland - see Appendix D to this Report.

<sup>14</sup> *Law of Torts* (3<sup>rd</sup> ed., Dublin, Butterworths, 2000), p. 51.

<sup>15</sup> Deloitte and Touche, *Report on the economic evaluation of insurance costs in Ireland* (1996).

<sup>16</sup> *Ibid.*, p. 63.

<sup>17</sup> As will be seen from the summary of the "North Wales cases" contained in Appendix F, however, the English Guidelines proved to be of little assistance to the court when it came to assessing the damages payable to the victims of institutional child abuse.

eye case relates to some extent at least to every other case of loss of an eye, etc. Members of the court from their experience at the bar and experience as trial judges and indeed of previous similar appeals may with some confidence form a view as to what the legitimate *spectrum* of awards could be."

5.14 Some indication of the way in which damages for personal injuries may be assessed by the High Court may be found in the recent Irish cases summarised in Appendix G. One recent case of particular interest is *F.W. v BBC*, decided by Barr J. in March 1999. In this case the plaintiff was a married man aged 44, a manager in Guinness and an international swimming coach. At age 10-14 he had been subjected to sexual abuse of a most grievous kind by the man who had then been his coach. Seriously traumatised by this abuse, he told no one about it. When the abuse ended, the plaintiff tried to rebuild his confidence without counselling or assistance, and managed to do so quite successfully. But a further contact with his abuser caused the plaintiff to break down and in 1993 he told his wife what had happened. Once again he tried to "get back to normal" and was doing so quite successfully when the BBC asked him to appear on a programme about the abuse of young swimmers in England and Ireland. He agreed to do so provided that he was not identified. But when the programme was broadcast, he was named several times. The effect on the plaintiff of the broadcast was "shattering", both in terms of his emotional condition and his relationship with his wife, children and mother. When he sued the BBC, they arranged for the plaintiff to be interviewed by a consultant psychologist on behalf of the defence. These interviews were carried out in an unprofessional way and had the effect of exacerbating the plaintiff's condition.

5.15 Barr J. awarded damages for pain and suffering in the sum of £75,000, "in the light of the overlay of serious harm done by the broadcast to the plaintiff's psychological and emotional state", including the destruction of the substantial rehabilitation which had taken place prior to the broadcast; damage to close family relationships, some

of which is likely to have permanent consequences; depression; loss of confidence; inability to react comfortably with friends, acquaintances and the wider public; and loss of the joy and fulfilment which the plaintiff derived from competitive swimming. In short, the learned judge concluded that: "It is beyond controversy that the broadcast caused grievous harm, misery and distress to the plaintiff and ruined much of his enjoyment of life". A further £15,000 was awarded by way of aggravated damages (and a further £500 for agreed special damages).

- 5.16 Although there are no direct precedents for the level of damages to be awarded in respect of injuries arising from institutional child abuse, there are some relatively fixed points which can guide our deliberations. Chief among these is the judgment of O'Higgins CJ in *Sinnott v Quinnsworth Ltd.* [1984] ILRM 523 (Supreme Court). In this case, the plaintiff had, as a result of his injuries, become a quadriplegic, which O'Higgins J described as "probably the most serious condition that a person can suffer as a result of personal injuries". Having described the task of compensating for "a terrible transformation" in the life of a young man as "impossible", the Chief Justice accepted that it was a task which must nevertheless be undertaken, and he continued:

"In assessing such a sum the objective must be to determine a figure which is fair and reasonable. To this end, it seems to me, that some regard should be had to the ordinary living standards in the country, to the general level of incomes and to the things upon which the plaintiff might reasonably be expected to spend money. It may be that in addition, on the facts of a particular case, other matters may arise for consideration in assessing what, in the circumstances, should be considered as reasonable. However, a yardstick of a reasonable nature must be applied if reality is to be retained in the assessment of such compensation....."

In *Sinnott*, the jury had made an award of general damages in the sum of £800,000 - an amount which O'Higgins CJ considered "lacks all sense of reality" as being a sum which, if invested, would yield a yearly income which in itself would defy even the most profligate expenditure. Such a sum bore no relation to ordinary living

standards in the country or to the income level of even the most comfortable and best off in our community.

5.17 The Chief Justice also emphasised another consideration:

"In a case such as this, regard must be had to the fact that every single penny of monetary loss or expense which the plaintiff has been .. or will be ... put to ... has been provided for and will be paid to him in capital sums [by way of special damages] ... These sums will cover all his loss of earnings ... all hospital and other expenses ... and the cost of special care which his dependence requires, and will require, for the rest of his life. What is to be provided for him in addition in the way of general damages is a sum, over and above these other sums, which is to be compensation, and only compensation."

5.18 Taking all these considerations into account, the Chief Justice took the view that "unless there are particular circumstances which suggest otherwise, general damages, in a case of this nature, should not exceed a sum in the region of £150,000."

5.19 In *Reddy v Bates* [1983] IR 141, Griffin J. expressed the view that "the income which that capital sum would generate with reasonably careful and prudent investment" is a factor which should be taken into consideration in deciding whether compensation is fair, adding that "Notwithstanding the ravages of inflation, a very substantial income can be obtained from a large capital sum, while preserving the capital intact. This is a factor which has been taken into consideration by this Court in very many cases within the past ten years."<sup>18</sup>

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<sup>18</sup> Cf Walsh J in *Arnott v O'Keefe* [1977] IR 1 (SC): "[General damages] should be viewed as a form of capital compensation for injury to a capital asset, namely the bodily integrity of the plaintiff which has been permanently damaged and which, to that extent, represents a capital loss of the assets which he brought to his life. Those assets, to the extent to which they have been permanently damaged, are now irreplaceable and any compensation awarded should likewise be treated as a capital asset in the same sense. The plaintiff could invest any sum awarded for his pain and suffering but, of course, he is not obliged to do so. In my view no account should be taken of the fact that some income could be gained by investing the sum awarded for his pain and suffering because to do so would be, in effect, to penalise him in respect of the substitution of the asset which has been damaged."

5.20 Since 1984, the *Sinnott* maximum has been regularly increased in line with inflation and other changes in the value of money. In *Connolly v Bus Eireann* (January 1996) and in *Coppinger v Waterford C.C.* [1996] 2 ILRM 427, the High Court accepted that the limit should be increased to £200,000, and in both cases the plaintiff was awarded that amount in respect of pain and suffering and loss of amenities.<sup>19</sup> In *McEneaney v Monaghan C.C.* (July 2001), the plaintiff was so badly injured in a car accident that he was made paraplegic. In the High Court, O'Sullivan J. assessed total damages of £3,574,369 (including £2.2 million for cost of care, £527,000 for cost of aids and appliances and more than £500,000 for loss of earnings); damages for pain and suffering and loss of amenities were assessed at £200,000, being £75,000 for past pain and suffering and £125,000 for pain and suffering in the future.

5.21 The court heard evidence as to how a sum for damages suggested in 1984 should be brought up to date and considered a number of different measures. O'Sullivan J. concluded that "a reasonable equivalent to the £150,000 for general damages in *Sinnott v Quinsworth Ltd.* in today's money would be £300,000." But he went on:

"I cannot accept ... that a paraplegic, no matter how aware he is of his condition or how long his life expectancy ... is in the same category as a quadriplegic. In the circumstances of the present case I would assess general damages having regard to the very large sums that must be awarded to the plaintiff under the heading of ascertainable loss at £75,000 for pain and suffering to date and £125,000 for pain and suffering in the future - *being amounts in both cases very considerably less than I would have assessed had I been considering them on their own.*"<sup>20</sup>

5.22 A second point of reference is provided by a recent decision under the Hepatitis C Compensation Tribunal Act, 1997. By section 5(1) of that Act, "an award of the Tribunal to a claimant shall be made on the same basis as an award of the High

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<sup>19</sup> The Deloitte and Touche Report referred to earlier explains that in 1984 the *Sinnott* limit was equivalent to approximately 15 times the level of average earnings, while the updated cap of £200,000 in *Connolly* was approximately 14 times the level of average earnings in 1996.

<sup>20</sup> Emphasis added.

Court calculated by reference to the principles which govern the measure of damages in the law of tort and any relevant statutory provisions ... and including, subject to section 11, consideration of an award on the basis which reflects the principles of aggravated or exemplary damages...". In *Kealy v Minister for Health* [1999] 2 IR 456 the plaintiff had been injected with contaminated blood products in June 1977; she subsequently developed hepatitis which was likely to cause cirrhosis within ten years, and decompensation within a further five years which would necessitate a liver transplant at that stage. The Tribunal awarded £150,000 for pain and suffering (plus £50,000 for loss of earnings and £15,000 for expenses). The plaintiff appealed against the award for pain and suffering, and in the High Court, Morris P. increased the part of the award to £250,000 "for a lady whose life has been effectively ruined".

5.23 Three particular points may be noted about this case:

1. The cap on general damages set in *Sinnott* was considered to have only a limited relevance to this type of case, because in *Sinnott*-type cases there are very large sums awarded for loss of earnings, medical care, house renovation, etc., to which the court has regard in considering whether the award for pain and suffering is fair and reasonable. In a typical hepatitis case, there may be no omnibus sum to be taken into account.

2. *Sinnott* was decided at a time of depression when interest rates were high and incomes, relative to the present day, small. The rate of interest now available on investments bears no relation to the interest rates available in 1984, and the cost of property has multiplied since that time. "It would work a genuine injustice to an appellant such as Mrs Kealy in this case to hold that the cap of £150,000 plus whatever consumer price index increase would be appropriate, was the limit of the damages which she could recover".

3 "My own day-to-day experience in the courts ruling in infant settlements is the clearest possible test for me that the cap is no longer regarded as applicable by practitioners in the courts on either the plaintiff or defendant side".

### **Other relevant considerations**

5.24 There are, however, certain difficulties in applying "High Court" standards in cases of institutional child abuse. As we have seen, damages in civil actions for personal injuries are dependent upon a finding that the defendant was at fault - and legally liable. A person bringing an action for damages for injury arising from institutional child abuse faces a number of difficulties in this regard, arising (*inter alia*) from the Statute of Limitations, the law of vicarious liability as it applies to the managers of residential institutions, the duty of care of government departments and the fact that not all forms of abuse are recognised by law as giving rise to a cause of action under the existing law.<sup>21</sup> It is not appropriate in this Report to deal with these issues at length; but it may be useful to mention some of the difficulties which are likely to arise in such cases.

#### *The Statute of Limitations*

5.25 The general rule relating to actions for personal injury is that the normal limitation rules are postponed during a person's minority, so that time does not begin to run until he or she has attained the age of 18. By the Statute of Limitations (Amendment) Act, 1991, s. 3(1): "An action .... claiming damages in respect of personal injuries to a person caused by negligence, nuisance or breach of duty ... shall not be brought after the expiration of three years from the date on which [he or she attains the age of 18] or the date of knowledge (if later) of the person injured". Where the plaintiff claims in trespass, the period of limitation is six years from the date of attaining majority - i.e. a person has until the age of 24 to institute

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<sup>21</sup> A point made by the Law Reform Commission in its Consultation Paper on *The Law of Limitation of Actions arising from Non-Sexual Abuse of Children* (2000), pp. 72-73.

proceedings for child abuse where the claim is based on assault, battery or other trespass to the person. Yet another limitation period may apply if, as has been done in some claims for damages arising from institutional child abuse, the plaintiff bases the case on breach of fiduciary duty or breach of constitutional rights. There does not appear as yet to have been any judicial determination regarding the application of these provisions to civil actions arising from institutional child abuse.

- 5.26 As one of the measures announced by An Taoiseach on 11 May 1999, the Statute of Limitations (Amendment) Act, 2000<sup>22</sup> amended the general rule by retrospectively extending the period within which a person may bring a claim for damages in tort<sup>23</sup> against the perpetrator or someone vicariously or otherwise liable for his or her conduct arising out of child sexual abuse<sup>24</sup> - but only in circumstances where the person bringing the claim is deemed to be "under a disability".<sup>25</sup> A person is under a disability while he or she is suffering from a psychological injury that has been caused, wholly or partly, by the act of sexual abuse, or any other act of the perpetrator [such as the issuing of a threat], in circumstances where that

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<sup>22</sup> See especially P. Ward, "Statute of Limitations (Amendment) Act 2000 and actions for child sexual abuse" in O. Breen, J. Casey and A. Kerr, *Liber memorialis Professor James C. Brady* (2001), p. 344 and C. Noctor, "Statute of Limitations (Amendment) Act, 2000 - Implication for parties to actions regarding child sexual abuse", *Irish Law Times* (2001), 126.

<sup>23</sup> As Ward has noted (p. 367), the 2000 Act "may be entirely circumvented by a plaintiff basing an action for damages in equity by claiming breach of fiduciary duty".

<sup>24</sup> Note definition of "an act of sexual abuse" in the Act as *including* "(a) any act of causing, inducing or coercing a person to participate in sexual activity; (b) any act of causing, inducing or coercing the person to observe any other person engaging in any sexual activity; or (c) any act committed against, or in the presence of, a person that any reasonable person would, in all the circumstances, regard as misconduct of a sexual nature - provided that the doing or commission of the act concerned must be recognised by law as giving rise to a cause of action." As the Law Reform Commission point out (*The Law of Limitation of Actions arising from Non-Sexual Abuse of Children*, p. 71), this definition does not treat as "sexual abuse" an act which is overtly non-sexual (i.e. would not be regarded by a reasonable person as sexual) even if it is performed for the sexual gratification of the perpetrator. The Commission's recommended definition (p. 72) of "an act of sexual abuse" is "an act of causing, inducing or coercing a person to participate in, observe or experience any sexual activity, provided that a reasonable person with no insight into the motivation of the perpetrator, would consider the act to be objectively of a sexual nature".

