



Comptroller and Auditor General

Special Report

## **Department of the Education and Science**

The Supervision and Substitution Scheme

Fulfilment of Employment Contracts

The Commission to Inquire into Child Abuse

June 2009

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This report was prepared on the basis of information, documentation and explanations obtained from the public bodies referred to in the report. The draft report was sent to the Department of Education and Science. Where appropriate, the comments received were incorporated in the final version of the report.

# **Report of the Comptroller and Auditor General**

## **Department of Education and Science**

I have, in accordance with the provisions of Section 9 of the Comptroller and Auditor General (Amendment) Act, 1993, carried out examinations of

- the supervision and substitution scheme in post-primary schools,
- the fulfilment of employment contracts in Institutes of Technology, and
- the cost and timescale of the Commission to Inquire into Child Abuse.

I hereby submit my report on the above examinations for presentation to Dáil Éireann pursuant to Section 11 of the said Act.

A handwritten signature in black ink, appearing to read 'John Buckley', with a stylized flourish at the end.

**John Buckley**  
**Comptroller and Auditor General**

29 June 2009



# Table of Contents

<b>CHAPTER 1: THE SUPERVISION AND SUBSTITUTION SCHEME .....</b>	<b>7</b>
SUMMARY AND CONCLUSIONS .....	9
REPORT ON THE EXAMINATION OF THE SUPERVISION AND SUBSTITUTION SCHEME IN POST- PRIMARY SCHOOLS.....	11
 <b>CHAPTER 2: FULFILMENT OF EMPLOYMENT CONTRACTS .....</b>	<b>27</b>
SUMMARY AND CONCLUSIONS .....	29
REPORT ON THE EXAMINATION OF THE FULFILMENT OF EMPLOYMENT CONTRACTS IN INSTITUTES OF TECHNOLOGY .....	31
 <b>CHAPTER 3: THE COMMISSION TO INQUIRE INTO CHILD ABUSE.....</b>	<b>35</b>
SUMMARY AND CONCLUSIONS .....	37
REPORT ON THE EXAMINATION OF THE COMMISSION TO INQUIRE INTO CHILD ABUSE.....	39



## **Chapter 1**

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### **The Supervision and Substitution Scheme**





## Summary and Conclusions

There are two schemes in place to provide supervision and substitution cover in schools in the event of absence by teachers

- a substitution cover scheme
- a supervision and substitution scheme.

This examination focussed on the supervision and substitution scheme in post-primary schools which was established with effect from the school year 2002/2003.

Under the scheme the Department of Education and Science provides funding for the provision of supervision and substitution on the basis of an agreed 37 hours per annum for each wholetime equivalent teacher allocated to the school at the beginning of September each year. The scheme provides for substitution cover and the supervision of pupils during morning and lunchtime breaks and before and after school.

Teachers do not have to participate in the scheme. In cases where teachers do not opt to participate, the Department pays a grant to schools equivalent to the cost of 37 hours for each teacher who opts out of the scheme. This grant is designed to enable schools to make alternative substitution and supervision arrangements.

It is accepted that due to the unpredictable nature of teacher absences it is difficult for the managerial authority of a school to ensure exact usage of the 37 hours commitment. However, subject to that, the examination concluded that

- where records were available they showed that teachers are providing less than the 37 hours the Department pays for
- the full amount of the grant was not applied for the purpose intended in some schools and some schools could not demonstrate how the portion used was applied
- since some schools only used the supervision and substitution scheme as a last option there is a risk that money is being paid for supervision and substitution in circumstances where a pool of teachers has already been paid to provide it
- in some schools the scheme does not smoothly match purchased hours with the demand for supervision and substitution across the school day
- the use of external supervision staff has resulted in the accrual of contract rights in some instances
- pupils lose out in circumstances where teachers (where qualified to do so) do not teach when providing substitution.

While recognising the value of arrangements to utilise existing teaching resources in supervision and substitution and the practical difficulty of matching the committed hours against short term school needs there appears to be some scope to refine the operation of the scheme to improve the value obtained for the State's outlay.



# Report on the Examination of the Supervision and Substitution Scheme in Post-Primary Schools

1.1 There are two schemes in place to provide supervision and substitution cover in schools for absent teachers

- a substitution cover scheme
- a supervision and substitution scheme.

1.2 This examination focussed on the supervision and substitution scheme in post-primary schools. The scheme was formally established with effect from the school year 2002/2003 and the conditions applying at post-primary level were set out by circular letter<sup>1</sup>.

1.3 The supervision and substitution scheme is used to provide for

- supervision of students during periods that are not assigned to any teacher and which had previously been provided by teachers on a voluntary basis (for example lunch breaks)
- periods that are assigned but where teachers are absent at short notice or for short periods (for example absences on official school business and uncertified sick leave).

1.4 Under the scheme, where a suitable substitute for emergency cover is not immediately available, the Principal or Deputy Principal makes arrangements for the supervision of classes of absent teachers that normally involve other members of the teaching staff supervising on behalf of their colleagues. However, in some instances students are not taught during the supervised classes.

## Supervision and Substitution

**Supervision:** the supervision of students on the school premises outside of specified classroom teaching duties aimed at ensuring the health and safety of the pupils.

**Substitution:** the replacement of an absent teacher by another qualified teacher with the objective of maximising appropriate teaching during substitution periods.

1.5 In practice, a teacher is timetabled for specified supervision duties and the substitution element of the agreement is only called upon in the case of another teacher's absence. The substitution duties required of teachers are operated in a similar manner to an "on-call" service. The teacher must be in the school and available for the timetabled class periods to provide cover, if required.

1.6 Expenditure on this scheme in the school year 2007/2008 was €34.8m in respect of Voluntary, Community and Comprehensive Schools<sup>2</sup>.

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<sup>1</sup> Circular Letter PPT 01/03 issued by the Department to the school management bodies on 10<sup>th</sup> January 2003.

<sup>2</sup> This does not include VEC costs which are not readily available.

## **The Substitution Cover Scheme**

A Substitution Cover Scheme which has been in operation for many years predominantly provides cover for pre-approved absences where a replacement teacher is required, arising for example from family leave, jury service or certified sick leave. The substitution cover scheme was extended in 2003 to provide cover for uncertified sick leave at primary and post-primary level and official school business at post-primary level. Expenditure on this scheme in the school year 2007/2008 was some €183m in respect of primary and post-primary schools.

In Budget 2009 substitution cover under the Substitution Cover Scheme for uncertified sick leave and official school business was suspended for post-primary schools. Following subsequent proposals from the management bodies of post-primary schools, new arrangements were put in place for substitution cover for uncertified sick leave and for official school business in post-primary schools.

These arrangements were put in place from 1 January 2009 and will remain in place for the remainder of the 2008/2009 school year while a review of the supervision and substitution scheme and related matters takes place.

## **Operation of the Supervision and Substitution Scheme**

1.7 The Department provides funding for the provision of supervision and substitution on the basis of an agreed 37 hours per annum for each wholetime equivalent teacher (WTE) allocated to the school at the beginning of September each year. The scheme provides for substitution cover and the supervision of pupils

- during morning and lunchtime breaks and
- before and after school.

1.8 Substitution cover occurs mainly in cases of uncertified sick leave and teachers' absences due to approved school activities or official school business.

1.9 Payment for supervision and substitution duties should not be made to teachers for periods within their normal assigned timetabled class periods.

1.10 Permanent, temporary and part time teachers, both qualified and unqualified, Principals and Deputy Principals are eligible to participate in the scheme. Teachers can opt in and out of the scheme on an annual basis but if they opt out they lose the pensionability of their payments. Teachers may re-enter the scheme but the payments will no longer be pensionable.

1.11 The Department informs each school for each school year, in advance, of the resources available for supervision and substitution. The hourly rate for the 2007/2008 school year was €47.91 from the 1 September 2007 and €49.11 from the 1 March 2008. The average payment for the school year was €48.35. As an example, a school with a teacher complement of 100 WTE posts was allocated €178,895. Teachers who sign up to the scheme are paid directly, i.e. each received a total of €1,789 (37 x €48.35) for the school year 2007/2008. This payment is pensionable and is paid directly by the Department to the individual teacher in two payments.

1.12 In those Voluntary, Community and Comprehensive schools where all teachers do not opt to participate in the scheme, the Department pays a grant to schools equivalent to 37 hours for each WTE teacher who opts out of the scheme. This grant is to enable schools to pay for the employment of other teachers in the school who complete supervision and substitution duties in excess of their own agreed 37 hours annually or for the school to employ external

supervisors/personnel. In VEC schools, a grant is not issued to individual schools, however, the funding is available at VEC level to meet expenditure incurred by schools when providing additional supervision and substitution cover for short term emergency absences.

## The Role of the Department

1.13 The Department is responsible for the administration of the scheme in the Community and Comprehensive sector and the Voluntary sector. Administration of the scheme involves the processing of payments to teachers and allocating grant payments to schools. The Department is also responsible for coordinating the scheme at a national level and for ensuring Voluntary, Community and Comprehensive schools are operating within the parameters of the scheme. It is also responsible for the monitoring and evaluation of the scheme.

1.14 Vocational Educational Committees (VECs) are responsible for the administration of the scheme in the Vocational Education sector. While the Department provides funding, it is the responsibility of VECs to process payments to teachers and to monitor the operation of the scheme.

1.15 Figure 1 outlines the number of schools, approved WTE posts and the number of pupils for the school year 2007/2008 in the post-primary school categories.

**Figure 1 Pupil Numbers for 2007/2008 School Year**

	Number of Schools	Number of Approved WTE Posts	Number of Pupils
Community and Comprehensive Schools	91	4,247	52,793
Voluntary Post-Primary Schools	389	13,499	183,358
VEC	225	8,689 <sup>a</sup>	71,061
<b>Total</b>	<b>705</b>	<b>26,435</b>	<b>307,212</b>

Note:

a Figures as at June 2008 which include mainstream and Post Leaving Certificate staff.

## Objectives and Scope of Examination

1.16 The examination concentrated on the operation of the scheme in the post-primary sector (Community and Comprehensive Schools, Voluntary Secondary Schools and the VEC sector).

1.17 Visits were made to seven schools in order to examine the operation of the scheme at school level. Schools visited included three in the Voluntary sector, two in the Community and Comprehensive sector and two in the VEC sector. The largest twenty schools in each second-level sector were identified and the schools visited were selected at random from these.

1.18 The role of the Department in administering the scheme, and its monitoring and evaluation arrangements to ensure the scheme is applied consistently and that funds are used as intended, were also examined.

## Examination Focus

The examination sought to establish

- the cost of the scheme
- the contractual and implementation arrangements
- the extent to which supervision and substitution resources paid for were utilised
- how funds provided in lieu of available supervision and substitution resources were applied
- how effective the scheme is at school level and
- the arrangements for monitoring and reviewing outcomes.

## Cost of the Scheme

1.19 The total cost of the scheme for the 2007 financial year (the last year for which full information is available) in the Voluntary, Community and Comprehensive sectors was €35.4 million<sup>3</sup>. Complete costs for the VEC sector are not available from the Department as VECs are funded on a block grant basis.

### *Voluntary, Community and Comprehensive Sectors*

1.20 In the school year 2007/2008, the Department paid €24.6 million directly to teachers who participated in the scheme and €0.2 million to schools as grants<sup>4</sup>, 77% of the 17,746 teachers were signed up to the scheme. Figure 2 outlines the cost of the scheme in the Voluntary, Community and Comprehensive sectors.

**Figure 2 Cost of Scheme in Voluntary, Community and Comprehensive Sectors – 2002-2008**

	2002/2003	2003/2004	2004/2005	2005/2006	2006/2007	2007/2008
	€	€	€	€	€	€
Payroll	10.5	27.1	21.0	22.1	23.5	24.6
Grant	5.3	8.6	8.3	9.0	9.6	10.2
<b>Total Cost</b>	<b>15.8<sup>a</sup></b>	<b>35.7<sup>b</sup></b>	<b>29.3</b>	<b>31.1</b>	<b>33.1</b>	<b>34.8</b>

Notes:

- a The costs for 2002/2003 are reduced as a result of an ASTI strike – secondary teachers were only paid for eight hours each.
- b The cost for 2003/2004 includes arrears from 2002/2003 school year paid in December 2003 and the impact of two partnership pay increases and the first instalment of benchmarking.

### **VEC Sector**

1.21 The resources for the scheme in the VEC sector are calculated in the same way as those for the Voluntary, Community and Comprehensive sectors. However, the Department was not able to provide complete costings in relation to the VEC sector. It cannot identify the amount of scheme funding that has been given to the VEC sector because payments to individual teachers and the

<sup>3</sup> Primary sector cost is estimated at €54 million.

<sup>4</sup> The grant payment includes a 5% administration fee which is used to pay for the administration costs incurred by schools and VECs in the administration of the supervision and substitution scheme, PRSI and holiday pay.

grant element of the allocation are paid as part of the overall instruction pay allocation to individual VECs.

