

COMMISSION TO INQUIRE INTO CHILD ABUSE

INVESTIGATION COMMITTEE – VACCINE TRIALS DIVISION

RULING DATED 5th JUNE, 2003

1. **The Applications**

1.1 This ruling sets out the decision of the Vaccine Trials Division of the Investigation Committee (the Division) on the following applications for legal representation heard at a procedural hearing of the Division held in public on 30th May, 2003:

- (a) an application made by Counsel instructed by Anne Marie Mc Crystal LLB, Solicitor, on behalf of a client who will be referred to as “the First Applicant”;
- (b) an application made by Counsel instructed by Murphy English and Company, Solicitors, on behalf of two clients who will be referred to as “the Second Applicant” and “the Third Applicant”; and
- (c) an application made by Counsel instructed by Kieran Mc Carthy and Company, Solicitors, on behalf of a client who will be referred to as “the Fourth Applicant”.

1.2 The applicants have sought legal representation at the public hearings, now scheduled to commence on 1st July, 2003, of the module of the work of the Division, which relates to the vaccine trial which, for the purposes of the Division, is known as Trial 1.

2. **Statutory Framework**

2.1 By virtue of the Commission to Inquire Child Abuse Act, 2000 (Additional Functions) Order, 2001 (S.I. No. 280 of 2001), the Government, in exercise of the power conferred on them by section 4 of the Commission to Inquire into Child Abuse Act, 2000 (the Act of 2000), conferred on the Commission certain additional functions, including the function to inquire, through the Investigation Committee, into the circumstances, legality, conduct, ethical propriety and effects on the subjects thereof of certain vaccine trials, including Trial 1, and to prepare and publish a report on the results of the inquiry. It was provided that the powers conferred on the Commission and the Investigation Committee in relation to the inquiries made by them under the Act of 2000 should apply to that inquiry.

2.2 Section 4 (3) of the Act of 2000 provides that the Commission shall have such powers as are necessary or expedient for the performance of its functions. Section 12 (2) of the Act of 2000 provides that the Investigation Committee shall have such powers as are necessary or expedient for the performance of its functions and section 14 confers certain specific powers on the Chairperson of the Investigation Committee, which may be exercised for the purposes of the functions of the Investigation Committee.

2.3 Section 32 of the Residential Institutions Redress Act, 2002 (the Act of 2002), which was enacted on the 10th April, 2002, amended the Act of 2000 by substituting for Section 20 of that Act certain provisions, including Section 20A (1), which provides as follows:

“The Investigation Committee may allow a person before it to be represented by counsel or solicitor or otherwise”.

The succeeding subsections of section 20A empower the Commission to pay such reasonable costs arising out of such representation to the person so represented, as may be 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, subject to a discretion to refuse to allow such costs or direct their payment by another party in the circumstances specified.

2.4 As was stated by the Division in its opening statement delivered at its first public sitting held on 23rd January, 2002, emphasising the inquisitorial nature of the process being engaged in by the Division, it is a fact finding process; not a process which is capable of giving rise to a determination of criminal responsibility or civil liability. It is, however, a process which must be conducted in a manner consistent with natural justice. The *modus operandi* must ensure that every person or body whose conduct is impugned or is likely to be the subject of an adverse finding is afforded a reasonable means of defending himself in the manner laid down by the Supreme Court in In Re Haughey [1971] I.R. 217

2.5 Section 20 A (1), which was enacted after the Division delivered its opening statement, must be construed on the basis that the Oireachtas intended that the discretions thereby permitted are to be exercised in accordance with the principles of constitutional justice.

3. **Trial 1 – The Factual Matrix**

3.1 Trial 1 was a trial in which 58 infants resident in institutions in the State took part, which sought to compare the poliomyelitis antibody response after vaccination with a quadruple vaccine (diphtheria, pertussis, tetanus (DTP) and polio combined) (Quadravax) with standard vaccines in use at the time, which consisted of DTP and polio administered separately and at different sites. The trial was conducted between December 1960 and November 1961. The results of the trial were published in the British Medical Journal in 1962.