<sup>25</sup> Cf. a special provision allows persons *not* under a psychological disability on 21 June 2000 to initiate proceedings at any time before 20 June 2001 if, at some time prior to 30 March 2000 [the date of enactment of the amending Act], either he or she had obtained professional legal advice that caused him or her to believe that an action could not be brought because it was statute-barred or a complaint had been made by or on behalf of him or her to the Gardai in respect of the act to which the action relates.

injury is of such significance that the victim's will to bring an action, or his or her ability to make a reasoned decision, was "substantially impaired". In such cases the normal three-year limitation period does not begin to run against a plaintiff until he or she overcomes the psychological injury.

5.27 However, section 3 of the 2000 Act provides that "nothing in [the Act] shall be construed as affecting any power of a court to dismiss an action on the ground of there being such delay between the accrual of the cause of action and the bringing of the action as, in the interests of justice, would warrant its dismissal". This power was used by Murphy J in *Kelly v O'Leary* (High Court, 2 June 2001) to strike out a claim for physical abuse alleged to have occurred between 1934 and 1947, on the grounds that (i) an inordinate time had elapsed before proceedings had been commenced by the plaintiff; (ii) that delay was legally inexcusable; and (iii) there would be a clear and patent unfairness in asking the defendant to defend the action after the lapse of time involved, given (a) that actual prejudice to the defendant had occurred by reason of the delay, and (b) that the defendant had not contributed to the delay. In the words of the learned judge: "To allow the action to go on would put justice to the hazard".

5.28 As originally introduced, the 2000 Act<sup>26</sup> was intended to apply to both physical and sexual abuse, but the Minister for Justice, Equality and Law Reform queried whether it should apply to physical abuse:

"With other forms of child abuse ... the issues are not always as clear-cut as in the case of sex abuse. Questions arise from the wide range of activities which, at one end of the scale, would have been classed until not too long ago as reasonable corporal punishment and, at the other end of the scale, are by any standard unacceptable but may not affect the ability of a person to take legal proceedings in a given time. The Government's view is that it needs to obtain the advice of experts on whether and to what extent other

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<sup>26</sup> A second amendment bill (introduced in 1999) proposed to extend the limitation period in actions for damages for personal injuries in respect of physical or sexual abuse to six years from the date on which the cause of action accrued or the date of knowledge (if later). According to the Law Reform Commission (p. 4n), "this bill has never passed into law".

forms of abuse are likely to have the inhibiting effect on the victim long into adult life that is known to occur in many instances of childhood sex abuse."<sup>27</sup>

As a result, the Bill was amended at committee stage so as to exclude non-sexual abuse. The question of the limitation period in such cases had already been referred by the Attorney General to the Law Reform Commission, as another of the measures announced by An Taoiseach in May 1999.

5.29 In a paper published in August 2000,<sup>28</sup> the Law Reform Commission provisionally recommended a limitation regime for non-sexual abuse which is different from that for sexual abuse laid down in the 2000 Act.<sup>29</sup> The Commission's tentative view is that a plaintiff in a case concerning non-sexual abuse of children should have a fixed period of time from the date of his or her majority (18) within which to bring an action. There were two views within the Commission as to the length of the new limitation period; on one view, the period should be 12 years from the age of majority, but with a judicial discretion to extend this period for no more than three years; on the other view, the fixed period should be 15 years, without any judicial discretion to extend. The Commission were provisionally agreed that any change in the law should apply to all causes of action which accrued before the coming into force of the proposed legislation (but not to cases which have been determined by the courts or settled by agreement between the parties or otherwise). They were also agreed that the special limitation regime should apply (i) irrespective of the particular legal form of the action, be it negligence, nuisance, assault, battery, trespass to the person, breach of contract or breach of fiduciary duty or any other, and (ii) in respect of vicarious liability or other associated liability, including any statutory or constitutional responsibility of the State or its agencies. It follows that if legislation is enacted along the lines provisionally recommended by the Law

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<sup>27</sup> *Dail Debates*, vol. 505, col. 1026 (27 May 1999).

<sup>28</sup> *The Law of Limitation of Actions arising from Non-Sexual Abuse of Children* (LRC consultation paper, 2000 (CP16-2000)).

<sup>29</sup> However, where both sexual and non-sexual abuse are committed against the victim, and both types of abuse are actionable under the civil law, the limitation regime most favourable to the plaintiff should apply to the case.

Reform Commission, no person over the age of 33 would be able to bring a claim for damages in respect of non-sexual child abuse. But it remains to be seen if the Law Reform Commission will adhere to its provisional recommendations when it makes its final report on this matter.

### *Vicarious liability*

5.30 The victim of child abuse who wishes to sue the institution rather than the perpetrator must establish either that the institution is directly liable or that the abuse was committed by the perpetrator in the course of his or her employment. An act is normally considered to have been committed in the course of employment if it is either a wrongful act authorised by the employer or a wrongful and unauthorised mode of doing some act authorised by the master. According to the Law Reform Commission: "It is not clear that a court would find an employer to be vicariously liable in these circumstances, as the abuse of a child is evidently not envisaged as part of an employee's duty."<sup>30</sup> However, if the institution or other employer had knowledge of the abuse, this would be a ground for a finding of vicarious liability .... [However], the appropriate test to govern the allocation of vicarious liability in the context of child abuse remains in doubt until there is an authoritative Supreme Court decision to settle the matter."<sup>31</sup>

5.31 Such a decision for the United Kingdom was recently given by the House of Lords in *Lister v Hesley Hall Ltd* [2001] 2 All ER 769, where the owners of a school for boys with emotional and behavioural difficulties were held vicariously liable for systematic sexual abuse of a number of boys by a man employed as warden of the

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<sup>30</sup> In *The Health Board v B.C. and the Labour Court* [1994] ELR 459, Costello J held a Health Board was not vicariously liable for a sexual assault on one employee by two other employees. But it is not clear whether this would be applied to abuse of a child in a residential institution.

<sup>31</sup> *The Law of Limitation of Actions arising from Non-Sexual Abuse of Children*, pp. 78-79.

school's boarding annex. Overruling a decision of the Court of Appeal given only one year earlier,<sup>32</sup> the House of Lords held as follows:

"When determining whether an employer was vicariously liable for an employee's wrongful act, it was necessary to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, taking a broad approach to the nature of the employment by asking what was the job on which the employee was engaged for his employer. If that approach to the nature of employment were adopted, it was not necessary to ask the simplistic question whether .. the acts of sexual abuse were modes of doing authorised acts. Rather, it became possible to consider the question of vicarious liability on the basis that the defendants had undertaken to care for boys through the services of [the warden] and that there was a very close connection between his employment and his torts. They had been committed in the time and at the premises of the defendants while [the warden] was busy caring for the children in the performance of his duties. In those circumstances, [the warden's] torts were so closely connected with his employment that it would be fair and just to hold the defendants vicariously liable."

It may well be that the Supreme Court will follow the line taken by the House of Lords, which in turn reflects, but does not precisely follow, recent developments in Canada.<sup>33</sup> But until the matter has been fully resolved by the Court, the scope of vicarious liability for institutional child abuse must remain a matter of some doubt.<sup>34</sup>

### *Civil liability of supervisory bodies*

5.32 The Law Reform Commission has also pointed out that "A further area of likely controversy ... would be the extent to which public supervisory authorities like the Garda Síochana, Department of Social Community and Family Affairs (or one of its predecessors) and the health boards ... could be made liable for failing to detect offenders and protect the victims. In a concrete case, such a claim would involve

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<sup>32</sup> *Trotman v North Yorkshire CC* [1999] LGR 584.

<sup>33</sup> See *Bazley v Curry* (1999) 174 DLR(4<sup>th</sup>) 45 and *Jacobi v Griffiths* (1999) 174 DLR (4<sup>th</sup>) 71, discussed P. Cane, "Vicarious liability for sexual abuse", *Law Quarterly Rev.*, (2000), 116, 21.

<sup>34</sup> It is, for example, noticeable that *Lister's* case involves vicarious liability for a warden, and that their Lordships accepted that the employer's liability was "a matter of degree" which depended on "an identification of what duty the servant was employed by his employer to perform ...".

difficult questions of statutory interpretation of the governing statutes, as well as the application of standards of awareness and conduct which were contemporary at the time of the abuse."<sup>35</sup>

### *A new and developing field of law*

5.33 The general aura of uncertainty in relation to civil liability for institutional child abuse was well summarised by McEachern CJ in a recent case in British Columbia:

"In some of these cases the victims have succeeded in obtaining compensation in the courts; in others, they have failed. The outcome has depended in large measure on highly subtle differences in circumstances, such as the precise legal relationship between the wrongdoer and the party sought to be made liable. Lawyers and judges are attempting to develop some meaningful jurisprudence that will apply not only to the case at hand, but to all the other cases that will be coming along in the future. Sometimes we find some assistance from legislation, sometimes from previously decided cases; but more often, it seems, by resort to judge-made social policy that lacks certainty and is not really law.

In most instances, the defendants are either dead and unable to defend themselves, or alive but unable for financial reasons to provide compensation. As a result, efforts are made ... to impose responsibility on governments or institutional agencies... When this happens, judges have to ask themselves the basis on which they can properly require those with resources to make good the wrongs of others ...

Our courts ... have struggled with these problems in a number of cases. As must be expected in a new and developing field of law, the jurisprudence is inconsistent and policies applied ad hoc in some circumstances do not seem to fit well in different factual contexts."<sup>36</sup>

### *Differences between court proceedings and applications to the Board*

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<sup>35</sup> *The Law of Limitation of Actions arising from Non-sexual Abuse of Children*, pp. 79-80. The Commission also notes that there could also be a claim that the State failed to perform a possible duty to supervise education facilities under Article 42 of the Constitution.

<sup>36</sup> *B(M) v British Columbia*, March 2001.

5.34 The Committee considered whether there should be some allowance by way of reduction of awards because applicants will be spared the uncertainties of litigation including the procedural and legal difficulties discussed above. Such an approach was rejected because there is nothing in the Bill which would justify such a reduction and also because it would be wrong in principle. Awards made under the Bill are to be "fair and reasonable having regard to the unique circumstances of each applicant." Furthermore, the package of measures of which the proposed redress scheme is a part would be undermined by an approach to the assessment of awards which provided for less than the proper entitlement of each applicant to be awarded.

## Chapter 6

### GUIDELINES FOR ASSESSING THE AMOUNT OF REDRESS: THE OPTIONS

6.1 Our research<sup>1</sup> has revealed five options for setting legislative guidelines for compensation in respect of personal injuries.

#### 1. A tariff of fixed sums

6.2 This option involves the setting out of a number of categories of injury and allocating to each a single fixed figure from which the Redress Board would not be permitted to depart. Once the injury is placed within the category which best describes it, the amount to be awarded is automatically determined. There is a ready precedent for this approach in the criminal injuries compensation scheme in Great Britain, and the similar scheme expected to be introduced in Northern Ireland in 2002 (see Appendix C). A slightly different form is to be found in some European countries (especially Denmark) where awards of tort damages for permanent disability are assessed by determining the percentage of medical disability and multiplying it by a fixed amount.<sup>2</sup> This kind of tariff has also been traditionally used e.g. in industrial injury schemes.

6.3 If the injury categories are narrowly drawn - that is, if there are a large number of different injury categories - allowance can be made for some of the variations which may exist in the particular circumstances of individual plaintiffs. There is then some scope for individualisation - and for discretion - in the selection of the appropriate category. But the task of the Redress Board would remain fairly mechanical. The process of assessment is made relatively simple, speedy and inexpensive - and achieves a fair degree of consistency and predictability. But the principal problem

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<sup>1</sup> See especially (English) Law Commission, *Damages for Personal Injury: Non-Pecuniary Loss* (Consultation Paper No. 140, 1995), pp. 109-116.

<sup>2</sup> See e.g. B. von Eyben, "Standardised or individual assessment of damages for personal injury and for loss of support; Some reflections on the Danish Tort Liability Act 1984", *Scandinavian Studies in Law* (1985), 29, 73-75.

with this approach is that it makes relatively little allowance for the victim's individual circumstances, and certainly falls far short of the individual approach taken by the courts in such cases. For this reason it has recently been rejected for the assessment of damages in personal injury cases by the Law Commission in England and Wales:

"We consider it to be unacceptable because it prevents the judge from taking into account the individual circumstances of the plaintiff's case. A high level of uniformity is achieved [but] at the expense of sensitivity to the particular consequences which an injury may have had for the plaintiff, and we believe that this sets the balance between uniformity and an individualised assessment in the wrong place."

6.4 The Law Commission also noted that this approach is unacceptable to the legal profession in England and Wales.

### *2. A tariff of upper and lower limits.*

6.5 This form of tariff would establish a range or band of compensation for each category of injury, giving the Redress Board discretion to select a figure within the range which is most appropriate to the victim's individual circumstances, but *no* discretion to go outside the stipulated range. This is the approach which appears to have been adopted in some Canadian jurisdictions (see Appendix E). A variation on this approach is to give the Redress Board a discretion to go outside the stated limits where it considers it appropriate to do so; this is the form which the Judicial Studies Board Guidelines for the assessment of general damages in personal injury cases take in England and Wales, and in Northern Ireland (see Appendix D).

### *3. A tariff of minimum or of maximum awards.*

6.6 This kind of tariff sets a lower, or a higher, limit on the amount of compensation for a particular type of injury, but then leaves an unfettered discretion to the Redress Board

to award any sum above the stipulated minimum or below the stipulated maximum. We have not found any practical example of the use of this approach.

#### 4. *A tariff of average awards.*

6.7 In this instance the tariff once again sets out a single figure for each category of injury, but this only represents the appropriate award for an "average" victim who suffers from that injury. The Redress Board would be entitled to award a lower sum where it took the view that a particular victim had suffered less than "average", or a higher sum in the case of above-average suffering.