1.22 VECs pay the participating teachers directly for their commitment under the scheme out of that allocation and a grant is not issued to schools in respect of teachers who do not sign up for the scheme. However, the VEC can draw on this element of funding subject to the overall limit of 37 hours per WTE when expenditure is incurred by schools in providing additional supervision and substitution cover for short time emergency absences. Unspent funding is set against the overall instruction pay allocation.

1.23 Two VEC schools were examined as part of this report and the VECs that funded these schools were able to provide some information regarding the cost of the scheme through an analysis of payments made directly to teachers.

## **Contractual Provisions and Implementation**

1.24 In the Voluntary, Community and Comprehensive sectors, the Board of Management of Schools has responsibility for ensuring the scheme is operated in accordance with the terms of the circulars. In the VEC sector, the CEO of the VEC is responsible for ensuring correct implementation. Wholetime participating teachers are required to contract to deliver a minimum of 37 hours. The Department pays teachers for additional hours delivered over and above that level up to a maximum of 49 hours on condition that the school is staying within the overall allocation of funding under the scheme. Job-sharing teachers are required to deliver substitution on a pro-rata basis. Part-time teachers may be paid additional hours up to a total of 735 hours for the year provided the school operates within its total allocation.

1.25 The contracted commitment covers both supervision and substitution requirements of the school as determined by the Principal. The agreement provides that teachers, who are wholetime, will not normally be required to provide more than 90 minutes per week of the contracted duties. The teacher may agree to undertake duties for more than 90 minutes in a particular week on the request of the Principal, and additional time worked may be reckoned towards the total annual commitment. Similarly, if a teacher is required to work less than the 90 minutes in a week, the hours outstanding still remain in the annual commitment and may be called on another time.

### ***Official School Business***

1.26 The scheme provides for the extension of approved substitution to cover teachers on official school business. However, the Department has never defined official school business for the purposes of the scheme and it is open to each school to interpret what official school business means. As a result, there is a very wide and varied interpretation of what comprises official school business. It has been interpreted as anything that is school related (including teachers accompanying students on extra and co-curricular activities, meeting with parents and running errands on behalf of the school).

***Audit Findings***

There is a risk that a lack of definition of what constitutes official school business may result in resources provided for the scheme being used for purposes that are not directly related to the core business of schools. The Department needs to ensure that there is greater clarity about what falls within the definition of official school business.

***Views of the Accounting Officer***

1.27 The Accounting Officer stated that, with effect from 1 January 2009, under an amendment to the separate Substitution Cover Scheme, there is now a limited number of hours of substitution cover allocated to second level schools to cover absences on official school business and on uncertified sick leave.

1.28 This adjustment more effectively ensures that the resources allocated are being used for the core purpose envisaged and it is aimed to continue with this approach following the completion of the review. Given the wide range of school business that arises, the Accounting Officer considers this approach more appropriate for school decision making rather than trying to set out a prescriptive list.

**Implementation Issues**

1.29 Three of the seven schools visited stated that their understanding of the scheme is that the supervision and substitution scheme should be used only when no other substitute is available elsewhere. All absences in these three schools are covered firstly using part-time teachers (at additional cost), followed by external staff (at additional cost) and finally using the supervision and substitution timetable (where teachers have already been paid for and are available for cover). The Department believes that this is an incorrect interpretation of the scheme. The Department's interpretation is that the supervision and substitution scheme should be the first call on unplanned or unexpected absences under either uncertified sick leave or official school business.

1.30 Some local arrangements appear to call for the use of teachers for one period only each week. Schools have experienced difficulties in applying the scheme in circumstances where participating teachers are only called for one of their timetabled supervision and substitution classes each week. This local interpretation is despite the fact that a commitment from teachers to be available for two timetabled class periods per week forms part of the arrangements envisaged in the governing circulars.

1.31 In addition, there is a lack of clarity in regard to the duties of the participating teachers. It is reported by some schools that participating teachers refuse to teach when substituting for an absent colleague because they interpret the circular as only requiring them to supervise the class for the absent teacher. The circular is clear in relation to this point and states that substitution is the replacement of an absent teacher by another qualified teacher and substitution arrangements should aim to maximize appropriate teaching during substitution periods.



***Audit Findings***

The practice of using teachers participating in the scheme only as a last resort is not the most efficient use of resources and does not appear to be in compliance with the terms of the scheme. The effect is that paid teachers available to provide cover under the scheme are not utilised, while other methods of filling the temporary vacancies are used at additional cost to the public purse. Resources provided in the supervision and substitution scheme should be exhausted before payments are made to other substitutes at additional cost. The Department needs to provide clarity on the sequence for filling absences and emphasise the need to prioritise use of staff already paid, and available through the supervision and substitution scheme.

There is also a need to provide guidance on the number of classes a participating teacher can substitute for each week, as local interpretation in some schools, has resulted in teachers being called for no more than one class period each week. This is not what the circular intended.

The Department should clarify the role of the participating teacher when providing substitution for a colleague. The fact that teachers do not teach when completing substitution duties has an adverse impact on the education of pupils in the affected classes.

***Views of the Accounting Officer***

1.32 The Accounting Officer stated

- With regard to the sequence of filling absences, the relevant circular provides that the paid substitution arrangements are only intended to cover situations where a suitable substitute is not immediately available and that teachers are expected to facilitate school management in dealing with short term unplanned or unexpected absences under the 37-hour scheme.
- In regard to the number of hours for which staff should be available, the circular requires a commitment from teachers to be available for two timetabled class periods per week.
- In regard to the role of the participating teacher when providing substitution for a colleague, the circular is clear that substitution arrangements should aim to maximise appropriate teaching during substitution periods.

1.33 The Accounting Officer stated that these requirements will be drawn to the attention of schools.

***Delivery of Commitment***

1.34 All of the schools provided timetables that showed each contracted teacher has committed to be available for a minimum of 37 hours supervision and substitution.

1.35 In all seven schools visited participating teachers had committed to be available for the minimum of 37 hours. Two of the seven schools could not provide any information regarding the actual delivery of hours. The remaining five schools all produced records showing how many hours of supervision and substitution were completed. In each of these schools teachers were not required for the full contracted 37 hours.

1.36 As shown in Figure 3, in three of the five schools supervision duties performed accounted for something of the order of 20-23 hours. Substitution hours delivered accounted for as little as one hour per teacher per year in one school and up to 25 hours in another two schools. Overall,

schools have demanded less of the participating teachers than the 37 hours paid for. The average hours used calculated over the five schools was 30 hours<sup>5</sup> per teacher.

**Figure 3 Hours Delivered<sup>a</sup> under the Scheme for the School Year 2007/2008**

School <sup>b</sup>	Average Hours Delivered			Hours Paid
	Supervision	Substitution	Total	
VCC 2	22	8	30	37
VCC 3	20	10	30	37
VCC 4	6	25	31	37
VCC 5 <sup>c</sup>	22	1	23	37
VEC 1	10 <sup>d</sup>	25	35	37

Notes:

- a This is the average hours delivered for participating teachers in each school.
- b Seven schools were examined, five from the Voluntary, Community and Comprehensive sectors (VCC) and two from the Vocational Education Sector (VEC).
- c These figures do not include the hours completed by the Principal and Deputy Principal as these figures were usually large (125 hours each completed but claimed payment for 49 hours) and would distort the overall average.
- d This is the average for all 38 teachers participating in the scheme. Supervision duties are undertaken by 16 of these who deliver an average of 23 hours each.

### ***Audit Findings***

The lack of records in two of the schools visited and the fact that in the remaining five schools teachers provided less supervision and substitution than the 37 hours they were paid for casts doubt on the value received from the outlay. In practice, payment is being made for work not completed. While recognising that it is difficult in practice to align the allocation with the drawdown, the scheme should be reviewed to ensure that payment is more closely related to hours actually delivered. It is acknowledged that this matter is being addressed in a review of the supervision and substitution scheme and other related matters that is underway at present.

## **Grant Payments**

1.37 Grants are available to schools to allow them to meet any shortfall in supervision or substitution using casual staff.

1.38 The maximum annual resource available to each school for the entire scheme is the cost of 37 hours for each full-time teacher on its staff. Where this overall allocation is not exhausted because the required number of participating teachers do not sign up for the scheme, the remaining allocation is used as follows

- Full-time and part-time teachers are paid for any additional casual supervision and substitution they provide up to a maximum of 49 hours per annum. This is done through the payroll operated by the Department.
- The Department issues the monetary value of the remaining allocation by way of grant to the Board of Management which, in turn, pays other teachers to perform the duties on a casual basis or may employ external personnel on a casual basis at a rate of €21.88 per hour.

<sup>5</sup> This average is calculated using all of the teachers actual hours divided by the total number of teachers. It is not the average of the figures represented in the table.

1.39 The examination reviewed the utilisation of grants received by the five schools visited in the Voluntary, Community and Comprehensive sectors. The results are set out in Figure 4.

**Figure 4 Summary of Grant Expenditure for 2007/8**

School <sup>a</sup>	Grant Allocated €	Grant Used €	Balance €
VCC 1	35,019	25,086	9,933
VCC 2	75,785	73,323	2,462
VCC 3	9,164	Information not available	Information not available
VCC 4	60,812	32,827	27,985
VCC 5	36,581	22,102	14,479

Note:

a All schools were in the Voluntary, Community and Comprehensive sectors.

1.40 One school stated that the school year 2007/2008 was, in fact, the first year it had used the grant to provide supervision under the scheme. Up to that point, it was not aware of the purpose of the grant. The school was unable to provide the details of what the grant money was spent on in the previous years.

1.41 The Department stated that

- The circular sets out that personnel employed by a school as supervisors may be paid either on a casual basis or on a contract basis from funds provided by the Department as a grant. Accordingly, the school should have been aware of the purpose of the grant issued.
- A remittance slip issues annually with the grant payment indicating that the grant is for supervision and substitution. The Payroll Division issued a letter to each school giving a breakdown of the grant payment for the 2007/2008 school year in July 2008.

1.42 A second school uses the full amount of the grant to employ four non-teaching staff for supervision and substitution duties, and payment for supplementary supervision provided by other staff in the school.

1.43 Another stated that their grant amount is more than the school needs and a smaller grant would suffice. The grant money that is spent is used to employ two non-teaching staff for supervision and substitution duties. The school does not have any records showing how the grant was spent in previous years.

1.44 A further school uses the grant money to pay teachers who make up the deficit in supervision and substitution and each year spends approximately half of the grant.

**Case Study – School A**

One of the schools has underspent in each of the last three years, and the unused grant money is accumulating in a bank account. The school stated that the money is ringfenced and they are unable to apply it for any other purpose. The receipts and expenditure for the last three school years were as follows

<b>School Year</b>	<b>Grant Receipts</b>	<b>Grant Expenditure</b>	<b>Balance</b>
	€	€	€
2005/2006	28,143	20,795	7,348
2006/2007	40,769	23,213	17,556
2007/2008	36,581	22,102	14,479
<b>Total</b>	<b>105,493</b>	<b>66,110</b>	<b>39,383</b>

In three years, the school has accumulated €39,383 or 37% of the receipts in those years in the school bank account.

1.45 None of the schools informed the Department they had grant money remaining and the Department did not contact any of the schools requesting information as to how the grant was spent. The fact that the grant element exceeds requirements raises questions as to the efficient allocation of the grant payment.

**Audit Findings**

The Department was unaware of the level of unspent grant in the schools visited. It is acknowledged that the sample was small but the fact that those schools could not spend the full amount granted under the scheme suggests that the grant allocations may need to be better aligned with needs.

These concerns are increased by a lack of annual review or a requirement for schools to submit an annual account of expenditure under the scheme. The existence of accumulating balances with no direction as to their use is an ineffective allocation of scarce funds.

**Views of the Accounting Officer**

1.46 The Accounting Officer informed me that the Financial Support Services Unit (FSSU) based in the Joint Managerial Body of Secondary Schools (JMB) secretariat advises the managerial authorities of Voluntary secondary schools on a range of financial management issues and control procedures. The FSSU advises schools that grant payments to their schools for supervision and substitution should be used for that purpose only. As a matter of course, the FSSU evaluates the use of supervision and substitution grants when visiting these schools. The Internal Audit Unit of the Department audits Community and Comprehensive schools and the use of supervision and substitution is part of the audit. The amendments for substitution cover introduced in January 2009 should mean that there would be more effective use of the supervision and substitution scheme, including the grant element of this, in the current and subsequent school years. The matter of accumulating balances will be addressed in the review of the scheme. The monitoring of the scheme in the VECs is a matter for the Chief Executive Officer of the VEC.

## Use of Grant Funds

1.47 Schools may use the grant money to recruit external personnel to provide supervision services before school, at break time and after school and for supervision of classes for teachers on uncertified sick leave and approved absences on school business. External personnel should be paid on a contract or casual basis using funds made available from the Department under the terms of the scheme. Contracted staff are required to deliver a minimum of ten hours and a maximum of 20 hours per week as set out in the circular letter.

