

EXTRACT FROM THE TRANSCRIPT OF THE PUBLIC SITTING

STATEMENT BY MR FRANK CLARKE, SENIOR COUNSEL

COMMISSION TO INQUIRE INTO CHILD ABUSE ACT, 2000

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ON WEDNESDAY, 23RD JANUARY 2002

BEFORE A DIVISION OF THE INVESTIGATION COMMITTEE

(MS. JUSTICE LAFFOY AND PROFESSOR EDWARD TEMPANY)

I hereby certify the
following to be a true and
accurate transcript of my
shorthand notes in the
above hearing.

...

MR. CLARKE: Thank you, Madam Chairperson, Members of the Division. As you pointed out, the Commission to Inquire into Child Abuse was conferred with additional functions by virtue of Standing Order 280 of 2001 which requests and empowers it through the Investigation Committee and through that this Division to inquire firstly into the three vaccine trials that are known to have occurred during the 1960's and 1970's.

And secondly into any other systematic vaccine trial which the Committee finds took place in an institution between 1940 and 1987 following an allegation by a person that he or she as a child in the institution was the subject of such a trial.

The legislation under which the Investigation Committee operates, that is the Commission to Inquire into Child Abuse Act 2000, is in many respects similar to that under which Tribunals of Inquiry operate.

In broad terms the nature of the inquiry to be pursued in relation to vaccine trials is such as lends itself to the model adopted by Tribunals of Inquiry and it is, broadly speaking, the intention of the legal team to pursue this aspect of the Investigation Committee's work by means of what one might describe as the "Tribunal model". That is perhaps to distinguish it from the procedures being adopted by other aspects of the Investigation Committee's work.

Therefore, the inquiry by the Investigation Committee would involve the following stages:

1. A preliminary investigation of the evidence available.
2. The determination by the Investigation Committee of what it considers to be evidence relevant to the matters into which it is obliged to inquire.
3. The service of such evidence on persons likely to be affected by it.
4. The public hearing of witnesses in regard to such evidence, the cross-examination of such witnesses by or on behalf of persons affected thereby.
5. The preparation of a report and the making of determinations and recommendations based on the facts established at such public hearing.

I should perhaps say that while that is the sequence intended it may be that for practical reasons there may be an overlapping of some of those in relation to particular issues depending on how much advanced the inquiry may be in certain respects. Subsequent to the conferring of the additional functions on the Commission, that is to say to deal with the vaccine trials inquiry, the Investigation Committee's legal team has begun the process of assembling and examining the available evidence relating to the issues raised in the additional terms of reference.

In commencing its task of gathering that evidence the legal team did not start with what is sometimes called the blank sheet of paper, as prior to the conferring of additional functions on the Commission, as

you yourself pointed out, Madam Chairperson, the three vaccine trials known to have occurred were the subject of the inquiry by the Chief Medical Officer of the Department.

And the legal team has available to it the document entitled "Report on Three Clinical Trials Involving Babies and Children in Institutional Settings 1960/61, 1970 and 1973" prepared for the Minister and published to the Dail on 9th November 2000, together with documentation generated and located by the Chief Medical Officer in the course of his inquiry. So that was our starting point. And as indicated, those three vaccine trials are known to have taken place and were carried out in the 1960's and the 1970's. Briefly to indicate them again, the first took place in 1961/1962 in five mother and baby homes throughout the State. The only homes so far identified as having been involved in the trial is Bessborough. The purpose of the trial in general terms was to measure the effectiveness of the four-in-one vaccine, details of which you have already outlined. The general practice at the time was to give a three-in-one vaccine against the first three diseases and give polio separately.

The second known trial took place in 1970, it was carried out in an as yet unidentified children's home in Dublin, though some details are known, and also involved children in the midlands who were living at home. In general terms the purpose of the trial was to assess the effectiveness of a rubella vaccine when administered nasally rather than by injection.

The third trial that will be undoubtedly investigated took place in 1973. The subjects of that trial were living at home in Dublin as well as children residing in the following institutions: St. Patrick's Home, Navan Road; Madonna House; Cottage Home for Little Children, Dun Laoghaire; Birdsnest Home Dun Laoghaire and in and Bohrin Na Bearna.