6.8 No example of this approach has been found, but it is a form favoured by one commentator in the field.<sup>3</sup> This would set out a statutory guideline of average figures for loss of specified faculties, injuries and illnesses, coupled with an upper limit on non-pecuniary awards. This approach, which might be used in conjunction with DSM-IV or ICD10, would operate merely to provide the Redress Board with a workable guide, without imposing an undesirable rigidity on its discretion. Each specified figure would represent the most appropriate sum to compensate the average plaintiff in an ordinary case for a particular condition and its effect upon him or her individually. It would not detract from the principle that the Board evaluates the individual case, but would allow it to analyse the circumstances of each claim and to determine whether the compensation awarded should be above or below the average and by how much.

6.9 Options 2, 3 and 4 all seek to achieve a balance between uniformity and individualised assessment. They recognise that it is not possible or desirable to stipulate a rigid legislative formula for all the variations in the consequences which similar injuries may have for different victims; but at the same time they establish a clear indication of proper levels of compensation, and the relative severity of

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<sup>3</sup> N. Mullany, "A new approach to compensation for non-pecuniary loss in Australia", *Melbourne Univ. Law Rev.* (1990), 17, 714.

different injuries. They also provide a certain transparency in the making of awards which is clearly desirable. In England and Wales, the Law Commission's initial thinking was that the real choice for a legislative tariff lay between a tariff of fixed sums, and a tariff of upper and lower limits:

"It is only these forms of tariff which control and regulate judicial discretion in a way which would justify abandoning the present system for assessing non-pecuniary damages. They each ensure that the legislative scale will itself remain intact, by providing limits beyond which the judge is not permitted to transgress. Consequently also, they promote more uniformity and consistency in awards. In contrast, there appears to be no significant difference between a tariff of either maximum sums, minimum sums or average sums and the informal judicial tariff which we currently have. Further, these carry a real danger, because of the breadth of the ranges of award that they permit, that a new judicial tariff will emerge to undermine the statutory sums."

6.10 Accordingly, if a legislative tariff was to be introduced, the Law Commission's initial thinking was that it should be one which involved *non-discretionary* upper and lower limits (ranges or brackets), coupled with a non-exhaustive list of relevant factors which may legitimately affect the level of award within the range, as guidance for the judge. This would be not unlike the Judicial Studies Board Guidelines, but the limits would be binding, and the opportunity would be taken to reassess the levels of award, the relative severity of the injuries, to spell out in greater detail the relevant discretionary factors for determining the precise award within the range, and to cover in a more comprehensive and detailed way the range of injuries (the Guidelines contain fairly wide categories of injury and ranges, and not all injuries are covered). Ultimately the Law Commission rejected the idea of a tariff altogether; but it is interesting to note that the vast majority of lawyers who addressed this issue in England and Wales agreed that if a legislative tariff was introduced, the form should be as suggested in the Consultation Paper.

## 5. Medical scores

- 6.11 Under this approach the victim's physical and psychological injury is first scored according to recognised medical scoring systems such as the Glasgow Outcome Score, the Abbreviated Injury Score, the Injury Severity Score, the Structured Clinical Interview for PTSD and the Clinician Administered PTSD Scale.<sup>4</sup> Dr. Curran, a psychiatrist who has dealt with many PTSD claims for criminal injuries compensation in Northern Ireland, has developed a scoring system of this kind which appears to be 96% accurate, although it has not been used in practice and does not include child abuse cases. This approach has apparently been used in practice in determining deafness and asbestos-related claims in England and Wales.
- 6.12 Something very like this was provided for deafness claims in the State by the Civil Liability (Assessment of Hearing Injury) Act 1998. In *Hanley v Minister for Defence* (December 1999), the Supreme Court held that the scale of damages provided by the Act gave rise to a just and fair guideline. In that case the High Court had put forward its own formula, which the Supreme Court rejected as incorrect, adding that (i) the constitutional guarantee of equality requires that similar cases should be determined in a constant and foreseeable pattern; (ii) if a formula were in place, there would be less reason for delay; (iii) a formula was a guideline for a judge from which he or she could depart in a particular case if the specific circumstances so required, and the cases should be dealt with by High Court judges on their merits; (iv) the formula suggested by the High Court was incorrect in that it would give rise to excessive awards; (v) the Act's approach was to be commended, as it involved only one calculation, as opposed to three in the High Court formula. For a case in which O'Donovan J in the High Court departed from the statutory formula, see *Kerwick v Minister for Defence* (March 1999).
- 6.13 But the English Law Commission was very doubtful about using medical scores on a general basis:

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<sup>4</sup> See e.g. Pysent, P., Fairbank, J. and Carr, A. (Eds.), *Outcome Measures in Trauma* (1994); Shepherd, J., Richmond, P. and Miers, D., "Assessing general damages: a medical model", *New Law J.* (1994), 144, 162.

"The possible benefit of adopting such a model would be in providing a scientific and rational way of comparing injuries ... and rationalising the different amounts awarded for different injuries. It can also be argued that the scientific basis of the comparison would make the assessment process more straightforward to administer and easier for non-lawyers to understand. On the other hand, it would appear that the medical scoring systems do not take account of the particular characteristics of those injured (for example, that the plaintiff who has lost the tip of a finger was a pianist); and, moreover, that they score the injury at the time of the injury and do not therefore take into account the fact that the recovery rate and problems associated with the same injury can vary considerably between individuals.... A further problem is that some injuries ... may be minor in purely medical terms, yet severe when one takes account of their effect on the plaintiff's social relations (which, under the present law, will be reflected in the damages awarded for suffering and loss of amenity). We are also aware that, while increasingly commonly used by the medical profession, there remains some doubt within that profession as to the validity of at least some of the various scoring systems."<sup>5</sup>

6.14 Indeed, the majority of English lawyers consulted by the Law Commission thought that there should *not* be greater reliance on medical scoring. Accordingly, the Law Commission's final view was to reject this approach.

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<sup>5</sup> *Damages for Personal Injury: Non-Pecuniary Loss* (Consultation Paper No. 140, 1995), p. 122.



## Chapter 7

### THE COMMITTEE'S CONCLUSIONS AND RECOMMENDATIONS

- 7.1 It is important at the outset to remember that the redress to be provided under the Bill is, and is intended to be, only a part of the State's response to the tragedy of institutional child abuse. Following the apology which he gave on 11 May 1999, An Taoiseach announced a broad programme of measures designed to meet the needs of those who had been abused, and to prevent such abuse from occurring in the future. In addition to establishing the Commission to Inquire into Child Abuse [the "Laffoy Commission"], the Department of Health and Children and the health boards in September 2000 formally established a National Counselling Service to provide counselling and other support services for any adult who had suffered abuse in childhood.<sup>1</sup> By November 2001, approximately sixty counsellors had been recruited nationally to provide this service, and on the strength of the figures for the past year or so, it is expected that the numbers of persons wishing to avail of this service in 2002 will be in the region of 2,000. Arrangements have also been made to provide counselling for victims of abuse now living in the United Kingdom, and outreach officers have been appointed for both London and Coventry. In order to assist survivors' groups with their work, the Departments of Education and Science, and Health and Children, established a National Office for Victims of Abuse in November 2000 as a mechanism for providing direct services and financial assistance to the groups represented on the management committee of the Office. Any other group representing victims may also apply to the Office for such support and assistance as it may require. The Office also provides information and referral services to any victims of abuse on a nation-wide basis; an Education Co-ordinator has, for example, been seconded to the Office to provide assistance with any queries from persons seeking to return to education. The Laffoy Commission, in its second interim report, has also announced that it intends "in early course" to issue

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<sup>1</sup> The National Counselling Service has also established a formal liaison with the Laffoy Commission and works with the Commission to provide counselling and support services to those attending the Commission.

a special report on the need for, and method of delivering, "tracing family" services to assist those who, as children, were separated from parents and other family members and deprived not only of knowledge of their families of origin, but also of access to personal information about their own childhood.

- 7.2 In other words, some of the support services which might otherwise have to be taken into account in assessing the appropriate level of redress are already being provided by the State. Nevertheless, direct financial assistance can perform two vital functions. It is unquestionably true that no amount of money can "compensate" for a body which has been battered and a mind which has been shattered; but the award of appropriate financial redress can at least provide some tangible recognition of the seriousness of the hurt and injury which has been caused to the victims of institutional child abuse. Secondly, suitable financial assistance may allow many of those victims to pass the remainder of their years with a degree of physical and mental comfort which would otherwise not be readily attainable. Some of the more elderly survivors who made submissions to us saw the payment of redress as enabling them to provide their dependants with some material benefits as a form of "compensation" for the difficulties and hardships they had undergone as a result of the childhood experiences of their parent(s).

### **Quantifying the amount of redress**

- 7.3 As a result of the evidence which we received and our own independent research, we reached five broad conclusions with regard to the nature of the redress required. First, the "injuries" received by a number of victims of abuse are among the most serious kinds of personal injury known to the law; many survivors not only "lost" their childhood, but much of their adulthood as well. Secondly, no form of abuse or consequential injury is reducible to mathematical calculation. Thirdly, there is an almost infinite variety of combinations of abuse and the effects of that abuse. Fourthly, the nature of the "injury" varies in severity, both in terms of the abuse itself and in relation to its physical and psychological consequences. Finally,

some system of "guidelines" or "weighting" is desirable in the search for a degree of consistency in the level of redress; it is also desirable in helping to speed up the process of determining individual cases and to make the amount of redress more predictable, thus assisting the informal settlement of applications. We accept that any scheme which makes use of legislative - or even judicial - "guidelines" will be arbitrary to some extent. But we are satisfied that no scheme of compensation will guarantee fairness to all, and, given that many applicants will already have waited a long time for redress, it is important in our view that all that can reasonably be done to speed up the process of payment should be done.

7.4 It is our judgement that the special compensation schemes to which we have been referred or to which we have had regard do not adequately recognise the seriousness of the injuries which have been suffered by those who have experienced the very worst forms of institutional child abuse. It was for that reason that we concluded that the best guidance is to be obtained from within the State, by reference to the level of awards made by the Irish courts for pain and suffering and loss of amenities arising from serious personal injury. Where a person has "lost" earnings or suffered damage to his or her property, it can be argued that that loss can be "objectively" assessed; that is not so in the case of pain and suffering and loss of amenities, and the way in which these are measured in financial terms is very specific to each particular society. Not only do the awards of the Irish courts provide the best evidence of the "judicial and social outlook" in this jurisdiction, but they also provide some indication of the award likely to be made if, as anticipated in the Bill, an applicant elects to pursue a claim for damages in the High Court.

7.5 The central and most difficult part of our task was to devise a scheme of recommendations concerning awards for persons who had suffered different categories of abuse and injuries over a protracted period of time. Some assistance as to what was required could be found in the provisions of the Bill. Section 4(1) requires the Redress Board to make awards "which are fair and reasonable having regard to the unique circumstances of each applicant."

Section 3(2) provides that the Board and its members are independent in the performance of their functions. Section 5 envisages the appointment of a Judge as a member or chairman of the Board. Section 11(1) requires the Board when determining an award to "have regard to" regulations which are going to embody the awards guidelines.

7.6 Considering the terms of the Bill as outlined above, it seemed to us that a rigid system of fixed tariffs would be entirely inappropriate and unworkable. Schemes which have elaborate categorisation and sub-categorisation of injuries are for the most part intended to be used in an administrative context and not by a body acting quasi-judicially. Where the task is essentially to fit the particular circumstances of the relevant case into the spreadsheet box which is most appropriate, it is not usually done by an independent board including a member or members of the judiciary. The explicit requirement in the Bill that the redress be fair and reasonable having regard to the particular circumstances of the applicant is also a clear indication of the unsuitability of a rigid system. The persons who made submissions to the Committee were unanimous in their rejection of such a scheme.

7.7 It seemed to us that we had to find a system that would meet a number of requirements including:-

- (a) fairness/reasonableness;
- (b) individual assessment;
- (c) consistency with court awards or likely awards;
- (d) predictability;
- (e) sensitivity;
- (f) flexibility.

It will of course be seen that these requirements are not always easy to reconcile one with another. The greater the degree of predictability, for example, the lesser the amount of flexibility that can be achieved.

- 7.8 On the question of sensitivity, it was made clear to us repeatedly that persons who had been abused rejected emphatically any suggestion that their experiences could be graded in classes headed "serious", "moderate" or "mild". On more than one occasion, it was said to us that there was no such thing as "mild" sexual abuse. The same would be true of other forms of abuse as described in the Bill. The fact that any such abuse was happening to children in care in the relevant institutions was a scandal and any description of such experiences as being "mild" would be offensive to applicants to the Redress Board. It follows obviously that any categorisation of that kind into a threefold grading and using synonyms for the words that are rejected by the applicants would be scarcely more acceptable.
- 7.9 We wanted to devise a scheme that would be of assistance to the Redress Board in determining the amount of awards, would help applicants in presenting their cases, and would also enable reasonable predictions to be made as to the likely outcome of applications. The scheme we have ultimately adopted is a mathematical model (to a degree) which enables an application to be considered by the Board by reference to a weighting system so as to locate the case in a band of award levels and then to fix the amount within the appropriate band.
- 7.10 We first tried to identify what elements went to make up the suffering of victims of abuse. From the submissions made to us and the expertise available in the Committee we found there were four areas which had to be considered. First, there is severity of abuse. Second, physical and mental injuries suffered or being suffered by applicants. Third, psycho-social sequelae. Fourth, loss of opportunity. It will be seen that the second, third and fourth items all relate to the effects and consequences of the abuse that was suffered. The reason for dividing the experiences into these categories was to find a way of assessing the different impacts that might result to victims of abuse. A person who suffered dreadful sexual and physical abuse might miraculously have emerged relatively unscathed. Someone else might have reacted very severely to lesser trauma. The possible combinations and permutations of the different categories are

endless. However, a scheme that focused on these areas would in our view be starting at the right place. Obviously, it is not sufficient simply to identify the four areas; but it is in our judgement a necessary preliminary step.

