



Dáil Éireann
An Coiste um Chuntais Phoiblí

Tuarascáil
maidir leis an Scéim um Shásamh i leith Foras Cónaithe
Márta 2005

Dáil Éireann
Committee of Public Accounts

Report
into the Residential Institutions Redress Scheme
March 2005

Contents

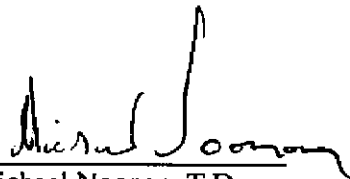
Chairman’s Preface	i
Members of the Committee of Public Accounts	iii
Orders of Reference of the Committee of Public Accounts.....	v
The Report	
Abbreviations	
1. The Facts	1
2. Proceedings of the Committee.....	7
3. The Accountability Issues	7
4. Examination of the Issues	8
5. Adoption of Reports.....	38
Findings and Recommendations	39
Annexes.....	43

Chairman's Preface

At the outset the Committee wishes to express its sincere sympathy to all of those who suffered child abuse, particularly abuse that took place in institutions regulated by public bodies.

The Committee began its consideration of the matter by examining Chapter 7.1 of the Report of the Comptroller and Auditor General 2002. It also examined Chapter 9.1 of his report in 2003. The Committee, during its deliberations, also met with representatives of the religious congregations involved; with officials from both the Department of Education and Science and Finance; and with representatives of the Office of the Attorney General. The Committee considered the matter on five occasions, in public session, between October 2003 and November 2004.

We recommend this report to the Houses of the Oireachtas.



Michael Noonan, T.D.,
Chairman.

9th March, 2005

Members of the Committee of Public Accounts

FIANNA FÁIL

Seán Ardagh T.D.	Dublin South-Central
John Curran T.D.	Dublin Mid-West
John Dennehy T.D.	Cork South-Central
Seán Fleming T.D.	Laois-Offaly
John McGuinness T.D. (<i>Vice-Chair</i>)	Carlow-Kilkenny
Michael Smith T.D. ⁴	Tipperary North

FINE GAEIL

John Deasy T.D. ²	Waterford
Tom Hayes T.D. ³	Tipperary South
Michael Noonan T.D. ¹ (<i>Chairman</i>)	Limerick East

LABOUR

Pat Rabbitte T.D.	Dublin South-West
-------------------	-------------------

GREEN PARTY

Dan Boyle T.D.	Cork South-Central
----------------	--------------------

SOCIALIST PARTY

Joe Higgins T.D.	Dublin West
------------------	-------------

1 Deputy Michael Noonan replaced Deputy Padraic McCormack by order of the House on 18th June, 2003.

2 Deputy John Deasy replaced Deputy Paul Connaughton by order of the House on 20th October, 2004.

3 Deputy Tom Hayes replaced Deputy John Perry by order of the House on 20th October, 2004

Deputy Michael Noonan elected as new Chairman on 21st October 2004

4 Deputy Michael Smith replaced Deputy Batt O’Keeffe by order of the House on 16th November, 2004.

Orders of Reference of the Committee of Public Accounts

156. (1) There shall stand established, following the reassembly of the Dáil subsequent to a General Election, a Standing Committee, to be known as the Committee of Public Accounts, to examine and report to the Dáil upon—

(a) the accounts showing the appropriation of the sums granted by the Dáil to meet the public expenditure and such other accounts as they see fit (not being accounts of persons included in the Second Schedule of the Comptroller and Auditor General (Amendment) Act, 1993) which are audited by the Comptroller and Auditor General and presented to the Dáil, together with any reports by the Comptroller and Auditor General thereon;

Provided that in relation to accounts other than Appropriation Accounts, only accounts for a financial year beginning not earlier than 1 January, 1994, shall be examined by the Committee;

(b) the Comptroller and Auditor General's reports on his or her examinations of economy, efficiency, effectiveness evaluation systems, procedures and practices; and

(c) other reports carried out by the Comptroller and Auditor General under the Act.

(2) The Committee may suggest alterations and improvements in the form of the Estimates submitted to the Dáil.

(3) The Committee may proceed with its examination of an account or a report of the Comptroller and Auditor General at any time after that account or report is presented to Dáil Éireann.

(4) The Committee shall have the following powers:

(a) power to send for persons, papers and records as defined in Standing Order 83;

(b) power to take oral and written evidence as defined in Standing Order 81(1);

(c) power to appoint sub-Committees as defined in Standing Order 81(3);

(d) power to engage consultants as defined in Standing Order 81(8); and

(e) power to travel as defined in Standing Order 81(9).

(5) Every report which the Committee proposes to make shall, on adoption by the Committee, be laid before the Dáil forthwith whereupon the Committee shall be empowered to print and publish such report together with such related documents as it thinks fit.

- (6) The Committee shall present an annual progress report to Dáil Éireann on its activities and plans.
- (7) The Committee shall refrain from—
 - (a) enquiring into in public session, or publishing, confidential information regarding the activities and plans of a Government Department or office, or of a body which is subject to audit, examination or inspection by the Comptroller and Auditor General, if so requested either by a member of the Government, or the body concerned; and
 - (b) enquiring into the merits of a policy or policies of the Government or a member of the Government or the merits of the objectives of such policies.
- (8) The Committee may, without prejudice to the independence of the Comptroller and Auditor General in determining the work to be carried out by his or her Office or the manner in which it is carried out, in private communication, make such suggestions to the Comptroller and Auditor General regarding that work as it sees fit.
- (9) The Committee shall consist of twelve members, none of whom shall be a member of the Government or a Minister of State, and four of whom shall constitute a quorum. The Committee and any sub-Committee which it may appoint shall be constituted so as to be impartially representative of the Dáil.

The Report

Abbreviations

The Congregations The Congregations refers to eighteen religious congregations with whose representatives the Department entered into negotiations to secure a voluntary contribution to the redress scheme in return for an indemnity.

The eighteen congregations were:

Congregation of the Sisters of Mercy (South Central Province)
Congregation of the Sisters of Mercy (Northern Province)
Congregation of the Sisters of Mercy (Western Province)
Congregation of the Sisters of Mercy (Southern Province)
Daughters of Charity of St. Vincent de Paul
Congregation of Christian Brothers
Congregation of Our Lady of Charity of the Good Shepherd
Congregation of Presentation Brothers
Institute of Charity (Rosminians)
Congregation of Oblates of Mary Immaculate
Hospitaller Order of St. John of God
Religious Sisters of Charity
Congregation of the Sisters of Our Lady of Charity of Refuge
Congregation of the Sisters of St. Clare
Institute of St. Louis
Union of the Presentation Sisters
Institute of the Brothers of the Christian Schools (De La Salle)
Dominican Friars' Order of Preachers
Daughters of the Heart of Mary
Congregation of the Brothers of Charity
Congregation of the Sisters of Nazareth

C&AG Comptroller and Auditor General

CORI Congregation of Religious in Ireland

The Department Department of Education and Science

NGO Non Governmental Organisation

The Office Office of the Attorney General

the Laffoy Commission the Commission to Inquire into Child Abuse

UK United Kingdom

1. The Facts

1.1. In the late 1990s, there was enormous public concern about past child abuse, particularly abuse in institutions regulated by public bodies, although owned, for the most part, by religious orders. Eighteen separate religious institutions were responsible for two thirds of the 123 institutions and there were a further 41 institutions that were not managed by them. The public concern gave rise to several Government initiatives - the Commission to Inquire into Child Abuse (the Laffoy Commission), counselling and the redress scheme. On 11 May 1999, the Taoiseach made an apology, on behalf of the State, to all those who had suffered child abuse in institutions regulated by public bodies.

1.2. In setting up a redress scheme, the Government was motivated by a combination of legal, social and humanitarian considerations. The Minister of Education and Science was a co-defendant in many of the cases before the courts. As it was apparent that the religious congregations which ran the institutions were only prepared to adopt a legal strategy the Government decided that a compensation scheme should be set up without delay. It considered that the fairest scheme from the victims' viewpoint and the only one likely to be successful in removing the issue of child abuse from the courts was to provide awards comparable with High Court damages for victims of abuse.

1.3. The policy decision that the State would compensate confirmed victims of abuse was made regardless of whether there would be contributions from other sources and regardless of the number of the cases which might emerge. The decision to set up the scheme initially was made without any reference to the Congregations and was not contingent on their involvement. The Government looked at the broader picture and decided that it had a moral and societal duty to pay early compensation to those injured by past abuse.

1.4. The signing of the indemnity agreement with representatives of eighteen religious congregations (the Congregations) meant that, rather than the State having to meet the full cost of the redress scheme, a substantial contribution towards the cost of the scheme has been obtained from the Congregations. Had the redress scheme not been set up, the State would have faced the prospect of thousands of former residents taking their cases to court. By June 2002, there were approximately 2,500 civil litigation cases pending against the State and, had the Redress Board not been established, it is certain that many further civil litigation cases would have been lodged. The processing of those cases through the courts system would have resulted in hundreds of millions of Euro in legal costs alone, and the courts would have been clogged up for many years.

1.5. Section 7.1 of the Comptroller and Auditor General's (C&AG) 2002 Annual Report records the results of an audit of the redress scheme established by the Government to compensate persons who suffered abuse as children in residential institutions, including the agreement concluded with the Congregations for a contribution towards the cost of the awards made. The principal objectives of the examination were:

- to estimate the State's potential financial liability arising from the redress scheme;
- to review the negotiation of the agreement with the Congregations to establish if proper use had been made of the available information and appropriate approval arrangements were in place, and
- to review the implementation of the agreement concluded.

1.6. Chapter 9.1 of the C&AG's 2003 report provides updated information on the issues raised in the 2002 annual report on the redress scheme

1.7. The C&AG's reports in 2002 and 2003 do not express an opinion on the merits of policy issues surrounding the scheme of redress or the nature of the agreement with the Congregations on the amount of their contribution. An awareness of the indicative cost of policy proposals or, where appropriate, the range of possible costs is a prerequisite to prudent decision-making by Government. The report sets out to establish if the Accounting Officer has ensured all relevant financial considerations were taken fully into account and, where necessary, brought to the attention of Ministers in the preparation and implementation of policy proposals relating to the expenditure involved.

Potential financial liability

1.8. The potential financial liability for redress is dependent on a number of contingencies and future events and accordingly, any estimate of the potential liability is made in circumstances of uncertainty such as an unknown number of successful applicants for redress, the level of awards and the extent of expenses, in particular legal costs. By using the data available on the number of claims to the Redress Board, the incidence of litigation commenced or threatened against the Congregations, freedom of information requests and the level of applicants to give evidence to the Laffoy Commission, the potential claimant base was estimated by the C&AG in 2003 at around 10,000. By applying this number to the estimated average award and taking account of experience elsewhere, an indicative figure can be derived for the possible cost of compensation, to which legal costs have to be added. In the absence of reliable data on the level of costs being allowed by the Redress Board, a figure of 15% of awards was used. According to the 2002 audit calculations, the ultimate cost could lie somewhere between €869 million and €1 billion. These calculations are estimates of a contingent liability, that is, the liability that may arise if the potential population claim is in accordance with the pattern set out in the assumptions. The computed figures must be viewed with caution until the claim and award trend emerges in the light of further experience of the Redress Board and also the courts.

1.9. The initial estimate of the ultimate liability made by the Department of Education and Science in Autumn 2001 was based on the number of claims at that time (2,000) and an average court award agreed at that time (€127,000). This provided a potential liability of €254 million. There was an expectation in the Department that the ultimate amount finally paid by the Redress Board would not exceed the higher end of the original estimate of €508 million. At the time of the 2002 audit (mid 2003), the Department expected that the maximum number of applicants would be unlikely to exceed 8,000. Using the average award of €84,000, plus a figure of 15% for legal costs, this would put a ceiling of €772 million on the potential liability.

1.10. Three different methods were used in the 2003 audit (completed in mid-2004) to estimate the final cost of the redress scheme:

- Information was obtained from 16 firms of solicitors handling redress cases on the number of cases they had on hand which had yet to be submitted to the board, along with information on the number of new cases being received. The 16 firms in question accounted for 36% of all claims made to the Redress Board. Using the figures supplied, the

estimate of the final number of claimants is in the order of 8,900. By applying the current average award of €77,500, increased by 20% to cover legal and other costs, an estimated final figure is €828 million.

- The second estimation methodology was based on Freedom of Information request trends. Using this basis the final number of claims could be in the range of 8,200 to 8,700. Applying these figures to the average all-in cost of awards gives a liability between €763 million to €809 million.
- The third method used was a simple extrapolation based on the number of claims made to date. Assuming claims continue to be received at the same rate and the average all-in cost of awards remains unchanged, the overall estimated liability using this method would be approximately €700 million.

1.11. Earlier in 2004, the Redress Board tentatively estimated that it will receive between 6,500 and 7,000 applications, giving a final possible liability of between €605 million to €650 million. All of these figures come with a heavy caveat but there is a lower divergence in the estimate of final liability between the Department and the audit.

1.12. The possible overall costs outlined in the 2003 audit report vary between the estimate made by the Redress Board itself (€605 million to €650 million), to the C&AG's latest estimate (€700 million to €828 million). The reduction in the C&AG's estimate between the 2002 and 2003 audit illustrates how difficult it is to put an accurate figure on the eventual outcome. The original Departmental estimate, adjusted for 20% legal and administrative costs was €610 million, which is at the lower end of Redress Board estimate. The final cost will not be known until the Redress Board has completed its work.

1.13. At 8 February 2005, 5,369 applications had been made to the Redress Board and 2,555 awards totalling €199.9 million had been made, making the average award approximately €78,000. Applications for compensation are still being received at an average of 48.5 a week. Legal and other costs to date are coming in at 15% of awards, with the board's expenses accounting for another 5%.

Negotiation of the agreement with the Congregations

1.14. While the Government had already decided that a redress scheme would be established regardless of any contribution from the Congregations, it was considered a desirable policy outcome that the Congregations which owned and managed the institutions should contribute to the scheme. The Congregations indicated early on that they wished to make a meaningful contribution. The objective of the negotiations from the Department's perspective was to achieve the highest possible contribution that the Congregations were prepared to make. There was no capacity to coerce them into any agreement and it was thought that if they were not part of the scheme, they would avoid most, if not all, of the cost of the compensation. There was no separate agreement with the 41 other institutions who are not covered by the indemnity.

1.15. The negotiation of the agreement was the culmination of meetings between the two sides from the beginning of 2001 up to June 2002. There were three phases in the negotiations:

- During the period up to October 2001 officials conducted the negotiations in the course of which the Congregations made their opening offer which they deemed to be worth €108 million. These negotiations reached an impasse.
- In the period November 2001 to January 2002 there were two meetings with the Congregations involving only the Minister and the Secretary General of the Department on the State side. The outcome of these meetings was an announcement on 30 January 2002 that the Government had agreed, in principle, to proposals that would see the Congregations contribute €128 million to the redress scheme comprising cash, past and future property transfers and counselling services. This sum was not based on any apportionment of liability or any portion of the likely costs of the scheme. In return, the Government would indemnify the Congregations concerned against all present and future claims arising from past child abuse covered by the redress legislation.
- In the period February to June 2002 there was further discussion on two main issues: the nature of the indemnity to be provided and whether property previously transferred by the Congregations to NGOs could be reckoned as part of the contribution.

1.16. While the Attorney General's office was involved in finalising the legal documentation to give effect to the deal, the deal was agreed in principle directly between the Minister and the Congregations. The Department asserts that at all key stages of the process leading to the Government decision to enter into the indemnity, relevant Ministers, the Attorney General, Departments and Offices were involved and/or consulted. It is satisfied that appropriate legal advice was made available to the Minister and the Department by the Office of the Attorney General at all key stages of the process.

1.17. The 2002 audit found that the Department did not appear to carry out any detailed analysis of the State's potential financial liability to support it in its dealings with the Congregations. In November 2001, it indicated that it would be prepared to accept €127 million as the capped contribution, even though the information available at the time suggested that this was far less than 50% of the likely minimum cost of the scheme. The Department had no way of knowing the financial standing of the various congregations, which clearly put it at a disadvantage in trying to push for a larger contribution. No effort was made to stress test the Congregations' assessment of their financial exposure in litigation which was closely tied to the amount they were willing to pay. The departmental papers suggest that the Attorney General's office was not kept fully informed of the detailed negotiations during the period November 2001 to April 2002.

1.18. The audit concluded that greater diligence in these areas would have added extra rigour to the State's negotiating stance but it is difficult to gauge whether any of these matters would have made any difference to the nature of the final agreement.

Implementation of the Agreement

1.19. After the expiry date for applications under the scheme, people will be entitled to pursue their claims through the courts for three years. For a case to qualify, it must be commenced in court within six years of the commencement of the Residential Institutions Redress Act (i.e. by December 2008). The State must be put on notice within the period of the scheme, which is three years from the date of commencement, and the legal proceedings must commence within a further three year period. This is to assist in the situation where a

person may apply on the very last day of the scheme but continue to have the option to accept or reject an award and to go to the courts with his or her case. The view was taken that at the outside the Redress Board should have finished the very last case three years after it accepted it.

1.20. The State indemnity has so far been invoked in five cases. The amounts of the settlements were €180,000, €150,000, €50,000 and €100,000 together with a Court award of €370,000. When everyone's costs are added in, it is likely that the total cost of meeting the five claims could nearly double those amounts.

Implementation of the agreement with the Congregations

1.21. All cash contributions have been received from the Congregations.

1.22. Under the agreement, the Congregations are required to transfer property to the State to the total value of €76.86 million, divided into two separate and distinct schedules. One schedule related to property that was to be transferred from the date of the indemnity agreement and was to have a value of €36.54 million. By February 2005, agreement in principle has been reached with the Congregations on the transfer of 35 properties to the value of €38.28 million. That figure of €38.28 million includes €4.98 million in cash provided by the Congregations in lieu of property.

1.23. The second schedule of property related to property transferred between May 1999 and June 2002 and was to be valued at €40.32 million. At this stage (February 2005), transfers of 27 properties to the value of approximately €32.93 million have been agreed in principle. The Department has recently written to the solicitors for the Congregations and proposed that they should now offer a cash sum to finalise the property aspect of the agreement.

Counselling services

1.24. Part of the Congregations' contribution was the equivalent of €10 million worth of counselling and other support services for former residents of institutions and their families. The value of counselling already provided can be taken into account as per the agreement. The Department has agreed in principle that expenditure totalling approximately €9.5 million qualifies as meeting the commitment of the Congregations with regard to the provision of counselling support. Further details have been sought on other expenditure which the Congregations claim should also qualify under this heading and it has been agreed that the final agreement will be subject to independent audit.

Education Fund

1.25. The indemnity agreement specified that a sum of €12.7 million is to be provided to enable former residents of institutions and their families to avail of educational programmes. Pending the setting up of the fund on a statutory basis, an administrative scheme has been put in place. To date, approximately €1 million has been provided to former residents and their families under the scheme to enable them to avail of various educational opportunities.

1.26. A strong publicity campaign was conducted in the United Kingdom (UK) by various organisations to make victims aware of their rights. However, the flow of applications from

UK-based solicitors is small and has not picked up significantly although there has been a substantial increase in freedom of information requests from solicitors in the UK.

Alternatives to the redress scheme

1.27. The Department stated that a range of alternatives to the redress scheme were examined, particularly in relation to the various forms of litigation in which the victims and the State could have engaged, to recoup money from the Congregations.