In general terms the purpose of this trial was to compare the reactions of children who were given commercially available batches of three-in-one vaccines to the reactions of children who were given a modified vaccine of equivalent efficacy but of lesser potency. So they are the three identified trials.

As part of the process of evidence gathering the Investigation Committee has already advertised with a view to ascertaining whether other persons unknown to it may be in a position either to provide it with evidence or to indicate the sources of evidence that might be followed up. That advertisement has requested responses not later than 15th February 2002, so there is still some time to go before the completion of that time span within which response was sought.

The process of receiving, considering and acting upon communications received in response to that advertisement is obviously ongoing and, equally obviously, is likely to continue for some time and at this stage it is impossible to give any realistic estimation of how long that process will take. But I would at this stage, Madam Chairperson, like to set out in broad terms the process which the legal team would intend to pursue so that any interested parties would at least in those general terms have a broad understanding of what is likely to occur and the way that we would intend to proceed. This Division of the Investigation Committee will conduct its hearings in relation to vaccine trials as a separate part of its remit. It is largely a stand-alone function of the Investigation

Committee and it will conduct its affairs separate from the other business of the Commission and the Investigation Committee.

As you pointed out in the course of interpreting the terms of reference, the Division has been requested not only to investigate the three identified trials but also to see whether there were other trials within the definition which you have explained and if so to investigate those. Accordingly there are two broad strands to the evidence gathering process:

The first is to assemble all relevant evidence in relation to the three known trials. The second is to make all appropriate inquiries to ascertain whether there were other trials that ought to be the subject of investigation. And clearly, if such investigation reveals that there were other trials, then to investigate them as well. I will deal with them separately.

In relation to the three known trials it is the intention of the Investigation Committee's legal team to pursue in private initially all lines of inquiry identified to them for the purposes of assembling all material evidence. When that process has been completed the relevant evidence will be made available to legitimately interested parties in advance of public hearings.

It is the intention to propose formal procedures at a subsequent preliminary hearing for the consideration of the Investigation Committee and interested parties. And it is hoped, therefore, that procedures in the light of that proposal and any submissions that might be received in relation to it will have been fixed before the commencement of the taking of evidence in public at public hearings, though it is likely that any such procedures will contain a caveat that they may be necessary of amendment in the light of proceedings as they develop.

It would be the intention of the legal team to invite this Division, where appropriate, to exercise its powers under Section 14 of the Act, which entitles the Investigation Committee to direct the attendance of witnesses, the production of documents, the swearing of affidavits of discovery, if necessary the taking of evidence on Commission both to enable it to pursue its private inquiries and to enable it to assemble material evidence that will be necessary to put before the Division at its public hearings.

That is the first broad strand of the consideration and the inquiry. In relation to the second matter, being the possibility of other trials being uncovered, the legal team will attempt, again in private initially, to ascertain, especially from persons who may respond to the advertisement already published, whether there may have been other trials as defined in accordance with the terms of reference and also noting the comment made by you, Madam Chairperson, to the effect that if a trial emerges from a source other than a Complainant and therefore would not technically come within the terms of reference but there seems to be evidence that there was such a trial the Investigation Committee would give serious consideration to the possibility of inviting the Government to expand the terms of reference to include such a trial.

Clearly, should the legal team come across significant evidence from a source other than a Complainant to the effect that there may have been other trials it would be processed in accordance with those indications.

The initial test which the legal team would propose applying is whether there is reasonable evidence available of the existence of such other trials as defined, in which case it would put that evidence to the Investigation Committee with a recommendation that that trial might at least first be considered as to whether it was a trial and subsequently if found to be a trial, be investigated.

Clearly, if such evidence is found and the Investigation Committee is satisfied that it constitutes another trial the legal team will engage in a similar exercise in relation to any such other trials as it has already commenced in relation to the three known trials.

I would like to emphasise, Madam Chairperson, that the Division's legal team would welcome the opportunity to discuss at any material time and certainly well in advance of any public hearings, to discuss with any relevant likely witnesses, parties or their advisors the evidence that those witnesses may be in a position to give.

It clearly has the advantage of focusing the public hearings both to the advantage in terms of efficiency of the Commission and to the advantage of all parties in the exclusion of irrelevant material if the legal team are as aware as possible in advance of the evidence that it is likely to be in a position to present.