7.11 We next turned to the question of the level of redress. An early problem in any scheme of this kind is to establish the range, which means in the first instance ascertaining the maximum sum that can be given by the deciding body. We believe that the appropriate comparison is what the courts might award by way of general damages for personal injuries. This question is more fully discussed in Chapter 5 but it is sufficient to say that in our view the appropriate maximum sum is €300,000.

7.12 The evidence we heard and the material available to us in documentary form left us in no doubt that the most severe cases deserved to be given awards up to the maximum sum which we consider appropriate. Those victims who have been worst abused and most severely affected afterwards are entitled to be compensated up to that level if the Board is satisfied that their cases deserve to do so. We think accordingly it is appropriate to have a band of damages for these the most serious cases in the range €200,000 to €300,000. For cases in which the abuse and its effects are less devastating or debilitating there should be lesser awards and we have devised five bands in all as set out below.

### **Redress Bands**

REDRESS BAND	TOTAL WEIGHTING FOR SEVERITY OF ABUSE AND INJURY/EFFECTS OF ABUSE	AWARD PAYABLE BY WAY OF REDRESS
V	70 OR MORE	€200,000 - €300,000
IV	55 - 69	€150,000 - €200,000
III	40 - 54	€100,000 - €150,000
II	25 - 39	€50,000 - €100,000
I	LESS THAN 25	Up to €50,000

Once the Board has decided which band is appropriate for the particular applicant it will then have the task of assessing whereabouts within the band the award should be located.

7.13 We now had the broad redress bands. Obviously a major issue is how to distinguish between cases in point of severity of abuse and injuries. In other words, a method of comparison has to be devised. Any scheme must contain a yardstick by which the more severe case can be located further up the scale of awards than the less severe. We considered different methods which are described in Chapter 6 and set out more fully in the Appendices C to E.

7.14 Ultimately it seems to us that the fairest system and the one that went furthest in meeting the requirements which we have listed above at paragraph 7.7 is as follows: Taking the list of the four elements that go to make up the experiences of victims of abuse, we ascribe a weighting method based on a points system. As between the four elements and based on the material available to the Committee and the expertise within it we ascribed a percentage weighting system to the different elements as is set out in the table below. Somebody who suffered the most severe sexual, physical, and emotional abuse and neglect could on this system be given level 25 in the first category dealing with severity of abuse. Depending on the nature of the injury suffered or being suffered, the number in the next panel could be up to 30. Similarly in the next area for psycho-social sequelae again the number could be 30. Lastly, there is loss of opportunity to which we assigned a maximum of 15, not because it is unimportant but because it is included to some extent in the previous category and also it should feature in our view to a lesser degree than the other elements.

**Weighting scale for evaluation of severity of abuse and consequential injury**

<b><i>Constitutive elements of redress</i></b>	Severity of abuse	Severity of injury resulting from abuse		
		Medically verified physical/psychiatric illness	Psycho-social sequelae	Loss of opportunity

<b>Weighting</b>	1-25	1-30	1-30	1-15
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7.15 The Board will consider the individual case with a view to establishing a points or weighting system measurement. That measurement will locate the applicant's case in the appropriate band as previously described. Two obvious questions arise. The first is how to decide where in the particular category that we have listed above should the individual case be placed. In other words, on a scale of 1 to 25 how is severity of abuse to be scaled or graded? This is a matter which will have to be considered by the Redress Board but we have indicated guidelines. Obviously, some instances of abuse will speak for themselves in point of severity because of the nature of the abuse or the combination of sexual and physical abuse, in addition perhaps to other elements. A further feature could be the prolonged nature of the suffering. These elements will clearly tend to push the case to the upper end of the scale. We have provided a further table to enable the Board to have guidance on the levels within the individual categories but we have stopped short of giving specific scores to these examples. These weightings are designed to produce an award in which the principal determinant of the amount of the redress will be the Board's assessment of the severity of the "injury" suffered by the applicant as a result of the abuse which he or she has suffered.

**Non-exhaustive examples of factors to be considered in weighing severity of abuse**

TYPE OF ABUSE	EXAMPLES
SEXUAL ABUSE	Violent anal or vaginal penetration.  Victim made to masturbate member of staff or perform oral-genital acts.  Sexual kissing; indecent touching of private parts over clothing.
PHYSICAL ABUSE	Serious injuries requiring hospitalisation; profound deafness caused by blows to ears.  Severe beating causing e.g. a fractured limb or leaving permanent scars.

	Corporal punishment more severe than was legally sanctioned at the time, but leaving no permanent physical signs; Gross over-work involving inadequate rest, recreation and sleep.
EMOTIONAL ABUSE	Depersonalisation e.g. through family ties being severed without justification or through deprivation of affection.  General climate of fear and apprehension.  Stigmatisation by staff, e.g. through repeated racist remarks or hurtful references to parents
NEGLECT	Severe malnutrition; failure to protect child against abusive placements; inadequate guarding against dangerous equipment in work-place.  Failure to provide legally prescribed minimum of school instruction; lack of appropriate vocational training and training in life skills.  Inadequate clothing, bedding or heating.

7.16 In making these evaluations, the Board should have particular regard to the duration of the "injury", and in particular whether it was temporary, is still continuing and/or is likely to continue in the future, and whether or not the applicant now avails himself/herself of counselling services. But there will in addition be a number of particular factors to which the Board should have regard, on the basis of the evidence available to it, when making its assessment of the severity of the injury suffered by the applicant. We set out below a non-exhaustive list of particular factors by way of illustration of the matters to which the Board should have regard, when supported by appropriate evidence, in making its evaluation of the severity of the effects of the abuse suffered by each individual applicant.

**Non-exhaustive Examples of factors to be considered in evaluating severity of injury**

NATURE OF INJURY	EXAMPLES OF PARTICULAR FACTORS TO BE TAKEN INTO ACCOUNT
PHYSICAL OR PSYCHIATRIC ILLNESS	

<p>1. Physical injury</p> <p>2. Physical illness</p> <p>3. Psychiatric illness</p>	<p>1. Loss of sight or hearing. Loss of or damage to teeth. Permanent scar(s)/disfigurement.</p> <p>2. Sexually transmitted diseases. Respiratory diseases. Skin diseases.</p> <p>3. Severe depression with suicide attempts. Personality disorder. Post-traumatic stress disorder.</p>
<p>PSYCHO-SOCIAL SEQUELAE</p> <p>1. Emotional disorder</p> <p>2. Cognitive impairment/ educational retardation</p> <p>3. Psychosocial maladjustment</p> <p>4. Anti-social behaviour</p>	<p>1. Inability to show affection or trust. Low self-esteem; persistent feelings of shame or guilt. Recurrent nightmares or flashbacks.</p> <p>2. Literacy level well below capability. Impoverished thought processes. Limited vocabulary leading to communication difficulties.</p> <p>3. Marital difficulties involving sexual dysfunction. Low frustration tolerance. Shyness and withdrawal from mixing with people.</p> <p>4. Substance abuse. Compulsive stealing. Physical aggressiveness.</p>
<p>LOSS OF OPPORTUNITY</p>	<p>Working below employment capacity, e.g. through having to refuse employment opportunity/ promotion because of illiteracy.</p> <p>Need to concoct a false identity and to live a lie with workmates.</p> <p>Unable to pursue certain occupations, e.g. police, because of "record".</p>

7.17 In every case, as required by section 6(1)(d) of the Bill, the Redress Board will have to be satisfied that the particular injury resulted "as a consequence of the abuse" suffered by the applicant. The Board must also have regard to the requirement set out in section 1(1) of the Bill that if the basis of the applicant's claim is that he or she was neglected, this amounts to "abuse" for the purposes of the Bill only if the failure to care for him or her resulted "in serious impairment of [his or her] physical or mental health or development...or serious adverse effects on his or her behaviour

or welfare". This same requirement also applies where the basis of the applicant's claim is that he or she was subjected to emotional abuse.

- 7.18 How would this scheme work in practice? The Redress Board will have its information in the form of the application and supporting evidence from the victim of abuse and it will also have such other material as the Board has thought necessary to obtain, including the medical report referred to in section 9(9) of the Bill. The Board, we suggest, will ascribe weighting firstly to the category dealing with severity of abuse and will then work progressively through the other elements of the table indicated at paragraph 7.14 above. Reference can be made to the examples of factors to be considered in evaluating severity and in giving weighting to the other areas. The result of this process will be four numbers derived by evaluating the scale of the abuse and its effects. The total of those numbers will indicate the appropriate band indicating the scale of the award. The score will also suggest a level within the band. We envisage that the Board will then stand back and look at the case overall to see whether the quantum thus arrived at is reasonable in all the circumstances for the particular applicant and, where necessary, to make appropriate adjustments.
- 7.19 If the Redress Board is going entirely outside the parameters indicated by the scheme, which in our view it should be entitled to do in exceptional cases, it may be that it should give specific reasons for doing so. Even if the legislation did not permit the Board to go outside the scheme, we would be of the view that there should be such a capacity, which is in accordance with the approach favoured by the Supreme Court in *Hanley v Minister for Defence* (see above paragraph 6.12). We recognise that no scheme of graded awards is going to be perfect; even in a court system there is going to be some element of inconsistency.

### **Additional redress**

- 7.20 The evidence which we received suggested that in a number of cases victims of child abuse suffered added hurt, fear and humiliation as a result of the general

manner or context in which the abuse occurred. The injury which they suffered was not restricted to specific acts of abuse, but was exacerbated by the general climate of fear and oppression which pervaded the institution. At common law, such matters are recognised by the award of "aggravated damages", by way of additional compensation for the added injury suffered by the applicant (see above paragraph 5.6). Such an award may also be made in appropriate circumstances under section 5(3) of the Hepatitis C Compensation Tribunal Act 1997. We consider that it should also be open to the Redress Board, without going into any question of fault on the part of any person or institution, to make such an additional award where it is satisfied that it is appropriate to do so having regard to the circumstances of the abuse suffered by the applicant. In such cases, we further recommend that no award on the principle of aggravated damages should exceed 20 per cent of the redress otherwise payable as a result of the Board's assessment of the severity of the abuse and the injury suffered by the applicant.

7.21 The Hepatitis C Compensation Tribunal is also authorised to make an additional award on the principle of punitive damages in any case where an applicant establishes a legal entitlement to such. We do not, however, consider this appropriate in the context of the Redress Board. Aggravated damages are payable by way of compensation to the injured person; punitive damages are designed to punish the person who committed the injury for his or her arbitrary, oppressive or unconstitutional conduct (see above paragraph 5.6). To make such an award would, of necessity, require the Redress Board, when considering an application, to make a finding on an issue of fault - something which is expressly prohibited by section 4(3) of the Bill. Accordingly, we recommend that additional redress should *not* be payable on the principle of exemplary or punitive damages.

7.22 Section 11(2)(b) of the Bill specifically provides that an award by the Redress Board "shall include an award for medical expenses which have been incurred by the applicant in respect of the treatment received for the effects of the injury concerned". We assume that this is intended to refer to medical treatment

(including psychiatric treatment) which it was reasonable for the applicant to receive, and as so understood, we can see no reason why this provision should be limited to *past* treatment. Accordingly, we recommend that the section should be amended to make it clear that the Redress Board may make an award to cover the reasonable costs of medical treatment which the applicant has received in the past, or should, on the basis of the medical evidence available to the Board, receive in the future, for the effects of the injury which he or she has suffered. We recommend that such an award, which will depend on the evidence in each particular case, should not be included in the "general" award assessed on the basis outlined above, but should take the form of an additional award assessed on the basis of the evidence available to the Redress Board. It is to be assumed that the necessary therapy will have an ameliorative effect on the condition of the applicant in the future, which will be reflected in the Board's assessment of the general award of redress payable to the applicant.

### **A summary of the Committee's recommendations**

7.23 In short, we recommend that the redress payable to a person who has suffered abuse as defined in the Bill should be determined as follows:

1. The Redress Board should evaluate the severity of the abuse suffered by each individual applicant and the "injury" which he or she has suffered as a result of that abuse by reference to the weighting scales which we have set out, and which will normally lead the Board to make an award in one of the five redress bands which we have identified. In an exceptional case, the Board may depart from these bands where it considers it necessary to do so to ensure that the award is "fair and reasonable" having regard to the unique circumstances of the applicant.

2. In an appropriate case, the Redress Board may make an additional award, not to exceed 20 per cent of the redress awarded under the previous heading, by way of the principle of aggravated damages, where the applicant has satisfied it that it is

appropriate to do so, having regard to the circumstances of the abuse suffered by the applicant.

3. Where supported by appropriate medical evidence, the Board may also make an additional payment in respect of reasonable medical expenses reasonably incurred by the applicant in respect of treatment received or to be received by him or her for the effects of the injury which is the subject of the redress.

## Chapter 8

### SOME RELATED ISSUES

#### Introduction

8.1 In the course of our discussions and deliberations, several points were raised which may not be strictly within our terms of reference, but which we consider sufficiently relevant to merit further consideration by the appropriate authorities.

#### The meaning of "abuse": Vaccine trials

8.2 At a very late stage in our deliberations it came to our attention that any person who alleged that, as a child in an institution included in the Bill, he or she was the subject of a vaccine trial between 1940 and 1987 had been invited to contact the Commission to Inquire into Child Abuse with a view to further investigation of the matter. It appears that trial vaccines may have been administered to some children in care without the necessary consent and that such children may have been exposed to a risk, or to an additional risk, to their health and well-being by reason of the administration of the vaccine.<sup>1</sup> We have not had sufficient time to consider the implications of this development in relation to the question of redress; but it may well be that the vaccination of children in some of these cases, if verified, will amount to "abuse" within the provisions of the Bill. We trust that this matter will be kept under review in the light of the evidence presented to or obtained by the Laffoy Commission.