1.28. The Civil Liability Act of 1961, which brought into being the option of suing a second party, was also a relevant factor in the decision to establish the redress scheme. The key alternative was to allow the courts deal with the issue but this would have cost a great deal more on a case per case basis and would not necessarily have led to a situation where the Congregations would have paid more. The reality was that in any litigation the State would have been co-defendant with the particular religious congregation. Assuming that a victim of abuse won an award in such an action, the Civil Liability Act, in a situation where there were co-defendants, would have allowed the successful plaintiff to proceed against any one of them. In relation to the Congregations, a person trying to execute a judgment against them would have faced a lot of difficulties, not least the fact that their assets, by and large, were tied up in charitable trusts, the objects of which had nothing to do with compensating people for abuse. It was most likely that the lawyers for a successful plaintiff would execute the judgment against the State.

1.29. The legal advice to the Department was that a number of applicants (in particular claims based on physical abuse, neglect or mental cruelty there was no element of sexual abuse) would have faced insurmountable obstacles in taking cases because of the Statute of Limitations time restriction on civil actions in the ordinary courts. In addition, the Government believed that the early establishment of a compensation scheme would reduce the level of stress and trauma suffered by many of those involved.

1.30. The only alternative to the agreement would have required the State and/or the victims to sue the Congregations through the courts. This course of action would have resulted in victims having to face traumatic cross-examination by lawyers. It would have taken many years for the courts to finish and having gone through that trauma, the likelihood was that many of the cases would have failed in the courts because of a lapse of time since the abuse had occurred. This would have resulted in an uneven pattern with anomalous results and outcomes varying from perpetrator to perpetrator and institution to institution.

1.31. The associated legal fees would have been enormous and if any portion of liability had fallen on the State, victims would have been entitled to recover the full 100% of their damages against the State because of the laws relating to co-defendants.

1.32. At all times the concerns for the victims had priority in the Government's considerations. In that context, an enforceable agreement to receive €128 million from the Congregations had much to recommend it. In the course of policy development, each of the scenarios was considered and ultimately not accepted by the Minister and the Government. They would have led to a situation where one of the basic tenets of the redress scheme - the provision of a forum whereby these cases could be dealt with, without the need for victims to undergo the traumatic and lengthy process of court proceedings - would have been negated.

2. Proceedings of the Committee

2.1. The Committee considered Chapter 7.1 of the 2002 report at three meetings:

- The Committee first met with the Secretary General of the Department of Education and Science and his officials, and with a Second Secretary of the Department of Finance and his officials on 2 October 2003.
- Following the first meeting, the Department made available to the Committee a large set of documents supporting the negotiation of the agreement with the Congregations. In the light of this additional information, a second meeting was held with the Secretary General of the Department of Education and Science and his officials, and with a Second Secretary of the Department of Finance and his officials on 4 March 2004.
- In order to achieve a full consideration of the accountability issues involved, the Committee met with a delegation from the Congregations on 8 July 2004. The delegation appeared as voluntary witnesses before the Committee.

2.2. The Committee considered Chapter 9.1 of the 2003 report and Vote 13 – Office of the Attorney General on 25 November 2004. At that meeting, the Committee met with the Secretary General of the Department of Education and Science and his officials and with the Director General of the Office of the Attorney General and her officials and with officials from the Department of Finance.

2.3. Section 3(5) of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 states that the committee does not have the power to direct the Attorney General's Office to give evidence on matters of the legal advice it provides. Accordingly, the Committee is limited in the scope of its questioning of the Attorney General's office to matters of general administration.

3. The Accountability Issues

3.1. The consideration of the accountability issues was achieved through an in-depth examination of the three audit objectives covered by the C&AG's report.

3.2. The specific accountability issues covered follow the chronological sequent of events, as follows:

The State's potential financial liability arising from the redress scheme

Negotiation of the agreement with the Congregations

The mandate and the negotiating position

The early negotiations

The agreement in principle

The finalisation of the agreement

Role of the Attorney General's Office

Involvement of the Department of Finance

Implementation of the agreement

Concluding perspectives on the agreement

4. Examination of the Issues

The State's potential financial liability arising from the redress scheme

The Department's estimate of the liability

4.1. The initial estimate of the State's ultimate liability under the redress scheme was €254 million, based on the number of cases in the Courts in 2001 (2,000) and an average settlement at that time (€127,000). The Department informed the Committee that it had used all sources of information available to it in calculating the liability to the State and had specifically considered the potential sources of information referred to the C&AG's report, such as people who had applied to appear before the Laffoy Commission and Freedom of Information cases. This had been done in working with colleagues in the Department of Finance, the Attorney General's office and elsewhere. However, the huge amount of information available was not used in the calculation of a reference figure for the agreed settlement with the Congregations. The Department maintained that at the time of the initial estimate they did not have all of the figures from the Laffoy Commission and that the only certainty was the number of litigation cases in the courts.

4.2. The initial estimate is important as it is from this estimate that the mandate and the negotiating position on the State's side were determined. It also established the basic method used for subsequent estimates of the potential final liability - the numbers applying in litigation and the awards being made by the courts.

4.3. The Department maintains that at all times the Government was made aware of new information as it emerged but at no stage was the figure of £100 million (the minimum contribution sought from the Congregations) tied to what the eventual overall cost of the scheme would be. Neither was the indemnity tied specifically to a portion of the expected overall cost. In making the decision on the agreement, the Government was aware of the fact that the numbers were rising and that the cost would certainly be far in excess of the original estimation. The Government decision was based on all of the available facts, including strong advice from the Department, the Department of Finance and the Attorney General's office on the possible eventual liability and number of cases involved. Based on all of this information, the Government made a decision that it would make a deal with the Congregations and accept a sum of €128 million towards the eventual cost of the redress scheme, regardless of what the eventual cost would be.

4.4. The Committee considered the Department's latest estimate (as at November 2004) of the ultimate liability which is that €508 million would be the amount paid to individuals. This assumes that the higher end of awards would be reached at an early stage and that awards would reduce as the lower profile cases were reached. In July 2003 the average award was €84,000; by November 2004 it was €77,000. If there is a continuing reduction, the figure outlined will represent the final outcome but the estimates of liability are all qualified.

4.5. Legal and administrative costs will add 20% to the Departmental estimate. The Department considers that if each case went to court the overall costs for each case would be 75% to 80% higher. It noted that in terms of the number of cases per week, the board is running more or less on track or slightly ahead of what was indicated. The statistics in terms

of freedom of information requests are higher. The figures from the solicitors are similar to the calculations made in the first instance. What is now taking place is a slight reassessment of the position.

4.6. Some of the calculations made by the C&AG in his 2003 audit remain prudent. The solicitors' survey does not take account of the position in respect of solicitors in the UK where a road show was organized to publicise the scheme but it is not yet clear how many additional applications will result from it. The freedom of information figure also appears to have been under-estimated in that the figure given is 90 submissions per month while the current number being received is 120 per month. There could be a last minute increase in applications towards the deadline for receiving applications which could add to the actual final liability.

4.7. The dissemination of information in the UK is not a new phenomenon. UK based lawyers have been taking on clients in respect of this issue for a number of years. The situation could also be distorted by the fact that a large proportion of those in the UK who intend to make claims are using Irish based lawyers. In that regard, they are included in the information already available from solicitors in Ireland.

4.8. The Committee recalled that the Government had initiated the redress scheme without setting any financial limit and had decided that those detained in institutions needed to be recompensed for the trauma they had suffered within them. The figure of €128 million was by way of addition and not based on any particular proportion of the cost. The Government did not set the addition of that figure as a precondition for the initiation of the scheme. It decided it would initiate a redress scheme with or without the €128 million paid by the Congregations.

The Congregations' estimate of their liability in a court situation

4.9. In the absence of determination by an independent body, the only basis of assessment of liability the Congregations could make was by reference to the number of claims they had across the 18 Congregations, the age of the victims and the seriousness of the abuse. The Committee asked if the Congregations thought that the number of cases would increase as they have done. The actual reference figure at the time of the negotiations was around 2,000. The Congregations noted that the issue of the rising number of cases, in terms of the redress scheme, is not equal to an establishment of culpability because the redress scheme is prohibited from defining, establishing or determining either fault or guilt. However, they recognised that many of the cases would have had a difficult passage through the court system and many might have fallen. The Congregations did not take advantage of the fact that it might have been much more positive for them to go through the court scene. They took an approach that showed concern for every case.

4.10. The Congregations' estimate of their exposure was €50 million to €60 million and they were surprised with the estimate of up to €1 billion in the C&AG's 2002 report. The Committee explained its concern that if, finally, there is a liability in excess of €1 billion, the contribution of the Congregations seems disproportionately small. It argued that it would be reasonable from the point of the view of the man or woman on the street, that a 50-50 arrangement would be fair and balanced and reflect the responsibilities of both the State and the Congregations. The Committee asked if the estimate of liability made by the Congregations was based on a narrow definition of sexual abuse which reflected the nature of cases being brought. The Congregations explained they had assessed all cases they were aware of on the assumption they would all be successful. They did not receive professional

advice beyond their legal advisers and were not in contact with people from other countries. They had not established a bottom line for their negotiations with the Department.

Likely cost of alternative options

4.11. The Committee is satisfied that there would have been a massive liability for the State had the Redress Board not been established, not alone in potential payments to individuals but also in legal costs. The State would have faced the prospect of thousands of former residents taking their cases to court. Within the terms of the redress scheme, legal and administrative costs come to approximately 20%. In three cases which were dealt with in the courts, the costs are in the range of 75% to 80% of the award. Going to the courts would be a far more expensive process for the State than going to the Redress Board. There is a perception that the establishment of the Redress Board helped create a contingent liability to the State. Others have the view that the fact the Congregations only paid €128 million has somehow added to a large liability for the State. In fact, the State was facing a massive liability regardless of whether there was a redress scheme or any contribution.

4.12. Early indications from cases where the indemnity has been invoked suggest that the court route is likely to be more expensive to the State than recourse to the Redress Board, particularly in the matter of legal and other costs. However, if the court option is taken, the burden of proof is much more onerous than going to the Redress Board which should result in fewer successful claims. It was indicated that legal proceedings were instituted in 2,500 cases but one must consider how many would have gone ahead. One must also consider the State's exposure to these cases and try to establish the supervisory and operational responsibilities of the Congregations who ran these institutions. The earlier documentation, which has been seen by the Committee under the Freedom of Information Act, made it clear that once the scheme is set up, the process that follows is quite different from pursuing a claim through the courts. The scheme generates a multiple of the number of claims that might otherwise have been expected if they were dealt with solely through the courts and the impact of this on the estimate of cost would need to be determined.

4.13. A major difference in outcome between the two approaches is that on an individual case basis 80% of the cost goes to the victim and legal costs account for approximately 15%. However, the lower burden of proof means that more awards are being made through the redress scheme than would be made in a court action. The Department had not calculated the alternative cost because they had no examples of cases that had gone to court. There was no basis on which a reasonable estimate could be made. The Department advised the Government that the alternative was potentially extraordinarily expensive, apart from the social and humanitarian reasons to do this another way.

4.14. An estimate of the ultimate cost of the court alternative to the redress scheme was not relevant to the financial audit of the Department on which the chapters in the C&AG's annual reports are based. The matters covered in the C&AG's annual reports arose from his consideration of the appropriation accounts of the Department and the importance to know, in a broad financial context, what one was getting into. An examination of the alternative options would be a complex value for money exercise. The Committee noted that any consideration of the contingent liability from a value for money perspective would also need to consider the other side of the equation at the same time.

Negotiation of the agreement with the Congregations

The mandate and the negotiating position

The Negotiating Team

4.15. The negotiation team consisted of representatives of the Departments of Finance and Education and Science and the Office of the Attorney General.

Code of Ethics

4.16. The Committee established there was no code of ethics procedure in the Department or in the Civil Service generally for those engaged in negotiations so that prior to forming a negotiating team, vetting takes place to ensure that the judgment of members would not be compromised by their associations outside their role on behalf of the State. In the context of the strategic management initiative, there might be cause for such a vetting procedure to be put in place.

Mandate for the negotiations with the Congregations – 30 April 2001

4.17. There was a difference between the negotiating stance and the mandate. The mandate came from the written agreement reached on 30 April 2001 between the Ministers of Finance and Education and Science with the knowledge of and in consultation with the Office of the Attorney General on what was the bottom line they would accept by way of a deal with the Congregations.

4.18. The mandate provided for an indemnity for the Congregations contributing to the scheme in respect of all civil actions arising from acts of abuse committed on people who were eligible to make a claim to the compensation scheme. It also included a cap of £100 million, which ended up as €128 million, as the minimum contribution which would be accepted from the Congregations in return for the indemnity. The mandate did not specify whether the contribution would be in cash or other assets. The Department agreed that all civil actions arising from acts of abuse on people who were eligible to make a claim to the compensation scheme would be dealt with under the agreement. This included cases which did not necessarily go directly to the Redress Board. It included all claims, including those which could go directly to court.

Knowledge of the Congregations' ability to pay

4.19. In a press release issued by CORI (representing the Congregations) on Sunday 29 October 2000, mention was made of the Congregations' willingness to participate in the redress scheme and help bring closure to the issues for everybody involved. The theme of the Congregations' ability to pay is an important issue for their involvement in the scheme.

4.20. The C&AG's report summarised the situation in these terms:

“...The Congregations took the view that the level of contribution required from them should be in proportion to the level of validation of allegations decided by the Government and their ability to pay...” and “...In addition, the Congregations indicated that any contribution

should take into account the ministry which they continue to carry out and, where appropriate, the resources of the individual congregations... ”

4.21. The Congregations have great difficulty with the question of ability to pay because the question of ability to pay is being asked before an obligation to pay has been established. The policy position at April 2001 was reached without any information on ability to pay. No attempt was made to assess the financial situation of individual Congregations as the Department considered this was not an approach the Government wanted to take at the time. A considerable amount of the properties of the Congregations are tied up in trusts. The legal advice was that the State could not forcibly acquire any of these properties; it would have to be done voluntarily and some properties could not be voluntarily handed over because of the nature of the trusts. The Committee inquired why the Department did not try to ascertain a benchmark as to what the religious authorities would have been able to pay. The reason is that the redress scheme was set up and established by the Government independently of the Congregations.

4.22. The draft memo for Government (the memo was not sent) of July 2001 included the following extract at Section 5.2:

“The Minister for Education and Science accepts that the Congregations have made a valuable contribution to Irish society in the past. It is not in the public interest that their capacity to continue to make a contribution should be seriously jeopardised by the amount of their contribution to this scheme. However, as no reliable information on the Congregations’ assets and ability to pay have been provided, it is not possible to determine how much weight can be given to this argument. In addition, since the total amount of the contribution proposes €45 million, this represents less than €4 million per Congregation concerned. This would seem to be a small fraction of the value of the assets of most of the Congregations.”

4.23. In the early negotiations there was some discussion about the question of insurers being involved regarding the payment of any contribution that the Congregations would ultimately make. The Congregations were not forthcoming with information on this, or on their assets. The impression conveyed was that they would pay all or most of any contribution to be made from their own resources. The understanding was that their insurers would not play any significant role in this matter because some 70% of claims, or likely claims, are from the 1960s and before and the Congregations did not have that kind of insurance for that period.

Congregations’ perspective on their ability to pay

4.24. The Committee asked about the early deliberations of the Congregations on their estimate of liability and whether amounts might be recoverable from insurers. The 18 Congregations involved in the discussions were all quite different; some were small and some were large. Some had considerable assets and a small number of claims and *vice versa* for others. Some Congregations would not have ready access to large amounts of cash but they might have property while others could have large amounts of cash and little property. There was quite a disparity in the resources of the Congregations and in the nature and extent of the claims the Congregations would have faced.

The policy decision (the mandate) and the negotiating position

4.25. The Department explained that there was an examination of the total policy context in April 2001. The Government decided that there would be a redress scheme with a low burden of proof. It did not wish to go down the court based route. Officials reviewed all of the pros and cons in terms of the implications for the State and the victims and concluded that the negotiating strategy for the discussions should be based on putting it to the Congregations that the costs should be apportioned 50-50 between the two sides, subject to a cap which the negotiators agreed should be initially put at a certain figure. That figure was £150 million, subject to a floor amount, an absolute minimum of £100 million or €128 million. The other aspect was that if the Congregations agreed to make such a contribution, an indemnity would be accorded in return.

4.26. The Department of Finance originally recommended a 50:50 division of liability between the State and the Congregations as the appropriate approach to be adopted for the discussions with the Congregations. The 50-50 ratio attempted to assert that the scale of the State's or the Congregations' exposure would be no more than 50%. Behind this negotiating strategy was an acceptance that the State carried a major degree of culpability for the manner in which the situation in the affected institutions had evolved, whether it was through the decades long inadequate transfer of resources, the decades long failure to ensure staff in the institutions were properly trained, and the failure on some occasions to adequately inspect the institutions. There were references in the debate on the Bill that there was a possible failure to act on complaints made and rejection without adequate investigation. This occurred many decades ago.

Congregations' perspective

4.27. From the beginning, the Congregations never accepted the 50:50 stance as they referred to their legal exposure to claims if they all went through the court system. They asserted that because of the decision to proceed with a low burden of proof rather than the higher standard of proof required in a court setting, the scale of the redress scheme involved a level of compensation that would be hugely ahead of their estimate of exposure from a court based process. Each Congregation looked at every claim they had and estimated that the total liability of the 18 Congregations was in the region of €50 to €60 million. They were advised by the State's side that they could and should approach their insurers. The issue of insurance was raised at the very first meeting on 25 September 2000.

4.28. The issue around value for money is related to the idea that the number of claims equates with culpability or guilt. At the time of the negotiations, there was an expectation of 1,500 to 2,000 claims through litigation or the Laffoy Commission. The redress scheme started in advance of the work of the fact-finding aspect of the Commission. The contribution offered by the Congregations was a voluntary one in advance of any establishment of determination around the claims. The Congregations viewed the 50:50 split as unfair as a concept and feared the total would be entirely unrealisable in terms of capacity to pay. A 50:50 split would have been based on an assumption that all of those who were accused were guilty. Furthermore, the State would have the freedom to proceed on the grounds that individuals would be assumed to be guilty if the Congregations were to make a contribution based on a 50:50 split. The Congregations did not have an open-ended cheque book, or the freedom to give away resources on that basis. They felt they made a fair, just, moral and generous contribution.

4.29. On the basis that the State was taking on its responsibility, if the Congregations took equal responsibility then, a member of a Congregation, if accused, would have been able to say that the Congregation had paid out money without the case being heard and not as the cases were processed. The Congregations were making a finite agreement at a particular stage in advance of the redress scheme being set up.

Subsequent outcome

4.30. Although the 50-50 negotiating position came from the Department of Finance, there was a view in the Department of Finance that it would have been an amazing outcome if a 50-50 agreement had been secured. The Committee argued that having established a formula, whether it is 50:50, 60:40 or 70:30, it should have been pressed in the negotiations. The Department replied that one could only adhere to a formula if it was likely to lead to a satisfactory outcome. The position reached was that the Congregations had asserted convincingly to the negotiating team that they saw their liability as strictly confined in relation to the normal standards of proof in court and that their degree of exposure was limited. While the 50-50 negotiation tactic did not succeed, the State achieved its minimum baseline contribution level of €128 million and the Department of Finance was satisfied with this result.