3.2 As a result of its private investigations, the Division has identified all of the children involved in Trial 1 and their mothers. The Division has also identified the institutions in which Trial 1 was conducted being:

- a mother and baby home located at Bessboro, Co. Cork (Bessboro);
- a mother and baby home known as St. Peter's located at Castlepollard, Co. Westmeath;
- a mother and baby home located at Dunboyne, Co. Meath;
- a mother and baby home known as St Patrick's located at the Navan Road in Dublin;

- a home for babies known as St Clare’s located at Stamullen, Co. Meath; and
- an Industrial School known as Mount Carmel Industrial School located at Moate, Co. Westmeath (Mount Carmel Industrial School).

The Division has also identified that the children who participated in Trial 1 fall into three groups, which are referred to as the A Group, the B Group and the Moate Control Group. Children in the A Group, who were resident in a number of the institutions involved, were administered Quadravax. The B Group was a control group and children in that group, who were also resident in a number of the institutions, were administered the standard vaccines, but may have been subject to tests which would not have been administered as part of the standard vaccination programme. All of the children in the Moate Control Group were resident in Mount Carmel Industrial School. They were administered standard polio vaccine as a control group, but may have been subject to tests which would have been part of the standard vaccination programme.

3.3 The First Applicant was involved in the A Group in Bessboro. The Second Applicant, the Third Applicant and the Fourth Applicant were all involved in the Moate Control Group.

4. **Legal Representation Allowed for Public Hearings**

4.1 Full representation was sought by and has been allowed to the following persons:

- The manufacturer of the vaccine (Glaxo Smith Kline, formerly Wellcome Foundation Limited);
- Professor Irene Hillary, one of the personnel involved in the conduct of the trial; and
- The Department of Health and Children.

4.2 Limited representation, to the extent necessary to protect their respective interests was sought by, and has been allowed in principle to the members of certain religious congregations which managed the institutions involved in the trials at the relevant time and to the Health Boards which now exercise the functions which were exercised at the relevant time by the health authorities for the areas in which the institutions were located. The precise parameters of the limited representation necessary to protect the relevant interests will be defined in separate rulings which will be issued after 13th June, 2003.

4.3 Limited representation was sought by, and has been allowed in principle to, University College Dublin, on the basis that two academics of the University conducted Trial 1. A ruling to be issued after 13th June, 2003 will delimit the precise parameters of this representation necessary to protect the interest of University College, Dublin.

4.4 All of the foregoing have interests to protect, in that they are persons or bodies who are, or who succeed persons or bodies who would have been, or who now exercise functions exercised by persons or bodies who would have been, at risk of an adverse finding being made against them and, consequently, have a

constitutional right to legal representation in accordance with the principles laid down by the Supreme Court In Re Haughey, and a legal right under Section 20A (1) of the Act of 2000.

5. **The Interest of the Participants**

- 5.1 None of the participants is likely to be the subject of an adverse finding in consequence of the discharge by the Division of its functions to inquire into and report on Trial 1. Accordingly, none has a constitutional or legal entitlement, whether described as a right or an interest, to legal representation in the process.

Nonetheless, the Division has always recognised the importance of ensuring that the perspective of the participants of Trial 1, the children and their mothers, is properly reflected in its operations and in the outcome of its inquiry. As was stated by the Division in its opening statement, the Division recognised that there were interests, apart from interests of the type to which reference has been made in paragraph 4.4 of this ruling, to which it might be considered appropriate to grant legal representation having regard to the nature of the inquiry, for example, the public, or a section of the public which is the focus of the inquiry.

At that hearing, Counsel to the Division, having adverted to the understandable mistrust that many of those who have been in institutional care have for the State, suggested that consideration might be given to the appointment of an independent legal team by a neutral body to represent the

interest of all those who were or may have been the subject of a vaccine trial under investigation. He suggested that the independent legal team should be contractually precluded from acting on behalf of any individual whose interest they represent before the Division in any other capacity. The purpose would be to ensure that the entire focus of the team appointed would be on representing the interest in the inquiry of all persons affected or potentially affected. He stressed that any existing lawyer/client relationships would not be interfered with. It was submitted that a legal team which has a full understanding of all the issues would best represent the interest of those affected. It was also suggested that such team would obtain its own experts to advise it and, if it was appropriate, proffer such experts to give evidence to the Division.

