



***Coimisiún Imscrúdúcháin (Nithe Áirithe i dtaobh Seirbhís
Míchumais san Oirdheisceart agus Nithe Gaolmhara)***

***Commission of Investigation (Certain matters relative to a disability
service in the South East and related matters)***

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Sole Member

Fifth Interim Report and Request for Extension of Time

5th April 2019

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Commission of Investigation (certain matters relative to a disability service in the South East and related matters).

1. Introduction

1.1 The purpose of this report is to apprise the Minister of the following:

- Progress of the Commission's work since the fourth interim report was submitted on 10th January 2019.
- An outline of the issues remaining to be investigated by the Commission.
- Conduct of the Investigation
- Appropriate time scale for the completion of the phase 1 investigations.

1.2 This interim report is made to the Minister for Health pursuant to section 33 (3) of The Commissions of Investigation Act 2004 ('the Act') and in connection with a request that the timeframe for submitting the Commission's final report on the first phase of its work be revised as provided for in section 6 (6) of the Act.

1.3 The scope of the range of issues forming part of the Commission's investigations in modules 1, 2, 3A, 3B, 3C, 4, 5A and 5B have been attached to the Commission's earlier interim reports. The scope of module 5C was subsequently sent to the Minister.

2 Progress of the Commission's work

15th May 2017 to 10th January 2019

2.1 Progress of the Commission's work from commencement on 15th May 2017 to 10th January 2019 has been set out in the Commission's interim reports of 14th November 2017, 27th April 2018, 14th September 2018 and 10th January 2019.

2.2 The Commission's fourth interim report set out that significant investigative work had been undertaken and was continuing. This remains the case. The Commission expects to reach a stage where it will have sufficient evidence on all issues referred to it in Phase 1 and will be able to report meaningfully on all the questions raised in its terms of reference.

2.3 The fourth interim report to the Minister for Health on 10th January 2019 also set out further work to be carried out by the Commission in accordance with the requirements of the terms of reference set for the Commission and in accordance with the Commission's obligations pursuant to the Act.

10th January 2019 to date

2.4 In earlier interim reports the Commission has described the modularisation of its investigation, in the main, on a chronological basis. This method has continued since the presentation of the Commission's last report dated 14th January 2019 ("fourth interim report"). This method remains effective as a means of organising work especially where the length of time under review, the volume of information to be addressed and also the fact that certain matters under investigation lend themselves to joint consideration or to stand alone treatment.

2.5 A substantial body of further investigative work has been carried out by the Commission since submission of the fourth interim report.

2.6 Module 5 of the Commission's work was organised into three parts addressing the scope of the Commission's investigations into the care and protection of Grace by public authorities, as set out in its terms of reference, over the period from January 2007 to July 2009.

- Module 5A focuses on the period from January 2007 to October 2008
- Module 5B focuses on the period from October 2008 to July 2009
- Module 5C focuses on the period from July 2009 to December 2009

- 2.7 The scope or the range of issues forming part of the Commission's investigations in 5A, 5B and 5C have been provided to the Minister in connection with earlier interims reports.
- 2.8 Earlier interim reports have described the preparatory work for the taking of evidence with respect to the above time periods. Much of this work centred on the analysis of module relevant documentation sought out by the Commission and disclosed to it from multiple sources.
- 2.9 This documentation to be examined with respect to this period has been particularly voluminous. The Commission has isolated and examined 973 documents comprising approximately 2,750 pages for the purposes of taking evidence in module 5. A number of these documents were disclosed to the Commission during the course of evidence being taken in module 5.
- 2.10 The preparation by the Commission of a documentary narrative of matters disclosed from analysis of the documentation has assisted the Commission in the management of hearings. It has also helped those witnesses and bodies in attendance to engage with the evidence. This organisation of the core documentation has proved of very considerable benefit and has provided the basis for a thorough and forensic examination of witnesses.
- 2.11 The Commission has now heard from approximately 124 witnesses over 264 appearances before the Commission across modules 1 to 5 with respect to the matters to be investigated in phase 1 of the Commission's work.