The early negotiations

The Congregations' understanding of the nature of their participation in the redress scheme

4.31. The Congregations had absolutely no contact with the Government or the Taoiseach's office and no advance knowledge that an apology was about to be made. It was a unilateral decision by the Government and the Taoiseach. The Committee asked when and how the discussions had started. In August 2000, a small piece in the *Irish Independent* suggested the Laffoy Commission was to become a compensation tribunal. The Congregations contacted the legal adviser of the Department to clarify the newspaper report. On 15 August 2000, the Department expressed interest in meeting with representatives of CORI. The meeting was held on 25 September 2000 between the President and Secretary General of CORI and representatives of the Attorney General's Office and the Department. The nature of the meeting was to consider a potential response from the Congregations to an invitation to become contributors to a compensation scheme. It was made very clear that the scheme was being put in place whether or not they would contribute. The phrase used was, "It is not predicated on your becoming part of it or not". The CORI representatives made it clear that as a representative group, they could not make decisions for the Congregations. A month was agreed to consider the matter and a response was made to the Attorney General's Office by the end of October.

4.32. Many issues raised at the meeting were of huge interest to the Congregations. At that point there were approximately 750 cases against the State, most of them relating to institutions such as reformatories and industrial schools and some orphanages. It was acknowledged that no one knew what the extent of the claims could eventually be if a redress scheme was put in place. It was estimated that it could reach a maximum of 2,000. The reasons given at the meeting for setting up a compensation scheme were that it would be a decent, humane and generous thing to do for former residents of the institutions who had a very difficult time in their earlier life. The assumption was that the religious, who had already

taken some initiatives in healing and outreach towards the victims would agree to the opportunity to contribute to the healing initiatives that were already taking place.

4.33. It was also obvious to the Congregations that the State side did not look forward to the prospect of endless litigation. Neither side felt it was in the interest of the former residents who had suffered so much and who were looking for some gesture of financial compensation. The Laffoy Commission was complaining that it could not get on with its work because of the failure to address the financial aspect. It was in the interest of the former residents and, by and large, was something that could be of interest to the Congregations. It was outlined that the alternative was that the Department could deal directly with the claimants, pay them a certain sum and then tell them to go after the Congregations for the remainder of the sum. That would still require the claimants to endure the rigours of cross-examination in court. It was generally agreed this was not attractive to former residents.

4.34. The information from the first meeting with CORI was shared with the Congregations and a positive initial reaction was received. When the announcement was made on 3 October 2000 that a compensation scheme was about to be put in place, CORI was taken by surprise but was confident enough the following day to be able to say that the religious Congregations would be happy to make a voluntary contribution towards the scheme.

Negotiations up to June 2001

4.35. The Department took a tough negotiating stance until June 2001 when an initial offer was made by the Congregations. The Department's Legal Adviser wrote on 27 June 2001 outlining this offer. He stated that the Congregations gave the clear impression that this package was their only and final offer and, if not acceptable, the negotiations would end. It was his feeling that the State negotiators were not going to make any more progress with the Congregations and that the negotiations had reached a critical point. He listed the difficulties he believed would arise. If it was perceived that taxpayers were shouldering the cost of resolving the problem, there would be public criticism. However, a settlement with the Congregations which was seen as inadequate could be as damaging as no settlement in the project of bringing closure to the abuse issue. He recommended that the proposals should be taken to Government and drafted a memo for Cabinet.

Memo for Cabinet dated July 2001

4.36. The Committee asked why the draft memo did not go to Government. The Congregations had put forward a position which they had said was final. The Department stated that the decision to take it to Government rested with the Minister who took a view that he did not agree with the views expressed in the draft memo and therefore could not recommend it, in which case it was unlikely to be accepted by Government. Rather than have the Government reject a proposal and the chance of an agreement receding, he decided to let matters rest over the summer and to try once more in the autumn.

News of the World Article

4.37. A senior negotiator and legal adviser to the Congregations wrote to the Department's Legal Adviser concerning an article in the *News of the World*. The headline on the front page read: "Irish church: €200 million snub to abuse victims". The Congregations were sensitive that the negotiations should be confidential on the basis that nothing should be agreed until

everything was agreed. They felt that the story in the *News of the World* was a leak from a high official source. They had no idea of the source of the leaks but were sure they had not originated from their side. The correspondence suggests that they thought it might have been someone on the negotiating group on the officials' side or perhaps someone higher up in the chain of command. The Congregations were very annoyed. The leaks to the media shattered their confidence to continue in negotiation. The letter stated that there was a serious question mark over the State's approach to the negotiations and expressed concern that such a calculated and deliberate attempt should be made to damage them and to create controversy for them in the course of the negotiations. There was a genuine sense of breach of trust because of the article.

4.38. The Department replied on 1 August and agreed that the leaks had "cast a pall of dishonour over the participants in the discussions from the State side". A briefing note to the Secretary General, dated 4 August, informed him of the damage the leaks caused to the negotiating position. The Committee asked if the leaks put the state negotiators on the back foot but this was denied. In August the Department's legal adviser again advocated that the issue should be taken to Government on the basis that if there was to be no further change in the position, the proposal of the Congregations would have to go to Government at some stage.

4.39. The Committee felt that arising from the *News of the World* leak, the negotiators for the Congregations had a genuine cause for grievance that the matter was in the media. Notwithstanding all of that, at no time did the Congregations believe that the Department was acting in bad faith. The Department never felt a need to make an offer to restore the negotiating relationship. A fortnight later, the negotiation moved up the chain of command with a communication to the Assistant Secretary that indicated general unhappiness with the position and stated they were not in a position to continue negotiations without reference back to their principals. Relations were at a very low ebb at that point.

4.40. A short meeting with the Congregations took place on 16 October 2001. At this meeting, the suggestion that the contribution from the Congregations could be capped at approximately £100 million emerged for the first time. It had featured as the bottom line of the State's position in the document of 30 April 2001 and was agreed by the Ministers and the Attorney General. This was the first serious move on the part of the State negotiators. At the meeting, the Congregations side were not in a position to agree to it. They needed to refer back to the individual congregations. After that, the Congregations were invited to meet the Minister directly. There remained a high degree of media interest in the negotiations as RTE ran an item on the news on 17 October. The Congregations informed the Committee that they never considered that negotiations had broken down. They felt it was a very difficult period but were not anxious to walk away from them. They saw the matter of the leaks as separate to the negotiations.

The Agreement in Principle

Letter from the assistant secretary to CORI dated 6 November 2001

4.41. The Committee feels that a letter from the Assistant Secretary on 6 November to CORI was the key letter in the negotiating process. It was a written offer by the Department to the Congregations. The Committee notes that in the letter, the Department totally reversed its position and made major concessions on its negotiating position. The letter stated the State

would be willing to provide a permanent indemnity against litigation in cases which would come under the remit of the Redress Board. It outlined the nature of the package the State would accept, which was in line with what the Congregations were requesting. It stated that the contribution could be capped at €127 million and that the problem of previously transferred property, against which the Department had always held out, would be conceded, back to the date of the Taoiseach's apology. It concluded that if past transfers were excluded, the contribution envisaged from the Congregations would be of the order of 10% to 20% of the expected final liability.

4.42. On 6 November 2001, the number of claimants was 3,000 and the estimated cost was €381 million. The Committee considered whether the decision to cap the contribution based on the estimate of 2,000 claims, when it was known that claims were running at 3,000, hampered the State's ability to get a better deal for the taxpayer. But the notion of going beyond €127 million appears not to have arisen. The original negotiating position was that a 50:50 deal should be sought but as the discussions progressed it became obvious this was not going to be the case.

4.43. The Committee noted the effect of the letter of 6 November. The concession on limiting property transfers to the date of the Taoiseach's apology subsequently accounted for €40 million of the overall contribution, because that was the value put on the transfers that took place back to the date of the apology in 1999. Furthermore the requirement for a 50:50 contribution was removed and the £100 million (€127 million) cap was put in its place. A very strong commitment was made on the indemnity. Although there was "much to be discussed in relation to the size, nature and timing of the Congregations' possible contribution to the scheme particularly around the possible transfer of further property", at that point, the negotiation was well in play. After the letter, the negotiating team was effectively stood down as the negotiations were taken up by the Minister and the Secretary General.

Concession on the Transfer of Property

4.44. The Department's interpretation of the letter and subsequent meetings is that the Minister was seeking to break the logjam by setting out a possible way forward for the negotiations, that there was no agreement to anything and that the letter contained ideas that could be explored in discussions. It was not intended to be binding in any way on anybody. The Committee disagrees. It holds that the letter contained concessions offered by the Department to break a negotiating logjam but it is unclear that these concessions were properly authorised.

4.45. The Committee asked if the Minister made this concession unilaterally or was it checked with the Department of Finance or authorized by Government. The Department held that the only significant change was that the Congregations had not previously been told that these proposals had been discussed among the officials. Accordingly, it was not a significant change in a negotiating position but rather a position that had not previously been declared to the Congregations, in the interests of getting as much of a contribution from them as possible. A conclusion had been reached at that point that something major needed to be done if the Congregations were not to walk away from the negotiations completely. The process contemplated these things being done at a much earlier stage.

4.46. The Committee asked if the offer of €127 million was authorised by the Department of Finance prior to the issuing of the letter. The Department advised that the State's position had been determined in April 2001 at 50:50, if it could be achieved, in the realisation that it was highly unlikely, with a cap of £150 million but with an absolute baseline of £100 million. The Committee established that the Department did not have clearance from the Department of Finance to offer a specific figure to the Congregations but the Department held that the figure of £100 million would be acceptable to the Department of Finance. It is unclear if the letter was discussed by the cross-party group of negotiators from the Departments of Education and Science and Finance and legal representatives. It appears to have been issued unilaterally from the Department.

4.47. The Committee noted that the letter indicated that the Congregations' proposed contribution, when past transfers are excluded (€57 million), represented only 10% to 20% of the likely final cost. This confirms that the Department's estimate of liability had moved to in excess of €500 million. When the Department got its negotiating mandate in April 2001, the estimate had been €254 million. Despite this increase, the Department was operating under the same mandate as in April 2001. It was basing its estimate on what would be a reasonable monetary contribution from the Congregations on figures that were out of date. .

4.48. The Committee asked if the leaks to the media had an influence on the position stated in the letter of 6 November and the subsequent change in the negotiating team. The Department denied that the leaks influenced the letter in any way and asserted that the letter was a declaration of the State's bottom line in an effort to reach agreement on the matter. The Committee noted that the change in position on property that had been transferred previously had not been the negotiating team's bottom line at any point and was not in any of the documentation. The Committee established that the legal adviser (who was a member of the negotiation team) participated in the drafting of the letter. There were discussions at official level with the Minister on the issue of property in the interests of breaking the log-jam. With past transfers going back ten years out of the question, it was hoped there might be some scope to talk about transfers from a date that had some meaning, like the date of the Taoiseach's apology.

Congregations' perspective

4.49. The Committee asked how the Congregations were able to convince the Minister that properties transferred to non-governmental organisations, which transfer had nothing to do with the controversy of abuse, could be construed as forming a part of the contribution. When the first offer was made in June 2001, the amount offered was far short from what the State was prepared to accept. By 16 October 2001, it was clear they were not going to bridge the gap with property and cash that the Congregations could give. The issue was whether there was some ground on which they could agree. During the conversation on 16 October, there was an acknowledgement by the State that the Congregations had been involved in very significant transfers of properties through the State for the benefit of many, particularly for people in need. These actions had significantly affected the assets held by the Congregations. The idea then developed that property which had already been transferred to other bodies (such as Health Boards and NGOs) could be taken into account. If that did not happen, agreement would not have been reached.

4.50. In the agreement reached, the State was willing to include various ways in which the Congregations had provided for social need over the preceding years. These provisions had

come from the Congregations' assets. The idea that property was in almost constant movement towards State or voluntary bodies from Congregations at this particular time was recognised as a fact and a reality by the State side. It was in that context that credit was given to the Congregations for the transfer of some earlier properties. The acknowledgement of what had been going on for the good of society was taken into account.

4.51. The Committee noted that the property element was one of the more difficult aspects of the deal to agree on, as shown in a letter on 29 April 2002 from the Department of Finance in which it was still strongly resisting this idea. One of the critical aspects is that property that goes to voluntary bodies could as easily go to State bodies. The only difficulty is that State bodies are more difficult than voluntary organisation to deal with in acquiring property. The restrictions on a health board in acquiring a property often prevent it happening.

Extent of the indemnity

4.52. The Committee pursued the understanding of the two Departments about those persons who would be covered by the indemnity. The Department of Finance felt that it covered the Congregations and members being accused of wrongdoing. Eighteen congregations signed up to the indemnity deal. However, the agreement would only have financial implications in cases that go to court. For a case to qualify, it must commence within six years of the commencement of the Residential Institutions Redress Act 2002. It was intended that the Redress Board would provide compensation for most, if not all, of the claimants. It is the Department's belief that the number of cases which will benefit from the indemnity will be minuscule.

4.53. In the preparation of the mandate on the indemnity and the initial negotiating position (Spring 2001), it was necessary to conclude on the State's stance. In correspondence, the Attorney General's Office noted that it was its understanding, when previously involved in negotiations during 2001 that the indemnity would only extend to cases which would **actually go before** the Redress Board. In a letter to the Attorney General's office (Spring 2002) the Minister clarified the policy objectives that while the indemnity would cover all cases which would come **within the remit** of the board and that it would be time limited. It appears that the Attorney General thought that it only related to cases that would go before the Redress Board.

4.54. The Committee considers that the extent of the indemnity was determined in the letter of 6 November 2001. In this letter, an offer was made that a permanent indemnity against litigation in cases which would come under the remit of the Redress Board would be given¹. The issue of the indemnity had always been an integral part of any agreement that would be reached with the Congregations and was flagged to the respective Ministers and the Attorney General in April 2001 when the negotiating strategy was developed.

4.55. The Department argued that the precise extent of the indemnity was not ultimately agreed until 2002. The exchange of correspondence with the Attorney General's Office suggests that there was a change of policy between Spring 2001 and Spring 2002 that widened the remit of the indemnity. The Department maintains that this is not the case. There was no change to the originally agreed mandate. The situation was that the State would be

¹ The letter stated: "In return, the participating congregations would receive a permanent State indemnity against any and all litigation in cases which come under the remit of the Redress Board".

liable for costs on both sides in case that went to the Courts and came within the terms of the redress scheme. The objective of the Redress Board is to take all of the qualifying cases out of the courts. Qualifying cases involve those who were in institutional care for which the State had regulatory and supervisory responsibility. Any applicant to the scheme can go right through the process and still carry forward his or her case in the courts or he or she may go directly to the courts without going through the scheme.

4.56. The issue was defining which cases would benefit from the indemnity. The Congregations wanted the widest possible indemnity. They sought a limitless indemnity for all time in respect of all cases that could have occurred up to the date of its signing. It was ultimately agreed that qualifying cases were those that could go before the Redress Board where litigation commenced within six years of the date of the indemnity, the date of the Act. They were policy decisions made by the Minister which in part, caused the delay in responding and giving directions to the Attorney General as to exactly what was being negotiated.

4.57. The Committee asked if the Department estimated the possible contingent liability arising from the indemnity. The Department expects that the number who may be involved will be very small on the basis that if the scheme is successful, the overwhelming majority should go through the redress scheme, in which case it will cost between €500 million and €1 billion. A small number are likely to go to the courts but they are part of the same pool. Therefore, the Department's expectation is that the indemnity will not significantly affect either estimate.

First Meeting between the Minister and the Congregations

4.58. Two meetings involving the Minister effectively broke the negotiations logjam. Prior to those meetings, the Congregations had not come close to the amount the Ministers for Education and Science and Finance and the Government regarded as the bottom line.

4.59. The first meeting was short - perhaps 20 minutes – on 7 November 2001. The Minister told the Congregations that if they were not willing to come into the redress scheme and make a contribution to it, the Government would press ahead on its own. They were asked to think about this. The Minister advised that to be included they would have to at least reach a minimum contribution level of €128 million.

Congregations' perspective on the first meeting

4.60. The Congregations had not absorbed the full message of the letter of 6 November 2001 when they met the Minister on the following day. There was nothing in the letter that had not already arisen in the discussions and negotiations. The advances coming through were that a figure had been proposed, and there was agreement to give an indemnity and cap the figure at £100 million. The Congregations had given the State a draft indemnity document in May, which was comprehensive and would have covered all claims eligible to come before the Redress Board in due course. At the meeting, the issue on which the Congregations were surprised was the willingness of the State to accept past properties dating back three years to the Taoiseach's apology in May 1999. That helped bridge a gap between the figure they felt they could offer and the figure the State required, which had otherwise been regarded as unbridgeable. The Congregations left the meeting to consider whether this would be a possibility. They needed to check details of what properties had been transferred within the

three-year period and ascertain if the proposed way of reaching an agreement, would be acceptable to them.

4.61. The Congregations did not know how the State had computed the minimum contribution amount of £100 million. It did not seem to relate in any way to the cases they had and on which they had made their assessment of exposure. The State had the same cases. The Residential Institutions Redress Act had not yet been passed so the issue of claims increasing significantly after that was not an issue of which they were aware at the time. They were making a contribution on the basis of the claims they had. From their perspective, the first meeting discussed the issue of the contribution, the elements of the June 26 offer which had come to between €50 million and €60 million and the question of including some properties already transferred but within a three year time limit. They agreed to examine the three year possibility on property transfers and look at the package they had presented in June and see if it could be reformulated in a way that would be acceptable to their congregations, and be somewhat closer to what the Minister was looking for.

4.62. Information about the number of assets that had been transferred in the three year period dating back to 1999 was received on 18 December and passed on to the Secretary General. At that stage they also looked at other elements of the package like counselling. They wanted to address the issue of access to education, which was a recurring theme among former residents of institutions, and their need for opportunities to be made available to them. The Congregations wanted that included in the cash contribution.

Second Meeting between the Minister and the Congregations

4.63. The second meeting lasted 45 to 50 minutes. The purpose of the meeting was to explore how the Congregations would come into the scheme with the detail to be worked out separately by officials on both sides with the required legal presence. In this meeting the Congregations brought a legal adviser with them because they raised the question of the indemnity based on a document supplied to the negotiating officials many months earlier. The only detail discussed was the sum of money involved - €128 million. The Congregations gave a breakdown of what they were prepared to offer, which was an improvement on the earlier situation to the extent that they were now offering €128 million. They were also including property transferred from a period beginning in 1999 rather than ten years previously. The Minister agreed to use his good offices to put the deal to the Government but refused to discuss its terms in any way. He said he could only do so if he had the official legal arm of the State present with him.

4.64. It was made very clear by the Minister at both meetings that he was not agreeing to anything, nor was he binding anybody else to any form of agreement. He was willing to listen to the case and accept the document provided only as a summary of the issues the Congregations wished to raise. The Committee asked why the Department's Legal Adviser (who is a barrister) was not included on the State side especially when there were barristers on the other side of the table at the second meeting. The Minister had set up a meeting with the Congregations where he wanted to move the agenda forward, re-establish a position of trust and see if an agreement could be reached. He only asked the Secretary General to come along with him and was aware that the Secretary General worked closely on this issue with the Legal Adviser. Suggestions have been made of a sweetheart deal at the meetings with the Minister. The Committee is satisfied that this is not the case. There is sworn evidence from the Secretary General that the indemnity was not discussed in detail. The time was spent on

the money figure. The Congregations also confirmed there was no discussion of the indemnity up to January 2002, i.e. at the two meetings with the then Minister. They were concerned that they had not had much discussion on the elements of the indemnity. At the meeting on 7 January, they emphasised that they needed an assurance that the indemnity was in place. Following that meeting, their recollection was that the issue of the indemnity had not been responded to by Government officials.