#### The Payment of redress

##### 1. Preliminary or interim awards

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<sup>1</sup> See especially *Report of the Chief Medical Officer, Department of Health and Children*, laid before Dail Eireann on 9 November 2000.

- 8.3 It is envisaged in section 9(7) of the Bill that the Redress Board shall make a "preliminary" decision that an applicant is entitled to compensation, but not that any compensation will be paid to the applicant at that stage. In the view of this Committee, there is a compelling case for making, as soon as practically possible after a positive preliminary decision, an interim payment to certain applicants, namely those over the age of 60 or those who are seriously ill.
- 8.4 We envisage that the making of a preliminary decision by the Board that redress is payable to a particular applicant should be sufficient to justify an immediate "interim" payment of €10,000 to that applicant, provided that he or she comes within the limited category of applicants described above and it appears to the Board that the applicant is reasonably likely to be awarded a sum in excess of that amount. If the Redress Board then goes on to make a higher award which the applicant accepts, the €10,000 will be deducted from that award. If the Board makes an offer, but this is rejected by the applicant, then he or she keeps the €10,000, but this sum should be deducted from any award of damages which that applicant may subsequently obtain from any defendant(s). We appreciate that the most difficult case is that in which the Redress Board, having made an "interim" payment, subsequently determines, on the basis of further evidence or consideration of the case, that the applicant is not entitled to any redress. We do not think that there will be many cases of this kind, and the benefit to be gained from making an immediate payment is, in our view, worth the risk that there will be a small number of cases in which the final decision is that the applicant is not entitled to any redress.

## *2. Lump sum awards*

- 8.5 A number of those who made submissions to the Committee commented on the wording of section 11(8) of the Bill, which provides that:

"Where an applicant does not wish to receive the entire amount of an award in a single payment, the Board, having heard the applicant or a submission on behalf of the applicant, may in its absolute discretion, direct that the award shall be paid to the applicant in instalments."

As will be seen from Chapter 4 of this Report, and as we were advised during our consultation process, some applicants who receive a substantial award may be unwilling or unable either to seek and act upon financial advice or otherwise make use of the award for the purposes for which it is intended. In colloquial terms, there is a danger that they will simply "fritter it away". Evidence to this effect may well be included in the medical reports presented to or commissioned by the Redress Board, and it seems to this Committee that it would not be proper to ignore such evidence - irrespective of the stated wishes of the applicant. Accordingly, we recommend that the words "Where the applicant does not wish to receive the entire amount of an award in a single payment" be deleted from section 11(8). Whether or not the instalments should be paid by means of a trust, structured settlement or other mechanism we leave to the discretion of the Redress Board.

- 8.6 If this recommendation is accepted, it may be that the word "absolute" should also be omitted from section 11(8).

### *3. Redress awards and entitlement to social security benefits outside the State*

- 8.7 Many of the victims of abuse who now reside outside the State are concerned that their awards from the Redress Board will adversely affect their existing entitlement to social security or social welfare benefits or services. The effect of section 19(1)(b) of the Bill appears to be that this will not be the case so far as those who reside within the State are concerned. The problem, of course, is that the State has no authority to legislate in respect of the law of other jurisdictions, and it would, in our opinion, be highly undesirable to "supplement" the awards payable to applicants resident outside the State to "offset" any reduction or loss of such benefits or services which was likely to follow receipt of an award.

- 8.8 We understand that the Government has already raised this matter with relevant United Kingdom Government departments. It is our view that all that we can appropriately do is to encourage the Government to continue such discussions.

#### *4. Meaning of "spouse"*

8.9 Section 8 of the Bill, which makes provision where survivors have died after 11 May 1999 (the date of An Taoiseach's public apology), refers throughout to the applicant's "spouse"; this term is not defined in section 1(1). We note, however, that section 1(1) of the Hepatitis C Compensation Tribunal Act, 1997 expressly provides that "'Spouse' in relation to a person, includes a person with whom the person is or was at the material time cohabiting". A comparable provision is to be found in section 1(2) of the Civil Liability (Amendment) Act, 1996. We consider that some such provision should be included in the Bill, to ensure that consideration may be given to the entitlement to redress of a person living with the deceased immediately prior to his or her death with a view to allowing applications to be made or continued by a person who was a long-term partner of the deceased.

### **The procedure of the Redress Board**

#### *1. Medical reports*

8.10 Given the importance of medical reports to the smooth running to the redress scheme envisaged in the Bill, it was suggested to us that we should include in this report some proposals as to the nature and contents of such reports,<sup>2</sup> with particular reference to the recommendation by the Civil Justice Review in Northern Ireland that "experts' reports [should] be accompanied by a signed statement to the effect that the expert has directed his or her mind to the issues in an impartial manner, with a view to assisting the [Board] rather than seeking to support the case of the instructing party".<sup>3</sup> The Committee accepts that this is an important point; but we feel that it is a matter which it is more appropriate for the Redress Board to decide for itself, under the powers conferred by section 10(3) of the Bill.

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<sup>2</sup> The assessment of survivors for the effects of abuse as defined in the Bill may best be served by the use of the DSM-IV axes to elicit the various sequelae. For example, not all survivors will fulfil the criteria for an Axis I Diagnosis at the time of examination, but may have done so in the past and may have findings on Axes 2, 3, 4 or 5. There is considerable difficulty posed by the retrospective nature of such examinations, by the need to track the specific effects of abuse as defined in the Bill and to establish the existence of any pre-traumatic conditions.

<sup>3</sup> *Review of the Civil Justice System in Northern Ireland: Final Report* (June 2000), para. 123.

## *2. Venue for Board hearings*

8.11 A number of those who made submissions to us said that they would welcome an arrangement whereby the Redress Board conducted oral hearings in locations outside Dublin - including, if practicable, in appropriate centres in the United Kingdom. The Committee considers that this also is a matter for decision by the Redress Board.

## *3. Administration issues*

8.12 We recommend that all administrative forms associated with the Redress Board should not only be user friendly in terms of language, but be made available in a format which can be accessed by those with sensory impairment.

## **Criminal records**

8.13 Many of the survivors who made submissions to the Committee spoke strongly of their bitterness at having "a criminal record" as a result of their committal to a reformatory or industrial school thirty, forty or more years ago; some told us that they had even been refused employment on account of such record. It was their wish for the record to be expunged in some way, so that no reference could or would be made to their confinement in an institution.

8.14 The Committee was not in a position to give such matters any detailed consideration. We do not know, for example, whether a person's formal criminal record includes the details of his or her detention in an industrial or reformatory school. We have been informed that there would normally have been a record in respect of children who committed offences as a result of which they were detained in a reformatory or industrial school, but that there ought not to be a criminal record in respect of a child placed in such an institution for care reasons. We are not however in a position to arrive at any conclusions on this question. The Committee

is aware that the Children Act, 2001 provides in section 258 a type of rehabilitation of offenders scheme for offences committed during childhood but that this provision is not yet in effect.

## Chapter 9

### CONCLUDING REMARKS

- 9.1 The task which we have undertaken in this Report was difficult and unique. The differences between the redress scheme proposed in the Bill and existing compensation procedures in other jurisdictions meant that there was no obvious model on which to base our recommendations. In any case, the question of redress is peculiar to each society and the solution adopted as appropriate in some other legal system is unlikely to be applicable, particularly in the special circumstances of the context in which we were working. Accordingly we have endeavoured to frame proposals which will provide fair and reasonable redress with regard to contemporary Irish standards and with particular reference to the exceptional nature of the injuries in question.
- 9.2 It is to be expected that the detailed scrutiny which our recommendations will understandably and rightly attract will reveal a number of shortcomings. Proposals of this kind are never perfect, but the provisions of the Bill as to the composition of the Redress Board, and the right of appeal to a Review Committee, have encouraged this Committee to believe that what we have suggested is a good starting point to enable justice to be done to applicants who have suffered abuse in residential institutions. Our scheme is intentionally not laid out in the form of fixed and rigid categories of abuse and injury, but gives a degree of discretion to the Board. This approach seems to us to be entirely proper.
- 9.3 We should also like to emphasise that we have seen the redress scheme not as an end in itself but rather as part of a more general process of attempting, in the words of An Taoiseach, "to come to the rescue" of the victims of childhood abuse. The making of financial redress to individual survivors is only one of the measures which are being taken by the government and our recommendations should be viewed in that context. The overall objective, as very many of those who made submissions to

us strongly insisted, must be to ensure that nothing of this kind ever happens again. It is also, in our view, essential that the question of redress is resolved in such a way as will add as little further injury as possible. We hope that this Report will be seen as a stepping stone along the road to redress and recovery.

## **APPENDICES**

## **APPENDIX A**

### ***List of organisations which made submissions to the Committee***

\* *Written submission only*

\*\* *Written and oral submissions*

- \*\* Alliance for Healing from Institutional Abuse
- \*\* Aislinn Centre: Association for the Healing of Institutional Abuse
- \*\* Federation of Irish Societies
- \*\* Irish Deaf Society
- \*\* Irish Survivors of Child Abuse [Irish SOCA]
- \* London Irish Centre
- \*\* London Irish Women Survivors Support Group
- \* National Counselling Service for adults who experienced abuse in childhood
- \* National Office for Victims of Abuse (Management Committee)
- \*\* Right of Place (Ireland)
- \*\* Right of Place (UK & International)
- \*\* Right to Peace
- \*\* Survivors of Child Abuse [SOCA] (UK)

## **APPENDIX B**

### ***Selected Rules and Regulations for certified industrial schools***

*The following Rules and Regulations are taken from Appendix L of the Kennedy Report on Reformatory and Industrial Schools Systems (Prl. 1342, 1970), pp. 129-135. They purport to be made under section 54 of the Children Act, 1908, which provided that the managers of a certified school "may make rules for the management and discipline of the school, but the rules so made shall in all cases be subject to approval by the Minister for Education". No date is given, and it is not clear if these rules applied to all or some only of the schools. A more general power to make regulations for the conduct of industrial schools was conferred on the Minister by section 3 of the Children Act, 1941; but this power does not appear to have been exercised, at least before 1970.*

- "5. The children shall be supplied with neat, comfortable clothing in good repair, suitable to the season of the year ...
6. The children shall be supplied with plain wholesome food, according to a Scale of Dietary to be drawn up by the Medical Officer of the School and approved by the Inspector. Such food shall be suitable in every respect for growing children actively employed and supplemented in the case of delicate or physically under-developed children with such special food as individual needs require. No substantial alterations in the Dietary shall be made without previous notice to the Inspector....
7. Subject to Rule 8, all children shall be instructed in accordance with the programme prescribed for National Schools. Juniors (that is, children under 14 years of age) shall have for literary instruction and study not less than four and a half hours five days a week, and Seniors (that is, children of 14 years of age and upwards) shall have for the same purpose not less than three hours, five days a week ...
8. The Manager may arrange for children to attend conveniently situated schools ... but always subject to (a) the sanction of the Inspector in each case, and (b) the condition that no increased cost is incurred by the State.
9. ... Each school shall submit for approval by the Inspector a list setting forth the occupations which constitute the industrial training of the children and the qualifications of the Instructors employed to direct the work ....
10. The progress of the children in the Literary Classes of the Schools and their proficiency in industrial training will be tested from time to time by Examination and Inspection....
12. The Manager or his Deputy shall be authorised to punish the children detained in the School in case of misconduct. All serious misconduct, and the punishments inflicted for it, shall be entered in a book to be kept for that purpose, which shall be laid before the Inspector when he visits. The Manager must, however, remember that the more closely the School is modelled on a principle of judicious family government the more salutary will be its discipline, and the fewer occasions will arise for resort to punishment....
14. Parents, other relations, or intimate friends, shall be allowed to visit the children at convenient times .... Such privilege is liable to be forfeited by misconduct or interference with the discipline of the school by the parents, relatives or friends... Subject to the approval of the Inspector, holiday leave to parents or friends may be allowed to every well-conducted child who has been under detention for at least one year, provided the home conditions are found on investigation to be satisfactory. Such leave shall be limited to seven days annually....
17. The School shall be open to visitors at convenient times ... The term "visitors" means members of the public interested in the school ...
- 20 (I) A Medical Officer shall be appointed who shall visit the school periodically, a record of his visits being kept in a book to be provided for the purpose....

(IV) The Medical Officer shall make a quarterly examination of each child individually, and give a quarterly report as to the fitness of the children for the training of the school, their general health, and the sanitary state of the school ....(V) In the event of the serious illness of any child, notice shall be sent to the nearest relatives or guardian and special visits allowed....

22. The Manager (or Secretary) shall keep a register of admissions and discharges, with particulars of the parentage, previous circumstances, etc. of each child admitted ....
23. All books or journals of the School shall be open to the Inspector for examination. Any teacher in the School who does not hold recognised qualifications may be examined by the Inspector, if he thinks it necessary ...
24. The officers and teachers of the School shall be careful to maintain discipline and order, and to attend to the instruction and training of the children, in conformity with these Regulations. The children shall be required to be respectful and obedient to all those entrusted with their management and training, and to comply with the regulations of the School ...."

## **APPENDIX C**

### ***Criminal Injuries Compensation Tariffs in the United Kingdom***

A person who has suffered mental or physical injury as a direct consequence (*inter alia*) of a crime of violence in Great Britain and who applies for compensation on or after 1 April 2001 may be awarded compensation under the Criminal Injuries Compensation Scheme 2001, made under the Criminal Injuries Compensation Act 1995. In every case where compensation is payable, the applicant qualifies for "a standard amount of compensation" determined by reference to the nature of the injury and in accordance with a detailed tariff of fixed sums, which lists a wide variety of injuries by reference to their nature, severity or the circumstances in which they was sustained. While these descriptions draw some distinctions between injuries according to their impact on the victim, they do not generally permit many of the factors that are standard features of the common law assessment of general damages to be taken into account. This tariff, which was originally based on the median awards made under an earlier scheme under which awards were, subject to important exceptions, determined by reference to common law principles, now identifies some 400 different injuries and categorises each by reference to a scale running from level 1 (£1,000) to Level 25 (£250,000). The standard amount of compensation is fixed in the sense that if a claimant has sustained a particular injury, the compensation payable is the amount fixed for the designated level of that injury. For example, a child who has suffered non-penetrative indecent act(s) under clothing qualifies for compensation at Level 7, namely, £3,300. Social security benefits, insurance payments, etc. received by the victim as a result of the injury are NOT deducted from the standard amount of compensation; but any damages received by the victim as the result of a civil claim by way of a court order or out-of-court settlement are deducted in full.