Module 5A investigations since 10th January 2019

- 2.12 The Commission has taken evidence from a further witness previously unavailable to it with respect to investigations undertaken in 5A.

Module 5B investigations since 10th January 2019

- 2.13 Since 10th January 2019 the Commission has taken evidence from 26 further witnesses in module 5B.

- 2.14 Arising from evidence heard, the Commission has directed the disclosure of certain additional documentation and data which the Commission considers will assist it in establishing the facts with respect to an important matter of controversy between a number of witnesses who have given evidence to the Commission. The Commission is currently addressing the state of compliance with this direction and steps that may need to be taken to expedite it.
- 2.15 Arising from evidence gathered and documentation disclosed in the course of the above hearings, the Commission has recalled and taken further evidence from a number of these witnesses.

Module 5C investigations since 10th January 2019

- 2.16 As set out in the Commission's fourth interim report:-
- the documentation pertaining to the period from July 2009 to December 2009, disclosed from multiple sources and analysed by the Commission, is even more extensive than that disclosed for either period under investigation in modules 5A and 5B.
 - The Commission identified 23 witnesses whose evidence is required in 5C.
 - Having regard to the volume of relevant documentation and the number of witnesses, these hearings will be extensive.
 - The Commission intended to commence the hearing of evidence in module 5C by March 2019 subject to the hearings in module 5B having concluded.
- 2.17 The Commission in fact commenced taking evidence for module 5C on the 25th February 2019. These hearings are ongoing.
- 2.18 Subject to the challenges identified later in this interim report, the Commission estimates that the gathering of evidence from witnesses in module 5C will be concluded by the end of May 2019.

Inspection of Foster Care Home

- 2.19 The Commission has carried out an inspection of the foster care home where Grace resided from 1989 to July 2009. This is of assistance in considering various aspects of evidence received from public body representatives and other witnesses whose evidence will be considered in the task of establishing relevant facts in accordance with the terms of reference.

3 An outline of the issues remaining to be investigated by the Commission.

Module 7 investigations since 10th January 2019

- 3.1 At the date of the fourth interim report, the Commission was at the stage of preparation of materials for distribution preparatory to planning for hearings on matters to be investigated by the Commission over the period from January 2010 until 2016 in accordance with the terms of reference in particular those set at IX.
- 3.2 The Commission has continued to work on analysing the very considerable records, communications and other documentation generated and disclosed by a wide number of parties over this period on matters within and outside of the scope of the Commission's terms of reference. This is to specifically identify and categorise documentation of relevance and on which the Commission considers it appropriate to take evidence so as to assist the Commission in establishing the facts on matters set out for investigation in the terms of reference. Approximately 800 documents, some of considerable length, now remain under consideration for distribution.
- 3.3 The Commission currently estimates that evidence may require to be taken from up to 40 witnesses for the purposes of investigating the above matters. Some of these witnesses have given evidence in earlier modules of the Commission's work.
- 3.4 The issues that are the focus of the Commission's inquiry with respect to the extensive material disclosed for the above period include:
- Issues relevant to the decision by SEHB/HSE not to make an application for wardship for Grace in the period from 1996 to 2009.

- Issues of Grace's personal presentation that may assist the Commission in establishing the facts on matters relevant to her care from 1989 to 2009 in accordance with the particular questions raised in the terms of reference.
- Issues with respect to the response to a Freedom of Information request by Grace's mother in 2008.
- Whether there was, in accordance with the terms of reference, any deliberate or attempted suppression of information in relation to Grace's case.
- Whether there was, in accordance with the terms of reference, danger of deliberate destruction of files by the HSE.
- Whether there were, in accordance with the terms of reference, threats made, as alleged, by the HSE to the funding of the agency whose staff made protected disclosures in relation to Grace's case.