Letter from the Congregations to the Secretary General on 14 January 2002

4.65. The Congregations were concerned that there should be no misunderstanding of what had been agreed between the two sides, especially concerning the indemnity. They felt it very prudent that what had been agreed would be committed to paper so that there would be a record of it. They were aware it was intended to bring the deal to Cabinet the next day. No documents transferred between both parties after either of the meetings.

4.66. The Congregation side took very few notes because it was very clear in their minds as to what was being agreed to. The Congregation's legal adviser attended the meeting of 7 January 2002 as they felt it important to have a witness to what was agreed. The letter of 14 January 2002 is their record of what happened.

4.67. The Congregations had discussions about the press release arising from the Cabinet meeting specifically about the figures that would be included in the press release. The indemnity is the main issue in the letter. The Congregations felt secure in all elements of the agreement reached. Although there was no definitive response to the original indemnity proposal (May 2001) it was now on the record. In the discussions with the Minister the Congregations referred to the indemnity they anticipated. The letter is very strong on this point.

4.68. The Attorney General in subsequent letters to the Department at the end of January 2002 asked what had been agreed about an indemnity and whether there was any note or statement. This became a public row later on when the then Attorney General went public and had a difference of opinion with the Department. The Congregations were not aware of the issue questioned by the Attorney General.

4.69. When the then Minister was explaining the indemnity on "Morning Ireland" the following morning, he stated that cases that went to the Redress Board would be covered. In the following months when the technicalities of the agreement were worked out, the issue of time-limiting the indemnity came to the fore. In many ways what was hoped for had not been fully achieved at that stage. The State's side achieved a full indemnity limited to three years after the Redress Board's period has concluded. The Congregations' position had been that a ten year timeframe should have been involved.

4.70. The Congregations succeeded in getting an amendment to the Schedule of the Bill which included special schools and hospitals. They had no knowledge that hospitals or long-stay places for children who were ill would be included in the Bill and learned of it only through the news. While the Congregations were pegged back on the time limit of the indemnity, it was extended to cover other institutions where litigation might arise. Claims made by victims that they were abused in hospitals and special schools run by the religious orders are covered by the indemnity. The indemnity now has a wider scope and covers more

than the schools the Congregations had originally negotiated for. The Congregations had no part in initiating this.

4.71. The Committee asked the Congregations why it was necessary to mention a contribution from the insurers in the letter of 14 January. The Congregations stated they were reiterating what had been raised throughout the discussions with the State officials. They were looking and hoping for insurance as in some cases, there was no capacity for some Congregations to pay their portion of cash without insurance proceeds. They told the Minister that agreement had not been reached with the insurers.

4.72. In response to the letter of 14 January, the Secretary General indicated orally that certain items would require legal involvement and could not be put in a letter without legal advice being given.

Cabinet decision on the indemnity

4.73. When the Congregations offered to pay €128 million, the Minister took a proposal to Government in January 2002 and made an oral report. The advice to Government was that this was as far as the Congregations would go. The Government made a decision which was conveyed to the Department. The decision was not made by reference to the assets held by the Congregations, their ability to pay or the likely percentage it would represent of the overall cost of the scheme. The two meetings held in November 2001 and January 2002 resulted in a Government statement in January 2002 in which all the details were agreed in principle.

4.74. When the Cabinet agreed to the deal in principle, it did not know what the terms of the indemnity were. In outline, it would have known that the Congregations were looking for a very broad indemnity. All the Cabinet could reasonably have been told was that the principle of an indemnity was in contemplation but that no terms had been worked out.

4.75. The Attorney General noted in June 2002 on the indemnity, that an estimate of the doubling of the number of cases to 5,200 might be conservative. He pointed out that the contribution of €128 million might be insufficient and highlighted the lack of a mechanism for increasing the contribution if the number of cases increased greatly. From the very outset the Department had made the Government aware that it was almost impossible to predict what the eventual cost of this scheme would be. The Minister for Finance made the same observation. The decision, based on all the information available to it, was ultimately taken by Government with respect to signing off on the sum that would be acceptable.

The finalisation of the Agreement

Subsequent negotiation of the indemnity

4.76. From March until June 2002 work began in earnest on the draft indemnity. The final document does not look much like the one presented in May 2001 and the State drove a better bargain when it came to finalising the deal over these final months. All of the negotiations were very difficult. The main areas agreed when formalising the indemnity were a restriction that it should be time limited to three years after the life of the redress scheme. Second, a constriction was accepted on properties transferred to voluntary bodies so that the State's interest would be protected, namely, that the voluntary body could not off-load the property for 25 years without the consent of the Department of Finance.

4.77. The Committee noted the Congregations had clear goals they hoped to achieve but the State side never came to grips with the elements of the waiver of indemnity until the deal was done by the Cabinet and the legal people started to analyse it. From the Congregations' point of view they were trying to envisage the situation as time would go on and avoid a situation of double jeopardy. An extensive point-by-point response to the CORI submission of 21 March 2002 was sent. Items that were taken from the letter of 14 January 2002 were in fact dealt with as early as 20 March 2002. The Attorney General was involved in the finalisation stages from April to June 2002.

4.78. If a particular Congregation wished to take and defend a case, obviously it would do so for very good reasons, in which case the indemnity would fall. In other areas, it was agreed that the State will do the defending and the Congregations will provide what is required. In regard to what has happened since, the indemnity in terms of court cases was called down on just three cases in the past two years.

4.79. A key objective for the Office of the Attorney General and the Department in the discussions, was that any case to which the indemnity would be applied would go to a court hearing and that the State would have complete control over the running of the case. Thus, in the event that the Congregations wanted to have control, the indemnity would cease to apply. In addition, under the terms of the indemnity, the Congregations are obliged to co-operate in every way and give all information to the State in respect of any case that goes to a hearing. The final indemnity also provided for a process of arbitration in the event of any breakdowns between the parties that could not be resolved by agreement.

Limit of the indemnity to proceedings commenced within 6 years

4.80. Subsequent negotiations established the permanent indemnity would only apply to those cases which would come within the remit of the scheme and in which proceedings commenced within a period of six years. This had not been included in the letter of 6 November 2001 and represented a tightening of the indemnity as the negotiations continued, to the advantage of the taxpayer.

Extension of the indemnity to cover certain hospitals and schools

4.81. The scope of the indemnity was significantly broadened by the inclusion of additional institutions such as hospitals and special schools. On 12 March 2002, the legal adviser contacted his colleagues in the Department of Finance suggesting that the Congregations' position as regards the extension of the Bill to cover certain hospitals and special schools should be teased out. These institutions were not covered by the Bill when the agreement in principle on their contribution was reached. The State negotiators asked for an increased contribution to have the indemnity extended to these institutions.

4.82. There is confusion over the lists of institutions involved. The Congregations have no recollection of the extra institutions under the headings of hospitals and special schools. They had been concerned since December 2001 that the list of institutions to be appended to the Bill was not complete in respect of institutions that had moved on from the early days of the 1930s, 1940s, 1950s and 1960s. In the 1970s and 1980s many of these institutions moved out of the large buildings into group homes. A list from each of the Congregations was provided to the Department of Health and Children, in early March 2002, of what they understood were

the institutions by their present day names, or by the names they had been for the past 10 or 15 years. However, when it came to the enactment of the Bill, the original list was appended to it. The legal adviser assured the Congregations that it was not that there was any difficulty in including them but that they did not have time, in advance of issuing the Act, to check each one. No ministerial order has been made since the Act was enacted to include the list supplied. The Congregations have no recollection of where the additional hospitals and schools came from. They thought it must have come from some other lobby group who wished to have the hospitals and special schools included. Their major concern was that all of the residential institutions that were industrial schools or reformatories would be included under their more modern names as well as their previous names so that nobody who had been in them, for instance, in the 1970s and 1980s would be excluded because the name was not on the list.

Property transfers to non-governmental agencies

4.83. The agreement stipulated that past transfers to non-governmental organisations or charities would only be accepted by the State in so far as they provided for a restriction on being sold for a period of 25 years. They could not be sold without the consent of the Minister for Finance. There was also a condition that transfers would only be accepted in the event that the body which benefited was not connected with the Catholic Church. The actual amount of cash was increased by €3 million in the course of the negotiations.

4.84. The State negotiating position had been that any properties that changed hands to non-governmental agencies prior to a certain date would not be taken into account. The Committee asked for the Congregations perspective on this issue. It was explained that this issue was not a focus of attention in the discussions and that these properties were under the general heading of properties already given, which had been talked about throughout the negotiations. There was no doubt in the minds of the Congregations that part of the package agreement included properties that were transferred to State or voluntary sector within three years of the Taoiseach's statement although the Government's press statement on 30 January 2002 is contradictory on this point. Some misunderstanding arose in terms of a legal agreement and the matter came back to the Congregations. The Congregations wrote to the Secretary General and the Legal Adviser to confirm their understanding of that matter.

4.85. The Committee noted that while the agreement, in principle, was announced on 30 January 2002, by the time the indemnity was signed on 5 June, a substantial tightening up and major benefits for the taxpayer in terms of value for money and ultimate exposure of the Exchequer had been achieved during the detailed negotiations.

Role of the Attorney General's Office

4.86. The Attorney General's Office was formally represented at meetings on 10 and 22 November 2000, 7 and 21 February 2001, 6 and 22 March 2001, 4 and 30 April 2001, 10 May 2001, 5 and 26 June 2001 and 16 September 2001. Between October 2001 and April 2002, the Office was not represented or had no contact with those negotiating on behalf of the State. The Attorney General was not present at the two meetings with the Minister and the Congregations held in November 2001 and January 2002. The stated reason is that these meetings were policy meetings where it was not necessary for the Attorney General's office to be represented. This was not an unusual situation.

4.87. At April 2001, the State's negotiating position had indicated that the State should, as a *quid pro quo* for a reasonable contribution, grant an indemnity to the Congregations which contribute to the scheme in respect of all civil actions arising from acts of abuse committed on people who were eligible to make a claim to the compensation scheme. Having examined the files, it was clear to the Committee that all parties to the negotiations from the State side had agreed the wide range of people who could be covered by the indemnity. They did not have to make the claim to the Redress Board to be eligible. The letter of 6 November 2001 conceded the indemnity sought. The letter from the Congregations of 14 January, to which extensive reference has been made, says essentially the same thing. When the C&AG issued his 2002 report, the Attorney General (now a Minister of Government) flatly contradicted that this was his understanding of the position. However, the files clearly indicate that the Attorney General's Office had the relevant information.

4.88. When an announcement was made in January 2002 that an agreement had been made in principle, the Attorney General wrote seeking information of the negotiations and of the extent of the indemnity on 31 January 2001 and on 1 February 2002. The Attorney General told the Minister that his Office had been excluded from the negotiations and asked to be sent any note, memorandum or minute of what was agreed. The Attorney General's Office had been, effectively, out of the loop since the previous negotiations broke down. No reply was received. The Committee asked why it had taken so long to reply to the Attorney General's queries. It was only when the Attorney General advised the Minister, on 13 March 2002, that his office could not act for the State because of this lack of information that he received a reply, on 13 April 2002, outlining the policy approach to be adopted in further negotiations on this indemnity.

4.89. The Department's view was that the Attorney General's Office, very reasonably, wanted the Minister to decide on the policies and principles which would underpin the indemnity agreement before engaging in any detailed discussion with the lawyers for the Congregations. There were two key issues which the Minister had to decide - what cases should be covered and the period for which the indemnity would apply. During that period the Minister and officials took some time to formulate the policy responses to the issues being raised. It would be a misunderstanding to think that during that period there was no contact between the two offices. While no formal letter of reply was sent during that period there was substantial contact between officials from the Department of Education and Science and the Attorney General's office.

4.90. On 13 March 2002 and 12 April 2002, there were two meetings at official level, involving officials from the Departments of Finance and Education and Science, at which the Attorney General's Office was not represented. They dealt mainly with process and procedure for the indemnity. The first meeting took a decision that the detail of the indemnity would not be discussed until such time as the legal teams from the Congregations, the Department and the Attorney General's office could meet. The indemnity was not discussed in detail.

4.91. The key problem for the Attorney General's Office was that they were waiting for a reply with instructions from the Minister on two key policy issues before they would attend meetings to discuss the detail. The Attorney General's office **was** represented at all of the meetings held on 19 and 23 April, 1 and 8 May, and 16 May 2002 when a crucial and long meeting took place in the Department of Finance in relation to finalising the package that finally went to Government.

4.92. The Committee felt it was quite extraordinary that the Attorney General had to send these letters at all but also that he had to wait for several months before receiving a reply. It felt that it was strange that the Attorney General should seek an outline of the State's position when it had agreed the position in April 2001. The Department's view was that the position signed off in April 2001 in respect of the indemnity, was substantially the position which was ultimately agreed in Spring 2002. There was no change of the financial parameters of the agreement when the discussions were among officials, when the negotiations broke down or when the agreement was brought to the Minister over the winter period and, ultimately, agreed by the Government at the end of January.

4.93. The reason why the Office of the Attorney General wrote the letters in January 2002 when it had signed up to the agreement eight months earlier has not been adequately established. It appears there was some confusion in the Office at the time. On the other hand, the Committee felt it should not have taken the three months from the end of January until April to establish exactly what the position was. The Office explained to the Committee that it is not possible to advise on matters without precise instructions on precisely what was agreed. They would not have known what had been agreed at the two meetings where they were not present. As the position could have changed, it was a question of seeking particular instructions in regard to a matter on which they were to advise. The Committee asked if that type of letter would be a one-off or would such a letter be issued regularly. Lawyers and the Attorney General's office will say that they cannot give advice on matters if they have not got instructions in regard to them.

4.94. In a letter to the Deputy Director of the Office of the Attorney General on 31 January 2002 in regard to the contribution of €128 million, the Department stated that:

In return for this contribution, the Minister agrees the Congregations would receive an indemnity. The detailed terms of that indemnity were not discussed. In principle, however, it was agreed that the indemnity would be such as to cover all qualifying claims, by which we understand all claims which are dealt with through the Redress Board or which could be so dealt with within the terms of the Residential Institutions Redress Bill 2001.

To that extent, the Attorney General's office was aware of the position in January 2002 but it wanted a detailed minute of what precisely was discussed at the meetings with the Minister.

4.95. The Committee asked if it was reasonable for the Office to be left out of the loop in respect of an issue as big as redress. The Office has no opinion on this. It is a matter for the primary parties to negotiations to decide when they involve their legal teams. Very frequently, the Office would not be at negotiations in important matters. Whether they are bigger, smaller or different, is not really the question. It would be normal procedure to write to a Department seeking direction or seeking for the case involved to be laid out for the Office.

4.96. The Congregations did not have any knowledge of the turmoil the deal provoked, between the Attorney General and the Minister and between the Attorney General's Office and the Department, as evidenced in the correspondence. As the Attorney General attends Cabinet meetings it was assumed by the Congregations that everyone involved was informed of the deal that had been reached.

Participation in the negotiations

4.97. The Committee reviewed the involvement of the Attorney General's Office in the negotiation of the agreement with the Congregations. The Office was involved in a series of meetings during the negotiation on the eventual agreement between the Government and the religious Congregations. When they attended meetings, they provided legal advice. Following the announcement of agreement in principle, they wrote and asked for details of what had been agreed at the meetings. This was normal practice.

Organisation of legal work

4.98. The Committee asked about the organisation of work on child abuse cases in the Chief State Solicitor's Office (CSSO). The CSSO is divided into five different groups with advisory counsel in each. The matters relating to child abuse are dealt with by one group that deals with other matters as well. The group has five lawyers and a group manager at Assistant Secretary level. The litigation is spread across the lawyers within the group, with specific institutions allocated to the various members of the group. This provides for consistency of approach. There is a childhood abuse litigation panel of counsel which is also divided up by institutions, with a limited selection of counsel allocated to each institution. In so far as is practicable, the group sticks to the distribution of institutions among its members.

4.99. Two staff deal with separate legal issues concerning the Ryan commission. These are not covered by the Redress Board or the indemnity and relate to litigation regarding abuse that arose in day schools. This is dealt with in the group and there are approximately 250 such cases. The groups are organised so that they meet weekly to discuss their work.

4.100. Overall activity in litigation concerning institutional childhood abuse has fallen off to a considerable degree. Many of the cases are being dealt with by the Redress Board so the cases are not actually proceeding. To that extent, the cases are really invisible to CSSO. The first indication is when an award has been accepted and that the case has been discontinued or will, in due course, be discontinued. Then there may be advices relating to the operation of the indemnity and these are all dealt with in this group.

The indemnity agreement

4.101. From a negotiating point of view, the draft of the indemnity, on which all negotiations were based, was supplied by the Congregations. There was never a draft from the State side. The Committee asked if a draft from the Office would have strengthened the negotiating position of the State's side. The Department felt that allowing the Congregations to come forward with their draft first was a good idea from a negotiating position because if they had drawn up a first draft they might have conceded more than was sought.

4.102. The Department believes that the Office made an enormous contribution to the final indemnity. At the beginning of the negotiations the Congregations presented a three page indemnity that indemnified just about everything one could imagine and was something which could not have been accepted. It was quite reasonable, in the context of the exercise, to ask their lawyers to draw up the first text of the indemnity. The Office of the Attorney General ran a fine toothcomb through it and caused many amendments to be made. More than 50% of the final document was drafted by the Office.

4.103. The negotiation of the indemnity also covered matters like the timescale of the indemnity which is now tied down to cases up to December 2008. It also involved matters like where the indemnity would have come into play and where it would have been withdrawn in cases that went to court and where the State would not have control of the defence. There were many issues that had to be sorted out that could not have been envisaged by one or two lines in a memorandum going back to April 2001.

4.104. The Committee asked how the case load compares with the army deafness experience in terms of volume, scale and complexity. It is a very different and more difficult type of litigation. There are problems in administering the case load. The aim is to ensure the cases will not go to trial so that one will avoid the cost, delay and other difficulties associated with a trial. In so far as is possible to estimate, the cost is higher than the army deafness is likely to turn out to be. Most army deafness claims at this stage are of a relatively low order and costs are quite low. If one was to aggregate the costs relating to child abuse litigation in many instances those costs would be much higher than the 70% figure mentioned earlier. The issue involves a very big caseload.

Involvement of the Department of Finance

Department of Finance financial procedures attaching to an indemnity

4.105. Under the heading C8 - contingent liabilities - the Department of Finance specifically provides that in the absence of specific legislation covering the issue of a particular indemnity, any letter issued should indicate clearly that the assurance contained therein is not an unqualified promise to pay but rather an undertaking by the Minister concerned to take the appropriate steps to seek the necessary authority of the Oireachtas to ensure payment and that the advice of the Department of Finance, and where necessary the Attorney General, should be sought on the actual form of words used. This condition implies that the indemnity required legislation and the approval of the Oireachtas.

4.106. The indemnity was encompassed by the Redress Act which was enacted on 10 April 2002. The Act gave a more general power to give an indemnity, the actual terms of which were never incorporated in the legislation. The Department started discussions on the indemnity on 19 April 2002. In the procedures laid down by the Department of Finance it is clear that the approval of the Oireachtas is required. The Department hold that approval in principle had been given. The Committee established that the terms of the indemnity were not debated in the House although the indemnity itself was discussed.