1.48 The schools considered the employment of external staff to be a very short term, irregular casual arrangement. Five of the seven schools visited did not employ external personnel under this scheme. The reasons cited for this decision included health and safety, a lack of understanding of school culture on the part of external personnel and difficulties in securing personnel who were not parents of pupils.

1.49 In the case of the two schools that did employ external personnel, an advantage cited was that external staff provide the school with more flexible arrangements than teachers, because they are available for all class periods over the week. Both schools use non-teaching staff after timetabled staff have been used to supplement the supervision and substitution timetable. The ability of the school to employ non-teaching staff is a function of the number of teachers who sign up to the scheme.

### ***Audit Findings***

While the use of external staff would appear to offer an alternative delivery option where sufficient teachers do not opt into the scheme, this needs to be carefully managed. External staff should not be permanently employed as the funding is not guaranteed, and is dependent on the level of uptake from teachers in the school. In fact, external staff in the schools that do employ them have become entitled to a fixed term contract under legislation because the temporary contracts did not set out that the conditions of employment were subject to the continued availability of funding. The Department should monitor the use of external staff by schools that could result in the accrual of full contract status.

### ***Views of the Accounting Officer***

1.50 The Accounting Officer informed me that as the Department has issued circulars to schools advising them in relation to the operation and application of the terms of the Protection of Employees (Fixed-Term Work) Act 2003, it is a matter for each managerial authority to implement the terms of the circulars.

## Timetabling Issues

1.51 The relevant circulars provide that each school is responsible for ensuring that resources are used to provide adequate supervision of pupils and to provide suitable substitution to minimise the impact of teacher absences. The schools should prepare the supervision and substitution timetable depending on the needs of their school. The Department does not request timetable details from schools. However, the Department did collect copies of timetables from 15 schools for the school year 2004/2005 in order to verify that timetables were in place.

1.52 Specific arrangements for a supervision and substitution timetable should be made following consultation between management and teachers, and is subject to a maximum of 90

minutes supervision and substitution per week for each teacher, which should include two class periods per week.

1.53 When timetabling the supervision time, approximately 20-25 hours (depending on school size, layout, etc.) is firstly allocated and the balance is available for substitution duties.

1.54 One of the seven schools timetables teachers for 40 minutes supervision and 30 minutes substitution per week (one class period). The remaining six schools timetable for varying amounts of supervision and two class periods for substitution. All of the seven schools reported difficulty in filling all of the timetabled class periods (particularly early morning and late afternoon periods) and three of the schools stated that the scheme was too inflexible. In each of these three schools, teachers nominate two class periods and the school timetables them. This can leave the school with class periods with no timetabled cover and other periods with too much cover available. While the school may approach a teacher and ask them to nominate another class, this is not always possible.

### ***Audit Findings***

Due to local agreements and varying interpretations of the circular, the completion of an appropriate timetable for substitution is influenced by the options of participating teachers more than the coverage needs of the school. In some schools, teachers nominate two of their free classes for timetabling and this may result in more than one teacher being timetabled per period leaving other periods with no timetabled cover.

### ***Views of the Accounting Officer***

1.55 The Accounting Officer pointed out that the circular states

- A commitment from teachers to be available for two timetabled class periods per week will form part of these arrangements. It is a matter for the managerial authority of the school to ensure that this commitment is met.
- The principal should consult with the volunteers in deciding on the timetable for supervision duties. Supervision duties should be timetabled over the course of the school year.

## **Overall Implementation Findings**

1.56 Figure 5 summarises the findings in respect of the school visits in the areas covered by the review. Overall, the schools had a good knowledge of the circular and its provisions, however local implementation was sometimes deficient.

**Figure 5 Summary of Audit Findings at School Level**

	VCC 1	VCC 2	VCC 3	VCC 4	VCC 5	VEC 1	VEC 2
Scheme Used in the First Instance to Fill Absences	✓	✓	✗	✗	✗	✓	✓
Full 37 Hours Used	⊖	✗	✗	✗	✗	✗	⊖
Grant Fully Utilised	✗	✗	⊖	✗	✗	a	a
Grant Used to Employ Casual Staff <sup>b</sup>	✗	✓	✗	✓	✗	a	a
Timetables Prepared	✓	✓	✓	✓	✓	✓	✓

**Key** ✓ Denotes cases where there was compliance

✗ Denotes cases where there was non-compliance or the accounting trail was inadequate

⊖ Denotes cases where no information was available

**Notes:**

- a These were VEC schools where no specific grant is available to individual schools. The funding is administered at VEC level. In these schools no funds were actually applied on external supervision and substitution.
- b The grant is available to schools for employment of non-teaching staff to cover supervision and substitution duties.

## Monitoring and Evaluation Arrangements

1.57 The 2003 circular establishing the scheme provided that its operation would be monitored at national level throughout the year and reviewed at the end of the school year. The review procedure was intended to allow for any practical issues of implementation that might arise, to be dealt with. The review was intended to involve the parties to the agreement – the teacher unions, management bodies and the Department. The scheme has not been reviewed to date. The Department has indicated that a review of the scheme will be completed before the end of the 2008/2009 school year. No formal review or evaluation has been carried out at school level, but the schools did state that the scheme is reviewed informally.

1.58 Apart from the setting of general objectives, no defined measurable performance indicators were established when the scheme was introduced. This could hamper evaluation since the documentation merely states that a scheme was being introduced to pay for work that was previously covered through voluntary work.

1.59 The Department does not collect information to enable it to evaluate the scheme's effectiveness or measure the resources required for the scheme. As a result, operational difficulties have not been examined nor has the effectiveness of the scheme from the Department's point of view or from the schools' perspective.

***Audit Findings***

The scheme has not been monitored to identify any difficulties in its practical application. No needs identification exercise was completed at the inception of the scheme and the scheme had not been evaluated in the six years of operation.

***Views of the Accounting Officer***

1.60 The Accounting Officer informed me that the supervision and substitution scheme and other related matters are being reviewed with the managerial authorities and teacher unions prior to the end of the current school year. A purpose of the review is to ensure that resources allocated are being used to provide supervision and substitution in the most effective way.

**Local Records**

1.61 Schools are required to keep records of the utilisation of the hours allocated under the scheme arrangements. They are also required to provide a balancing statement showing the hours allocated, the hours certified for payment and the expenditure on employment of external staff where applicable. The Department does not review these forms to ensure the information returned is correct and does not verify with Principals that the teachers have completed their contractual commitments. As a result there is no independent control on the use of the scheme. The Department informed me that the review of the utilisation of hours under the supervision and substitution scheme in a school and examination of the balancing statements are both subject to the normal auditing of a school.

1.62 The Department stated that while there may be no formal feedback from schools, it receives feedback from representative management bodies that are informed by the schools. Feedback to date was to the effect that hours provided in the scheme were not enough to meet the schools needs. Feedback was also received through the “Change Management Groups” in 2005/2006 and Principals, teachers and management bodies were represented in those groups and, on an ongoing basis, feedback is obtained through the Teachers’ Conciliation Council.

***Audit Findings***

Local records are maintained by the schools and returned to the Department in line with the provisions of the circular. However, the Department needs to independently verify the quality of the data received. Currently it does not use the local information for any analysis of the scheme.

***Views of the Accounting Officer***

1.63 The Accounting Officer stated that the claims submitted for payment of the teachers annually are certified by the Principal of the school. Schools must also prepare accounts on an annual basis and those accounts are subject to audit.

**Good Practice Opportunities**

1.64 Over the course of the examination, elements of good practice were identified in schools and there is scope for its extension to all schools to maximise the use of resources provided.



## **Good Practice**

### ***Using Timetabled Resources***

One school operates a system that provides a cost-effective way of filling absences. If a teacher has a free period due to their class going on a school trip (for example retreat, transition year activities, etc.) the school asks that teacher to provide cover. The reason for this is that in the schools view, the teacher was timetabled to be in class teaching. If further cover is required, the school then asks participating teachers on the supervision and substitution timetable to provide cover. If both of the above do not satisfy the need for substitution, the school will then approach part-time staff for substitution. Finally, the school will ask staff to provide cover on a voluntary basis.

### ***Use of Hours***

In one school, participating teachers agreed to make themselves available for two class periods (one hour each) per week for the year, on the understanding that when they delivered 37 hours, their commitment to the scheme was fulfilled. As a result, teachers could be called on to supervise two class periods each week, if necessary, until they had reached 37 hours. The Deputy Principal keeps a record of all hours and counts only those delivered (as opposed to those available) towards the annual commitment. The delivered hours are monitored to ensure there is a fair and even distribution among all staff. Participating teachers delivered an average of 33 hours in that school.

### ***Timetabling***

All schools reported evidence of bunching (too many participating teachers) around the middle of the day. Some schools reported a difficulty in that they could not ask a participating teacher to cover a second class period in a week if the school required them to. One school that reports difficulties in filling all timetabled periods suggested that a teacher should have to nominate three free periods and the school will timetable them for two (based on the needs of the school).

In another school, teachers are asked to nominate four free class periods where they would be available for substitution. The Deputy Principal then timetabled each participating teacher for two class periods, ensuring cover was available through all class periods (including periods that are less popular – early morning and late afternoon). Teachers may be asked to cover up to two class periods in a week.

### ***Views of the Accounting Officer***

1.65 The Accounting Officer informed me that the new arrangements put in place from January 2009 subsequent to the Budget will ensure that resources are more effectively used. Furthermore, the supervision and substitution scheme and other related matters are being reviewed with the managerial authorities and teacher unions with a view to conclusion before the next school year. The issues raised in the examination conclusions will be addressed as part of this review process.



## **Chapter 2**

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### **Fulfilment of Employment Contracts**



## Summary and Conclusions

Lecturers in Institutes of Technology are required to deliver a maximum of 560 class contact hours per annum, with a norm of 16 class contact hours per week. In addition to class contact, lecturers are also required to carry out other duties listed in the contract – including curriculum and course design, research, supervising tutorials and assessment of exam work. Their contract of employment states that the performance of these duties will require attendance in addition to class contact hours during the normal working week.

In March 2007, Athlone Institute of Technology was informed that one of its full-time lecturers was also lecturing in NUI Galway.

While initially the circumstances of how a lecturer was able to hold down two full-time positions gave rise to concerns regarding the management and monitoring of staff by Athlone Institute of Technology, the resulting independent review and report which it commissioned raised concerns for the sector as a whole.

The findings of the independent review suggest that there is a need to address a number of issues.

Firstly, there is a need for greater transparency around the delivery of services by lecturers paid out of the public purse. It is disturbing that some lecturers have a belief that their obligations to an Institute of Technology are exhausted upon delivery of contact hours which are set in terms of a norm of 16 hours per week. Third level institutes need to be in a position to demonstrate that monies provided from State sources are applied for the purposes intended.

There is also a need to review the extent to which the recommendations of the independent review are being implemented across the sector especially in the areas of

- monitoring of contract fulfilment
- approval and monitoring of external work and off-campus research
- monitoring of timetabling and contact hours.

Overall, academic work should be carried out within defined contracts that have clear provisions in regard to time commitments and any day-to-day deviations agreed by the governing authorities.

The Accounting Officer of the Department has informed me that the contract will be examined, in the context of the Towards 2016 Agreement, to take account of the totality of the service (in terms of teaching, research, learner support, supervision of post-graduates, course development, committee work and administration) to be provided by lecturers. Discussions on this issue are ongoing through the relevant industrial relations fora.

The Accounting Officer also noted that while she recognised the autonomous managerial responsibility of the Institutes in this area, there were clearly broader oversight issues surrounding the effectiveness of use of resources in the sector which were a matter of direct concern to the Department. She stated that her Department is explicitly addressing the question of the effectiveness of use of existing resources across the sector in the context of work on the preparation of a new strategy for higher education and in line with terms of reference approved by the Minister.



# Report on the Examination of the Fulfilment of Employment Contracts in Institutes of Technology

2.1 Like all bodies in receipt of substantial funding from the State, Institutes of Technology are expected to have arrangements in place to ensure the proper conduct of their business. These include systems and procedures for the management of staff in order to ensure that the terms of their employment contracts are adhered to and the services paid for are delivered.

2.2 Lecturers in Institutes of Technology are required to deliver a maximum of 560 class contact hours per annum, with a norm of 16 class contact hours per week. In addition to class contact, lecturers are also required to carry out other duties listed in the contract – including curriculum and course design, research, supervising tutorials and assessment of exam work. The contract of employment states that the performance of these duties will require attendance in addition to class contact hours during the normal working week. The contract also provides that any external employment, self employment, working partnership or consultancy work entered into must not conflict with the interests of the Institute and must have the prior written approval of the Director of the Institute.

2.3 In March 2007, Athlone Institute of Technology was informed that one of its full-time lecturers was also lecturing in NUI Galway. The lecturer was challenged about the situation and gave assurances that any arrangements with NUI Galway would cease. Further assurances were sought and given by the lecturer at the start of the following academic year. In November 2007 NUI Galway contacted the Institute and informed it that the lecturer was a full-time permanent staff member of NUI Galway. On 30 November 2007 the lecturer resigned from the Institute.