The Scheme provides five categories of physical abuse of children, ranging from Level 1 (£1,000) to Level 14 (£13,500); there are sixteen descriptions of sexual abuse of children, compensation for which ranges from Level 1 to Level 19 (£33,000). In all these cases, where the abuse has been repeated over time, the applicant may qualify, not for the injury arising from the most recent incidents, but "as the victim of a pattern of abuse", which attracts higher level awards.

#### ***Special rules***

1. Where the injury has the effect of accelerating or exacerbating a pre-existing condition, the compensation awarded will reflect only the degree of acceleration or exacerbation;

2. Where a victim has suffered multiple injuries of a serious nature, the standard amount of compensation is calculated as:

- (a) the tariff amount for the highest-rated description of injury, *plus*
- (b) 30% of the tariff amount for the second highest-rated description of injury, *plus*
- (c) 15% of the tariff amount for the third highest-rated description of injury.

No additional payment is made for a fourth or further injury.

3. Where the Compensation Authority considers that a person has suffered an injury for which no provision is made in the tariff, and that that injury is sufficiently serious to qualify for compensation of at least £1,000, the Authority refers the injury to the Home Secretary, and at the same time recommends to the Home Secretary (i) that the injury should be included in the tariff, and (ii) the amount of compensation for which it should qualify. An interim payment of up to half that amount is payable immediately to the claimant - and no part of that interim payment is recoverable if the Home Secretary decides not to include the injury in the tariff or decides that the injury qualifies for compensation at a level lower than the interim payment.

4. Where a victim has lost earnings or earning capacity for longer than 28 weeks as a direct consequence of the injury, he or she qualifies for additional compensation, as follows:

(a) Loss of earnings or earning capacity:

Nothing is payable under this head for the first 28 weeks; but compensation is thereafter payable for the period of the loss, calculated on much the same basis as common law damages (i.e. loss of net earnings *minus* any social security benefits, insurance payments or pension payable to the applicant during the period of loss). But the rate of net loss of earnings *before* any reduction for social security benefits, etc. is limited to one and a half times the gross average industrial earnings at the time of assessment.

(b) Special expenses

Additional compensation is payable in respect of special expenses incurred by the claimant *from the date of the injury* in respect of (a) loss of or damage to physical aids; (b) costs of medical treatment, including the cost of private treatment, *but only where the private treatment and its cost are reasonable*; (c) the reasonable cost of care, special equipment, adaptation of accommodation, etc. required by the victim

The total compensation payable in any one case in respect of the standard amount of compensation, loss of earnings and special expenses cannot exceed £500,000.

Awards take the form of a lump sum, but one or more interim payments may be made in appropriate cases. When making a payment, the Authority may attach directions, including the imposition of conditions with respect to the award, which are in the interests of the applicant and/or are required by considerations of public policy. Where prior agreement has been reached between the Authority and the applicant, an award may consist in whole or in part of an annuity or annuities, purchased for the benefit of the applicant or to be held on trust for his or her benefit. Once that agreement is reached, the Authority will take the instructions of the applicant or his representative as to which annuity or annuities should be purchased.

Where an applicant is legally represented, the costs of that representation are not met by the Authority.

**Selected provisions from the Compensation Tariff in Great Britain**

<b>Physical abuse of children</b>	<b>Level</b>	<b>Amount</b>
<i>Minor abuse</i>		
- isolated or intermittent assault(s) resulting in weals, hair pulled from scalp, etc	1	£1,000
<i>Serious abuse</i>		
- intermittent physical assaults resulting in an accumulation of healed wounds, burns or scalds, but no appreciable disfigurement	5	£2,000
<i>Severe abuse</i>		
- persistent pattern of repetitive violence resulting in: - moderate multiple injuries (eg bruising and minor fractures)		

and/or minor disfigurement	10	£5,500
- significant multiple injuries	12	£8,200
- severe multiple injuries	14	
£13,500		

**Sexual assault/abuse of children** (under age 18 at time or commencement of abuse)

*Indecent assault*

- minor: non-penetrative indecent physical act or acts over clothing	1	£1,000
- minor: non-penetrative frequent assaults over clothing	3	£1,500
- serious: non-penetrative indecent act under clothing	5	£2,000
- serious: pattern of repetitive indecent acts under clothing	7	£3,300

*Indecent assault*

- non-penile penetrative and/or oral genital acts		
- one incident	7	£3,300
- two or more isolated incidents	9	£4,400
- pattern of repetitive frequent incidents		
- over a period up to three years	11	£6,600
- over a period exceeding three years	12	£8,200
- resulting in serious internal bodily injuries	17	£22,000

*Non-consensual vaginal and/or anal intercourse*

- one incident	13	£11,000
- one incident involving two or more attackers	14	
£13,500		
- repeated incidents over a period		
- up to three years	15	£16,500
- exceeding three years	17	£22,000
- resulting in serious internal bodily injuries	17	£22,000
- resulting in permanently disabling mental illness confirmed by psychiatric prognosis	18	
£27,000		
- resulting in serious internal bodily injuries with permanent disabling mental illness confirmed by psychiatric diagnosis	19	£33,000

Sexual assault/abuse: additional awards where the following are directly attributable to sexual assault (not subject to multiple injuries formula, and may be paid in addition to other awards)

Pregnancy	10	£5,500
Sexually transmitted disease other than HIV/AIDS		
- substantial recovery	10	£5,500
- permanent disability	13	£11,000
Infection with HIV/AIDS	17	£22,000

**Some comparators**

Quadriplegia	25	£250,000
Disabling mental illness, confirmed by psychiatric diagnosis,		

and lasting over five years, but not permanent		14	
£13,500			
Seriously disabling permanent mental illness, confirmed by psychiatric diagnosis	18		£27,000
Serious disfigurement of face	13		£11,000
Total deafness in one ear		15	
£16,500			
Loss of one eye		18	
£22,000			
Loss of one arm/hand	20		£44,000
Loss of one leg below knee	19		£33,000

***Selected provisions from the proposed compensation tariff in Northern Ireland***

(to be made under the Criminal Injuries (Compensation)(N.I.) Order, expected to be enacted in 2002)

<b>Sexual assault/abuse of victims any age</b>	<b>Level</b>	
<b>Amount</b>		
Attempted rape	15	£10,000
Indecent assault		
- serious - non-penetrative indecent act under clothing	10	£5,500
- severe - involving digital or other non-penile penetration and/or oral-genital	15	£12,000
Non-consensual vaginal and/or anal intercourse		
- by one attacker	18	£22,500
- by two or more attackers	19	£30,000
- resulting in serious internal bodily injuries	20	£40,000
<b>Sexual assault/abuse of children</b>		
Attempted rape	15	£12,000
Non-penile penetrative and/or oral genital acts		
- isolated incident over period of up to one year	11	£6,500
- pattern of abuse		
- over period 1-3 years	15	
£12,000		
- over period exceeding 3 years	17	
£18,000		
Pattern of severe abuse		
-repetitive, frequent indecent acts involving digital or other non-penile penetration and/or oral genital contact	15	
£12,000		
-over period exceeding 3 years	17	
£18,000		
Non-consensual vaginal and/or anal intercourse		
- one incident	18	£22,500
- repeated incidents over a period		
- up to 3 years	19	£30,000
- exceeding 3 years	20	£40,000

***Some comparators***

Quadriplegia	28	£255,000
Disabling mental illness, confirmed by psychiatric diagnosis, and lasting over one year, but not permanent	13	£8,500
Disabling permanent mental illness, confirmed by psychiatric diagnosis	19	£30,000
Serious disfigurement of face	19	£30,000
Total deafness in one ear £22,500	18	
Loss of one eye £60,000	22	
Loss of one arm below elbow/hand	21	£50,000
Loss of one leg below knee	23	£75,000

## APPENDIX D

### **Judicial Guidelines for the assessment of general damages in England and Wales and in Northern Ireland**

*(issued by the Judicial Studies Board for England and Wales (5th ed., 2000) and the Judicial Studies Board for Northern Ireland (1st ed., 1997: a second edition is due to be published early in 2002)*

These Guidelines are based on actual judicial decisions and, in the case of England and Wales, take into account the ruling of the Court of Appeal in *Heil v Rankin* [2000] 2 WLR 1173, which raised the general level of awards for more serious injuries. In the words of Lord Woolf, these Guidelines are intended to be used as "the starting-off point rather than the last word ... in any particular case".

	E/W	NI	
Maximum award (for quadriplegia)	£160,000-£200,000	£250,000 - £400,000	
Moderate brain damage £250,000	£75,000 - £110,000	£150,000	-
Loss of sight in one eye £70,000	£25,000 - £28,000	£40,000	-
Loss of one arm at shoulder	Not less than £70,000	£75,000 - £100,000	
Above knee amputation of one leg	£47,500 - £70,000	£100,000 - £150,000	

#### **Psychiatric damage generally**

The factors to be taken into account in valuing claims of this nature are as follows:

- (i) the injured person's ability to cope with life and work;
- (ii) the effect on the injured person's relationships with family, friends and those with whom he or she comes into contact;
- (iii) the extent to which treatment would be successful;
- (iv) future vulnerability;
- (v) prognosis;
- (vi) whether medical help has been sought.

#### **1. Severe**

marked problems with respect to factors (i) to (iv) and very poor prognosis

	£27,500 - £57,500	£30,000 - £100,000
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#### **2. Moderately severe**

significant problems associated with factors (i) to (iv) but a more optimistic prognosis

	£9,500 - £27,500	£25,000	-
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£65,000

#### **3. Moderate**

Problems associated with factors (i) to (iv), but marked improvement by date of trial and good prognosis

	£3,000 - £9,500	£7,500	-
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£25,000

<b>4. Minor</b>	£750 - £3,000	Up to £7,500
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**Post-traumatic stress disorder**

Specific diagnosis of a reactive psychiatric disorder in which characteristic symptoms are displayed following a psychologically distressing event, by reference to criteria established in DSM IV

**1. Severe**

Permanent effects which prevent the injured person from working at all or at least from functioning at anything approaching pre-trauma level. All aspects of life badly affected

£30,000 - £50,000	£25,000 - £60,000
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**2. Moderately severe**

Better prognosis for some recovery with professional help, but effects still likely to cause significant disability for the foreseeable future

£13,000 - £27,500	£25,000 - £60,000
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**3. Moderate**

Injured person has largely recovered, any continuing effects not grossly disabling

£4,000 - £10,000	£10,000 - £25,000
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**Reproductive system**

Total impotence and loss of sexual function and sterility in the case of a young man £80,000	In region of £75,000	£60,000	-
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Infertility in the case of a woman, with severe depression, anxiety, pain and scarring £90,000	£57,500 to £85,000	£60,000	-
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**Facial disfigurement**

Very severe facial scarring Woman aged 20-30, cosmetic effect very disfiguring, psychological reaction severe £150,000	£24,000 to £48,000	£50,000	-
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Man aged 20-30, permanent disfigurement, considerable element of psychological reaction £125,000	£15,000 - £33,000	£40,000 -	
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## **APPENDIX E**

### **Two Canadian matrix schemes**

#### **Nova Scotia Redress Programme**

A memorandum of understanding to compensate victims of institutional abuse was agreed between the Government of Nova Scotia and counsel representing 350 victims. The amount of compensation varied according to the degree of abuse, which was classified into 12 categories. For example, those who suffered both severe sexual and physical abuse received compensation ranging from \$100,000 to \$120,000; those who suffered severe physical abuse up to \$60,000; minor physical abuse, up to \$5,000. Money was also provided for counselling. For those receiving social assistance, the compensation was not deducted from their regular benefits. Lawyers representing victims agreed to accept payment of fees from the Government as full settlement of their accounts, and agreed not to enforce contingency fee agreements against the victims.

The average award in 1,130 claims settled in 1996-1999 was \$25,440; on average an additional \$6,000 was paid for counselling.