4.107. The legislation provides for the indemnity, which would be sufficient cover for the Department of Finance regulations. On that basis the Attorney General's office would have confirmed that the legislation was in place to facilitate the indemnity.

Department of Finance view of the agreement reached

4.108. The Committee asked why the Minister for Finance wrote to the Minister for Education and Science pointing to his unhappiness with the figure, at a time when he thought the total liability was approximately €258 million. The Minister for Finance wrote to the Minister for Education and Science in June 2001. At the time the offer from the Congregations was €50 to €60 million. In this context the Minister for Finance wrote to encourage the Minister for Education and Science to hold out for a much higher figure.

4.109. A range from £150 million to £100 million was accepted by the policy process as being appropriate in the context of the nature of the State's exposure. The Department of Finance view was to begin by looking for £150 million and settle for a minimum of £100 million. This was decided when the figures on the table in April 2001 were for a cost range of approximately £200 million. The figure was £381 million in April 2001, according to the C&AG's report. There was a maximum potential cost of £300 million at that point. Therefore, the Department was getting its 50%, approximately. From an initial negotiating point of view, that was the mandate officials sought. It was aimed at securing a figure of about 50%.

4.110. A contribution of €128 million made up of cash and property and an indemnity was the outcome the Ministers for Finance and Education and Science, with their appropriate authority, had mandated the negotiating team to secure. As far as the Department of Finance was concerned, the outcome of the discussions between the Minister for Education and Science and the Congregations was in line with the negotiating strategy. The Committee expressed concern that the Department of Finance was happy with the outcome, although they were aware by the time it went to Cabinet that the numbers were rising. The Department indicated that the Cabinet and the policy-making process had considered the totality of the emerging situation. Taking into consideration the victims and the policy response, it was felt any contribution from the Congregations towards the cost of the compensation process was better than no contribution in a situation where the Government would have had to foot the entire bill on its own and then seek to recover through the courts a legally adjudged contribution in each and every case from the Congregations.

4.111. It was not that the Department of Finance was happy with the result but that was the policy decision that had emerged. The Department of Finance was satisfied that the compromise outcome that had been reached was consistent with overall Government policy as it evolved. The series of policy issues that reflected the official input into the process as part of the negotiations need to be acknowledged. The Government and the Legislature decided to put the redress scheme in place. Policy dictated the nature of the process, that court rules would not apply and that there would be a low burden of proof. It dictated that, in the public interest, the State would own up to its share of culpability.

Reasonableness of the agreement with the Congregations - The Canadian Experience

4.112. The Accounting Officer from the Department of Education and Science informed the Committee that in Canada, in different circumstances, the State bore responsibility for 70% of child abuse claims and the religious orders, 30%. In a 1998-99 case in the Supreme Court of British Columbia (*Blackwater v. Plint*), the decision was that the State was 75% liable as opposed to 25% for the Congregation concerned. The Federal Government in Canada had been in negotiations with the various religious orders in relation to their possible contribution to an administrative compensation scheme. Pending its conclusion, the Federal Government decided in October 2001 that it would initially carry 70% of the award and that 30% would be borne by the Churches. The total cost of claims in Canada was reckoned to be about €1 billion. The Anglican Church was responsible for operating the institution which gave rise to 17.5% of the claims (i.e. €175 million). In February 2002 the Federal Government reached an agreement where the Anglican Church agreed to pay €25 million.

4.113. Using the Department's current estimate of the cost of compensation (€508 million), the Congregations' contribution is close enough to 25%. Based on the Department's higher

estimate of €772 million, the agreement with the Congregations is not that far removed from the settlement in Canada with the Anglican Church.

Reasonableness of the agreement – Congregations' perspective

4.114. The Congregations eventually agreed to a figure of €128 million, which was far more than their estimated exposure in a legal process. However, when it subsequently emerged that figures of €600 million, €700 million or €800 million might be involved, it would be fair to say that the Congregations were pleased when matters came to a conclusion during the period January to June 2002, regardless of the overall cost of the scheme. The maximum figure of €128 million was not arrived at on the basis of means but on the basis of the numbers of claims extant, without discrimination and which might eventually involve considerable outlay in the courts. The preference was that the outlay would go directly to the former residents rather than into the courts system. It was not related to the assets of the Congregations.

4.115. The Committee asked if no agreement had been reached, whether the higher burden of proof required in a civil case compared to a tribunal of compensation would have resulted in a reduced liability for the religious institutions. They had taken the approach of looking at all the claims they had but they preferred to have an agreement with the State. If the negotiations had broken down, the Congregations would have known the approximate figure they might be facing.

Implementation of the Agreement

Institutions under the remit of the Redress Scheme

4.116. The Committee noted there were currently 123 institutions under the remit of the redress scheme and asked if this number was likely to increase. There is capacity within the legislation for the Minister to make an order extending the scheme. No decision has been made, one way or another, in that regard. It depends on the claims history, in terms of claims being made against institutions not already listed.

Additional Institutions added to the list covered by the indemnity

4.117. The Committee noted that the proportion of the contribution of the Congregations to the final cost may be reduced by the decision of the Minister under the Act to add another thirteen institutions to the numbers covered by the Redress Board. The Department is of the opinion that the additional cost associated with the inclusion of these 13 institutions will be relatively small in the context of the overall cost of the redress scheme. Records kept within the residential institutions redress unit in the Department in the past 24 months and discussions with the solicitors for the relevant Congregations indicate that there are less than 100 potential Redress Board applications pending inclusion. However, information is becoming available all the time and there is no guarantee that the likely level of applications will remain at 100. If the Department had been aware at the time of the passing of the Act of the full details of the 13 institutions concerned, they would have been included in the Schedule.

4.118. The Committee asked if a check was made before the Minister was advised to extend the remit of the board to include the 13 additional institutions. The relevant check was to establish if the institutions came within the ambit of both the indemnity agreement and the

Act. This was confirmed. In regard to the institutions where the Department was a respondent or a defendant, in respect of one institution there were 15 or 20 civil cases in existence. It will be possible for people with civil cases, if they wish to do so, to proceed now to the Redress Board. It was noted that it was a fixed policy of Government at the time that this would be an all-encompassing scheme and that all individuals who had a case relating to abuse in a relevant institution would be comprehended by the arrangement. It was also fully accepted at the time of the passing of the legislation that, because of the age of some of these institutions, the fact that some had been closed and some uncertainties in regard to them, all the information was not available, which is why that provision was inserted in the Act to allow for an extension. If any case emerges within the lifetime of the Redress Board relating to an institution which is not scheduled, the proper course of action, given the policy line that was adopted, would be to schedule it by way of ministerial order to ensure that cases do not have to go to court and that they are covered by an all-encompassing arrangement.

4.119. While the Committee accepted the position, it noted that there had been a proposal to seek an additional contribution from the Congregations in view of the extension of the ambit of the redress scheme. The reality was that once the negotiations reached a conclusion, a decision was made that €128 million was as much as the Congregations were going to give in any circumstances whatsoever. This was a judgment call on the final sum on offer by the Minister and the Government of the day.

4.120. There was no cross-referencing to check if any of the claimants in respect of the additional institutions added to the list had already been before the courts. From information held the Department checked to see if there were civil cases in regard to these institutions in existence and the number of them. Some of the institutions would have been identified to the Department by either the Congregations or former residents who would have alleged that abuse had taken place there. The Department checked with the Department of Health and Children to see if they qualified as being eligible for inclusion, that is, if the State had an inspection or regulatory function in respect of them. On that basis, the Minister would have been entitled to make an order to add those to the schedule.

4.121. The advice of the Attorney General's Office was not sought before the Minister extended the remit to include the 13 institutions. There was no need to seek the advice of the Attorney General's Office on this as it was clear from the legislation and the indemnity agreement that there was provision to do so.

4.122. The Committee asked if there was a likelihood of further institutions being added resulting in further costs under the scheme. Section 4 of the Act provides that the Minister may provide for the addition to the Schedule of institutions identified as reformatory, industrial, orphanages, children's homes and special schools in which children had been placed and resident and in respect of which a public body had a regulatory or inspection function. When the Bill was being discussed in the Houses of the Oireachtas in 2002, the Minister made it clear that the schedule of institutions appended to it might not be the complete list of institutions to which the Bill would apply. Before an institution can be added to the Schedule, it must be identified as one in which children were placed and resident and in respect of which a public body had a regulatory or inspection function. The 13 institutions added to the list satisfy these requirements and were either run directly by the State or managed by one of the 18 Congregations which contributed to the indemnity agreement.

4.123. There is a range of psychiatric institutions under consideration but there is very little evidence regarding allegations of abuse within them. There are a further 11 institutions known as Mrs. Smyly's homes, institutions in respect of which the State had a regulatory or inspection function. The Department has written to Mrs. Smyly's Homes Trust with a view to meeting to establish if it would make a contribution to the redress scheme if it were to be covered by the indemnity. As they are institutions which do not come within the terms of the indemnity agreement, if included, the question of a contribution would arise. No decision has been taken regarding the inclusion of additional institutions, apart from the 13 recently added.

4.124. The Committee inquired whether it was fair to conclude that given the 13 institutions added and the likelihood of others being included, the estimate of €650 million from the Redress Board, which remains disputed, and the new figure of €828 million from the C&AG should be revised upwards. The Department maintains the final figure will be as indicated because of the likely reduction in the average amount paid out.

4.125. The Committee reviewed the process for invoking the indemnity. When a claimant does not proceed to the Redress Board but goes to the courts to obtain compensation, the indemnity is automatically invoked in all cases. In exceptional cases a congregation, if it wishes not to invoke the indemnity, will step outside it. Approximately 2,300 sets of High Court litigation are currently pleaded against the State and religious institutions. The vast majority of plaintiffs are anxious to go before the Redress Board and have their proceedings resolved in that forum. Analysis of the caseload in the CSSO suggests that in respect of approximately 85 to 100 cases, either the application is outside the scope of the Redress Board or the applicant wants to continue to court action. Most of these cases would not have been within the original remit of the indemnity and have come in with the extension of the remit of the Redress Board to include other institutions. There is confidentiality in the applications between the applicant and the Redress Board. With the extension of the remit of the Redress Board, the CSSO is examining those cases to see whether there will be a lessening of activity on the litigation files.

Use of the Indemnity

4.126. Up to the beginning of March 2005 the indemnity has been used five times. While the total amount of the settlements in the first four cases was €480,000, giving an average of €120,000, the fifth case (Noctor) involved a Court award of €370,000 which was substantially in excess of the top award made by the Redress Board. The fact that the award included €160,000 for loss of earnings – which would not be possible under the Redress Scheme – could lead to a situation where a certain category of claimants will decide to have their cases heard in the High Court rather than going through the Redress Board. If this scenario were to unfold it could have implications for the contingent liability attaching to the indemnity when all legal costs are taken into account.

However, there are a number of factors which would indicate that the Noctor case is not representative of the generality of cases coming before the Redress Board viz.

- the level of abuse suffered by the victim was exceptional;
- the perpetrator of the abuse had already been convicted of sexually abusing other persons;
and

- the State admitted liability and the Court was required to assess damages only.

On the face of it, it appears that the Noctor case is of relevance only to cases of severe or exceptional abuse and/or cases involving significant loss of earnings.

Notwithstanding the foregoing, it is difficult to predict, with confidence, how claimants in such cases will pursue their claims in the wake of the Noctor judgement.

Implementation of the Contribution

Cash Settlement

4.127. By October 2003, the cash payment of €41.14 million had been made in full. The Committee was concerned about the source of the cash settlement. The Congregations had a parallel track of negotiations with their insurance companies. Just one insurer agreed to make an ex gratia payout, because of a long-standing commitment over many decades. This was only agreed six months after the negotiations with the State were completed and it was minimal in terms of the overall picture. Some 15 of the 18 Congregations have benefited in different portions from that €6.5 million sum. All of the Congregations have set aside what they got from insurers for the services of former residents in one way or another.

Property Transfers

Overall Position at February 2005

4.128. The Committee noted that the property element of the contribution from the Congregations remains approximately €5.6 million short of the agreed amount but is largely being met. The Committee inquired to what degree has State funding in the maintenance and acquisition of such properties been taken into account in making an assessment as to whether the State is getting its own property back or is separate property from the religious Congregations involved. None of the properties handed over so far were owned by the State. If there has been State investment in those properties there is a mechanism in place to offset such investment when the final figure is worked out with the Congregations.

4.129. There are two schedules regarding property to be transferred. The Department has accepted 35 properties in principle (to a value of €38.28 million including €4.98 million of cash in lieu of property) in respect of property transfers since the date of the agreement. In terms of property transferred since May 1999, the Department has accepted 27 properties in principle (to a value of €32.93 million) and quite a number of others have been rejected. The agreement specified a sum of €40 million for property transferred between 1999 and 2002 but the Department rejected quite a lot of the initially proposed property under this heading. It is to the State's advantage, from the point of view of implementation of the agreement, that the Department rejected some of the previously transferred property and sought new properties in its place.

4.130. Many of the properties have been handed over to Health Boards; some to city councils and the Department of Education and Science is looking at some properties as possible school sites. The legal transfer is a long process but some of the properties are already occupied by Health Boards. A mechanism has been agreed for a timeframe when a

cash replacement might be made, if there is arbitration on property that the Department cannot get.

4.131. Only 10 of 37 properties were independently valued by the State. Of this sample, two were rejected and another two were not proceeded with in terms of valuation. The State carried out valuations of the remaining six properties and in one case there was a serious discrepancy between the Congregations' valuation and the valuation arrived at by the State. The Committee asked if the Congregations would be surprised if there were discrepancies in respect of the further 30 or so remaining properties. The Congregations are completely open to any independent examination of the valuations. The valuations carried out by Congregations were done by professional bodies which must stand on their status in respect of such valuations.

4.132. There is no distinction in both schedules between land and buildings. The property can be used for the provision of ongoing services or as sites for building schools and will be put to a variety of uses, including social housing. Dublin City Council has accepted a property which will be used to provide social housing.

4.133. There was no time mechanism as to when the cash or property option comes into play. Accordingly, payment of the remainder of the money may be protracted. There was a fear on the State side that, because children and young adults in the institutions were wards of the State, 100% liability would eventually attach to the State. The Committee considered that an argument could have been made that many of the children and young adults concerned had been placed in institutions, not for reasons of physical safety or because of any law-breaking but because of the moral discomfort society felt at the time. That attitude was engendered by many of the religious institutions. The Committee felt this aspect should have been debated when the agreement was being put in place.

Counselling Services

4.134. The Committee noted that the Congregations have identified counselling services to a value of €11 million as part of their contribution. This amount consists of €4.5 million paid to Faoiseamh and €7 million which has not been directly accounted for. The Faoiseamh element reflects professional counselling (billed and documented in full) provided for victims of abuse through the Catholic Church and other congregations involved but it does not differentiate between particular forms of abuse that might have taken place in residential institutions and other types in which religious may have been involved. The Department is insisting that any counselling provided for is provided for former residents of the institutions covered by the indemnity. Counselling provided for anybody else, whether it relates to other forms of abuse, is excluded. The finalisation of these issues has taken a long time in painstaking discussions and negotiations with the Congregations. It has been agreed that the whole issue will be independently audited when a final agreement is reached.

Education Fund

4.135. Included in the €41 million cash settlement is a €12.7 million education fund that has been set aside to provide additional special educational facilities for the individuals concerned or their offspring. An administrative scheme was put in place pending enactment of legislation. An *ad hoc* steering committee involving the National Office for Victim Abuse NOVA, the organisation representing many of the former victims, and the City of Dublin

VEC is currently administering the scheme which has to date paid out €1 million to individuals. A Bill will be introduced to amend the original commission to inquire into child abuse legislation and the opportunity will be taken to put the educational fund on a statutory basis.

4.136. It was agreed that the Department would oversee the spending of the fund. It has been the subject of negotiations between the Department, the four support groups affiliated to the NOVA and their educational facilitator. An application process and framework document has been developed to enable the people concerned to be helped. Application forms are available through NOVA or any of the victim support groups and outreach centres in the UK. The procedure for transferring funding from the National Treasury Management Agency through the Department to the agencies which will be involved in running the scheme has been finalised.

4.137. The Department is coming to an arrangement with the VECs to provide teaching programmes. About 30% of the people who sought funding came from outside the State, mainly from the UK. From the beginning it was obvious to the Department that there would be claims made by people outside the State, and many of the survivor groups have been met in Britain by officials and the Minister. There has also been contact with survivor groups in other countries.

Recovery of amounts from Insurers

4.138. When the Congregations appeared before the committee, they stated that at all times they made it quite clear to the Department that insurance was an issue. The Committee asked for a summary of the perspective of the Department on this issue. The Department stated that the issue of whether the Congregations could get an insurance pay-out from their insurers was discussed at a meeting on 25 September 2000 in the Attorney General's Office. There were Departmental officials at the meeting. At no stage was insurance a major issue in the negotiations and it did not form any part of the discussions surrounding the level of contribution. The State side was always given the clear impression that for the period during which it was felt the majority of the claims would materialise, the Congregations did not have cover.

4.139. The Congregations indicated to the Committee that the issue of insurance was raised as a minor issue at one of the two meetings with the then Minister. At that stage they were "hoping and looking" for some insurance pay-out. Insurance was listed among many other issues held of importance to the Congregations in the letter to the Secretary General of the Department sent in January but it did not register with him. At a meeting between the Minister and the Congregations after the deal was agreed, the then Minister indicated that if they had received any insurance settlement, it was his view from a moral perspective that that money should be available as part of the deal. The issue of a contribution from insurers is placed on the record by the Congregations in the letter of 14 January 2002 which states:

"In particular, I would be anxious that everybody involved would be clearly aware of the nature of the proposal made and those matters which are critical to it, such as the final agreement on the precise institutions which would be indemnified, the question of contribution from our insurers [and] the need for amendments to the Bill ...".

4.140. The letter refers strongly to the understanding that was agreed, but because the issue was going immediately to Cabinet, it needed to be clarified for other people. The reference to the contribution from insurers is directed specifically to the Accounting Officer. It would have been seen by at most two or three officials in the Department.

Impact on the Estimates

4.141. A primary objective of the audit report was to set down the basis for the Estimates of the costs of the redress scheme. The basis on which they were compiled is clear. In 2003 there were very few awards and it is possible to be more definitive in 2004 but even those Estimates need health warnings with them. What is important is that people got their awards and the scheme was set up. It is commonly agreed that it was a good scheme, on a social rather than financial basis. It is important to know the full financial extent of the liability.

4.142. The Department of Finance is making multi-annual provision for the compensation. €120 million has been provided for in the 2004 Estimate and a further €23 million will be provided by way of Supplementary Estimate as cases are being dealt with somewhat faster than expected. The Estimate for 2005 is €170 million. There is an agreement that these Estimates are ring fenced in that moneys not used for the purpose for which they were provided will be taken back and given again the next year. Also, a Supplementary Estimate will be provided if the commission deals with cases faster. The lifetime cost of the scheme is not affected by how fast the commission deals with cases. It is in the interest of both the State and victims that cases are dealt with as quickly as possible. The Department will provide whatever money is needed each year.