## Examination Focus

I was concerned whether in the circumstances outlined the funds provided to the Institute to engage lecturers was being applied for the purposes intended and the service provided was in line with the remuneration paid out.

2.4 The Institute informed me that it had commissioned an independent review of the circumstances of the case including any administrative or management issues that arose from existing processes and to make recommendations for improvement<sup>6</sup>.

2.5 The report was completed in June 2008. Its main recommendations were that

- heads of schools and departments should, in future, report to the human resource section where they had any concerns regarding the adherence by staff to their contracts of employment together with details of the actions taken
- the Institute should closely monitor the engagement by staff in external employment and introduce arrangements to improve the supervision of off-campus research
- the Institute should scrutinise and monitor class timetables on an ongoing basis.

2.6 The report also drew attention to the working hours for lecturers in Institutes of Technology and noted that the normal working week consisted of class contact time which is usually 16 hours per week and other duties involving research work, academic assessment and academic

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<sup>6</sup> NUI Galway did not wish to carry out a joint investigation of these matters as part of the independent review.

administration. The report noted that some staff (a minority of all staff) appeared to believe that their obligations ended upon fulfilment of their class contact hours.

2.7 It therefore recommended that

- the Institute should ensure that lecturers fulfil the terms of their contract in a visible and accountable manner particularly in regard to non-lecturing duties
- the contract of employment for lecturers and assistant lecturers should be clarified to specify the normal working hours each week.

2.8 The Institute informed me that it proposed to adopt the recommendations of the report. It expects to finalise the actions in response to the report's recommendations shortly. The Institute noted that, while in its view the specific issue represented no material financial risk to it in the context of its total payroll, the report findings raised sectoral issues in relation to contracts of employment of all academic staff. The Institute proposed that it would seek guidance from the Higher Education Authority (HEA) on the issue.

2.9 The HEA informed me that it seeks to ensure an accountable system of higher education and has recently reviewed and updated the governance framework to ensure an appropriate balance between accountability and autonomy. The revised framework updates a draft Code of Practice, which had been issued to the Institutes by the Department of Education and Science in 2003. That draft code had also provided for a code of conduct for employees which included a requirement to avoid conflicts of interest arising from outside activities. The revised Code of Practice requires Institutes to put appropriate arrangements in place to give effect to this requirement.

2.10 I also sought the views of the Department of Education and Science on the matter. The Accounting Officer said that the contract of employment for lecturers in Institutes of Technology was agreed under the 1998 National Wage Agreement<sup>7</sup>. It provided that, in addition to the class contact hours and other duties involving research work, academic assessment and academic administration, lecturers could only engage in external work<sup>8</sup> where it did not conflict with the interests of the Institute and that such work must have the written approval of the Director of the Institute of Technology.

2.11 She informed me that the contract will be examined, in the context of the Towards 2016 Agreement, to take account of the totality of the service (in terms of teaching, research, learner support, supervision of post-graduates, course development, committee work, administration etc.) to be provided by lecturers. Discussions on this issue are ongoing through the relevant industrial relations fora.

2.12 The Accounting Officer also pointed out that in accordance with the Institutes of Technology Acts 1992 to 2006 the Director of the Institute is responsible for, and answerable to the governing body of the Institute for the efficient and effective management of the college. Supervisory and management functions, which include ensuring lecturers comply with approved contract terms and requirements such as external employment are performed by senior academic staff such as Heads of Schools and Heads of Departments.

2.13 The Accounting Officer noted that while she recognised the autonomous managerial responsibility of the Institutes in this area, there were clearly broader oversight issues surrounding the effectiveness of use of resources in the sector which were a matter of direct concern to the Department. She stated that her department is explicitly addressing the question of the

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<sup>7</sup> Programme for Competitiveness and Work (PCW).

<sup>8</sup> External employment, self employment, working partnership or consultancy work.



effectiveness of use of existing resources across the sector in the context of work on the preparation of a new strategy for higher education and in line with terms of reference approved by the Minister.

### ***Higher Education Strategy Review – Terms of Reference***

- 1 To consider the role of Irish higher education in the context of higher education's role in modern societies and, in particular, in the modern knowledge society.
- 2 Describe and analyse the current environment of Irish higher education including
  - the current system in terms of its student numbers, funding, funding models, organisational arrangements and the roles of the different public and private entities involved in the higher education and research domain
  - the existing policy objectives
  - identification and assessment of external factors likely to influence change in the sector (e.g. demographics, student mobility) and
  - the international environment in which the higher education system operates including the benchmarking of the system against relevant international comparators and higher education systems, processes and outcomes in other countries.
- 3 Having regard to the issues arising from 1 and 2 above, and from the process of consultation on those issues, to develop a vision and related set of national policy objectives for Irish higher education for the next 20 years with more focussed targets for the sector for the next five years.
- 4 Having regard to the outcomes of 3 above, and taking into account best international practice, identify the operational framework of the higher education system including the number and roles of institutions within it which will enable it to deliver on these policy objectives, recommend any changes required in the system of oversight and accountability that will support achievement of objectives, determine the level of resources required to achieve the stated objectives, look at the effectiveness of use of current resources, identify any potential for rationalisation or change to maximise the use of those resources and identify how any additional resource requirements can be met having particular regard to the difficult budgetary and economic climate that is in prospect in the medium term.

2.14 I was informed that the Code of Conduct for employees had not been implemented in the Institutes of Technology sector as some of the Institutes were awaiting finalisation of the Code of Practice before introducing it. Those Institutes considered that it would not be feasible from an industrial relations perspective to reach agreement on a Code of Conduct in advance of the finalisation of the broader framework provided by the Code of Practice.

2.15 The background to this is that while discussions on a Code of Governance for Third Level Institutions were initiated in 2004, following legal advice obtained by the University sector as to the compatibility of some of the provisions of the draft Code with the legislation governing the sector, a Working Group was set up by the HEA to draft a new Code for the University sector. The Working Group was chaired by an independent person with significant expertise in the area of corporate governance. The new Code which was developed by the Group incorporates the relevant provisions of the Universities Act 1997 and took account of developments in relation to higher education governance internationally and particularly in the UK. All of the main aspects of the general Code of Practice for the Governance of State Bodies are embodied within this code and, in addition, the guidelines section includes up to date best governance practice – for example, on risk management – which go beyond the requirements of the general code. The Universities Code of Governance was formally published in December 2007.

2.16 Following the passing of the Institutes of Technology Act 2006 the Institutes of Technology and the Dublin Institute of Technology began work on a revised draft code for the Institutes taking account of the new legislation which had come into effect in 2007 and which conferred greater autonomy and enhanced academic freedom on the sector. They had regard to the structure of the Code put in place for the University sector in the course of their work.

2.17 The Code for the Institutes has now been finalised and was approved by the HEA in January 2009. It was issued to the Institutes of Technology in February for formal approval by their Governing Bodies. The HEA has informed the Institutes that, as required by the Code, an Annual Governance Statement is to be submitted for the year 2008/2009 and that a Statement of Internal Control is to be included in their financial statements for 2008/2009. The Annual Governance Statement will affirm compliance with all requirements of the Code, including the adoption of a code of conduct for employees.

## **Chapter 3**

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### **The Commission to Inquire into Child Abuse**



## Summary and Conclusions

The Commission to Inquire into Child Abuse (the Commission) was established on an administrative basis in 1999 and set up by legislation the following year.

This report on the administration of the Commission does not attempt to assess the value of the work it carried out but merely focuses on the timeliness and cost of its investigations. The work carried out by the Commission was both necessary and valuable in order to determine the extent and impact of abuse suffered by persons under the care of the State. The Commission published its final report on the work of its Investigation and Confidential Committees on 20 May 2009. It will now deal with post-publication tasks including the settlement of legal costs and discovery costs.

The Commission was originally given a two-year timeframe in which to complete its work which was expected to cost somewhere between €1.9 million to €2.5 million. Ultimately, by the time it finishes the Commission's work will have extended for more than ten years.

Due to the delays in agreeing a legal expenses scheme and a compensation scheme for victims, real substantive work, involving the submission of witness statements to the Commission did not begin in earnest until after the enactment of the Residential Institutions Redress Act 2002. This meant that progress was extremely slow in the initial years of the Commission's work.

Difficulties were encountered by the Investigation Committee which resulted in a number of reviews which caused the work of the Investigation Committee to be suspended in September 2003. Hearings began again with a public session in June 2004.

Additional functions conferred upon the Commission to review issues related to the testing of vaccines on children in relevant institutions added to the timeframe of the Commission. Because this aspect of the inquiry had to be abandoned, over €1 million in non-effective expenditure has been incurred to date.

As with many inquiries legal challenges delayed the progress of the Commission. Challenges also contributed to the cost of the Commission. The Supreme Court decision in September 2003 that the procedures of the Commission did not breach constitutional guarantees of basic fairness and the decision of the Investigation Committee not to name individual perpetrators opened the way for the Commission to proceed with its work.

Overall, the likely cost to the State of the Commission to Inquire into Child Abuse based on the pattern of costs experienced to date is estimated to be in the range of €126 million to €136 million. Assuming the Commission completes its work by the end of 2010 the cost of its operations is likely to be as follows

- administration will amount to almost €30 million
- the Commission Legal Team will cost €15.73 million
- litigation will account for €2.22 million
- other State Costs will cost over €2 million
- the outlay by the State in responding to Commissions enquiries will be €8.5 million.

The Commission's most recent projection suggests that the final cost of third party representation could range from between €52 million and €62 million. €15.76 million has been paid on third party costs up to 31 December 2008.

In the case of third party representation the Commission initially attempted to operate a legal expenses scheme which specified fees for solicitors and counsel. The scheme operated from May 2001 to April 2002. However, only one complaint went to a hearing before the Investigation Committee during that time. Thereafter, a decision was taken to use the legal costs accountant mechanism for the settlement of third party costs.

In the area of administration, some support work was done using counsel when less expensive staff could have been engaged, for example in the case of Inquiry Officers. There appears to be scope to achieve economies in any future inquiry by using less expensive paralegal or professional staff for research and investigation work.

Up to the date of publication of its report, only one attempt was made to estimate the inquiry's cost during its course. In general, estimation was hampered by a lack of adequate information systems. Even in 2008 the information base to underpin financial estimation and commitments remained inadequate.

In future inquiries, attention will need to be given to establishing information systems to enable the inquiry and the funding Department to estimate its commitments on an ongoing basis.

# Report on the Examination of the Commission to Inquire into Child Abuse

3.1 The Commission to Inquire into Child Abuse (the Commission) was initially established on an administrative basis in May 1999. It issued two reports to Government on future terms of reference in September and October 1999 respectively. Arising from its recommendations, legislation – the Commission to Inquire into Child Abuse Act 2000 was enacted in April 2000 and the Commission was established on a statutory basis in May 2000.

3.2 The original members of the Commission were The Honourable Ms Justice Mary Laffoy (Chairperson), Dr Imelda Ryan and Mr Bob Lewis.

3.3 The statutory Commission was given three primary functions

- |   |
|---|
| <ul style="list-style-type: none"><li>▪ to listen to victims of childhood abuse who wanted to recount their experiences to a sympathetic forum</li><li>▪ to fully investigate all allegations<sup>9</sup> of abuse made to it, except where the victim did not wish for an investigation and</li><li>▪ to publish a report on its findings to the general public.</li></ul> |
|---|

3.4 Three further members were appointed to the Commission on its statutory establishment – Dr Patrick Deasy, a Consultant Paediatrician, Ms Norah Gibbons, Childcare Director with Barnardos and Mr Fred Lowe, Principal Clinical Psychologist in the former East Coast Area Health Authority.

3.5 In June 2001, the Government conferred additional functions on the Commission<sup>10</sup>. A further member was appointed to the Commission as a result of the new functions – Professor Edward Tempany, a retired Consultant Paediatrician.

3.6 In 2003, Justice Laffoy tendered her resignation from the Commission and Mr Justice Sean Ryan was appointed as the new Chairperson of the Commission in December 2003.

3.7 The Commission was initially given a two-year timeframe in which to complete its work and it was expected to cost in the region of €1.9 million to €2.5 million. The Government extended the term of the Commission on four occasions – to May 2005, May 2008, January 2009 and May 2009.

3.8 Financial responsibility for the Commission rests with the Department of Education and Science (the Department). Accordingly, costs are met from a subhead in the Vote of that Department.

## Current Status of the Commission

3.9 The chronology of the main events of the Commission is set out in Figure 6 below.

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<sup>9</sup> This was later limited by the Commission to Inquire into Child Abuse (Amendment) Act 2005, whereby not all allegations would have to be investigated.

<sup>10</sup> These involved examining cases where vaccines had been tested on children – The Vaccine Trials.