I should also point out that two junior counsel have to date been retained to assist the legal team with the initial investigation and to process inquiries. Those they are referred to as Inquiry Officers I should point out from a legal point of view that it is not currently envisaged that they will be engaged in the carrying out of the statutory functions assigned to Inquiry Officers under Section 23 of the Act, because as presently considered the nature of the investigation into vaccine trials does not lend itself to such a mode of inquiry. It is not possible at this stage to give an estimate of precisely how long the evidence gathering phase will take. It is the current intention of the legal team to invite the Investigation Committee to commence its public hearings as soon as it feels that it has gathered all material evidence in relation to the three known trials.

Inquiries into other trials, if any, found to have occurred will continue in parallel with the public hearings into the three known trials and will, if evidence of them comes into existence, be the subject of further public sittings whenever all material evidence in relation to such further trials has been assembled. Whether that would occur immediately after the conclusion of the inquiry into the three known trials or after a gap would depend on the logistics of the situation.

It should also be noted at this stage that it is the intention of the legal team to propose that, in common with Tribunals of Inquiry, all evidence will be led by the Commission's legal team irrespective of the party against or in whose favour such evidence might lie. That is obviously subject to appropriate questioning by other parties. The legal team would like to emphasise that it would welcome informal discussion with the representatives of any interested parties with a view to resolving any procedural difficulties at as early a stage as possible.

Finally, there have been inquiries from some individuals and solicitors as to legal representation on behalf of those who were or

may have been the subject of a vaccine trial. Clearly, those who are found to have been or who are concerned that they might have been the subject of vaccine trials have an interest in the work of this Division of the Investigation Committee.

It cannot, however, be said that any of them is subject, on the basis of information currently available, to any adverse finding against them which would make it necessary for them to be individually represented throughout the public hearings.

Bearing in mind the understandable mistrust that many of those who have been in institutional care have for the State and its various institutions the legal team would propose that at least consideration be given by this Division to the following arrangement in the interests of ensuring firstly that the interests of those affected are protected and, secondly, that the inquiry is conducted in an orderly and efficient manner.

We propose that consideration be given to the appointment of an independent legal team by a neutral body to represent the interests of all those who were or who may have been the subject of a vaccine trial during the relevant period. The firm appointed would be contractually precluded from acting on behalf of any individual whose interests they represent before the inquiry in any other capacity.

The purpose of this provision would be to ensure that the entire focus of the team appointed would be on representing the interests in the inquiry of all those persons affected or potentially affected by vaccine trials. This provision will also ensure that any existing lawyer/client relationships which affected persons may have would not be interfered with.

A distinct advantage of proceeding in this manner in the opinion of the Division's legal team is that one legal team which has a full understanding of all the issues will best represent the interests of those affected. It is also envisaged that such a team would retain its own experts to advise it and, if they thought it appropriate, suggest that such experts would give evidence to this Division of the Investigation Committee on behalf of the persons affected.

It is also reflective of the fact that at present, and I emphasise at present, there is no apparent difference of interest as and between various affected parties. It may be, though it is difficult to envisage at this stage how it might become so, but it might be that at some subsequent stage some difference of interest might become apparent. But as presently informed, there does not appear to be any difference of interest between the various parties who might be involved.

Furthermore, if such a proposal were to meet with the favour of the Division of the Investigation Committee it would be necessary to put in place a transparent and acceptable process for the selection of such a team and also to provide for an appropriate involvement on the part of such persons who are so affected who would wish to be involved in that process.

I might also add two things: Firstly, that is the position as currently obtains. When a clearer picture of the identity of the persons in respect of whom there may be evidence that they were in fact affected persons, if I can just use that term loosely, has emerged it is possible that there might be identified a grouping or

body or some such which would be broadly representative of all of such persons.

I do not think it could be proposed that the Commission would impose representation that was against the wishes of such a broadly based body. But until such time as the precise parameters of those who may be affected have been identified it isn't immediately clear that there is any such body, though there were known to be groups of persons who have been affected who have expressed an interest.

I suppose, Madam Chairperson, the real point is this: If there is no difference of interest between those affected then it is difficult to see how there is any necessary public interest in a multiplicity of representation of the general interest of those affected. Unless and until there emerged a clear agreement between such persons as to who they might be represented by it does not seem to the legal team to be in the public interest or indeed in the interests of the Commission or indeed even the interests of such persons that there be a multiplicity of representation. And unless and until such a position emerges it would be the proposal of the legal team that something along the lines that I have just indicated might be adopted.