Concluding perspectives on the Agreement

4.143. The Committee asked why the Government accepted that a contribution capped at €128 million was appropriate. It also considered why, when so much information was available about the estimated potential final liability, it was not used by the Minister. The Department stated that a whole series of policy decisions and legal considerations led up to the acceptance of the agreement. One of those was that an established pattern had emerged, as far back as the Kennedy report in 1970, that the State had for its part failed to discharge its obligations in terms of the inadequate contribution of funds to these institutions, that there was a failure to ensure that people working in the institutions were properly trained, the inadequate nature of the supervision and inspection regime and the alleged failure to follow up on information that allegedly may have been there. The question of the degree of culpability of the State in its capacity as guardian of children in these institutions was a major part of that acceptance.

4.144. The Government set up the redress scheme and wanted a contribution from the Congregations. If it had waited to negotiate a contribution based on a percentage of the final figure, the negotiation would not have happened as the final liability is as yet unknown. An appropriate contribution needed to be defined as a monetary figure as opposed to a percentage of final figure. The end result of the negotiations is that resources to a value of €128 million have been transferred to the State.

4.145. The Department does not wish to perpetuate the idea that the figure sought was in any way linked to a percentage or proportion of the potential cost of the claims. The original negotiating position was that there would be a 50% contribution which would represent half

of the estimated lowest liability at that time. This is not what was achieved. It is important that in coming to policy decisions in these areas the policymakers and ultimately the Government have the fullest possible information available to them. In making such decisions, the information available to them should be absolutely up to date and as comprehensive as possible. The C&AG report indicates that less than full use was made of the information in the possession of the Department.

4.146. From the Congregations' point of view, they were asserting that if the full range of court procedures was to be brought into play in determining financial attribution for what had occurred or what was alleged to have occurred, they were determined in a court setting to rigorously defend those who were accused because of the passage of time, the fact that many people were deceased and that there was a huge gap of decades in some cases. The extent to which they felt their legal exposure would be confirmed by the courts was a big argument on their part against a contribution and against accepting a major share for the deal the Government put in place. The policy under which decisions were made was to have to the maximum extent possible a soft process for the people who were abused so that they would not be exposed through the redress process to the full range of critical examination, counter-examination, cross-examination, etc. that would happen in the courts. The final agreement is achieving its original purpose of providing, in a humane way, compensation to those that suffered abuse with an acknowledgement of what had happened by the key parties involved. .

5. Adoption of Reports

5.1. The Committee completed its examination of Chapter 7.1 of the 2002 report and of Chapter 9.1 of the 2003 Report on 9 December 2004.

5.2. The Committee noted Vote 13 – Attorney General’s Office for 2003 on 25 November 2004.

5.3. The Committee adopted Chapter 7.1 of the 2002 Report and Chapter 9.1 of the 2003 Report on 24 February 2005. The Committee noted Votes 26, 27, 28 and 29 for 2002 and for 2003 on 24 February 2005.

Findings and Recommendations

The Committee of Public Accounts:

finds specifically that

Redress

1. A very significant contingent liability existed in respect of victims of child abuse, suffered in institutions where the State had a regulatory or inspection function, who sought compensation through the courts. On 11 May 1999, the Taoiseach issued a public apology on behalf of the State to the victims of such abuse. A redress scheme was launched to facilitate the compensation of victims. The final cost of the redress scheme must be viewed in the light of the very substantial costs that would have been incurred in any event if no such scheme had been established and if the cases had been processed in the normal manner through the courts.
2. The government decision on the establishment of the redress scheme was informed by estimates of the scale of the likely claim load by the Department. However, the Department did not use all the data available in estimating the potential ultimate liability from the scheme and did not update its estimate of the liability as new information came to light.
3. The latest estimate of the final cost of the redress scheme is a range from €610 million (Department) to €828 million (C&AG). The initial estimates made by the C&AG were prudent and sought to take account of the ultimate number of claims that may be filed. In the Appropriation Accounts of the Department for 2002 and 2003, which were certified by the C&AG, the Department stated that “the amounts involved cannot be determined at this point”.
4. A mandate, which was approved by the Minister for Education and Science, for pursuing an agreement for a contribution from the Congregations was drawn up by the Department in consultation with the Department of Finance and the Office of the Attorney General. The mandate was to provide, to Congregations contributing to the scheme, an indemnity in respect of all civil actions arising from acts of abuse against people who were eligible to make a claim to the compensation scheme. In return, a minimum contribution of £100 million (€128 million) towards the costs of the redress scheme was expected from the Congregations.
5. The mandated minimum contribution bears little relation to the negotiating position that was favoured by the Department of Finance. Insufficient use was made by the Department of the information held about the likely final liability in establishing the mandate and the negotiating position. The underestimation of the final liability had implications for the negotiating mandate adopted by the State side.

Negotiations

6. The State negotiating team had no prior knowledge of the ability of the Congregations to pay the contribution expected and should have pressed for contextual information about the extent of available assets. It is acknowledged that pursuit of a negotiation

strategy based on ability to pay would have had implications for the likely time required for the finalization of the agreement.

7. The State adopted a negotiating position to seek a 50:50 sharing of the ultimate cost of the redress scheme. The Congregations viewed this position as unfair.
8. The initial offer of the Congregations of €50 to €60 million, made in June 2001, was considered unacceptable by the Minister and was not taken to Cabinet. At October 2001, the State's negotiation team believed that the negotiations had stalled and underestimated the desire of the Congregations to be part of the scheme. Media coverage of the negotiations affected the trust and confidence of the Congregations in the State's negotiation team.
9. A letter issued by the Department on 6 November, 2001, supported by two meetings between the Congregations and the Minister and Secretary General of the Department enabled agreement in principle to be reached on all main issues, in particular, the amount of the contribution to be made, the extent to which property already transferred could be included and the indemnity.
10. Written documentation of the original negotiation mandate (April 2001) exists. The documentation of the meetings with the Minister in November 2001 and January 2002, when agreement in principle was reached, was not good. No contemporaneous minute was kept by the State side. The Congregations wrote to the Department in January 2002, to ensure a record of its understanding of what had been agreed was available.

Indemnity

11. A Government decision in principle, to approve the Minister's proposals for a deal with the Congregations, was made on 31 January, 2002. When the Government reached this decision neither the detailed terms of the proposed indemnity nor the value of the previously transferred properties were known.
12. Formal documentation of policy positions and the progress of the negotiations left a lot to be desired, as reflected by the uncertainties raised by the Office of the Attorney General. There was a considerable difference of understanding over the agreed extent of the indemnity on the State's side. Between January and March 2002 the Attorney General wrote two letters seeking details of the agreement. Officials in the Attorney General's Office were not sufficiently aware of the original mandate agreed in April 2001. This was only clarified by a letter from the Minister to the Attorney General in April 2002.
13. While resort to the indemnity has been low to date, the Court award of €370,000 on 1 March, 2005 could lead to a change of approach by some claimants which would favour recourse to the Courts rather than the Redress Board. A substantial change of this kind could have implications for the ultimate cost of the redress issue.
14. The State's power to enter into such indemnity agreement has been based on the premise that the Executive Branch of Government has exclusive power to do so.

15. The Department of Finance was satisfied that the original mandate for reaching agreement with the Congregations was met.

Implementation

16. The full cash element of the contribution has been paid. The Department has been diligent in pursuing the transfers of property and in following up the counselling and education fund elements of the agreement.
17. While the nominal amount of the contribution was €128 million, the acceptance of property to a value of €40 million already transferred since 1999 and of the inclusion of counselling services to a value of €10 million, leaves a balance of €78 million, in cash and additional property, which was received subsequent to the finalisation of the agreement.
18. The final outcome of the redress scheme is that victims are compensated in a humane way with 80% of the costs of the scheme going to them. The legal costs of the scheme make up 15% of overall cost and administrative costs consume the remaining 5%.

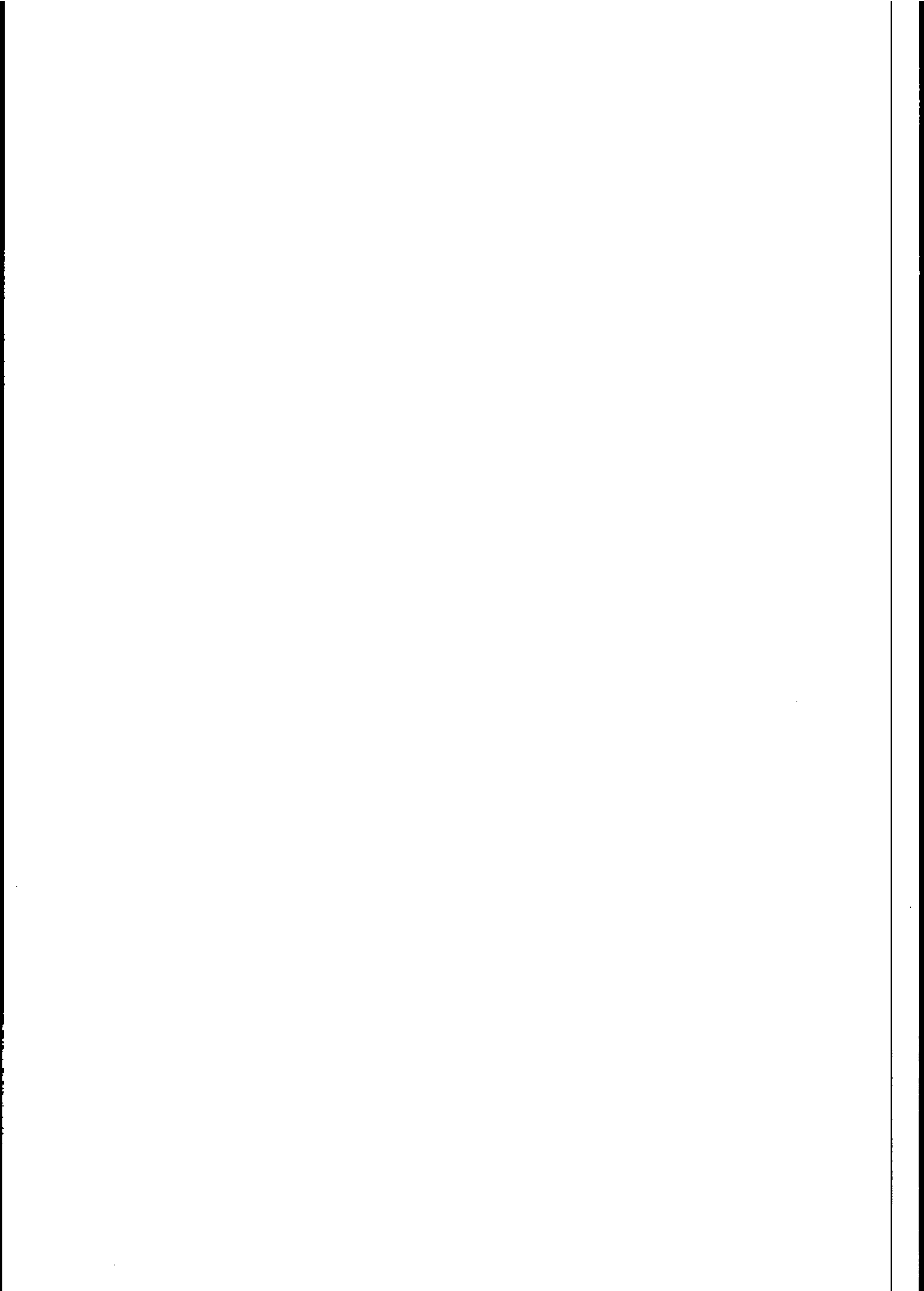
and recommends in general that

1. The strength of the State's negotiation team should be equal, at all times, to that of those with whom they are negotiating.
2. Departments involved in significant negotiations that commit large amounts of taxpayers' money should provide appropriate training and development for staff expected to serve on negotiation teams. The Civil Service should aim to ensure that its capacity to negotiate on significant issues is maintained at a sufficiently high level to match the negotiation strength of the opposing side. Where required, the facility to import the required specialist skills and expertise should be available.
3. In order to remove any potential doubt about the State's authority to enter into indemnities of this nature, the Committee considers that there may be merit in having the law officers of the State review the appropriate measures, statutory or otherwise for authorising indemnities or material financial commitments of this kind.
4. The Department of Finance accounting procedures for contingent liabilities should be reviewed and brought into line with good practice. The general approach to identifying, recognising and measuring contingent liabilities should be reviewed and updated in the light of the experience for the redress scheme. Guidance on suitable approaches to estimating contingencies should be developed so that departments can estimate and report on contingencies in a more realistic way.
5. A statement of good practice for the formal documentation of policy positions, negotiating positions and mandated positions should be developed by the Department of Finance for the Civil Service.
6. There should be a practice note regarding the involvement of the Office of the Attorney General in major negotiations with a legal dimension, particularly where the legal

dimension is complex and / or where large amounts of money may be involved. Further guidance on negotiation strategies should be developed where more than one department is involved. This should include appropriate standards for the documentation of meetings and key decisions and of the information to be provided to cabinet.

Annexes

- 1. The Mandate for the Negotiations – 30 April 2001**
- 2. Letter of 6 November 2001 from the Department to CORI**
- 3. Letter of 14 January 2002 from CORI to the Secretary General**
- 4. Government Press release announcing the agreement in principle – 31 January 2002**
- 5. Memorandum of the Secretary General on the meetings between the Minister and the Congregations – November 2001 and January 2002**
- 6. Indemnity Agreement of 5 June 2002**
- 7. Letter from Office of the Attorney General to the Committee, September, 2004**
- 8. Letters between the Minister for Education and Science and the Attorney General**



The Mandate for the Negotiations – 30 April 2001

To: Secretary General

From: Tom Boland

**Re: Negotiations with congregations on contribution to a
compensation fund**

Attached is a memorandum which sets out the background and working assumptions underpinning the on-going negotiations with the religious congregations on the issue of their participation in a compensation fund for childhood abuse. The memorandum was drawn up in consultation with the Department of Finance and the Office of the Attorney General.

In order to facilitate the negotiations it would be helpful if you and the Minister could consider the document. Approval is requested for the approach outlined in paragraph 16.

30 April, 2001

CONFIDENTIAL**Compensation scheme for victims of child abuse.
Considerations for and parameters to negotiations on
contribution by religious congregations****Background**

1. Discussions have been taking place over a number of weeks with representatives of the religious congregations including Donal O'Donnell S.C. on the contribution which the congregations may make towards a compensation scheme for victims of abuse in childhood. The discussions arose from a decision in principle by the congregations to make what they termed "a meaningful contribution" to a scheme. To-date the discussions have focussed on the principals underpinning the legislation establishing a scheme. While there are areas of concern to the congregations, the overall indications are that there is nothing in the proposed scheme which would cause them to rescind their decision in principle to participate. Discussions have now reached a point where the congregations will set out how much they are prepared to contribute. A final decision on whether to accept that contribution and on the quid-pro-quo for a contribution will rest with the Government. In the interests of facilitating agreement in the negotiations on a proposal to be put to Government it is important that representatives of the State operate within parameters agreed at Ministerial level in their respective Departments and that the considerations and factors dictating those parameters be identified. This is the purpose of this memorandum.

Estimated cost of a compensation scheme

2. The eventual cost of compensation is clearly a factor to be considered in determining the contribution from the congregations. Prudence would suggest that the Departments base negotiations on the likely upper end of estimated cost in so far as this can be ascertained and without being unreasonable. In the absence of precedents from the Courts it is not possible to estimate with confidence the eventual cost of a compensation scheme. A Memorandum for Government prepared by the Minister for Education and Science dated February, 2001 tentatively suggested that the overall cost could be £200m including costs. Having regard to the fact that at this stage there are approximately 1000 claims against the State, that the compensation scheme will run for three years and that its existence and operation itself is likely to give rise to the emergence of

further claimants, it is possible that the number of those receiving awards could reach 3,000. On the question of the amount of an award in each case this will need to be comparable with a High Court award so as to attract to the scheme those cases which would stand a good chance of success in the Courts. In some cases either the abuse itself or its aftermath will be considered, in relative terms, minor justifying a lower award while there are also some cases of very serious abuse likely to lead to an award of the order of £200,000 or more. Overall an average award of £100,000 would seem to be appropriate. It is noteworthy that in one fairly recent abuse case (McColgan) involving abuse in the home and consequent responsibility of the health board the settlement amounted to £100,000. Accordingly, it seems reasonable to operate in terms of a maximum potential cost of up to £300m (3,000 cases x £100k).

3. To assist the negotiations the congregations have been informed that just under 1000 cases are at present outstanding against the State and they have been asked for information on any cases where the State is not cited as a co-defendant. As a rough estimate they have been given a figure of a possible 2000 claims costing c. £100,000 each i.e. a possible final cost of £200m. However, given the range of uncertainty, both on the number of cases and the cost per case, it was stressed that the likely cost could be far higher.

Factors relevant to the congregations in considering the amount of their contribution.

4. It is likely that the congregations, their legal advisers and insurers will either have completed by now, or have well advanced, a risk assessment exercise which will give them some sense of the financial risk they are exposed to if the High Court is required ultimately to adjudicate on abuse cases. That figure will influence the amount which they are prepared to contribute to a compensation scheme since clearly they will not contribute a sum greater than their estimate of exposure.
5. The congregations will have to weigh up the cost and advantages of participation in the compensation scheme against adopting a "go it alone" approach. In that approach they can expect, for reasons outlined in 8 below, to meet only the stronger cases. There would therefore be less cases but they would be those likely to attract the highest awards. Ultimately, in that scenario the total cost in financial terms may be less than the State is willing to settle for as a contribution.
6. In addition to the financial implications of a compensation scheme versus the cost of litigation, the congregations will also be mindful of the damage which on-going litigation, over a period possibly as long as

ten years, will cause to their organisations and their mission and they will wish to avoid that.

7. Related to the point just made there is also the consideration, repeatedly expressed by the congregations in discussions, that they see the making of a financial contribution to help people who are in pain as consistent with their pastoral mission, as opposed to any making of amends for abuse which has not been proven.
8. From the congregations' viewpoint it is likely that they will take the view that the State itself has significantly increased the pool of potential claimants by its policies in setting up the Commission to Inquire into Child Abuse and its decision to provide for a low proof threshold for compensation. Accordingly, it will be argued that the congregations exposure should not be increased because of that increased pool of claimants. In effect they will argue for a lower total compensation figure for which they would have, at most, joint responsibility.
9. The State, the congregations have and will argue, carries a very large share of responsibility for the harsh conditions in the institutions both because of their funding policies and lack of proper supervision.
10. The congregations will seek to argue that any contribution they make to compensation must take account of the fact, as they see it, that in the past they voluntarily took up a difficult and thankless task in caring for children and that damage to the continuing and on-going pastoral and spiritual mission of the congregations should be avoided.
11. The congregations will seek an indemnity from the State. In effect this would indemnify the congregations against any litigation, whether or not commenced prior to the establishment of the compensation scheme, which relates to alleged abuse falling within the terms of the compensation scheme and committed prior to such establishment. An indemnity will also provide the best "closure" mechanism for the congregations and bring at least financial finality to the issue of past abuse.

Considerations for the State

12. While it is arguable that the State contributed to abuse by ineffective inspection and regulation, the abuse which occurred in institutions was perpetrated by people employed by the owners/managers of the institutions who had direct and daily control over them, not by employees of the State.