**Figure 6 Chronology of Main Events**

<b>Event</b>	<b>Date/Period</b>
Commission Established on Administrative Basis	May 1999
Commission Established on Statutory Basis	May 2000
Publication of the First Interim Report	May 2001
Additional Functions Conferred on Commission	June 2001
Publication of the Second Interim Report	November 2001
Vaccine Trials Division Established	November 2001
First Phase Review of Operations Commenced	December 2002
First Phase Review Report Completed	February 2003
First Phase Review Report Submitted to Government	March 2003
Commission informed Second Phase Review had Commenced	July 2003
Second Phase Review – Public announcement	September 2003
Announcement of Resignation of Justice Laffoy	September 2003
Government publishes “Proposals for the Way Forward”	September 2003
Justice Ryan’s Review of Operations	September 2003
Vaccine Trials Division Closed	November 2003
Justice Laffoy Stepped Down	December 2003
Appointment of Justice Ryan as Chairperson	December 2003
Publication of Third Interim Report Issued	January 2004
Reports on Justice Ryan’s Review and Attorney General’s Review Published	January 2004
Resumption of work of the Investigation Committee following Reviews	June 2004
Final Hearing of the Confidential Committee	March 2006
Final Sitting of the Investigation Committee	November 2006
Publication of the final Report	May 2009

3.10 The Commission’s functions of hearing evidence of, and inquiring into abuse were performed through two separate committees – the Confidential Committee and the Investigation Committee.

3.11 The Confidential Committee had 1,541 applicants of whom 1,090 gave evidence. The final hearing of the Committee was held in March 2006.

3.12 There have been both public and private hearings of the Investigation Committee. Most hearings, both evidential and procedural, have been held in private. The last sitting day of the Investigation Committee was in November 2006.

3.13 Data obtained from the Commission in January 2009 indicates that 2,107 applications were received by the Investigation Committee. Not all applicants proceeded to have their case heard by the Investigation Committee. Some had an interview only, others may have transferred to the Confidential Committee or did not proceed with the matter. 227 individuals had a hearing only, 493 individuals had an interview only and 59 individuals had both a hearing and an interview. Some applicants only provided a statement. Figures provided by the Commission in January 2009 on the numbers who proceeded with their case and a breakdown of those who did not proceed are set out in Figure 7.



**Figure 7 Investigation Committee Complainants by Category**

Category		Number	Totals
<b>Did Not Proceed</b>	Deceased	91	
	Withdrawn by Complainant	370	
	Outside Remit	26	
	Single Instance of Abuse <sup>a</sup>	86	
	Deemed Withdrawn by the Commission <sup>b</sup>	197	
	Transferred to Confidential Committee	319	
	Other	<u>11</u>	<b>1,100</b>
<b>Proceeded</b>			<b>1,007</b>
<b>Total</b>			<b>2,107</b>

Notes:

- a The Investigation Committee did not proceed with any investigations where one instance of abuse in any institution was reported. Section 13(2)(c) of the Commission to Inquire into Child Abuse Act 2000 stated that the report shall not contain findings in relation to particular instances of alleged abuse of children.
- b Complainants were deemed withdrawn by the Commission for failing to comply with rules or deadlines e.g. failing to furnish a statement by the deadline or failing to confirm attendance at a hearing.

3.14 The Commission published three interim reports. The first interim report was issued in May 2001, the second in November 2001 and the third in January 2004, just after Justice Laffoy's resignation. The Commission published its final report covering the two committees on 20 May 2009. It is currently dealing with post-publication tasks such as the settlement of legal costs, discovery costs and dealing with queries.

## Organisational Structure of the Commission

3.15 At 31 December 2008, the Commission consisted of the Chairperson, Mr Justice Sean Ryan and six ordinary members. They were – two of the original members Ms Norah Gibbons and Mr Fred Lowe, Ms Marian Shanley, a Commissioner at the Law Reform Commission, Ms Anne McLoughlin, a Social Worker, Ms Mary Fennessy, a Head Social Worker and Professor Edward Tempany, a retired consultant paediatrician. Ms Gibbons and Mr Tempany were not remunerated after 2005.

3.16 Members of the Commission were assigned to one or other of the two Committees – the Confidential Committee or the Investigation Committee. They could not be members of both. A person who wished to give evidence of abuse was required to choose between giving evidence to one or other Committee.

3.17 The organisational structure of the Commission at December 2005 and December 2008 is set out at Figure 8 below. Staff levels are falling as the Commission's work comes to an end. The 2005 details are given, as this was the peak year-end level of employment in the Commission.

**Figure 8 Organisational Structure of Commission at 31 December 2005 and 31 December 2008**

Category	Role	2005		2008	
		No of Positions	Total	No of Positions	Total
<b>Chairperson</b>	<b>Justice Sean Ryan</b>		<b>1</b>		<b>1</b>
Commissioners <sup>a</sup>	Confidential Committee	3		3	
	Investigation Committee	<u>3</u>	<b>6</b>	<u>3</u>	<b>6</b>
Legal Counsel	Senior Counsel	3		0	
	Junior Counsel	1		1	
	Solicitors	2		1	
	Paralegals	7		2	
	Documentary Juniors	<u>4</u>	<b>17</b>	<u>4</u>	<b>8</b>
Administrative Staff					
Civil Servants	Principal Officer	1		1	
	Assistant Principal Officer	2		1	
	Higher Executive Officer	1		2	
	Executive Officer	4		1	
	Staff Officer	1		0	
	Clerical Officer	0		0	
	Usher	<u>1</u>	<b>10</b>	<u>1</u>	<b>6</b>
Non Civil Servants <sup>b</sup>	Clerical Support	7		8	
	IT Manager	1		1	
	IT Support	1		1	
	Higher Executive Officer	1		0	
	Legal Administration	4		1	
	Administrative Support	1		0	
	Registrar	1		0	
	Research Assistants	2		0	
	Temporary Staff	<u>3</u>	<b>21</b>	<u>2</u>	<b>13</b>
<b>Total</b>			<b>55</b>		<b>34</b>

Notes:

- a Two Commissioners (one in each Committee) have not been remunerated since February and September 2005.
- b The Commission's contract staff are employed through an employment agency.

## Functions of the Committees

### *The Confidential Committee*

3.18 The role of the Confidential Committee was to hear and to record the evidence of those survivors of childhood abuse who wished to recount their experience of abuse in institutions in a confidential setting. Evidence heard could not be challenged by any third party and witnesses were not legally represented at hearings. A further function of the Confidential Committee was to make proposals of a general nature for the prevention of such abuse in the future. Its main purposes were to allow survivors to recount their experiences in an unchallenged environment and to make recommendations.

### *The Investigation Committee*

3.19 The purpose of the Investigation Committee was to facilitate victims who wished to both recount their experiences and to have allegations of abuse inquired into. The Investigation Committee had the power to compel persons accused to attend before it and to produce any documents required. All persons or institutions accused had the right to get advance notice of what a complainant had to say, and, where a hearing took place, to question the complainant if they wished to do so.

3.20 A separate issue relating to the use of children in the testing of vaccines was referred to the Commission in 2001. A division of the Investigation Committee – the Vaccine Trials Inquiry, considered this matter between November 2001 and November 2003.

### *Phases of the Investigation Committee under the Chairmanship of Mr Justice Sean Ryan*

3.21 The Committee held hearings in June and July 2004 under the Chairmanship of Mr Justice Sean Ryan. Representatives of State institutions, Religious Congregations, Survivor Groups and the ISPC were invited to attend the hearings to assist the Committee in a number of areas that it wished to explore. These hearings reassured interested parties that the work of the Commission was progressing.

3.22 Subsequently, the Investigation Committee conducted its inquiry in three phases. Phase I included public hearings which allowed congregations the opportunity to present their case as to how their institutions were managed and gave them an opportunity to present arguments they thought relevant in advance of the hearing of evidence in private. It established the context in which abuse occurred. Phase II consisted of private hearings into specific allegations of abuse in institutions. These hearings commenced in September 2004 and were completed in November 2006. They were preceded by extensive work which included obtaining statements from complainants, individual respondents, Congregations, Government Departments and discovery of documents. Over a million documents were recorded and analysed by the Committee's legal team. Phase III or *Amicus Curiae*<sup>11</sup> involved eight firms of solicitors. They were appointed by the Investigation Committee to represent the interests of complainants at public hearings held in 2006 in relation to the global picture of abuse emerging from the various hearings. A ninth firm was given permission to raise questions at certain hearings regarding the institution run by the order it represented.

<sup>11</sup> *Amicus Curiae* (Friend of the Court) is a person who has a strong interest in a matter that is the subject of a case in which they are not a party but it is thought necessary to have interests represented. A friend of the court may be given permission by the Court to file a written statement of their views on the subject.

## Relationship with the Department of Education and Science

3.23 In September 2000, the Secretary General wrote to Justice Laffoy indicating that he, as Secretary General of the Department would remain as Accounting Officer for the expenditure of the Commission. He also indicated that in the case of an independent statutory corporation it is normal practice that the most senior member of the administrative staff of the body acts as Accounting Officer<sup>12</sup> on a day to day basis and may be required to assist the Public Accounts Committee. He indicated that the Secretary to the Commission was the most obvious person to fulfil this role and would also be expected to give the Minister such information as was required from time to time about the finances of the Commission.

3.24 At an early stage the Commission sought to emphasise its independence from the Department. In April 2001 the Commission terminated the secondment of the Secretary to the Commission as he was seconded from that Department because the Commission saw this as a conflict of interest.

3.25 The Department acted as sponsor of the Commission at all times. Notwithstanding calls that sponsorship should pass to another Department the position of the Government at the time was that it was appropriate that the Department should continue to act as sponsor. The Departments view was that its sponsorship was similar to the position of other government departments which were responsible for inquiries that came within their remit.

3.26 The Commission provides the Department with monthly returns of expenditure and this enables the Department to monitor expenditure against the agreed monthly profiles and budget estimates for the year.

## Examination Methodology

3.27 The examination was carried out by the Office of the Comptroller and Auditor General. Information was made available by the Commission and the Department. The Chief State Solicitors Office, the Office of the Attorney General and the Department of Finance were also consulted.

### Examination Focus

The examination reviewed the factors which impacted on the timescale of the Commission, reviews its cost and the factors giving rise to that cost.

## Timescale of the Commission

3.28 The initial expectation was that the work of the Commission would be completed in a two-year timeframe ending in 2002. While the Commission's Final Report was published in May 2009, it is estimated that its business will not be completed until 2010<sup>13</sup>. A number of factors impacted on the timeframe for the Commission, such as

- additional functions relating to an inquiry into the testing of vaccines on children were given to the Commission in 2001

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<sup>12</sup> Strictly Accounting Officers are persons appointed under the Exchequer and Audit Act 1866 as amended.

<sup>13</sup> Settlement of legal bills, dealing with discovery documentation and wind-down of operations are taking place following publication of the report.

- reviews of the Commission delayed its work
- delays occurred in settling a scheme for the payment of legal expenses
- the issue of payment of compensation to victims also delayed proceedings
- some litigation cases delayed its work.

### ***Additional Functions – Vaccine Trials Inquiry***

3.29 Additional functions were conferred on the Commission in June 2001 that required it to inquire into

- three vaccine trials referred to in a Report of the Chief Medical Officer of the Department of Health and Children which had been referred to the Commission by the Minister for Health and Children
- any other vaccine trial found by the Commission to have taken place in an institution between 1940 and 1987 based on an allegation by a person who was a child in that institution that he or she was the subject of such a vaccine trial.

3.30 The Vaccine Trials Inquiry was a separate division of the Investigation Committee. The members were Justice Laffoy as Chairperson and a Commissioner who was appointed in November 2001. It had its own legal team and three Inquiry Officers were also involved in the work of the Division. The circumstances surrounding the suspension of this work are set out in the section dealing with legal challenges.

3.31 By virtue of the fact that the Inquiry did not proceed, non-effective expenditure was incurred by the Commission on the salary and expenses between November 2001 and September 2005 of a Commissioner appointed for that purpose at an estimated cost of €257,204. The solicitor and Inquiry Officers had been paid approximately €14,000 and between 2002 and 2004, the junior counsel had been paid €482,000. Two senior counsel also spent an element of their time working on the Vaccine Trials Inquiry.

3.32 In July 2005, the Commission wrote to the Department indicating that the Commissioner who had participated in the Investigation Committee in 2004, while awaiting the outcome of a judicial review and Government Decision on how to proceed with the Vaccine Trials Inquiry, was no longer required to attend hearings of the Investigation Committee but would continue to be a member of the Commission, attend meetings and consult with the Chairperson and the Investigation Committee as required from time to time. As and from September 2005, he would cease to be remunerated from the payroll of the Department but would be paid travel and subsistence expenses for all necessary attendance at the Commission's offices.

3.33 In August 2006, the junior counsel who had previously worked on the Vaccine Trials Inquiry, was appointed on a part-time basis by the Commission for a period of one to two months to deal with the return or destruction of documents in connection with the Vaccine Trials Inquiry. She completed that task by April 2007 but is still open to engagement if required. She had been paid €78,000 for dealing with the documents from the Vaccine Trials Inquiry.

3.34 The Commission have indicated that further work will be required in 2009 to dismantle the Vaccine Trials Inquiry. There are still internal documents to deal with and documents which had been circulated will need to be retrieved.