Alleged Threats to Funding – Scope.

3.5 As the Minister is aware, in accordance with the terms of reference for Phase 1 of the Commission's work, the scope of the investigations with respect to funding is as to whether actual threats were made by or on behalf of the HSE to the funding of "Day Service Provider A", the agency whose staff made protected disclosures in relation to Grace's case with particular reference to the period from July 2009 to March 2016.

4 Conduct of the Investigation generally

Hearings

4.1 While the following has already been set out in the Commission's earlier reports, it is appropriate to again refer to the methodology adopted by the Commission for the taking of evidence in this investigation.

- Evidence has been taken from certain witnesses individually and in private, where considered appropriate to do so.

- A substantial proportion of persons have however given evidence at private hearings involving a number of witnesses who are directed to give evidence to the Commission and permitted to be present during the taking of certain evidence from other witnesses.
- The Commission has further directed that certain other persons or bodies may be in attendance and legally represented during some private hearings where appropriate, and in accordance with the provisions of the Act.
- A very significant number of parties are represented by legal teams at hearings before the Commission.
- Many witnesses have provided assistance and given evidence to the Commission without legal representation.
- Certain witnesses have extensive evidence to give, extending over several time periods and differing events and actions under investigation with respect to the management of Grace's case together with the many subsets of investigation called for by the terms of reference.
- Having regard to the extent of evidence to be gathered from a significant number of witnesses on matters under investigation, both in examination by the Commission and cross examination, the taking of evidence can be lengthy with many witnesses under examination over several days.
- As in accordance with the Act, the Commission's investigations are conducted in private (except in limited circumstances which do not arise here) and must be kept confidential, the Commission must consider the substance of evidence to be made available to each individual witness on each occasion, before taking their evidence. The Commission also directs whether and, if so, which other individuals or bodies may be present when such evidence is being taken.
- The Commission has, in particular, considered the interrelationship between issues and potential witnesses together with the significant areas of difference or conflict between various parties as apparent from an analysis of documentation received in disclosure or evidence already received. The methodology it has adopted for conducting private hearings with a number of witnesses and parties in attendance has provided the best and the most

effective method of dealing with disagreement and difference and for getting to the truth. The method has greatly reduced the potential for an indeterminate number of individual hearings that might arise on any other application of sections 11 and 12 of the Act.

- Given the extent of the terms of reference and the involvement of a number of witnesses in the care and protection of Grace over a considerable time, the prospect of recalling certain witnesses must remain under review.
- Applications made by or on behalf of witnesses and bodies in attendance regularly arise in the course of hearings. Necessary time must be given to attend to such applications in the course of the Commission's work.
- The process is dynamic and estimations of the length of time likely to be required from witness to witness are necessarily only that.

4.2 Hearings require a considerable amount of time for planning and preparation of witness examinations by counsel to the Commission. They also entail considerable work in scheduling of witnesses and provision of books of relevant documents to these witnesses and to their legal representatives, where applicable.

4.3 Preparing for hearings also involves arranging venues both in Dublin and in the South East (two venues are used in Dublin and five venues in the South East, depending on the size of the attendance and availability of the venue).

Evidence

4.4 The Commission has taken extensive evidence from multiple managers and employees and former managers and employees of the SEHB/HSE, current and former employees and management of "Day Service Provider A" where Grace attended day service and with whom Grace now resides, the former foster mother of Grace, other service providers, a number of medical and other professionals, the three individuals who made protected disclosures in advance of the establishment of the Commission, members and officers of an Garda Síochána, current and former politicians, departmental officials and a large number of private individuals whose evidence is required with respect to the establishment of the facts under investigation. The Commission has continued to manage a situation where certain witnesses in module 5 have been in ill health at times and only able to participate where particular

scheduling has been arranged. In addition, the Commission has managed the situation where two witnesses (both former SEHB / HSE staff members) are living outside the State and particular arrangements have been made to facilitate hearings at a time when they were available within the State.