It was acknowledged by Counsel to the Division that it would be necessary to provide for the appropriate involvement on the part of affected persons who wished to be involved in the process. It was suggested that, when persons affected were identified, there might be identified a grouping or body which would be broadly representative of all such persons. However, in the absence of any difference of interests among those affected, Counsel questioned whether there could be any public interest in a multiplicity of representations of the general interest of those affected. Nonetheless, he recognised an overriding requirement that any person who is actually required to give evidence would necessarily be entitled to appropriate representation by a solicitor and counsel of his own choosing.

5.2 The authority of the Division to allow legal representation is now governed by section 20A (1) of the Act of 2000, which is quoted in paragraph 2.3. It is noted that that provision does not replicate section 2 (b) of the Tribunals of Inquiry (Evidence) Act, 1921, which empowers a tribunal “to authorise the representation before them of any person appearing to them to be interested to be by counsel or solicitor or otherwise, or to refuse to allow such representation”. It is the view of the Division that, as a matter of the proper construction of section 20A(1), while it has a discretion to allow legal representation to a person appearing before it, it is implicit that such appearance is necessary or expedient to enable it to discharge its statutory functions properly. It is considered that, in exercising its discretion to allow legal representation, the test which the Division should apply is whether the appearance of the person seeking legal representation is likely to contribute to the ability of the Division to ascertain the true facts in relation to the matters being inquired into.

It is the view of the Division that allowing the perspective and interest of the participants to have a voice in the Inquiry in a manner comparable to the voice which must be given to persons whose conduct is being inquired into, through counsel and/or solicitor, and to an extent proportionate to the significance of the participants in the overall context of the inquiry, will assist the Division in the fact finding process and manifestly will be seen to do so. On the other hand, allowing legal representation of a multiplicity of participants, all of whom appear to have had a similar involvement in Trial 1 and to have been similarly affected by the matters in issue, for example, all of the ten participants involved in the Moate Control Group, is not necessary or

expedient for the proper discharge of the functions of the Division and is not within the competence of the Division.

5.3 While the Division has been able to identify all of the children involved in Trial 1 and their mothers, the children have been identified by their birth names and their mothers have been identified by the names by which they were known in 1960/1961. In most cases the Division is not aware of their current names, where names have changed by reason of adoption, marriage or otherwise, or of their current whereabouts. Moreover, in the case of most of the children and their mothers, the Division has recognised that particular issues of privacy and confidentiality may surround the circumstances of the births of the children and the periods spent by them and their mothers in the relevant institutions. In the circumstances, the Division considered that it would not be appropriate for the Division's legal team to attempt to ascertain the current whereabouts of the participants or make contact with them. The Division considered that the appropriate course was to advertise in the national newspapers identifying the institutions in which Trial 1 was conducted and the time span over which it was conducted and to invite persons who thought they might be the subjects of the trial to contact the Commission, if they so wished. Arising out of the advertisements, the Applicants and some other participants in Trial 1 have made contact with the Division's legal team. The Applicants, who indicated through their solicitors that they would be seeking legal representation, have been furnished with the Books of Documents in relation to Trial 1, insofar as they are relevant to them, to afford them an opportunity to consider, and, if appropriate, make a case for entitlement to legal representation.

5.4 The current situation is that one A Group participant who was in Bessboro (the First Applicant) and three participants who were in the Moate Control Group (the Second Applicant, the Third Applicant and the Fourth Applicant) have sought legal representation. The Division has considered whether, assuming it has power to do so, allowing legal representation to the applicants would achieve the objective of giving a voice to the perspective and interest of the participants in the trial. It is the view of the Division that this objective cannot be effectively achieved by allowing representation to all or some of the applicants, because their own factual circumstances do not reflect the entirety of the disparate factual circumstances of the entire body of participants in Trial 1. None can be regarded as being truly representative of the entire body of participants or any group of participants.

6. **Independent Legal Team**

6.1 At a public hearing held on 8th April 2003 the Division appointed Michael Boylan of the firm of Augustus Cullen & Son, Solicitors, to represent the interests of the participants of the trial and to instruct Senior and Junior Counsel, who would be nominated by the Chairman of the Bar Council. It is readily acknowledged that statements made at that and subsequent public hearings by the Chairperson as to the nature of the appointment of the independent legal team and its status and role have been characterised by lack of clarity and even confusion. It is hoped that, by setting out the Division's considered views on the matter, having regard to submissions made and issues raised not only by the Division's legal team, Counsel for a party whose conduct is being investigated and Counsel for the applicants, but also by the

members of the independent legal team itself, the Division will clarify these matters.