### ***Reviews of the Commission***

3.35 In June 2002, the Commission sought to more than double its resources in order to divisionalise its operation. In communicating with the Commission on this matter, the Department concluded that based on the Commission's view that the Investigation Committee must hear each individual complainant, the Exchequer was likely to be faced with legal costs of the order of €200 million. This was in addition to the Commission's own administration costs which were running at approximately €5 million per annum and the Department's administration costs estimated at €1 million per annum. In addition, the Department considered that based on the then prevailing procedures the Commission was unlikely to complete its work for at least eight years<sup>14</sup> in total. At that stage there had been very few evidential hearings and the age profile and state of health of the witnesses was a cause of concern for the progress of the Commission's work.

3.36 In light of the request for additional resources, the Government decided in December 2002 to immediately review the terms of reference of the Commission and the Commission to Inquire into Child Abuse Act 2000. The purpose of the review was to examine the procedures of the Commission to ascertain if they could be amended with a view to achieving the original intentions of the Government within a more reasonable timeframe and in a more cost effective manner.

3.37 The review, in the form of a consultation process, involved the Commission, the relevant Government Departments and Survivor Groups. It was led by the Office of the Attorney General. It was completed in February 2003 and made a number of recommendations for amendments to the original Act designed to achieve substantial time and cost savings including allowing discretion to the Investigation Committee as to the cases it would investigate and giving cases not investigated the option of appearing before the Confidential Committee. The report was submitted to Government in March 2003 and the Government approved the drafting of amending legislation based on the review.

3.38 The report was not published at that time. Justice Laffoy repeatedly questioned the non-publication of the findings of the review and the status of the Commission whilst under review. In July 2003, the Minister informed the Commission that a further review of the operations of the Commission would be conducted. Justice Laffoy outlined her reservations to the Minister regarding the effect of this review on the work of the Commission and advised that legal opinion indicated that the Commission might be acting *ultra vires* in making any further discovery or production orders pending the outcome of the second phase of the review. A further round of consultations commenced with Survivor Groups and the Commission.

3.39 On 1 September 2003, the Minister announced the decision of the Government to engage in a second phase of the review. Following that announcement, Justice Laffoy issued a letter of resignation to the Secretary General to the Government citing numerous impediments to the work of the Commission over the previous three years and outlining the Commission's stance that the substantive work of the Investigation Committee would have to be put on hold pending the announcement of the results of the second review. She considered that the further review proposed would amount to a complete abrogation of the independence which the Oireachtas intended the Commission to enjoy and seriously undermined her credibility as Chairperson. She stated that she would step down on completion of the third interim report.

3.40 On 9 September 2003 the Government published a document entitled 'Proposals on the Way Forward' with the following elements

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<sup>14</sup> Subsequently, it was suggested that the work of the Investigation Committee could take at least eleven years.

- To legislate to adopt provisions of the completed review regarding how evidence was given, with a view to reducing the need for lengthy oral hearings and to shift the cost burden onto parties who conducted themselves unreasonably.
- To provide a legislative mechanism which would allow evidence gathered to date by the Commission to be used within the proposed new remit.
- To appoint a new Chairperson to the Commission and to consult with the Commission on the most effective way of ensuring a smooth transfer to the new Chairperson.
- To seek (within a three month period) a report, from an independent and objective source, on the application of best practices to the organisation and workings of the Commission to ensure that its mandate is fulfilled within a reasonable timeframe.
- To take all steps necessary to expedite the conclusion of the legal proceedings involving the Christian Brothers.
- The Government would continue consulting with the survivor groups.

3.41 At the end of September 2003, the Minister announced the appointment of Mr Sean Ryan, S.C. as Chairperson Designate. Mr Ryan was formally appointed a Justice of the High Court and Chairperson of the Commission in December 2003 when Justice Laffoy formally stood down.

3.42 At the time of Justice Laffoy's resignation in December 2003, the status of the Commission's work which was reported in the third interim report was as follows

- The Confidential Committee had completed 771 of its 1,090 hearings. The work of the Confidential Committee was not interrupted during the review stages of the Commission.
- The Investigation Committee had heard less than 3% of the 1,712 complainants who had committed to the Investigation Committee and were proceeding at that time. 391 complainants were no longer being dealt with by it at this stage<sup>15</sup>.
- The work of the Vaccine Trials Division of the Investigation Committee had been suspended.

3.43 Prior to assuming the Chairmanship of the Commission, Justice Ryan at the request of the Government made an independent review of the workings of the Commission.

3.44 Justice Ryan reached four broad conclusions

- Amendments to the Act were needed so as to focus the Investigation Committee on its core function of inquiring into abuse of children in institutions. In this regard, he recommended a number of legislative changes.
- Procedural changes were required, and could be put in place, which would enable joint hearings of cases to take place.
- Interim reports should be published as the work proceeded.
- Trust needed to be established between the Commission and all parties to it to ensure fairness in the hearings.

3.45 Justice Ryan stated that the difficulties encountered by the Investigation Committee could be largely traced to the ambitious nature of the original Act which tried to do too much. The essential problem of the Investigation Committee was one of case management. He concluded that without substantial changes being made to the legislation under which the Committee operated and

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<sup>15</sup> The 391 Complainants no longer being dealt with by the Investigation Committee had either failed to comply, transferred to the Confidential Committee, withdrawn, were deceased or were outside the remit.

the procedures to be adopted by that Committee, the estimate of 11 years for the completion of the work of the Commission would be optimistic. Justice Ryan was confident that the changes being recommended by him, together with the approach proposed to deal with the large volume of cases on hands, would result in the work of the Investigation Committee and the Commission being concluded in a reasonable timeframe and without incurring exorbitant costs.

3.46 The principal legislative amendment proposed by Justice Ryan was the removal of the obligation on the Committee to hear every allegation of abuse that had been made to it. Instead he proposed that the Committee could be given discretion to make a decision on which cases to hear based on a preliminary examination of the documentation associated with each complaint.

3.47 Other proposed legislative amendments included

- providing for a single member division of a Committee (rather than two or more)
- allowing for joint hearings to take place
- removing the provision restricting the Investigation Committee from making findings in relation to particular instances of allegations of abuse
- allowing a complainant to withdraw a complaint subject to the consent of the Committee.

3.48 The legislative changes proposed were provided for in the Commission to Inquire into Child Abuse (Amendment) Act 2005.

3.49 The review also recommended a number of procedural steps to be taken by the Investigation Committee as follows

- Each of the 1,712 individual complainants proceeding at the time should be asked by the Commission whether they wished to pursue their complaint through the inquiry process of the Investigation Committee.
- Cases should be grouped into logical units.
- Preliminary examination of documentation by the Investigation Committee to eliminate cases where there was no realistic prospect of a finding.
- Parties should be encouraged to take part in joint hearings and to engage the same legal team where that was in their interest.

3.50 The Report of Justice Ryan into the working of the Commission as well as the previous Review of the Laffoy Commission conducted by the Attorney General was published in January 2004. The review by Justice Ryan cost €17,067.

3.51 As a result of the reviews, the modus operandi of the Commission changed. The obligation on the Committee to hear each and every allegation of abuse that had been made to it was removed. Instead, the Committee was able to call witnesses to give evidence of abuse suffered by them to the extent that the Investigation Committee deemed necessary for the purposes of the inquiry. The work of the Committee would be carried out by reference to specific institutions, with reports to be made in relation to each institution. Persons not selected to recount their experiences at full hearings of the Investigation Committee could choose to recount their experiences before the Confidential Committee of the Commission.



### ***Delays in Agreeing a Scheme for the Payment of Legal Expenses***

3.52 In the third interim report<sup>16</sup> delays in agreeing a legal expenses scheme were listed as an obstacle to progress of the Commissions work. The expenses of legal representation were to be defrayed in accordance with a scheme made by the Minister for Education and Science under Section 20 of the Commission to Inquire into Child Abuse Act 2000.

3.53 Three draft schemes were drawn up between March 2000 and January 2001 by the Department in conjunction with the Office of the Attorney General but were rejected by the Commission. A legal costs accountant was engaged to devise a scheme and advised that a legal costs accountant mechanism would be more suitable for the exercise in which the Commission were engaged. In May 2001, following discussions of more than a year, a legal expenses scheme<sup>17</sup> was agreed for Phase I of the proceedings of the Investigation Committee.

3.54 The scheme was in operation from 9 May 2001 to 10 April 2002<sup>18</sup>. The enactment of the Residential Institutions Redress Act 2002 amended the Commission to Inquire into Child Abuse Act 2000 and provided for the payment of such reasonable costs arising out of representation by counsel or solicitor or otherwise as were agreed with the Commission or, in default of agreement, such costs as would be taxed by a Taxing Master of the High Court.

### ***Absence of a Scheme for the Payment of Compensation to Victims***

3.55 Solicitors representing survivors of abuse called for a compensation scheme to be put in place. Without such a scheme they asserted that it would be difficult for them to advise their clients as to whether participation in the work of the Commission was in their personal or legal interest.

3.56 The third interim report identified the following as effects of the absence of a compensation scheme

- solicitors acting on behalf of some complainants made cooperation with the Investigation Committee and participation in its work conditional on the putting in place of a statutory scheme for compensation
- some persons who had withdrawn requests to testify to the Confidential Committee did so on the advice of their solicitors pending the establishment of a compensation scheme
- others were advised by their solicitors to make participation in the work of the Confidential Committee conditional on the putting in place of a compensation scheme.

3.57 The State initially envisaged that a compensation scheme would follow on from the work of the Investigation Committee of the Commission. The Investigation Committee would determine issues of fact concerning allegations of abuse and a Compensation Board would decide the level of damages. However it became evident that the Investigation Committee would not be able to function unless a scheme of compensation was initiated.

3.58 In October 2000, the Minister announced that the Government had agreed in principle to establish a body to compensate people 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 a regulatory or

<sup>16</sup> The Third Interim Report was published in January 2004.

<sup>17</sup> Elements provided included a fee of €952 for attendance by a solicitor for one full day or €635 for a half day. It also provided for a brief fee of between €952 and €1,587 for a barrister with a refresher fee of €952 for a full days attendance.

<sup>18</sup> Only one complaint went to a hearing before the Investigation Committee while the scheme was in operation. The total amount of legal costs paid by the Commission under the scheme was €5,308.

supervisory function. Compensation would be paid on an ex-gratia basis without the need to establish liability on the part of State bodies but subject to the claimant establishing to the satisfaction of the body that he or she had suffered abuse resulting in damage.

3.59 The issue was resolved in April 2002 with the enactment of the Residential Institutions Redress Act 2002, which established the Residential Institutions Redress Board to make fair and reasonable awards to persons, who, as children were abused while resident in industrial schools, reformatories and other institutions subject to state regulation or inspection. The Redress Board cannot decide any question of civil or criminal liability on the part of persons involved in the running of these institutions. Such decisions are the responsibility of the courts and the Commission.

3.60 The Residential Institutions Redress Board was a completely separate process from the Commission to Inquire into Child Abuse. Applicants could participate in either or both.

### ***Legal Challenges involving the Commission***

3.61 The Commission has been involved in six sets of legal proceedings – one application pursuant to section 25 of the Commission to Inquire into Child Abuse Act 2000, four judicial review proceedings and one plenary hearing.

#### ***Hearing Representation – Limitation***

3.62 In July 2000, the Chairperson of the Commission ruled that the extent of legal representation of any person that could be present at oral hearings of the Investigation Committee during the first phase of its work, whether as a complainant or as a respondent, would be limited to one solicitor and one barrister of their choosing. This attempt to limit the number of legal representatives entitled to attend at evidential hearings was challenged and in an effort to resolve the issue the Commission applied to the High Court in May 2002 under Section 25 of the Commission to Inquire into Child Abuse Act 2000, for approval of its decision.

3.63 In a judgement in October 2002, the High Court refused to approve the decision of the Investigation Committee, indicating that it did not have jurisdiction to make such a decision and if it did have such jurisdiction, it had to be exercised in a manner that would not interfere substantially with the right of representation of parties before it and the interests of justice. It found that it interfered with the rights of five notice parties to the case and, therefore, was not justified. The High Court, however pointed out that it was clear that the ruling of the Investigation Committee did not purport to interfere with or impede the number of solicitors or counsel that may be retained in any particular case. The limitation was directed solely to representation at the giving of evidence. No attempt has since been made by the Commission to limit the number of legal representatives of any person who is appearing before it.

#### ***Evidence Deadline – Extension***

3.64 An applicant who had failed to meet the extended deadline for receipt of applications from persons who alleged they had suffered abuse in institutions was given leave by the High Court to apply to quash the Investigation Committee's decision not to accept his request. In February 2003, the High Court found that the applicant failed to establish good reason why the time should be extended.

#### ***Vaccine Testing – Compellability of Witness***

3.65 A professor who had been involved in the conduct of some of the vaccine trials under inquiry by the Commission refused to comply with a direction to attend at public hearing. The

Commission applied to the High Court to compel compliance and the professor sought a judicial review to quash the direction to attend. He considered that the manner in which the Vaccine Trials Division was proceeding with its inquiry was in breach of his rights. At the High Court proceedings in May 2003, it was held that the Commission had jurisdiction to issue the direction to attend and that it was valid. However, on appeal in July 2003, the Supreme Court found in favour of the appellant and quashed the direction of the Commission.