#### **Compensation categories**

Category	Description	Range of awards	Counselling allotment
1	Severe sexual and severe physical	\$100,000 - \$120,000	
2	Severe sexual and medium physical Severe physical and medium sexual	\$80,000 - \$100,000	
3	Severe sexual and minor physical Severe physical and minor sexual	\$60,000 - \$80,000	\$10,000
4	Severe sexual	\$50,000 - \$60,000	
5	Severe physical Severe physical and sexual interference	\$25,000 - \$60,000	
6	Medium physical and medium sexual	\$50,000 - \$60,000	
7	Minor sexual and medium physical Minor physical and	\$40,000 - \$50,000	\$7,500

	medium sexual		
8	Medium sexual	\$30,000 - \$50,000	
9	Minor sexual and minor physical	\$20,000 - \$30,000	
10	Medium physical Medium physical and sexual interference	\$5,000 - \$25,000	\$5,000
11	Minor sexual	\$5,000 - \$30,000	
12	Minor physical and/or sexual interference	\$0 - \$5,000	

### **Categories of abuse**

Category	Type of abuse	Duration/number of incidents	Aggravating factors
Severe Sexual	Anal intercourse, vaginal intercourse, sexual intercourse, oral intercourse	Repeated, persistent, characterised as "chronic" or "severe"	Verbal abuse, withholding treatment, long-term solitary confinement, racist acts, threats, intimidation
Severe Physical	Physical assault, with broken bones (e.g. nose, arm, etc), or other serious trauma, with or without hands (i.e. objects), with evidence of hospitalisation or treatment or permanent partial disability	Repeated, persistent, characterised as "chronic" or "severe"	Verbal abuse, withholding treatment, long-term solitary confinement, racist acts, threats, intimidation
Medium Sexual	Anal intercourse, vaginal intercourse, sexual intercourse, oral intercourse, masturbation or fondling, digital penetration	One or more incidents Shorter duration  Numerous incidents Repeated Persistent	Verbal abuse, withholding treatment, solitary confinement, racist acts, threats, intimidation
Medium physical	Physical assault, with broken bones (e.g. nose, arm, etc), or other serious physical trauma, with or without hands (i.e. objects), with evidence of hospitalisation or treatment if available	One or more incidents	Verbal abuse, withholding treatment, solitary confinement, racist acts, threats, intimidation

	Chronic beatings over a significant period of time		
Minor sexual	Fondling, masturbation, oral intercourse, digital penetration	Fewer incidents Short duration	Verbal abuse, withholding treatment, solitary confinement, racist acts, threats, intimidation
Minor physical	Physical assault, with or without hands (i.e. objects) (aka common assaults)	Isolated incidents, short duration	Verbal abuse, solitary confinement, racist acts, threats, intimidation
Sexual interference	Watching, comments, intimidation, touching	Numerous incidents, repeated, persistent, one or more incidents, shorter duration	Verbal abuse, racist acts, threats, intimidation

### ***The Ontario "Grandview School" Scheme***

This scheme was arrived at in 1994 by a process of negotiation between the Ontario Government and the Grandview Survivors' Support Group. The settlement package consisted of general benefits (intended to benefit society as a whole), individual benefits (for those individuals who claimed specific incidents of abuse) and group benefits (for all former wards of the institution).

Persons applying for individual benefits were required to complete a sworn application and provide supporting documentation, including a declaration of independent legal advice. This was done to ensure that the individual understood the terms of the agreement and the legal implications of signing a release. The adjudicator determined whether the victim had been abused or mistreated; if satisfied on this ground, he/she then assessed the claim for direct financial support. In doing so, the adjudicator was obliged to use a "Matrix", but only as "a guide".

The full complement of benefits payable to an individual was as follows:

- \* A financial award for pain and suffering which ranged between \$3,000 and \$60,000, according to the matrix;
- \* Major medical/dental award: in addition to any direct financial award, the adjudicator could, in the absence of insurance cover, give directions for the payment by the Government to the service providers of additional sums not exceeding \$10,000 to cover exceptional medical or dental costs;
- \* Therapy/counselling to a maximum of \$10,000;
- \* Residential treatment (e.g. for substance abuse or sexual abuse) to a maximum of \$5,000;
- \* Funding for vocational or educational training, career counselling/psycho-educational assessment, financial training or budget counselling;
- \* A contingency fund of up to \$3,000 per individual to respond to individual needs for items (e.g. dental treatment) not sufficiently covered by specific benefits;
- \* An individual acknowledgement/letter of apology from the Ontario Government for the abuse or mistreatment

### **Financial Awards Matrix**

Acts alleged	Harm/injury	Evidence/proof	Award range
Repeated serious sexual abuse (sexual intercourse, anal or oral) and physical beating and threats	Continuing harm resulting in serious dysfunction. Adjudicator applies standards set out in the Agreement.	Possible: medical, psychological, therapist, police reports, direct evidence of victim if credible, witnesses, documentary, conviction of perpetrator.	\$40,000 - \$60,000
Physical abuse involving hospitalisation with broken bones or serious internal injuries	Harm sufficient to justify award must be demonstrated. Adjudicator applies standards set out in the Agreement.	Same as above.	\$20,000 - \$40,000 "mid range"
Isolated act of sexual intercourse, oral or anal sex or masturbation, with threats of abuse of position of trust	Harm sufficient to justify award must be demonstrated. Adjudicator applies standards set out in the Agreement.	Same as above.	\$20,000 - \$40,000 "mid range"
No physical interference - forms of "mistreatment", i.e. cruel conduct that was prolonged and persistent. Confinement in segregation alone will not attract an award. Segregation may be justified in accordance with administrative authority. Abusive segregation cannot be so justified.	Long term detrimental impact - conduct must not have been lawful or condoned. The nature of the harm will determine, once proof of the acts is accepted, whether a minimal recovery or a higher award.	Same as above.	\$3,000 on proof of acts of abuse or mistreatment.  \$10,000 - \$20,000, where serious harm found by the adjudicator.

## **APPENDIX F**

### ***The North Wales cases***

#### ***C. v Flintshire CC*** [2001] Fam Law 420

C, now aged 36, brought a claim against local authority in respect of physical, emotional and sexual abuse by members of staff and residents at two children's homes in North Wales. In September 1979, she had been received into voluntary care when she was 14 years old following physical and emotional abuse by her parents and bullying at school. At the first children's home she was bullied and suffered regular and severe abuse inflicted by her fellow residents without intervention by staff members for five months. Her mother then took her home - but after four months C was again admitted into care [in a different home] for a further period of seven months. During that period she was subjected to physical, emotional and sexual abuse by members of staff, including an indecent assault on her by a care assistant whom she had come to trust. She tried to run away on three or four occasions and as a result she was kept in a secure unit as punishment, on one occasion for two weeks. She also suffered a physical assault by the deputy superintendent that was particularly serious and damaging.

C left care at the age of 17, with drink problems and unable to cope with part-time employment. She suffered from panic attacks and self-destructive behaviour and developed drug abuse problems. At the age of 20 she married a drug addict. Just over two years later she went to live with another man, and had two children with him; but it was not a happy relationship [he abused her], and they separated in 1998. She gave evidence to the North Wales inquiry in 1998 and began to receive psychotherapy, as a result of which her condition has improved. [Her current symptoms are set out at some length]

The court found that C's ill-treatment in the children's homes had had a very significant and continuing effect on her life until she had the opportunity to undertake therapy. He found that at the time that she went into care she had been bright and articulate with above average intelligence, but she was a difficult and unruly child and had presented with considerable behavioural difficulties. He found that she had suffered a constant barrage of verbal abuse from staff and residents and had come to believe that she was bad and useless, and further that, while she had serious problems which were independent of the abuse she had suffered while in care, that abuse had had a devastating effect, in particular undermining her trust in people, especially those with whom she had a close relationship.

Applying a broad brush approach, he awarded £35,000 for pain, suffering and loss of amenities, £20,000 for loss of past earnings, £5,000 for future loss of earnings and £10,000 for the cost of future psychotherapy. = total of £70,000.

The authority appealed on the grounds that the damages for pain, suffering and loss of amenities were excessive in that they were at the "guidelines" level for severe psychiatric damage [£25,000-50,000], whereas in fact the cases at its highest involved only moderately severe damage [£9,000-25,000].

Court of Appeal rejected this argument and upheld the judge's award. According to Ward LJ:

"Physical, emotional and sexual abuse of children in care by those who are supposed to provide that care ... fall into a wholly different category from psychiatric damage that follows other personal injuries. The injury is of a different character. The essential

element of the damage is the extent to which the injury compounds and multiplies the effect of the pre-existing condition. The JSB Guidelines do not include among the factors to take into account the duration of the suffering. In the nature of this kind of abuse, the victims are frequently unable to address the abuse until many years later. The claimant is an example of that unhappy state of affairs. She suffered from the age of 14 [in 1979] until ... 1997 or 1998.... It is all very well to say that the prognosis today is optimistic but guarded; but today is 20 years after she began to suffer at the hands of the local authority. I am quite certain that there is no easily definable bracket into which to place this case such as would enable the court to say that an award which fell outside that bracket must of necessity be so plainly wrong as to be set aside."

Buxton LJ added:

"Between the ages of 16 and until she was well over 30, the last thing that could be said about C was that she had a reasonably fulfilling life.... That opportunity, at a long and crucial stage of her life, was taken away from her by the misconduct of people for whom the defendants are responsible. Happily, the situation is now more promising .... But that does not affect the historical position that what, without undue dramatisation, might be called ... the best years of her life have been substantially taken from her. The judge was plainly entitled to give very substantial weight to that loss.

He was also entitled to have well in mind, when attributing the loss between the various conflicting causes involved, that C was in the hands of the defendants precisely because of her initial vulnerability, in circumstances where they well knew of that vulnerability. He was entitled in that context to have very well in mind ... that the effect of mistreatment by carers would, or at least very well might, have a multiplying or compounding effect on C's initial vulnerability.... [Accordingly] this is a case where the usual process of attributing responsibility between various causes to a large extent breaks down, because the initial cause of C's vulnerability is the context in which the defendants have to take particular care. If they did not take that care, in circumstances where it was known and foreseeable what could be the outcome of abuse by persons of trust and in positions of responsibility, then they cannot complain if less weight than otherwise might be the case is given to that original cause... Those considerations therefore entitled - indeed obliged - the judge not to weigh too nicely arguments based on the respective causal effects of the various facts in the history."

***Various claimants v Bryn Alyn Community Homes Ltd and another*** (High Court, June 2001)

These were 14 cases selected by the parties from the third tranche of claims arising from the physical and sexual abuse of children in homes in North Wales; the defendants were the company which ran Bryn Alyn Home, and their insurers (the company had gone into liquidation in 1997, only the insurers contested the case). The cases gave rise to issues of liability and questions of proof; this note deals only with the question of damages, which were awarded as follows (£ sterling):

Claimant (age at date of hearing)	General damages £	Past loss of earnings £	Future handicap on labour market £	Cost of psycho- therapy £	Other £	Total £
Man (42)	35,000	5,000	5,000	2,000	-	47,000

Man (36)	25,000	3,000	2,500	1,250	-	31,750
Man (34)	17,500	Nil	2,500	1,000	-	21,000
Woman (28)	5,000	Nil	nil	nil	-	5,000
Man (27)	5,000	Nil	nil	nil	-	5,000
Woman (33)	5,000	Nil	nil	nil	-	5,000
Man (36)	25,000	Nil	nil	500	-	25,500
Man (41)	5,000	Nil	nil	1,500	-	6,500
Woman (31)	15,000	Nil	nil	nil	-	15,000
Man (31)	25,000	Nil	2,500	10,000	-	37,500
Man (36)	30,000	Nil	10,000	1,800	-	41,800
Man (38)	12,500	2,500	10,000	2,000	-	27,000
Man (26)	10,000	Nil	nil	3,000	21,450	34,450
Man (28)	17,500	Nil	nil	nil	-	17,500

General observations by Connell J:

"I have borne in mind the JSB guidelines. In none of the cases heard by me was the damage as severe as that experienced by Jennifer Lescikowski in the 1986 Beck litigation, where Potts J awarded £80,000 for general damages. I also bear in mind the judgment of Ward LJ in *C v Flintshire*... There are several common features in [these] claims and C, in particular:

1. The claimants were all children when the abuse occurred;
2. They were all very needy children when placed in the care of the defendants;
3. They were let down badly, and their trust was betrayed, by individual staff members, but also by the child care system operated in the homes;
4. The abuse lasted for different periods, but in every case for a significant time during what should have been a special time in the life of the claimants;
5. The impact of the abuse has been long lasting in every case.
6. There is a depressing similarity in the circumstances of many of the claimants. With one possible exception, they had all been through a traumatic series of damaging experiences before being placed in the care of the defendants. Even if the care offered to them had been all that it should have been, it is doubtful that any of them would have escaped significant difficulties in coping on a day to day basis with adult life. The emphasis varies from case to case; but in no case have I felt that it would be doing justice to the defendants to condemn them for the whole of the psychiatric injury suffered to date by any claimant. In several of the cases the evidence drove me to the conclusion that the damage caused by the defendants formed a significant but small part of the total injury ... leading to small awards. In other cases their treatment at Bryn Alyn was the cause of more substantial damage. Hence the variation in quantum from case to case."

### **Selected cases**

R. (42)[relatively minor abuse causing serious PTSD]

Committed to care by juvenile court at age 15 (truancy and petty theft). In Bryn Alyn for two years (1973-75). Sexually abused by warden (indecent assault), and physically abused (punched) by members of staff. Affected by unpredictable and quite frightening regime. Experiences caused PTSD. He became withdrawn and angry, and after discharge, committed some crimes and was sent to Borstal. R has adjusted to some extent to his disorder, but continues to have significant symptoms. Married, then lived with another partner; concerned about sexuality, suffers flashbacks and intense psychological distress from time to time, etc. Judge classed case as a serious case of PTSD and bearing in mind JSB guidelines [£30,000-£50,000], awarded £35,000 by way of general damages.

Evidence satisfied judge that but for PTSD R would have spent more time in work and would probably have progressed to a better paid job; awarded £5,000 for past loss of earnings. For the future, not expected to make a full recovery, but reasonable to anticipate a steady improvement in his ability to hold down a job over an extended period. Nevertheless there is a continuing risk of handicap on the labour market, and therefore an additional award of £5,000. Psychiatrists who gave evidence agreed that R should undertake 24 sessions of psychotherapy at £90 per hour, a total of £2,160; but award only £2,000 because (i) early payment, and (ii) fact that Bryn Alyn was the only cause of the psychiatric damage suffered.

McK. (28)[present condition only partly caused by abuse]

In Bryn Alyn for two years between ages of 15 and 17. Arrived at Bryn Alyn as a very needy 15 year old with a highly disturbed background and very difficult to handle (Bryn Alyn was her 26th placement). Suffered frequent physical abuse from staff; punched and kicked, hair pulled, humiliating punishments, etc. Judge satisfied that treatment by staff exacerbated her pre-existing condition, but not the main cause of present symptoms of panic disorder and episodes of depression. General damages of £5,000. No damages for loss of earnings because no evidence that Bryn Alyn had made any difference to her (in)ability to work in the past or in the future. Although evidence suggested that psychotherapy offered 20% chance of worthwhile progress, no damages under this head because judge not satisfied that claimant would avail herself of therapy.