- 4.5 As of 5th April, 2019 the Commission has heard evidence on 38 days since the date of the fourth interim report. This brings the total number of hearings days so far to 169 days.
- 4.6 The number of transcripts of evidence has increased to approximately 170. There are also a number of additional transcripts arising from records of applications made, directions given and legal and procedural matters arising at hearings.
- 4.7 The work of analysing evidence taken is continuing.

Ongoing Disclosure / Privilege claims over documentation

- 4.8 Since the date of submission of the Commission's last interim report, it has received approximately 3,733 additional pages of disclosure. This brings the total volume of disclosure received to approximately 301,300 pages.
- 4.9 The Commission continues to engage with claims of privilege over documentation it requires to assist its investigations and the conduct of hearings.

Correspondence

- 4.10 Dealing with correspondence continues to be a necessary and continuing task for the Commission. Much of it is very technical requiring detailed consideration by the Commission. It requires the application of time and resources on a continuing basis. Correspondence tasks arise on a daily basis, both in advancing preparations for the investigation and in responding to issues raised by witnesses or bodies engaging with the Commission.

5 Appropriate time scale for the completion of the Phase 1 investigation.

- 5.1 The extent of the Commission's work including that undertaken since the fourth interim report on 10th January 2019, illustrates the breadth and scope of the tasks necessarily undertaken in conducting an investigation into the terms of reference set and in accordance with the matters provided for in the Act.
- 5.2 As previously noted, the Commission considers that the time originally set for the provision of a final report on phase 1 was not appropriate, having regard to the scope, depth and density of the terms of reference, the voluminous material provided to the Commission after its establishment, the number of witnesses identified and required to be examined, the provisions of the Act and the requirement for fair procedures which guide every aspect of the Commission's work.
- 5.3 Substantial progress has been made in the Commission's investigations during the first twelve month period. Substantial further progress has been achieved in the twelve month period of extension granted by the Minister in April 2018 during which the focus, pace and detailed organisation of the Commission's work has continued unabated.
- 5.4 The broad scope of the investigations required by the terms of reference, especially in terms of the length of the period of time under investigation and the spread of factual, organisational and performance issues arising, inevitably takes considerable time.
- 5.5 Certain factors have made it difficult to set a fixed time frame for the completion of the investigation and its report. While the nature of the principal challenges encountered by the Commission as it progresses its work have been referred to in earlier reports it is appropriate to set these out in summary form below. The principal factors are:
- The terms of reference
 - The volume of documentation for consideration with respect to periods of 20 to 40 years
 - Witness considerations

The Terms of Reference - Scope of the Investigations - Phase 1

- 5.6 The matters under investigation by the Commission span, at the outer limits, almost 40 years, with the majority of the investigations focusing on the time period 1989 to 2009.

- 5.7 While the terms of reference are grouped under eight broad headings, the specific areas of investigation for the Commission are set out in 35 separate paragraphs.
- 5.8 In carrying out the task of devising a working methodology the Commission had regard to the fact that a substantial number of those 35 paragraphs contain within them a requirement for multiple sub-investigations, some individually requiring examination of issues as they developed over a 20 year period.
- 5.9 The scope and depth of the matters for investigation are self evident from the terms of reference.

Volume of documentation under examination

- 5.10 The extent of documentation to be addressed in connection with the gathering of evidence over the 20 to 40 year period under consideration has been fully set out in the Commission's earlier reports and above.
- 5.11 The Commission continues to address issues of privilege and confidentiality which arise from time to times in dealing with disclosure of documents from bodies and individuals.