13. If it was the case that public funding was inadequate, this could never constitute a licence to anyone to abuse children.
14. While the congregations did perform a very useful service for the State and in the majority of cases did so reasonably in all the circumstances, this is not factor which in any way mitigates responsibility for abuse.
15. The indemnity sought by the congregations is a kind of retrospective insurance. As the State would be taking on an unspecified financial burden, and relieving the congregations of same (potentially providing them with a substantial subsidy), this should be a factor in seeking the highest possible contribution from the congregations.
16. It is appropriate that the State would have regard to the on-going role and mission of the congregations in Irish society. However, having regard to the likely resources at the disposal of the congregations relative to the projected overall cost of compensation and the fact that such resources are in any case vulnerable to awards in the courts if the congregations do not participate in the scheme, this should not be a significant factor in negotiations on the amount of their contribution.

Parameters determining amount of contribution from congregations

16. Having regard to the considerations set out above the following is proposed as the position to be adopted in negotiations –
 - The State should approach the negotiations on the basis that in principle the overall cost of the scheme should be borne equally by the State and the religious congregations. Accordingly the congregations should pay compensation in each case on a 50:50 basis as each award is made.
 - Having regard to the fact that the congregations' resources, however extensive are limited, unlike the State (which in the final analysis always can have recourse to taxation) a ceiling should be placed on their contribution.
 - A contribution of up to £150m should be sought from the religious congregations as an opening position – the working estimate of the total cost of compensation being £300 million.
 - In the event that the congregations do not agree to this approach and provide convincing reasons to the contrary then the ceiling could be reduced, but not below £100m.

- The State should be prepared to refuse to accept the participation of the congregations in the scheme, unless satisfied as to the amount of their contribution, and should in that event amend the law to ensure that claimants may, even if compensated by the compensation scheme, pursue their claims independently against the congregations.
- The State should, as a quid-pro-quo for a reasonable contribution, grant an indemnity to the congregations which contribute to the scheme in respect of all civil actions arising from acts of abuse committed on people who were eligible to make a claim to the compensation scheme.

Letter of 6 November 2001 from the Department to CORI

6 November, 2001

Sr. Elizabeth Maxwell, PBVM,
Secretary General,
Conference of Religious of Ireland,
Tabor House,
Milltown Park,
Dublin 6.

Dear Sr. Elizabeth,

Thank you for your letter of 31 October, 2001. You raise a number of important issues which I would like to deal with.

Turning first to the proposals you outlined at our meeting on 26th June, 2001, the Department accepts that these were a genuinely innovative and helpful attempt by the Congregations to address the very difficult issue which we are trying to resolve. Indeed, it was indicated at the meeting that there was much in the proposals with which we could agree. The combination of a cash payment, education trust and property transfers is one which we believe can form the basis for a settlement in relation to the issue of the Congregations' contribution to the redress scheme and one which can be recommended to the Government. In addition, it is likely that we could reach agreement on the payment of monies or transfer of property on a phased basis over a reasonable period of time. A problem does exist with the proposed inclusion of property transfers from the Congregations to the State over the past ten years. It is difficult to see how such transfers can be included in the final package of measures, given that they occurred without any reference to a redress scheme for former residents in institutions. Perhaps this can be re-examined in the context of the date of the State's apology. Also and apart from this, but again emphasising that the other elements of the proposals form the basis for a positive recommendation to the Government, a fundamental difficulty lies in our view that the value of your proposal amounts to a very small proportion of what the cost of the scheme is likely to be.

There has been discussion at some length what that estimate might be and I believe we all accept that it is not possible to reach a conclusion with any precision. However, having regard to the number of applicants to the Commission to Inquire into Child Abuse, the number of FOI requests which

this Department has received from former residents of the institutions and the number of litigation cases pending, it is our view that the total number of claimants to the proposed Redress Board is likely to exceed 3,000. A likely cost of the redress scheme of between £200 million and £400 million does, therefore, not appear unreasonable from our perspective. Of that, the Congregations' proposed contribution, when past transfers are factored out, amounts to around £40 million, i.e. between 10% and 20% of our best estimate of the likely total cost. In the absence of hard information on the scale of that cost, we have indicated that we would be prepared to recommend an approach based upon a 50:50 contribution. This would allow for a situation where the cost of the scheme was considerably less than we anticipate. We are also prepared to recommend that final agreement should allow for a situation where the cost of the scheme is greater than we anticipate, by capping the Congregations' contribution at a figure of the order of £100 million – a figure based on the lower of our estimates of overall cost. In return, the participating Congregations would receive a permanent State indemnity against any and all litigation in cases which come under the remit of the Redress Board.

As regards the response to your June proposals, the position is that the Minister, having taken soundings, was of the view that it was unlikely that the Government would accept them. Rather than risk having the proposals formally rejected and a possible breakdown in negotiations he decided not to bring the proposals to Government at that time but to allow the parties further time to reflect. I understand Mr. Boland conveyed this position to you in a telephone conversation at the time. Perhaps the period of over three months until next we met was overlong, but the Congregations would undoubtedly have been aware during this time that the proposals were not being recommended to Government.

With reference to the reports in the media concerning our negotiations, I can only repeat my previous expression of regret that such reports occurred. I accept that, at the very least, they have been seriously inimical to the Congregations' confidence in the discussions. As regards the most recent reports on RTE and the in the Irish Examiner, I understand that Mr. Boland has written to you on the matter specifically and that he will clarify the position for the full group at our next meeting. You will be aware from his letter that the purpose of the briefing was to inform the media about the progress of the Government's programme of measures to address issues of past abuse generally. In particular, it was designed to correct inaccuracies in previous reports relating to matters such as legal costs before the Lafoy Commission. The subject of the discussions with the Congregations formed only a small part of the briefing and at no time was any proposal made by you discussed or even acknowledged as having been made. That some of the journalists present failed to abide by the spirit and purpose of the briefing is probably an outcome we should have anticipated and is certainly a matter I regret. The reports of the same journalists contained several inaccurate statements and attributed views

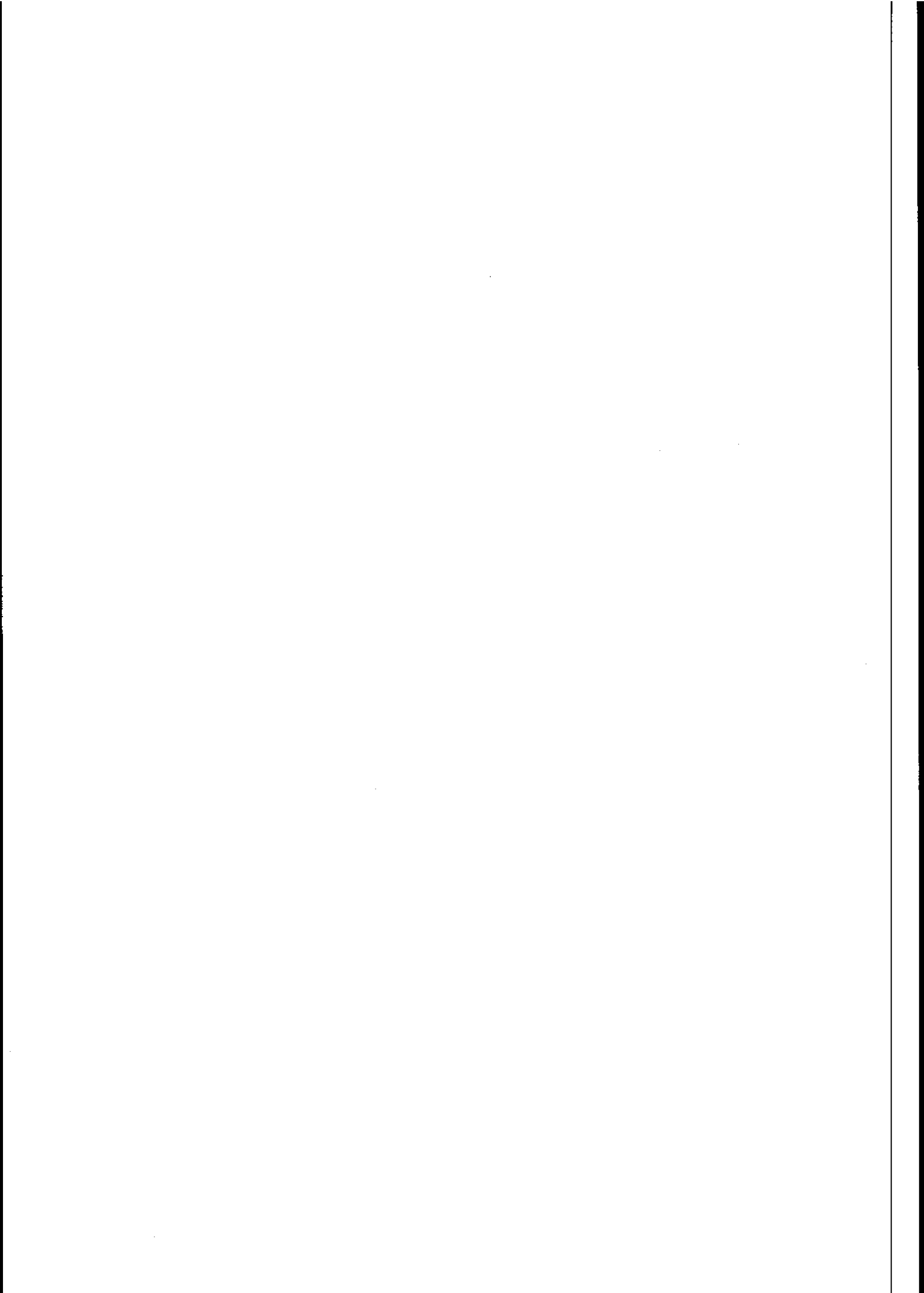
which had not been expressed. This is a matter of considerable annoyance to the Department and our views have been conveyed to the journalists concerned in strong terms. That said, we acknowledge in hindsight that, although the briefing was a matter for the Department solely, a more prudent course would have been to inform you in advance of it. The Department apologises for this and genuinely regrets the impact that the media fallout has had on the efforts of our two sides to achieve a negotiated resolution.

I agree with your assessment that our discussions are now at a crucial point. The enactment of the legislation is about to commence and we desire to bring discussions to a conclusion as soon as practicable. I wish to assure the Congregations that, notwithstanding what you refer to as their scepticism about the process, our sole objective as negotiating officials is to find the best possible resolution to what we accept must be a highly traumatic issue for the many religious involved. We are, in the context of the respective historical roles of the Congregations and public bodies in the management and regulation of the relevant residential institutions, seeking to strike a balance between the need to compensate people who are suffering the consequences of past abuse in those institutions and a recognition of the enormous contribution which the Congregations have made in so many ways in the past both to destitute children and to Irish society in general. We are seeking to do this in a way which will ensure that their ability to continue to so in the future is not compromised.

I fully realise that there are voices on your side which are counselling that your interests would be best served by not participating in the Government's Redress Scheme. Such a decision is, of course, entirely a matter for the Congregations themselves. I think you would agree, however, that it should be made in a calm and reasoned manner rather than in an atmosphere, perfectly understandable, of reaction to the media events of the last few months and the unfortunate light they cast, from your perspective, on the Departmental side. I feel there is yet much to be discussed in relation to the size, nature and timing of the Congregations' possible contribution to the Scheme particularly around the possible transfer of further property. I feel that to re-enter dialogue will allow the Congregations, at least, the opportunity to reach a decision with a better understanding of what we are looking for. Were this dialogue to resume, I feel that there might be merit in our meeting the Congregations' representatives collectively so that such a fuller understanding of our respective positions might be reached prior to further detailed negotiations.

Yours sincerely,

PK _____
Paul Kelly,
Assistant Secretary General.



Letter of 14 January 2002 from CORI to the Secretary General

CONFERENCE OF RELIGIOUS OF IRELAND



Mr. John Dennehy,
Secretary,
Department of Education and Science,
Marlborough Street,
Dublin 1.

14th January, 2002.

Dear Mr. Dennehy,

I am writing to you to raise one matter before the proposal we discussed with you and the Minister is submitted to the Cabinet. While I believe that there was and is a very clear understanding between us as to the basis of the proposal we discussed with you and the Minister, we would be anxious to try and remove any residual possibility of confusion about the essential structure of the proposal. Our main concern is that we will not know until Wednesday whether the Cabinet has been prepared to agree to the proposal or not and thereafter, events may proceed very quickly and any later disagreement would be very disappointing for everyone involved given the amount of effort that has been put into even reaching the point we have now arrived at.


In particular, I would be anxious that everybody involved would be clearly aware of the nature of the proposal made and those matters which are critical to it, such as the final agreement on the precise institutions which would be indemnified, the question of contribution from our insurers, the need for amendments to the Bill in the area of validation, regulatory consents or approval by the Charity Commissioners and, indeed, the position of the individual Congregation which may require attention. It is, of course, particularly important that the Cabinet should be under no misapprehension about the nature of the indemnity which would necessarily be provided by the Government to the Congregations, which would cover claims capable of being brought before the Redress Board, even if not brought to it or if brought to it and the awards rejected. I know that you have had a draft of such an indemnity for some time and, indeed, that all these matters appear to be very clearly understood between us. Nevertheless, it would obviously be undesirable that there should be any misunderstanding whatsoever or that indeed in the aftermath of any successful Cabinet meeting on Wednesday that comments were made publicly, perhaps by persons not directly involved in the discussions, which unwittingly misrepresented the precise situation.

SECRETARIAT, TABOR HOUSE, MILLTOWN PARK, DUBLIN 6 IRELAND.
TELEPHONE: 01 269 8011 FAX: 01 269 8857 Email: secretariat@cori.ie

- 2 -

We, of course, realise that how the matter is presented to the Government is a matter for the Department and the Minister and that there is no guarantee, indeed, that the proposal will be acceptable to the Cabinet. Nevertheless, any future disagreement would be disappointing to all of us given the effort already invested in trying to address this issue. Any misunderstanding or disagreement would be regrettable and, if possible, we would like to try and remove any scope for misunderstanding. Accordingly, I would be very grateful if you could confirm to me that we have a shared understanding of the nature of the proposal. Before anything is put to the Government, can you please confirm this as soon as possible.

Yours sincerely,


Sr. Elizabeth Maxwell, pbvm,
Secretary General.

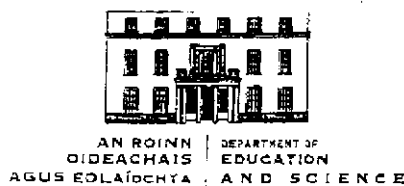
Government press release announcing the agreement in principle – 31 January 2002

An tAonad Cumarsaíde
(Óifig Faisnéise)
An Roinn Oideachais agus Eolaíochta,
Sráid Maolbhríde,
Baile Átha Cliath 1.

☎ (01) 873 4700
Ext. 2162, 2282, 2341, 2181, 2163

Direct Lines:

- Information: (01) 889 2388/889 2341
- Press: (01) 889 2163/889 2162



Communications Unit
(Press/Information Office)
Department of Education and Science,
Marlborough Street,
Dublin 1.

Fax: (01) 878 6712/878 7932
Web: <http://www.irishgov.ie/educ>

Press Release

Government agrees proposals with congregations for contribution to Redress Scheme

The Government today agreed in principle to a set of proposals which will see religious congregations contributing €128 million to the scheme for people who suffered while in institutional care. The agreement with the congregations comes after a lengthy period of discussion, including most recently direct meetings between representatives of the congregations and Minister for Education and Science, Dr. Michael Woods, T.D.

Commenting on the agreement of the congregations to contribute to the compensation scheme, Dr. Woods said that when discussions on this issue opened over a year ago the congregations stated that they wished to make a meaningful contribution to any scheme of redress for people who spent large parts of their childhood in institutional care. "The terms now agreed in principle represent a reasonable outcome, which will allow all relevant parts of Irish society to make meaningful redress for past wrongs through which children were injured," he said.

The terms of the agreement include –

- A cash payment of €38 million, of which €12.7 million will be placed in an education trust for former residents of the institutions and their families.
- Property transfers totalling €80 million. This amount will include property transfers which have been, or are being, made since the Taoiseach, on behalf of the State, made an apology in May 1999 to victims of institutional child abuse, with further transfers up to the total amount taking place within the next 3 to 5 years.

- €10 million in counselling, record retrieval and pastoral services for people in need.
- The Religious Congregations have stated that they will also continue their co-operation with State and Voluntary Bodies in relation to property transfers for services to people in need.

The Government for its part will indemnify the congregations directly concerned against all present and future claims arising from past child abuse which are covered by the Residential Institutions Redress Bill, 2001.

Minister Woods said that the proposed redress scheme, with the participation of the congregations, represented a significant part of the healing process for people who were damaged as a result of childhood experiences while in the care of the State and the congregations. Outlining the other measures already taken, the Minister pointed out that both the State and the congregations have apologised for the hurt caused.

In addition, the Minister said, the Government has set up the Commission to Inquire into Child Abuse to which the congregations have repeatedly committed their full co-operation and both the Government and the congregations have put in place counselling services for people injured as a consequence of their time in care. "I trust that this agreement on a contribution by the religious congregations to the redress scheme will be seen as a further sign of the genuine intention of the parties to make recompense and, combined with these other measures, will help in the process of healing and reconciliation."

ENDS

30 January 2002

Memorandum of the Secretary General on the meetings between the Minister and the Congregations – November 2001 and January 2002

Memorandum on negotiations between Minister for Education and Science and religious congregations.

Two meetings were held – the first on 7 November, 2001 and the second on 7 January, 2002. Present were the Minister for Education and Science and myself for the Department, Sr. Elizabeth Maxwell, Sr. Helena O'Denoghue and Bro. Kevin Mullen for the congregations. Donal O'Donnell SC attended the meeting on 7 January.

The purpose of the meetings was to explore whether and to what extent the negotiations on the contribution of the religious orders to a child abuse compensation scheme could be improved on and successfully concluded. Negotiations with officials of the Departments of Finance, Education and Science and the Office of the Attorney General had in effect reached a stalemate following the offer made by the congregations on 26 June.

Following the June offer, the congregations became greatly suspicious of the negotiation process in view of what appeared to be well-informed leaks to the media. They were most reluctant to engage in further detailed negotiations out of a concern that the confidentiality of the process of negotiation could not be guaranteed. Apart therefore from the stalemate which had been reached they wished to engage in discussions on a more confidential basis. In the interests of seeking a final resolution to the issue the Minister agreed to meet with them, accompanied only by myself as Secretary General.

Discussion with the congregations focussed almost exclusively on the amount of the contribution to be made and how it was to be structured. The final agreement was a contribution of €128million (€25.3million in cash, €12.7million in educational trust, €80million in property transfers (including some transfers made since May 1999) and €10million in counselling and support services).

In return for this contribution the congregations sought an indemnity and amendment of the Residential Institutions Redress Bill. As regards the latter the amendments sought related to the validation process and the congregations' concern that their members' reputations would be seriously damaged as a result of abuse allegations to which they could not respond in their own defence. The congregations sought amendments which would focus on injury rather than abuse or would give a right of reply to accused people.

As regards the indemnity, the issue was discussed only to the extent that the congregations indicated that the draft indemnity which they had proposed in the negotiations with the officials would form the basis for negotiating the final indemnity in detail. It was made clear to them that neither the Minister nor I had the legal expertise to deal with the subject. Our understanding was that that indemnity would indemnify the congregations against all present or future claims in the courts which came within the terms of the Residential Institutions Redress Bill.