6.2 It has been stated by the Division that the independent legal team will represent the interest of the participants in a manner analogous to the representation of the public interest before a tribunal, which representation is a recognised feature of tribunals which have conducted and are currently conducting public inquiries. The Attorney General, would normally represent the public interest and instruct the legal representatives for the public interest. In the instant case, no person capable of doing so has sought to appear to represent the public interest, or the interest of the section of the public which comprises the participants in Trial 1, or to instruct a legal team to that end. That being the case, it must be doubted that the Division has power to appoint the independent legal team under section 20A (1).

6.3 As outlined in paragraph 2.2, the Commission and the Investigation Committee are endowed with such powers as are necessary or expedient for the performance of their functions. The relevant provisions are similar, although not identical, to section 4 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979. It is the view of the Division that it has power under section 4 (3) and section 12 (2) of the Act of 2000 to appoint a legal team, separate and distinct from the legal team which has been, and will continue to be, involved in performing the traditional role performed by a legal team to a public inquiry – gathering evidence, considering the evidence for relevance, disseminating notice of the evidence to affected persons, and presenting the evidence at public hearings – where to do so is necessary or expedient for the

proper fulfilment of its remit. Exceptional circumstances prevail in relation to the inquiry into Trial 1. As has been stated, the participants who have sought legal representation do not reflect the disparate factual circumstances of the entire body of participants. It is reasonable to infer that considerations of privacy and confidentiality may have deterred other participants from coming forward or seeking an involvement. Because of the risk of breaching such privacy and confidentiality, the Division has not sought to contact participants. In such exceptional circumstances, it is the view of the Division that an independent legal team is necessary to properly reflect the perspective of the disparate elements who participated in Trial 1, there being no alternative method of achieving this objective.

A question has been raised as to why the Division's existing legal team could not put forward matters arising from the perspective of the participants in Trial 1. In response, it has been submitted by the Division's legal team that there may be areas where the necessary neutrality and objectivity which attaches to the Division's legal team would be interfered with, or even compromised, should it be seen to adopt what might be regarded as a partisan position. The Division accepts that advice.

- 6.4 The independent legal team has been appointed by the Division by virtue of the powers conferred on it by section 12 (2) of the Act of 2000. It has been appointed to perform the role defined by Counsel to the Division at the public hearing on 30th May 2003. The independent team does not represent the individual participants. It is, in effect, instructed by the Division to perform a

specific role, in much the same way as the existing team is instructed to perform the traditional role. Its role is in aid of the inquiry and specifically to-

- assess all of the documentation in relation to Trial 1 from the perspective of the generality of the participants;
- identify issues arising in relation to the participants, both children and mothers, and other issues arising from a correlation of the documents and through its development of a complete understanding of Trial 1;
- deal in complete confidence with any information or concerns which participants bring to it voluntarily and, where appropriate, raise in the inquiry any issues considered material to the inquiry; and
- take part in the public hearings in Trial 1 in order to put forward such matters as, considered from the perspective of the participants, may be appropriate, whether by submission, cross examination or by offering additional witnesses, including expert witnesses.

6.5 It is recognised that the Division requires the sanction of the Minister for Education and Science, who in turn requires the sanction of the Minister for Finance, to discharging the cost of the appointment of the independent team. Such sanction has been sought.

7. **Representation of the Applicants**

7.1 The Division has stated, at paragraph 5.2, that it is of the view that section 20A (1) does not allow a multiplicity of legal representations of persons who have a similar interest in the inquiry, because to do so is not necessary for the proper fulfilment of its remit. To allow a multiplicity of legal representations has the potential to be unfair to persons whose conduct is being investigated. It would be likely to lead to the protraction of the process of the inquiry, which would be contrary to the interests of all persons involved and the public interest. It would also militate against the Division fulfilling its function in an efficient and cost effective manner.