Witnesses

- 5.12 The Commission has reported on an interim basis on the witness considerations that require to be managed throughout the course of the investigations. These matters as set out in earlier reports continue to apply.
- 5.13 The Commission has been required to reschedule hearings on several occasions since January 2019 to accommodate issues of ill health, age, frailty and grave personal circumstances and to accommodate availability. For example, in the three months since the Commission's last interim report, 8 witnesses scheduled to give evidence to the Commission required to be postponed or rescheduled, some at short notice for these reasons.
- 5.14 Since commencement of the Commission's work in May 2017 some 36 witnesses have required to be rescheduled, some on a number of occasions for the reasons set out in Para 5.13.

- 5.15 While the Commission has been flexible and efficient in its arrangements to re-order and re-schedule witnesses, this has an inevitable impact on the progress of work.
- 5.16 The Commission continues to manage these witness issues as they arise in a manner appropriate to the investigation in order to progress matters as expeditiously as possible at every stage.

6 Compliance with requirements of sections 34, 35 and 36 of the Act.

- 6.1 The requirements of the above sections have been highlighted in the Commission's previous interim reports and are referred to again below.
- 6.2 Having regard to the large number of witnesses who have given evidence to the Commission, the considerable areas of conflict between multiple witnesses and the protracted periods and events over which certain witnesses evidence are relevant, it is particularly challenging to calculate the time that will be necessarily taken in fulfilment of the steps required by these provisions. The Commission can make estimations only of the time that will be required for these steps at this stage.
- 6.3 The work to be undertaken, following the conclusion of all of the Commission's hearings and before submission of a final report to the Minister on phase 1 requires:
- Analysis of the totality of evidence received by the Commission and consideration of any submissions received on the evidence from parties invited to make such submissions.
 - Preparation of the Commission's draft final report across the 35 areas of investigation in Phase 1.
 - Circulation of the draft report or relevant part of the draft report to any person who may be identified or may be identifiable from the draft report in accordance with section 34 of the Act.
 - Consideration of any submissions made to the Commission or requests of the Commission pursuant to section 35 (1) (a) or 36 (1) of the Act.
 - Consideration of applications for directions with respect to costs.

- Completion and delivery of the final report.
 - In accordance with the terms of reference set, term X must be considered once the Commission establishes the facts with respect to its investigations at Part III to IX.
- 6.4 The Commission has invited submissions on the evidence from a large number of witnesses who have given evidence in the course of the investigations in modules 1 to 4 and from other relevant parties. These have been sought so that the Commission can consider such submissions when analysing the evidence given in connection with the areas of inquiry covered in those modules. Most persons from whom such submissions have been invited have chosen not to make them.
- 6.5 The Commission will seek submissions from relevant parties with respect to the evidence taken in module 5 in due course.
- 6.6 Over the next phase of the Commission's work, it is intended to focus on the analysis of the body of evidence gathered to date and on such findings on the facts as can then be made at that stage of the Commission's work. This will enable the Commission circulate material to certain persons in accordance with Section 34 and consider any submissions that may be made on such draft findings.

7 Request for an Extension of Time

- 7.1 The basis for the requirement of further time for the Commission to complete its work in Phase I is explained by the matters highlighted above.
- 7.2 The Commission is enquiring into all issues set out in its terms of reference in a manner that focuses on providing clear answers to the questions of fact at the heart of the significant public concern which was raised over the care and welfare of Grace giving rise to the establishment of this Commission of Investigation.
- 7.3 Considerable progress has been made in the mandated investigations to date. The Commission anticipates that the results of these investigations will provide a true and sufficiently detailed account of the actual facts behind the concerns raised in the terms of reference.

7.4 Having regard to the scope of the terms of reference, the vulnerability of the citizen at the heart of the investigation and the personal or professional reputational interests of many of the individuals and organisations involved together with the legislative requirements set out above, the Commission work is ongoing and will not be concluded by 15th May, 2019.

7.5 Therefore the Commission must request the Minister for an extension of time within which to progress and complete its investigation and submit its report up to and including 15th May, 2020.

Dated this 5th day of April 2019



Marjorie Farrelly S.C.
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