The second qualification perhaps that I should give to that, Madam Chairperson, is that it is clearly subject to an overriding requirement that any affected person who is actually required to give evidence to the Division would necessarily be entitled to appropriate representation by a solicitor and counsel of their own choosing. Clearly, there would be no intention to depart in any way from that general rule.

And that would mean representation while they were giving evidence or in relation to any other matters that specifically impacted upon them. For example, if at a subsequent stage there was a dispute about whether there was a trial and there was conflicting evidence in relation to that then clearly those who were involved in that conflict would be entitled to a much wider range of representation.

If in the course of its inquiry it becomes clear, for reasons which cannot be identified at this stage, that any particular individual or group of individuals might require more extensive representation then the Commission will of course at that point give consideration to granting such further representation.

And finally, given that the legal team is itself I suppose the first port of call for the assembly and consideration of evidence I too would like to emphasise the point, Madam Chairperson, that you made to the effect that the ambit of this inquiry is into trials, not into vaccines.

Much as there may be public interest in the effect of vaccines and public debate about that issue and important as that debate might be, it is not for this forum, it is for other fora and we would ask that we not be sent information that does not relate to trials. Because necessarily that will simply involve us in additional and unproductive work in dealing with the submission of information that we cannot legally deal with. We are confined in our inquiries and in the evidence that we will seek to put before you and the Division to evidence that relates to trials as defined. They are the only comments I would wish to make at this stage, Madam Chairperson.

CHAIRPERSON:

Thank you, Mr. Clarke.

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MR. CLARKE: Yes, Madam Chairperson. I think there are three very separate things that have to be identified. The first I think that has to be said at this stage is that it is clear from a series of decisions of the Supreme Court that the only legal way in which an inquiry such as this can be conducted is if there is initially a private inquiry to see if there is evidence.

If people perceive that to be muzzling the prevention of evidence or stories being told at this stage then they obviously are entitled to their own view. But it wouldn't be consistent with the legal obligations of this Commission to permit any evidence to be tendered at this stage until such time as there has been a private inquiry. And to be honest, if we tried to do it people would have a High Court Order stopping us doing it in the morning and they would be right. So that is the first point that has to be made, we are all bound by that law whether we like it or not.

The second point I think that does have to be made is that the suggestion that is put forward, and it is only a suggestion, it may find favour, it may be rejected, is not that insofar as the story of any individual has to be told that that person will not be entitled to have their own legal representation in that I made clear that the suggestion I was making had no bearing on that. If as the speaker from the back indicated...(INTERJECTION)

MR. CLARKE: I am sorry, I didn't know Mr. O'Brien, I am happy to refer to him by name. If Mr. O'Brien or anyone in his position has a story that needs to be told in evidence before the Commission then that person is entitled to their own legal representation. And I hope I made that clear, if I did not then I apologise.

But there is a wiser question and that is the representation of the interests generally of those who may have been affected, some of whom may be here, some of whom may be members of organisations, some of whom may be not. And it is a suggestion as to how that interest may be properly represented that I was making. The Commission is constrained only to put before itself as a matter of law evidence that is relevant. If there is relevant evidence to come forward and it comes from those who are affected then they are entitled to their own legal representation in relation to that and there is no question about it. I want to make it absolutely clear that my suggestion does not in any way exclude that, it is relating to the necessary representation of the wide range of people who have been affected.

We believe that the number in the three identified trials is not far short of 300, certainly in the middle 200's. If further trials are identified then clearly that number will grow larger. We have to have regard to the interests of all persons who are affected and my suggestion is in relation to a way in which that might be met. And it is not in any way inconsistent with full selection by the individuals concerned if there be a body or group which is largely representative of them. But I do have to say I do not believe that it is appropriate that there be an excessive multiplicity of

representation of people who have no different interest. And it is to that end that my suggestion is directed.

Finally I would say that there is certainly no suggestion that even if the proposal that I made were to find favour that the lawyers would be foisted by the State. I indicated that there would need to be a transparent and acceptable selection process and did that in the context of expressing understanding of the fact that persons in the position of Mr. O'Brien have legitimate reasons why they might not be trusting of the State and it would therefore be necessary to explore an appropriate means by which such a neutral team could be appointed.