#### *Fair Procedures – Christian Brothers*

3.66 The Christian Brothers challenged a ruling of the Investigation Committee in October 2002. They claimed that the inability to offer proper defences and the danger of prejudice from the lapse of time in older cases would render findings unsafe. In January 2004, while the High Court found that, in particular respects, the Investigation Committee was acting *ultra vires* having regard to the provisions of the Commission to Inquire into Child Abuse Act 2000, constitutional provisions guaranteeing the right to basic fairness of procedures had not been breached. This was appealed to the Supreme Court.

3.67 In June 2004, the Investigation Committee independently issued a decision that it would not name individual perpetrators. The Christian Brothers indicated that this addressed concerns that led to the proceedings and they abandoned their appeal. In June 2004, the Supreme Court ordered that the Commission pay the Christian Brothers' costs of the substantive appeal.

#### *Vaccine Testing – Vires*

3.68 Judicial review proceedings seeking, *inter alia*, a declaration that the order which established the Vaccine Trials Inquiry was *ultra vires* the Commission to Inquire into Child Abuse Act 2000, were initiated against the Department in November 2003, by another professor who had a role in the conduct of some of the vaccine trials. Advice from the Attorney General and senior counsel was that the State and the Commission would not be able to defend the proceedings and that the conduct of the Vaccine Trials Inquiry by the Commission would be found to be *ultra vires*.

3.69 The Commission gave an undertaking on 25 November 2003 to the High Court that it would not conduct any hearings in relation to the matters within the ambit of the order until the matter was settled. The practical effect of this undertaking was that the work of the Vaccine Trials Inquiry was suspended at that point. The court subsequently decided that the order was *ultra vires* the Act. The work of the Vaccine Trials Inquiry never recommenced. It was agreed between all parties concerned that the future of the Vaccine Trials Inquiry was a matter for the Department of Health and Children and in June 2006 the Minister for Health and Children wrote to the Chairperson of the Commission indicating that no further action should be taken in regard to the statutory instrument of 2001<sup>19</sup> and that no inquiry into the trials should be carried out.

#### *Disclosure of Details by Confidential Committee*

3.70 In a further judicial review an applicant attempted to compel the Commission to provide details regarding her deceased husband's involvement at the Commission to the Residential Institutions Redress Board so that she might be awarded redress. The judgment was to the effect that due to the fact that the evidence had been given to the Confidential Committee, absolute confidentiality was required and if the respondents were to comply with the request, they would be committing a criminal offence.

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<sup>19</sup> SI 280 of 2001 which came into operation on 19 June 2001.

## Cost of the Commission

3.71 This section sets out an estimate of the cost of the Commission and analyses the main factors that contribute to its cost. There are three broad categories of cost – the cost of its own direct administration and investigations, the cost of third party witnesses who assist in its work and the costs borne by State Bodies in supporting the Commission and in responding to its work. In addition, litigation, as outlined previously, related to the conduct of the Commission can arise in order to clarify rights and defend rulings, thereby giving rise to litigation costs.

3.72 Up to 31 December 2008, approximately €12.04 million, excluding third party legal costs, had been directly incurred on the conduct of the Commission. A further €10 million has been identified as having been incurred to end December 2007 by other State Bodies including €8.48 million in responding to Commission enquiries. However, considerable costs have also accrued in respect of third party representation and discovery of documents. The gross projected cost of the Commission excluding third party legal and discovery costs as independently estimated by my staff is set out in Figure 9.

**Figure 9 Gross Projected Cost of the Tribunal excluding Third Party and Discovery Costs**

Category of Cost	Incurred to end 2008 <sup>a</sup>	Projected Further Costs <sup>b</sup>		Total Projected Cost		
		Low	High	Low	High	Average
	€m	€m	€m	€m	€m	€m
Administration <sup>c</sup>	25.57	4.08	4.30	29.65	29.87	29.76
Legal Team Costs	14.25	1.39	1.48	15.64	15.73	15.68
Litigation Costs	2.22	–	–	2.22	2.22	2.22
State Respondent Costs <sup>d</sup>	8.48	–	–	8.48	8.48	8.48
Other State Costs <sup>d</sup>	1.56	0.51	0.75	2.07	2.31	2.19
<b>Total</b>	<b>52.08</b>	<b>5.98</b>	<b>6.53</b>	<b>58.06</b>	<b>58.61</b>	<b>58.33</b>

Notes:

- a These are unaudited figures subject to change.
- b The low estimate assumes a wind-up date of January 2010 and the high estimate assumes a wind-up date of December 2010.
- c Included in the Administration estimate is €0.5 million for the publication of the report and for dealing with the closure of the Vaccine Trials Inquiry.
- d These are end 2007 figures but are unlikely to have changed.

## Administrative Costs

3.73 Administrative costs are projected to amount to between €29.65 million and €29.87 million. Over half of these costs are incurred on staff resources. An analysis of administration expenses incurred in 2008 indicated that approximately

- 59% related to salaries and wages of staff including temporary contract staff
- 25% related to furniture and accommodation
- 6% related to IT and Equipment
- 4% related to experts
- 3% related to the legal costs accountant.

The balance of 2% related to telephones and miscellaneous expenses.

### ***Tendering/Selection of Legal Costs Accountants***

3.74 In the course of financial audit work it was noted that the current legal costs accountant service procured using restricted tendering procedures led to costs of €215,961 up to end of August 2006. This exceeded the threshold established for an OJEU<sup>20</sup> tender.

3.75 The Commission has indicated that, while it considered all potential candidates operating in the State for legal costs accounting services, they were ruled out on the grounds of conflict of interest or capacity to meet requirements. The Commission then sought assistance from the Law Society in Northern Ireland but it became apparent that they could not provide the Commission with a dedicated team. Given the need for a service provider to be familiar with Irish common law as well as having no language impediments, the Commission sought assistance from the Law Society in Britain and interviewed three potential candidates, following which a contract was negotiated and agreed. The reason for the restricted procedure was the urgent need to recruit a suitable legal costs accountant against a background where solicitors were threatening court action, as well as application of interest and penalties on bills outstanding. With many legal bills to be settled, before the Commission is wound up, it would not be viable from an economic or operational viewpoint to commence another tender process at this stage. The Commission has stated that it is very satisfied with the service received to date and it has resulted in substantial savings.

### ***Remuneration of Members of the Commission***

3.76 The Chairperson of the Commission is the only member of the judiciary who is on the Commission and therefore paid from the Central Fund. In 2000, it was agreed that the other members of the Commission would be paid the higher of

- the salary of their current post, or
- the first point of the Assistant Secretary grade (€68,276).

3.77 In 2002, following sanction from the Department of Finance, the Commissioners were linked to the Assistant Secretary scale rather than the first point.

### ***Experts and Research***

3.78 The Act empowers the Commission to appoint experts to give advice, guidance and assistance and to conduct or commission research. The Commission has appointed several experts to its inquiry. These were selected on the basis of their particular knowledge and expertise. The Commission informs the Department of the appointment of consultants and the commissioning of research. Up to 31 December 2008, a total of €28,582 has been paid to experts.

### ***Witness Expenses***

3.79 The Commission to Inquire into Child Abuse Act 2000, provides that the Minister for Education and Science may, with the consent of the Minister for Finance and after consulting with the Commission, make a scheme for the payment of expenses incurred by a person in attending

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<sup>20</sup> EU Public Procurement Directives establish legal obligations on contracting authorities where the value of the contract is above specified thresholds. These obligations include advertising their requirements (in the Official Journal of the European Union (OJEU), the etenders.gov.ie website or similar), having open and transparent competition and having clear and objective criteria.

before the Investigation Committee or the Confidential Committee of the Commission or making a submission in person or through a legal representative.

3.80 The Minister established a scheme for payment of witnesses' expenses prior to the Commission's first public sitting in June 2000. It provided for the payment of travel, accommodation and subsistence expenses for witnesses and a travelling companion and for payment, in certain circumstances, of a fee and travel and subsistence expenses, of a professional counsellor accompanying a witness. The scheme was revised with effect from January 2002 with some changes to the rules applying to witnesses travelling from abroad and also to the accommodation and subsistence rules and rates. An amount of €114 for each witness and companion, where relevant, was allowed in respect of accommodation and subsistence expenses for any twenty-four hour period. It also provided for absences of shorter duration and for a discretionary payment where such a payment would assist a witness when attending a Committee to give evidence. Not every witness received expenses. The total witness expenses paid to the end of 2008 were €807,259.

### ***Document Scanning***

3.81 From 2004, due to the sporadic nature of the work, the Commission outsourced their document scanning. From 2004 to March 2007, €455,925 was paid to the service provider for data indexing.

### ***Deloitte Report***

3.82 In response to concerns regarding internal control, the Commission engaged Deloitte to carry out an internal review. No evidence was found to support those concerns. The Deloitte report cost €36,300.

### ***Engagement of Contract Staff/ Non-Civil Servants***

3.83 The Commission's contract staff are paid through a payroll provider. Each week the Commission transfers funds to it to cover the payroll. Funds for this purpose are kept in a public bank account.

3.84 In May 2005, 21 members of the Commission's staff had been transferred to the payroll provider. Their salary levels were adjusted upwards on transfer to reflect market rates at that time at an additional annual cost of €22,353 (exclusive of employer PRSI). The payroll provider became the employer of the transferees from that date. No formal contract was signed between the Commission and the payroll provider.

### ***Bank Accounts***

3.85 The Commission has, over the period of its existence, had five bank accounts which are all funded by the Department through an imprest system. They are as follows

- Confidential Committee Witness Expenses Account
- Investigation Committee Witness Expenses Account
- Contract Payroll Savings Account
- General Expenses Account
- Tribunal Legal Team Fees Account.

3.86 The Confidential Committee and Investigation Committee Witness Expenses Accounts are no longer in use.

3.87 Expert fees, legal fees, withholding tax, VAT and the commission credit card are all paid from the Tribunal Legal Fees Team Account. The credit card is used for certain expenses incurred by the Commission such as booking hotel accommodation, interview rooms, conferences and travel expenses.

3.88 In December 2003, the Secretary to the Commission agreed with the Department that they could hold a balance of €5,000 in each account at the end of the year. At the end of 2006, the Commission received approval to hold a greater balance in the Payroll and Legal Team Accounts.

## Legal Team Costs

3.89 It is estimated that, on completion of the work of the Commission, almost €16 million will have been incurred on Commission legal team fees.

### *Cost of Commission Legal Team*

3.90 Fees paid to counsel, agreed in 1999 between the Office of the Attorney General, the Department of Finance and the Department of Education and Science, for a period of two years with a review at the end, were slightly greater than those of other tribunals. An initial brief fee of €34,918 and €23,279 was payable to senior and junior counsel respectively. Daily refresher fees following the first 40 days of public hearings were set at €1,905 and €1,270 respectively.

3.91 Those rates remained in place until new rates equivalent to rates for the Mahon and Morris Tribunals were approved by the Department of Finance in January 2004 (i.e. €2,250 for senior counsel and €1,500 for junior counsel).

3.92 In 2007 a senior counsel to the Investigation Committee returned to the Law Library and his position was filled by a junior counsel serving the Committee. The junior counsel had been called to the Inner Bar in 2006 but continues to be paid the junior counsel rate.

### *Additional Cost of Engagement of Junior Counsel as Inquiry Officers*

3.93 The Commission to Inquire into Child Abuse Act 2000 provides that the Commission may 'authorise such and so many members of its staff as it may determine to perform the functions conferred on Inquiry Officers<sup>21</sup>' by the Act. When the Commission was established it was envisaged that Higher Executive Officers from the Civil Service should be retained to perform the functions of Inquiry Officers and the Commission had obtained sanction from the Department of Finance for the appointment of two Higher Executive Officers in this respect. However, as a result of the Commission's view that a conflict of interest could arise out of the involvement of civil servants in the investigative work of the Commission and, in particular, civil servants recruited from Departments under investigation, the Commission decided to retain junior counsel to perform the functions of Inquiry Officers. It appears that prior discussions had not taken place with the Department, the Department of Finance or the Office of the Attorney General in relation to the engagement of junior counsel as Inquiry Officers. The Commission proposed appointing Inquiry Officers as part-time staff members who would be entitled to the statutory minimum annual leave

<sup>21</sup> The role of an Inquiry Officer was to carry out a preliminary inquiry into an allegation by a person that he or she suffered abuse in childhood in an institution during the relevant period by obtaining complainant and respondent statements and other relevant documentation, conducting interviews and preparing a report for the attention of the Investigation Committee.

and payment for public holidays in accordance with the Organisation of Working Time (Determination of Pay for Holidays) Regulations 1997.

3.94 At that time, the rate for engaging junior counsel as Inquiry Officers of €254 per day and €51 per overtime hour was significantly higher than that for Higher Executive Officers of €159<sup>22</sup> per day and €25 per overtime hour.