J. (36)[delayed reaction to physical and sexual abuse]

In Bryn Alyn for nearly six years from age 10; taken into care because uncontrollable - aggressive tendencies aggravated by racial abuse. Evidence of physical and sexual abuse *before* entering Bryn Alyn, when subjected to further physical abuse (including punching and kicking) and sexual abuse (including buggery) categorised by judge as "extensive sexual abuse of a serious kind". Condition not diagnosed until 1997, when some disagreement between psychiatrists as to severity (delayed chronic PTSD or delayed adjustment reaction) Judge said that claimant had blocked out memories of abuse until 1997 and not entitled to any compensation for that period. But he had suffered significant distress since early 1997, and that distress likely to recur, albeit on a diminishing scale, for the indefinite future, though will overcome his difficulties as time proceeds:

"Given the length of time over which these problems have persisted [4.5 years], and bearing in mind the length of time over which the abuse took place, I conclude that the claimant's symptoms do justify the description of PTSD which cannot be described as severe in the light of the claimant's constructive manner and positive outlook for the future. I assess his general damages at £25,000, which also takes account of his difficulties in

maintaining longer term relationships with women which, as the doctors agreed, was partly attributable to his Bryn Alyn experiences."

*D.* (26)[exacerbation of pre-existing condition]

In Bryn Alyn for one year from 15-16. Had been in care in more than 20 homes from age 3 and suffered extensive sexual and physical abuse before arriving at Bryn Alyn in 1990 with severe emotional and behavioural problems. When in Bryn Alyn subjected to severe sexual abuse (including buggery) and extensive physical abuse; two attempts at suicide; ran away on numerous occasions. Now suffering PTSD and has a severe mixed personality disorder. A damaged person before going to Bryn Alyn, his experiences there exacerbated his condition, and made it more severe and more prolonged. But there would have been a degree of disability even if that abuse had not taken place. Judge held that it would be "a substantial injustice" to blame the defendants for the whole of the damage suffered and exhibited by D, and that the extra damage caused "although serious, was limited". General damages of £10,000. Nothing for loss of earnings, £3,000 for psychotherapy. But judge satisfied that care and assistance are provided to D by his partner of five years; she looks after D in the physical and emotional sense. Most of the care and assistance required for physical problems for which defendants in no way responsible; but also required as a result of abuse suffered by D. Therefore damages payable under this head, assessed on basis of 10 hours care per week @ £5.30 per hour (commercial rate) = £2,756 per annum; £1,000 pa attributable to abuse at Bryn Alyn. But since care is provided "in family", damages assessed on basis of 2/3rd commercial rate. Care provided for 5.75 years to date of trial = £5,750 x 2/3 = £3,800. Post trial multiplier = 26.48 years @ £1,000 pa = £26,480 x 2/3 = £17,650.

Need for at least 100 sessions of counselling likely to cost £8,100; but need only partly due to abuse, therefore damages for cost of counselling = £3,000. Nothing for loss of earnings: "No doubt the Bryn Alyn abuse did cause a deterioration in his ability to find work, but that ability was negligible in any event."

## **APPENDIX G**

### ***Some recent court awards of damages for personal injury***

#### **Sexual or physical abuse**

**R. v B.**, High Court (Record No. 1995/6066P) Date of award not known

The plaintiff, who was employed by the defendant to work as lounge staff in the defendant's licensed premises, was sexually and mentally abused by the defendant between September 1992 and May 1993, when the plaintiff was aged 16-17. As result of the sexual assault, the plaintiff suffered psychiatric disorders, suicidal tendencies and anorexia nervosa. The defendant did not admit liability, but was found guilty of assault. The plaintiff was awarded £135,000 compensatory damages, and £5,000 aggravated damages.

**R. v L.**, High Court (Record No 1996/8142P), July 2001 (O'Donovan J)

The plaintiff was sexually abused by the defendant between 1970 and 1978, when the plaintiff was aged 8-15. Liability was admitted. The plaintiff was awarded general damages of £150,000 [no other details available].

#### **Some other recent awards (for purposes of comparison)**

***Allen v O'Suilleabhain and Mid Western Health Board***, Supreme Court, March 1997

At issue in this case was an award of £468,000 damages to a state registered nurse who at the age of 25 suffered serious injury to her back in the course of her employment in 1989. The trial judge summarised her injuries as follows:

"The pain is now virtually constant. She is unable to sit for long periods or stand for more than five minutes. She is unable to walk for more than half an hour at a very slow pace and is unable to bend to wash her hair, etc. Her sleep is frequently disrupted by pain. The cold weather exacerbates her condition. She now has no social life and is on antidepressants. She is understandably pessimistic about her future. She is extremely disabled in that she is unable to continue in her studies let alone return to her work as a nurse. As a nurse and midwife she would have had extremely good career opportunities ... but it is unlikely that anyone would employ her knowing that she has a bad back problem and that she has to rest for over three hours every day and that she is in constant pain and is unable to sit for long periods."

The award consisted of £50,000 for special damages to the date of trial, £190,000 for loss of future earnings, £24,000 for loss of pension rights, pain and suffering to date of trial £80,000 and pain and suffering in the future £125,000. D appealed on the grounds that the damages for loss of future earnings and for pain and suffering were too high. The Supreme Court agreed and reduced the damages for loss of earnings to £168,000 and the damages for pain and suffering from £205,000 to £125,000 (reducing the overall award to £375,000).

The Court noted that in *Connolly v Bus Eireann* (1996) and *Coppinger v Waterford CC* (1996), it was accepted that the maximum should be increased to £200,000, and in both cases P was awarded that amount for pain and suffering. But the injuries which they suffered were "very much more serious" than in the case of nurse Allen in the instant case. In particular, "she is capable of

living an independent life apart from not being able to bend down ... None of her faculties is impaired." Without wishing to minimise the fact that P is suffering chronic back pain and is prevented by her condition from obtaining normal work, "the view of the Court is that when her situation is looked at in the light of the type of injuries which attract the maximum award of general damages, a fair and reasonable figure for her general damages is the sum of £125,000."

**Cody v S.E. Health Board**, High Court (McCracken J), January 1999.

At age 11, P complained of pain in her left knee joint, and began to walk with a limp. When she went for treatment, her condition was misdiagnosed by her medical advisers, and as a result she was found a few months later to have a slipped femoral epiphysis which prompt, appropriate treatment would have avoided. She suffered serious hip and knee injuries and more or less continuous back pain. By the time of trial she had undergone numerous operations with limited success and still faced the prospect of further surgical treatment. She was left with a deformed hip, restriction in ankle movements, unsightly scarring, a gross limp and continuous pain in her back, left leg and left hip. Her schooling had been seriously disrupted and her future career possibilities had been limited. In the words of the trial judge, "there is no doubt that the plaintiff's disabilities and the various procedures and hospitalisation have had a devastating effect on her". In particular, he noted, "she has been unable to enjoy a normal childhood". Although she mixed quite well with her peers, "she cannot join them in normal teenage activities ... She is also psychologically affected ... and to some extent has not yet managed fully to come to terms with her situation."

Total damages awarded were £581,000, including the cost of care (£78,000), cost of home help, house maintenance, etc. (£48,000), loss of future earnings (£98,000) and damages for pain and suffering £190,000 (made up of £120,000 for pain and suffering to date, and £70,000 for the future). In making this latter award, McCracken J said that the *Sinnott* maximum should now be £250,000, and commented: "While the injuries which P suffered in *Allen v O'Suilleabhain* were not unlike those in the present case, the plaintiff [in *Allen*] did not have to undergo the series of traumatic operations which this plaintiff has had, and did not effectively lose her childhood". Accordingly, "I do not think that the figure of £125,000 [awarded in *Allen*] can be considered as a guideline for this case".

**McDonnell v Walsh**, High Court (Barr J.), March 2001

P a back-seat passenger in car involved in collision. Sustained personal injuries, principally "severe" PTSD. Court found that P had previously suffered from mild mental disorder, though she had never required psychiatric treatment or medication; as a consequence of the accident P would now require daily medication for the rest of her life and would never be fit for ordinary gainful employment; she would need to attend a rehabilitation centre on a daily basis; psychiatric prognosis was that she had suffered significant permanent damage. Award £221,375.

**Troute v Brassil**, High Court (O'Neill J), November 1999

P = mother injured during birth of fourth child; she suffered brain damage which left her permanently and totally incapacitated. Total damages awarded were £1,180,311 and included £75,000 for pain and suffering to date, and £150,000 for future pain and suffering (and £100,000 for future loss of earnings)

**McHugh v Minister for Defence**, High Court (Budd J), January 1999

Negligent failure by army to take appropriate care for health of soldier aged 31 at date of incident, who developed chronic PTSD as a result. Much of the judgement taken up with discussion of

liability; but that issue decided in favour of P. Judge satisfied that P had chronic PTSD, but will probably manage to rehabilitate himself in time and get back into a good job. Total award = £218,900, included £67,600 special damages to date and £46,000 special damages for the future; for pain and suffering to date award was £65,000 and in the future £40,000. As to the damages for pain and suffering in the past, Budd J said: "This covers his change of personality and the effects on his working, social and domestic life and his reduced enjoyment of the amenities of life. In this sum I have taken into account that the plaintiff was a good soldier who enjoyed his army career and who has had the anguish and disappointment of having to leave the army on doctor's advice. I have included a sum of £5,000 in respect of this loss of vocational enjoyment and satisfaction and the stress of having to train for and find alternative employment."

***Brennan v Lissadell Towels Ltd.***, Supreme Court, November 2000

P, a woman aged 40, was injured in an accident at work and suffered a fracture of her right elbow. The fall also caused her to suffer acute pain in the back of her neck, which radiated across her shoulders and down her arms. This affected her grip and caused an inclination to drop things. An MRI scan revealed considerable degeneration in two discs, which had been present before the accident. P's symptoms were sparked off by the accident, but degeneration would probably have caused problems in any event. Her condition caused P to become depressed to a quite disabling degree; she was treated with anti-depressants, which had some effect. But her inability to continue with a creative and interesting job was considered a major factor contributing to her depression, which was characterised as "moderately severe" with PTSD. She also suffered severe and persistent pain.

P was awarded general damages of £130,000, plus £57,667 for loss of earnings and £4,214 special damages, making her total award £191,881. This award was upheld by the Supreme Court, where Hardiman J stated: "The plaintiff has a condition of constant pain, a significant loss of function and insomnia, all of which contribute to depression and have made it impossible for her to work. This in turn feeds back into the depression. She has in effect suffered the loss of her previous lifestyle, of her independence and her physical integrity.... With the aid of counselling and medication she has come to terms with [her condition] to some extent. She is suffering considerable pain some thirteen years earlier than ... it might have been expected ... The loss of her work plainly means much more to her than the loss of the associated income and this is a real substantial and continuing loss.... The overall figure [for damages awarded in the High Court] seems proportionate to the complaints ....".

***Gilna v Maguire and Another***, High Court (Johnson J), May 1999

P, a 25-year-old radiographer, received an electric shock when using a laser image processor. The shock entered her right arm, crossed her chest and went down her left arm. The shock threw her backwards across the room. She hallucinated and was severely shaken. She continued to suffer severe pain, which was considered unlikely to desist. She had to give up her job and it was not anticipated that she would work again. Her lifestyle was greatly restricted.

P was awarded general damages of £120,000, together with £544,203 for loss of earnings and other special damages, giving her a total award of £664,203.

***Curran v Finn***, Supreme Court, May 1999

Prior to her accident at the age of 38, P had been diagnosed as having multiple sclerosis. This condition was aggravated by the accident, which also caused back injuries. O'Neill J summarised her case as follows: "The plaintiff has to be compensated for all of her pain and suffering resulting from the fall, the development of the thoracic disc, the surgery, the MS symptoms for the period in question and in addition it has to be borne in mind that she is being compensated for an acceleration or bringing forward of symptoms of this disease which in due course would have afflicted her. The consequence of the disease is a probable shortening of her life expectancy for which she is entitled to compensation in general damages. In my view an appropriate sum to compensate the plaintiff ... for all of the disabilities and pain and discomfort and compromise of her independence that she has had to endure for the period in question, together with the shortening of her life expectancy is the sum of £200,000."

**Hogan v ESB**, High Court (O'Higgins J), June 1999.

P was a general operative employed by D. He came into contact with an electrical transformer and received severe burns to his back, arms and legs. He was given a number of skin grafts, but left with unsightly scarring. He continued to suffer from disturbed sleep patterns and flashbacks and was diagnosed as suffering from PTSD of severe degree and also as having some symptoms of depression. The problems of a psychological nature were ongoing, but the future prognosis was relatively good. In the words of O'Higgins J., "The plaintiff suffered terribly in this horrific accident. He continues to suffer. While the prognosis is relatively good, the plaintiff is left with permanent unsightly scarring."

P was awarded general damages of £90,000, together with special damages of £4,326. [The damages were reduced by 85% on account of P's contributory negligence.]

**Pethe v McDonagh and Another**, High Court (O'Sullivan J), July 1999.

P was aged 24 when injured in a road traffic accident. Immediately following the accident, he had to spend four hours trapped in the car, which caved in on him. He sustained fractures of the tibia, fibula and femur in his right leg, two broken fingers, lacerations to his knees and four broken teeth. These injuries necessitated seven operations up to the time of trial. He also underwent numerous sessions of physiotherapy. He had suffered loss of confidence, and socialised less since the accident. In addition his right leg was two centimetres shorter than his right leg, causing him to limp, and he was left with discomfort in his right hip. He also has a number of scars on his right leg.

P was awarded general damages of £115,000, together with £60,000 for loss of earnings and £15,000 by way of special damages, making a total award of £190,000.