7.2 The First Applicant has submitted a statement to the Division and submissions have been made on his behalf by Counsel. Some of the matters adverted to on his behalf relate to occurrences since the First Applicant made contact with the Division and may be extraneous to the remit of the Division. The First Applicant contends that he should be allowed to participate in the elements of the inquiry which relate to the selection process of children for the trial, matters concerning the effects of the trial on the selected children and ethical matters related thereto.

It is the view of the Division that, having regard to the significance of the children in the A Group in the overall context of Trial 1, the appearance of one person who was an A Group child to participate in the inquiry in a limited manner would assist the Division in conducting the inquiry and reporting on its outcome to an extent that would justify allowing to such a person limited

legal representation under Section 20A (1). Such participation would be limited to the person's own involvement in Trial 1 within the institution in which he was resident. Accordingly, the Division allows the First Applicant representation at the public hearings in relation to Trial 1 in relation to his own involvement in Trial 1 in Bessboro. For the avoidance of doubt such representation shall extend to appearance for the taking of evidence and hearing submissions in relation to:

- the manufacturer of Quadravax;
- the administration of Trial 1 in Bessboro (including the selection process and consent issues insofar as they affect him);
- the conduct of Trial 1 in Bessboro; and
- expert evidence in relation to the clinical aspects of the trial, including the effects of vaccination with Quadravax.

7.3 *Prima facie*, in the overall context of Trial 1, the involvement of participants in the Moate Control Group was of a lesser order of significance than the participation of the A Group children in Trial 1. The Division considers that the extent to which the appearance of a person who was a Moate Control Group child could assist the Division in the performance of its remit and the justification for allowing representation under Section 20A is correspondingly limited. Notwithstanding that, it is considered that, as regards her own involvement in Trial 1 in Mount Carmel Industrial School, the appearance of one person would assist the Division in fulfilling its remit, if limited to appearance for the taking of evidence and hearing submissions in relation to:

- the administration of Trial 1 in Mount Carmel Industrial School (including the selection process and consent issues); and
- the conduct of the Trial 1 in Mount Carmel Industrial School.

For the reasons stated earlier in paragraph 5.2, it is considered that the Division does not have power to allow representation to a multiplicity of persons who were in the Moate Control Group. The Division allows limited representation to the extent indicated to one of the applicants in the Moate Control Group. If it cannot be agreed among the applicants which of them will appear, the Division determines that representation is allowed to the eldest of the Second Applicant or the Third Applicant, represented by Murphy English and Company, whose request for representation was first in time. As no basis for differentiating the applicants who were in the Moate Control Group was advanced, although Counsel held an opportunity to do so, it is considered that the decision is not arbitrary.

7.4 The level of representation allowed in paragraphs 7.2 and 7.3 is representation by Senior and Junior Counsel and Solicitor.

7.5 The Division affirms that representation allowed to the Solicitor for the Second Applicant and Third Applicant (one representation) and the Solicitor for the Fourth Applicant for the purposes of considering the Books of Documents dispatched on the 25th April 2003. Such representation ceased on 30th May 2003.

7.6 Counsel who appeared for the Fourth Applicant at the public hearing on 30th May, 2003, for the first time and without any advance notice, also applied for representation for a “support group” known as “Irish Survivors of Institutional Abuse International”, of which the Fourth Applicant is a member. Nothing was advanced which would indicate that allowing that Organisation legal representation would in any way assist the Division in discharging its mandate in relation to Trial 1. The application is refused.

8. **General Observations**

8.1 The decisions recorded in this ruling are founded on the current circumstances as known to the Division. It is appreciated that the circumstances may change as the inquiry into Trial 1 proceeds. Any application for additional or varied representation as a result of altered circumstances may be the subject of a statement in writing to the Solicitor for the Division.

8.2 The Division accepts as a general proposition the submission made by Counsel to the Division at the public sitting on 20th January, 2003 and recorded in paragraph 5.1 that a participant who is called as a witness is entitled to representation by a Solicitor and Counsel of his own choosing in connection with his testifying. In this respect, and in every respect, the Division recognises that existing client/lawyer relationships should not be interfered with.

8.3 The Division considers that, through the combination of the appointment of the independent team and the representation allowed to one person who was

an A Group child and one person who was in the Moate Control Group, the perspective of the participants in Trial 1 will be properly reflected in the process and the outcome of the Inquiry.

Ms Justice M. Laffoy
Chairperson

Professor E Tempany
Ordinary Member