3.95 Four junior counsel were subsequently engaged as Inquiry Officers and in February 2002 a significant rate increase was sought for the Inquiry Officers. The Department of Finance believed at the time that the rates being paid were sufficient given their level of experience as barristers. The Office of the Attorney General pointed out that since they were not on an exclusive attention basis to the Commission, it was difficult to justify an increase so soon, a mere 18 months after the original rate had been agreed between the Commission and the Inquiry Officer counsel. In August 2002 following much debate the Department wrote to the Inquiry Officers again confirming that they would not support an application for an increase in remuneration.

### ***Documentary Counsel***

3.96 In November 2004, the Commission suggested that since three documentary counsel engaged by the Commission, two of whom were Inquiry Officers, were taking on onerous extra responsibilities and duties to speed up the work of the Commission, it would be happy for them to do the work rather than taking on an extra junior counsel. It proposed that each of the documentary counsel would be paid for one third of the year at the rate appropriate to a full junior counsel as they would be doing the work of a junior counsel. This amounted to an additional €23 daily rate on top of the standard €77 daily rate for each counsel for four months of the year. A yearly saving of €15,400 after year one was indicated. This was supported by the Office of the Attorney General and sanctioned by the Department of Finance. The additional payments were extended on a number of occasions and in December 2006 the Department did not formally seek sanction from the Department of Finance but allowed the extension on the understanding that the last day of December was the final day of the inquiry. A further four extensions were sought and sanctioned at an additional cost of €467,322. Payment at the higher rate was terminated in November 2008.

## **Approval of Legal and Administration Costs**

3.97 The Commission has considerable administrative autonomy including control of its banking activities. Payments made to the Commission's legal team are based on days worked as certified by its administrative staff until October 2007. After that date, days worked were certified by the Chairperson and Commissioners. Invoice copies and payment authorisation forms are submitted to the Department. A sample of fee notes for 2006 to the value of €1.14 million (53% of legal fees in 2006) were examined. All fee notes examined were properly authorised and charged at the correct rates. A payment authorisation form completed by the Commission is submitted to the Department for other administrative expenditure.

## **State Respondent Costs**

3.98 State Respondent Costs incurred to the end of 2007 were just under €8.5 million. These costs include the cost of representing public interest and the interests of government departments together with the cost to government departments of compliance with Orders of Discovery issued by the Commission.

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<sup>22</sup> €186 inclusive of 16.66% mark-up for superannuation.



### ***Department of Education and Science Costs***

3.99 Included in the figure is €3.44 million incurred by the Department of Education and Science between 2000 and 2007 on legal fees, research, discovery, reviews and related matters.

3.100 This includes costs of €12,436 incurred on a review of the process and procedures in the Department for the discovery of documents as a result of concerns raised by the Commission. It also includes €176,634 incurred on engaging two historians to look at the history of the old reform schools and the context in which the institutional abuse occurred and also to extract information and respond to a range of topics required by the Commission for the purposes of the public Phase III hearings in 2006. A 250 page statement setting out the role, responsibilities and policies of the Department over a 66 year period was provided to the Commission and the material in the statement formed the main basis of the questioning of the Secretary General over a two day period at the Phase III public hearings.

### ***Department of Education and Science Legal Team***

3.101 The Department as a respondent to the Commission has a right to legal representation at the public hearings and has attended all public hearing since mid-2004<sup>23</sup>. By agreement the Department did not attend private hearings of the Investigation Committee under Justice Sean Ryan but received transcripts and were entitled to raise issues, which they never did. The Department is represented by its own legal team which is separate from that of the Commission. On appointment counsel for the Department were informed by the Chief State Solicitors Office that only one counsel should appear before the Commission's Investigation Committee in any given case or matter before it. It was a matter for counsel to agree amongst themselves the apportionment of work and caseloads, subject to any overall instructions that the CSSO, the Office of the Attorney General or the Department may issue. The fee rates sanctioned were equivalent to the fee rates set for the Commissions own legal team.

3.102 The Department's legal costs at hearings before the Commission incurred in the years 2003 to 2007 were €1.1 million. The Department indicated that bills from senior counsel regarding the hearings for the Secretary General's appearance before the Commission in 2006 have not been received.

### **Other State Costs**

3.103 Other State Costs are projected to amount to over €2 million and consist primarily of the cost of the salary of the Chairpersons.

### **Litigation Costs**

3.104 Figure 10 outlines the costs associated with the litigation outlined earlier involving the Commission. No estimate has been made for possible future litigation costs.

<sup>23</sup> The current Solicitor in the CSSO represents the Department since 2004 so is not aware of attendance prior to this.

**Figure 10 Costs Incurred as a result of Litigation as at 31 December 2008**

Litigation	Commission Costs	Costs of Other Parties met by the Commission	Total
	€	€	€
Hearing Representation – Limitation	83,790	349,540	433,330
Evidence Deadline – Extension	31,013		31,013
Vaccine Trials Inquiry – Compellability of Witness	<sup>a</sup>	248,786	248,786
Fair Procedures – Christian Brothers	152,126	700,000	852,126
Vaccine Trials Inquiry - Vires	<sup>a</sup>	575,000	575,000
Disclosure of Details by Confidential Committee	78,426	<sup>b</sup>	78,426
<b>Total</b>	<b>345,355</b>	<b>1,873,326</b>	<b>2,218,681</b>

Notes:

- a The Commission was represented by its own in-house solicitor and counsel at the litigation relating to the Vaccine Trials Inquiry.
- b While the outcome of this judicial review was in favour of the Commission, the Commission decided not to seek an order for costs from the High Court given the particular circumstances of the case.

## Third Party Costs

3.105 Third party bills of costs processed by the Commission relate to one of the following six broad categories

- Complainants
- Respondents<sup>24</sup>
- Preliminary work of the Vaccine Trials Division
- Discovery Orders
- Procedural Hearing pertaining to all parties<sup>25</sup>
- Amicus Curiae

3.106 The total amount of third party legal fees paid by the Commission at 31 December 2008, across all categories was €15.76 million. Figure 11 provides a summary of the bills settled and closed at that date.

<sup>24</sup> A Respondent refers to a person or body against whom a Complainant alleges abuse, being an individual respondent, a management respondent (i.e. person or body in charge of an institution) or a regulatory respondent (e.g. Department of State or Health Board).

<sup>25</sup> Justice Laffoy held a procedural hearing to settle general questions of law and procedure that would apply to all parties before the Investigation Committee in 2002. It related to the question of lapse of time and allied issues i.e. whether as a result of alleged abuses many years previously, respondents would be prejudiced by potential findings. The hearing took place over six days between July and November 2002 and legal representation was heard from six parties – two management respondents, two complainants, the Minister for Education and Science and the Attorney General.

**Figure 11 Third Party Bills settled and closed at 31 December 2008**

Category	Amount Paid
	€
Complainants	6,743,222
Respondents	6,026,692
Vaccine Trials	555,790
Discovery Orders <sup>a</sup>	413,450
Procedural Hearing <sup>b</sup>	419,287
Amicus Curiae	770,074
<b>Total<sup>c</sup></b>	<b>14,928,515</b>

## Notes:

- a This relates to two bills of costs relating solely to discovery costs which have been settled up to the end of December 2008. Two further bills are currently under negotiation. In general, discovery costs are expected to form part of the bills of costs from respondents.
- b The cost relates to four parties (two management respondents and two complainants) who had legal representation at these procedural hearings to settle issues relating to Investigation Committee procedures which would relate to all parties before the Committee.
- c This does not include payments on account.

### **Third Party Legal Representation and Award of Costs**

The jurisdiction of the Commission to grant legal representation and to make directions for payment of the costs of such representation before the Investigation Committee is contained in section 20 of the Commission to Inquire into Child Abuse Act 2000 as amended by section 32 of the Residential Institutions Redress Act 2002.

Participants are not legally represented before the Confidential Committee.

#### ***Grant of Legal Representation***

Witnesses do not apply for representation in advance to the Investigation Committee. The issue of the level of representation of witnesses is only looked at when settling bills of costs received from solicitors. The Commission have indicated that Justice Laffoy interpreted section 32 of the Residential Institutions Redress Act 2002<sup>26</sup> as allowing one solicitor and one counsel per witness. Justice Laffoy then outlined this in her Framework of Procedures document. While it has not been restated, the Commission have indicated that when settling costs they endeavour to keep representation at that level.

On occasion, sanction for greater levels of representation has been requested. For example in the case of the Christian Brothers a greater level of representation was requested but the extent, if any, of such additional representation has yet to be established.

In the third interim report Justice Laffoy indicated that all but 55 of the 1,712 complainants had legal representation on record with the Investigation Committee. Only 8 of the individual respondents who were actively participating in the process did not have legal representation on record. All management respondents were legally represented.

#### ***Payment of Costs associated with Legal Representation***

Section 32 of the Residential Institutions Redress Act 2002<sup>27</sup> sets out the main principle for the payment of third party legal costs.

The section also allows for the refusal of costs where a person failed to co-operate with or provide assistance or has knowingly given false or misleading information. Furthermore it provides that costs may be awarded against such a party for the benefit of the Commission or another witness.

To date, costs have never been refused nor have they been awarded against a person in favour of the Commission or another witness.

#### ***Payment Processing of Legal Costs arising from Legal Representation***

3.107 Bills of costs can be settled once a complainant or respondent case is closed and without having to await the publication of a report. Consequently, an order awarding costs is not made by the Chairperson of the Commission<sup>28</sup>. In practice, costs are being negotiated by the Secretary to the Commission and the legal costs accountant for the Commission and settlements are being

<sup>26</sup> The Investigation Committee may allow a person appearing before it to be represented by counsel or solicitor or otherwise.

<sup>27</sup> The Commission may pay such reasonable costs arising out of the representation referred to in subsection (1) to the person so represented as are agreed between the Commission and that person or, in default of agreement, such costs as may be taxed by a Taxing Master of the High Court.

<sup>28</sup> This only occurs where a case proceeds to taxation, at which point the Taxing Master requires the order.

made, on an ongoing basis. The Chairperson does not get involved in the settlement of bills of costs.

3.108 There was a risk that gaps in information could lead to premature settlements with third parties. In one instance this came to light when a complainant bill was settled with a solicitor. Subsequently, a further bill was submitted for the same complainant by a different solicitor. The Commission had not been aware of the involvement of two solicitors. It ended up informing the second solicitor to approach the first to recover its share of the cost. If adequate information had been easily accessible on the complainant, the Commission would have been aware of the existence of the second solicitor and the first solicitor would only have been paid for their element of the work.

### ***Reductions being achieved by the Commission on Bills of Costs***

3.109 Excluding the costs for the procedural hearing, third party costs of €14.51 million had been settled and closed at 31 December 2008.

3.110 The Commission have provided the average reductions achieved on third party bills settled at 31 December 2008 in relation to complainants, respondents, vaccine trials, discovery orders and amicus curiae through the process of negotiation. The settlements agreed are considerably lower than the claims submitted. To some extent, this underscores the entirely unsatisfactory process for the establishment of third party costs. Because it is a negotiated process with ill-defined parameters and without a firm basis in substantiating evidence and agreed norms, the publication of the original claimed amounts could impact on the Commission's negotiating position.

3.111 Consequently, I have acceded to a request by both the Commission and the Accounting Officer of the Department of Education and Science not to disclose the level of reductions achieved by the Commission on the basis that the publication of such commercially sensitive information would affect the Commission's negotiating position and as a result its capacity to minimise costs of the Exchequer.

### ***Contingent Liability for Third Party and Discovery Costs***

3.112 The Commission, based on information available at 16 February 2007, estimated that the outstanding cost of third party representation including Discovery at the inquiry would be between €0 million to €80 million. Approximately €2 million in third party costs had been paid at that stage. In February 2009, the Commission indicated that the total estimate of between €52 million and €82 million still stood and had not been adjusted or updated<sup>29</sup>. Based on average costs being experienced to mid-2008, this examination suggests that the outturn is likely to be closer to the lower figure. However, in view of the limited information on respondent costs there is a potential for this figure to increase. While the Commission is aware of the larger respondent bills that are outstanding, it is not possible to precisely estimate the total eventual respondent claims.

### ***Management Information***

3.113 Even in 2008, the information base for managing its financial estimation and commitments remained inadequate. In mid-2008, the Commission installed a database to provide information on costs of legal representation of witnesses. Currently, the information available in the database is disjointed and relates predominantly to complainants. At this stage most of the information on complainants has been input from paper files and validation checks still need to be carried out on

<sup>29</sup> However, on publication of the Final Report on 20 May 2009 the Commission indicated that third party costs could amount to between €52 million and €82 million.

the component information in the database. Currently, work is planned on the capture of information regarding respondents whose costs will make up the largest proportion of third party costs.

3.114 In future inquiries it is important that information be maintained from the outset and on an ongoing basis to position an inquiry to estimate its costs and keep the funding Department fully informed of the extent and composition of third party representation.