The negotiations between the Minister and the congregations concluded on the basis that the Minister accepted their proposals in principle and would seek the approval in principle of the Government. It was agreed that, since the agreement was one in principle, the details relating to the property transfers and the indemnity would be finalised in detailed discussions involving representatives of CORI and the officials of the Department of Education and Science, the Department of Finance and the Attorney General's Office. Prior to bringing the matter to Government CORI sought certain written assurances. In particular she sought assurances in relation to the proposed indemnity. (Attached is a copy of a letter of 14 January from Sr. Elizabeth Maxwell) I discussed the matters with Sr. Maxwell by 'phone on 14 January and informed her that both the Minister and I understood that our discussions had led to an agreement in principle in respect of which the Minister would seek

Government approval in principle and which he and I would use our good offices to implement. I informed her that I could not recommend to the Minister that he be bound legally to the agreement, by way of written assurances of the kind sought, without the formal involvement and advice of the Attorney General's Office. I offered to secure that advice, but Sr. Maxwell expressed herself satisfied to leave the agreement on the basis which it then stood as an outline agreement in principle which both the Minister and I would use our good offices to implement.



John Dennehy.

12 March 2002

Indemnity Agreement of 5 June 2002

INDEMNITY

THIS DEED made the 5th day of June Two Thousand and Two BETWEEN THE MINISTER FOR FINANCE, Upper Merrion Street, Dublin 2 and THE MINISTER FOR EDUCATION AND SCIENCE, Tyrone House, Marlborough Street, Dublin 2 (hereinafter called "the State Party" which expression shall include them and each of them) of the One Part and EACH OF THE PARTIES LISTED IN THE FIRST SCHEDULE (hereinafter together called the "Contributing Congregations") of the Other Part.

WHEREAS:-

- A. The State Party has established a Statutory Redress Scheme ("the Scheme") under the Residential Institutions Redress Act 2002 ("the Act") to make financial awards to assist in the recovery of persons who as children were resident in certain institutions and who suffer or who have suffered injuries that are consistent with abuse while so resident.
- B. The Contributing Congregations are desirous of joining with the State Party to make a contribution to the Scheme.
- C. The Contributing Congregations are prepared to undertake to contribute to a special account to be established pursuant to section 23 of the Act (hereinafter called "the special account").
- D. The contribution of the Contributing Congregations will be paid into the special account in the amount and in the manner agreed between the parties on the date of commencement of the said Scheme.
- E. This Deed shall not be construed as an admission of liability by either party with regard to any alleged injury suffered by any applicant (within the meaning of the Act).
- F. Any payment made under the Scheme shall be without admission of liability or responsibility for any alleged acts of abuse and no liability or responsibility is or will be apportioned between the said parties or any other person arising out of any sums paid from the special account under the said Scheme.

NOW THIS INDENTURE WITNESSETH as follows:

- 1. In pursuance of this Deed and in consideration of the covenants herein contained the State Party hereby covenants and agrees to fully and completely indemnify each of the Contributing Congregations in respect of:
 - (A) each and every matter which is the subject of
 - (i) an award, interim award or settlement of an application (within the meaning of the Act) ("an Application") made by the Residential Institutions Redress Board or the Residential Institutions Redress Review Committee (in each case within the meaning of the Act), or

part (D) where the State Party is put on notice in writing of such matter within the Statutory Period and where proceedings are issued in respect of such matter before the expiry of the period constituting the aggregate of the Statutory Period and the period of three years immediately following thereafter.

Without prejudice to the generality of the foregoing such indemnity shall extend to all loss, claims, damages, demands, expenses, costs (including legal costs), and charges arising therefrom, of any kind whatsoever awarded to any claimant by any court or otherwise including interest thereon and the State Party shall at the request of any person or persons covered by this Indemnity take over, or arrange for the taking over of the conduct of the defence of such claim or proceedings and/or take any steps necessary for ensuring that the said indemnity is fully effective. For the avoidance of doubt the indemnity extends to any claim or proceedings brought by any person against the persons mentioned in Clause 3 below.

2. The State Party hereby acknowledges and agrees that the said indemnity shall extend to:
 - (i) the institutions listed in the Schedule to the Act;
 - (ii) any place, within the contemplation of section 1 of the Act, at which abuse took place and any institution which would be eligible for insertion into the Schedule to the Act by way of an Order of the Minister for Education and Science under section 4(1) of the Act,

each such institution being hereinafter referred to for the purposes of this Agreement as an "Institution". The State Party further agrees that all such institutions as referred to in sub-paragraph (ii) above as would be eligible for insertion into the Schedule to the Act by way of an Order of the Minister for Education and Science under section 4(1) of the Act shall be submitted for inclusion in any such Order which may be proposed.

3. The State Party hereby further acknowledges that the said indemnity shall extend to each and every member, and former or deceased member, of any religious body or Congregation of the Contributing Congregations, including any group of persons forming part of such religious body or Congregation or any constituent body thereof, and to every person engaged in the management, administration, operation, supervision or regulation of an Institution, and to every person otherwise employed (whether directly or indirectly) by a Contributing Congregation in or associated with an Institution.
4. Without prejudice to the foregoing, the State Party hereby acknowledges that any person entitled to the benefit of such indemnity shall stand discharged from being bound to defend any such claims or proceedings and shall not be answerable for any loss, claims, damages, demands, expenses, costs (including legal costs), or charges arising therefrom, including interest thereon and shall be held harmless and kept indemnified by the said State Party.
5. A. The State Party shall, at the request of any person or persons against whom such claim is made whether in legal proceedings or otherwise ("Proceedings") take over the defence of such claim provided however that where the defence is taken over as aforesaid the State Party will in defending the proceedings have regard to the provisions of Paragraph B of this Clause 5 and the State

Party shall inform the relevant Contributing Congregation of the proceedings to the extent necessary for the purposes of those provisions, but shall have absolute discretion (subject to the provisions of Paragraph B of this Clause 5) as to the conduct of the defence of the proceedings and as to whether and on what terms proceedings should be settled or compromised.

- B. Where in respect of any Proceedings a Contributing Congregation wishes to vindicate its reputation or the reputation of any person as contemplated by Clause 3 above, then it may require, by notice in writing to the State Party, that the State Party return to it the responsibility for carriage of the Proceedings, in which case this Indemnity shall cease to apply in respect of the subject matter of those Proceedings.
 - C. Where a person as contemplated by Clause 3 above requests that a Contributing Congregation take over responsibility for carriage of any Proceedings, and the said Contributing Congregation refuses to do so, the said Contributing Congregation shall indemnify the State Party for 50% of all damages which may be awarded by a court or made by way of settlement and 50% of all costs (including legal costs) and expenses incurred by the State Party in defending any claim by that person against the State Party in any proceedings arising from the taking over of responsibility for carriage of the Proceedings.
6. The Contributing Congregations by virtue of these premises, hereby severally covenant with the State Party:
- a) To undertake to provide to the State Party details of any existing or future legal claims for compensation covered by the indemnity of which they are aware.
 - b) To undertake to assist the State Party in the defence of claims which come within the Scheme made in any legal proceedings that are now in being or may be issued in the future provided such claim is in respect of abuse allegedly suffered prior to the date of the introduction of the Scheme.

In relation to the defence of any such claim as contemplated by sub-paragraph (b) above, the relevant Contributing Congregation will bear its own costs incurred in respect of the retrieval of records in relation to the defence of such claim and in providing any assistance reasonably required by the State Party for the purposes of defending such claim, which assistance, for the avoidance of doubt, shall involve identification of relevant witnesses to the extent known by the relevant Contributing Congregation and liaising with such potential witnesses.

7. The contributions of the Contributing Congregations contemplated by this Indemnity shall comprise and shall take into account the following:-
- (i) a cash payment to the State Party amounting in aggregate to the sum of €41.14 million, of which €12.7 million shall be used by the State Party for educational programmes for former residents of institutions and their families. The sum of €12,654,000 shall be paid to the State Party on the execution hereof and the balance of the said sum of €41.14 million by four equal instalments on the 5th of September 2002, the 5th of December 2002, the 5th of February 2003 and the 5th of May 2003;

- (ii) transfers of real property which have been made to the State Party or State agencies or local authorities or Voluntary Organisations (as defined in Clause 9 below) since 11th May 1999 to the extent that the value of same amounts in aggregate to the sum of €40.32 million. The aggregate value of the particular properties so transferred by the Contributing Congregations is more particularly identified in Part I of the SECOND SCHEDULE;
 - (iii) transfers of real property which are to be made to the State Party (or its nominees(s)) as soon as practicable following the execution hereof to the extent that the value of same amounts to €36.54 million. The aggregate value of the particular properties to be so transferred by the Contributing Congregations is more particularly identified in Part II of the SECOND SCHEDULE;
 - (iv) counselling and other support services for former residents of institutions and their families already provided or to be provided to the extent that the value of same amounts to €10 million.
8. Pursuant to the commitment referred to herein of the Contributing Congregations to transfer cash and/or real property to the State Party in consideration for the Indemnity given by the State Party hereunder, where a Contributing Congregation proposes to transfer a real property asset to the State Party, the State Party shall have the right (for a period of nine months from the date hereof) to refuse to accept a transfer to it of any such real property asset where in its reasonable opinion the said asset will be of no use or benefit to the State or any State agency (which refusal and the reason therefor shall be notified to the said Contributing Congregation in writing). In the event of any such refusal, however, the relevant Contributing Congregation shall have the right to replace such real property asset with cash or other real property assets (at its sole discretion). The said right of refusal shall expire nine months from the date hereof. The provisions of this Clause 8 shall apply to a proposed transfer which is in substitution for a transfer which has been refused in the same way as they apply to the original transfer.

The valuation of any real property assets which have been, or which it is proposed will be, transferred to the State Party or any State agency or local authority or voluntary organisation providing health or social services ("Voluntary Organisation") by a Contributing Congregation as contemplated by this Indemnity shall be determined by agreement of the State Party and the said Contributing Congregation in consultation with their respective valuers, and in default of such agreement shall be determined by an independent valuer to be appointed on the application of either the State Party or the said Contributing Congregation by the Chairman for the time being of the Society of Chartered Surveyors. Such independent valuer shall act as an expert and not as an arbitrator, and his determination shall be final and binding on the State Party and the said Contributing Congregation and shall be in writing stating the reasons therefor. Prior to such independent valuer making such determination, however, each of the State Party and the said Contributing Congregation shall have the right to make written representations to the independent valuer. The costs of the said independent valuer shall be borne equally by the State Party and the said Contributing Congregation.

The valuation to be determined by the State Party and the relevant Contributing Congregation or by the above-mentioned independent valuer (as the case may be) shall be the current open market value of the relevant real property asset as at the date

of its transfer to the State Party or any State agency or local authority or Voluntary Organisation (as the case may be) in the case of real property assets transferred prior to the date hereof, and as at the date hereof in the case of all other real property assets. The State Party and the relevant Contributing Congregation or the independent valuer (as the case may be), in making such determination, shall have due regard to the current Practice Statements and Guidance Notes contained in the Appraisal and Valuation Manual issued by the Society of Chartered Surveyors.

In any valuation exercise in respect of any real property asset which has been, or which it is proposed will be, transferred to the State Party or any State agency or local authority or Voluntary Organisation by a Contributing Congregation as contemplated by this Indemnity, the valuation shall (pursuant to the protocol in this regard previously agreed between the Department of Education and Science and the diocesan authorities or any other protocols (if any) previously agreed by the State Party or any State agency and the Contributing Congregations or their representatives where applicable) take account of any grants or other payments provided by the State or any State agency to the said Contributing Congregation for the acquisition, development or improvement of the said real property asset.

10. Pursuant to the commitment referred to herein of the Contributing Congregations to provide real property assets to the State Party in consideration for the Indemnity given by the State Party hereunder, if it should transpire that the aggregate value of all real property assets so provided by the Contributing Congregations (their "Real Property Amount") is found to fall short of the aggregate value of all real property assets which they have committed to provide to the State Party or any State agency or local authority or Voluntary Organisation as referred to in Parts I and II of the SECOND SCHEDULE (their "Committed Real Property Amount"), then the Contributing Congregations shall be entitled to make up the shortfall in cash and/or non-cash assets (comprising real property) as soon as practicable without prejudice to the continuing efficacy of the said Indemnity but not later than six months from the date such shortfall is ascertained and notified in writing by the State Party to the Contributing Congregations. The obligation of the Contributing Congregations to make up the said shortfall shall be a joint obligation, and any apportionments between the Contributing Congregations which become necessary as a consequence of their meeting that obligation shall be a matter for the Contributing Congregations *inter se* and not the State Party.
11. If it should transpire that the value of the Contributing Congregations' Real Property Amount is found to exceed the value of their Committed Real Property Amount, the State Party shall as soon as practicable thereafter but not later than six months after the excess is ascertained and at the option of the State Party either make a refund of the excess to such one or more of the Contributing Congregations as are nominated for the purpose by the Contributing Congregations jointly or elect to forego the transfer of a real property asset from any one or more of the Contributing Congregations equal to the value of the excess. Any apportionments between the Contributing Congregations which become necessary as a consequence of such election to forego a transfer shall be a matter for the Contributing Congregations *inter se* and not the State Party.
12. Where any non-cash asset comprising real property was transferred at any time since 11th May 1999 to the State or any State agency or local authority or Voluntary Organisation by a Contributing Congregation free of charge or below open market value, the State Party hereby agrees that the open market value of such asset or the difference between the consideration paid and the open market value as at the date of

transfer shall be taken into account when assessing the value of the Contributing Congregations' Real Property Amount. The open market value of such real property so transferred shall be ascertained in accordance with the provisions of Clause 9 above.

In the case of real property in this category transferred since 11th May 1999 to a Voluntary Organisation, the real property concerned must be subject to a restriction on transfer or alienation for a period of twenty-five years from the date of this Indemnity without the prior consent in writing of the Minister for Finance (the "Restriction"). The Restriction shall be disregarded in determining the value of such real property under Clause 9 hereof. In the event of any Contributing Congregation failing to procure the Restriction on any real property transferred to a Voluntary Organisation, the relevant Contributing Congregation shall be entitled to replace the relevant real property asset with an alternative real property asset (to which the Restriction shall apply) or cash of an equivalent value.

13. Any real property which it is proposed will be transferred to the State Party by a Contributing Congregation as contemplated by this Indemnity must be of good and marketable title (being of a title commensurate with prudent standards of current conveyancing practice in Ireland). Good and marketable title shall be established either by way of a certificate of title from the Contributing Congregation's solicitor or by way of an investigation of title by the Chief State Solicitor (at the Chief State Solicitor's option). In default of agreement between the State Party and/or Chief State Solicitor and the said Contributing Congregation as to the quality of the title to any real property, the matter may be referred for determination, on the application of either the State Party or the said Contributing Congregation, to the Conveyancing Committee of the Law Society of Ireland without prejudice to the entitlement of either party to have the matter determined by a Court.

In the event that good and marketable title cannot be established, however, the relevant Contributing Congregation shall have the right to replace the relevant real property asset with cash or other real property assets (at its sole discretion). The provisions of this Clause 13 shall apply to any proposed real property replacement.

14. In respect of any real property which it is proposed will be transferred to the State Party by a Contributing Congregation as contemplated by this Indemnity, each such party shall bear its own costs (including legal costs) in respect of the investigation of title, valuation and transfer of such property.
15. The Deed shall constitute a voluntary agreement and shall not be construed as a contribution, payment or compromise for the purposes of the Civil Liability Acts 1961-1964 or otherwise.
16. In the event of any dispute arising out of this Deed (save under Clauses 9 and 13 hereof), including without limitation as to whether any claim falls within the scope of this Indemnity, (a "Dispute"), the authorised representatives of each of the State Party and the relevant Contributing Congregation shall meet and endeavour to resolve the said Dispute in good faith and in an expeditious manner.

Failing such resolution within a period of 30 days from the commencement of the Dispute (or such period as may be agreed by the relevant parties), the Dispute shall be referred on the application of either party to an independent person to be appointed by agreement of the parties or failing that by the President for the time being of the Law Society of Ireland (the "Expert").

The Expert shall be entitled in rendering his decision to take into account only such evidence as the parties shall have put forward to such Expert. Any such decision shall be final and binding on the parties (save in the case of manifest error) and shall be given by the Expert acting as expert and not as arbitrator. The Expert shall give his decision in writing stating the reasons therefor.

The costs of the Expert shall be borne equally by the State Party and the relevant Contributing Congregation unless the Expert shall decide that one party has acted unreasonably, in which case he shall have discretion as to costs.

17. Any notice to a party under this Deed shall be in writing signed by or on behalf of the party giving it and shall, unless delivered to a party personally, be left at, or sent by prepaid recorded delivery to the address of the party as set out below or as otherwise notified in writing from time to time:-

The State Party

Address: Secretary General, Department of Education and Science,
Marlborough Street, Dublin 1.

The Contributing Congregations

In respect of each Contributing Congregation, the congregational superior/leader of that Contributing Congregation.

A notice shall be deemed to have been served at the time of delivery, if served personally, or 48 hours after posting, if served by prepaid recorded delivery.

Where a Contributing Congregation becomes aware of any claim which could give rise to a matter which lies within the scope of this Indemnity, such Contributing Congregation shall notify the State Party of such claim as soon as practicable after becoming so aware.

Where the State Party becomes aware of any claim which could give rise to a matter which lies within the scope of this Indemnity, the State Party shall notify the Contributing Congregation the subject of such claim as soon as practicable after becoming so aware (which awareness, for the avoidance of doubt, shall be deemed to constitute notice for the purposes of Clause 1 above).

IN WITNESS whereof the parties hereto have hereunto set their respective hands and seals the day and year first herein WRITTEN.

FIRST SCHEDULE

List of Contributing Congregations

Congregation of the Sisters of Mercy (South Central Province)
Congregation of the Sisters of Mercy (Northern Province)
Congregation of the Sisters of Mercy (Western Province)
Congregation of the Sisters of Mercy (Southern Province)
Daughters of Charity of St. Vincent de Paul
Congregation of Christian Brothers
Congregation of Our Lady of Charity of the Good Shepherd
Congregation of Presentation Brothers
Institute of Charity (Rosminians)
Congregation of Oblates of Mary Immaculate
Hospitaller Order of St. John of God
Religious Sisters of Charity
Congregation of the Sisters of Our Lady of Charity of Refuge
Congregation of the Sisters of St. Clare
Institute of St. Louis
Union of the Presentation Sisters
Institute of the Brothers of the Christian Schools (De La Salle)
Dominican Friars' Order of Preachers
Daughters of the Heart of Mary
Congregation of the Brothers of Charity
Congregation of the Sisters of Nazareth

Part I

Contributing Congregation	Property Value
Congregation of the Sisters of Mercy Daughters of Charity of St. Vincent de Paul Congregation of Christian Brothers Oblates of Mary Immaculate Religious Sisters of Charity Congregation of Our Lady of Charity of Refuge Congregation of the Sisters of St. Clare Union of the Presentation Sisters	Total: Euro 40,320,000

Real Property yet to be transferred

Contributing Congregation	Property Value
Congregation of the Sisters of Mercy Congregation of Christian Brothers Institute of Charity (Rosminians) Oblates of Mary Immaculate Hospitaller Order of St. John of God Religious Sisters of Charity Congregation of the Brothers of Charity Congregation of the Sisters of Nazareth	Total: Euro 36,540,000

SIGNED, SEALED & DELIVERED
by the said MINISTER FOR FINANCE
in the presence of:

John Laffey
Assistant Secretary

Ken Carroll
Assistant Secretary

SIGNED, SEALED & DELIVERED
by the said MINISTER FOR EDUCATION
AND SCIENCE
in the presence of:

Muirne Woods

John Donohue
Secretary General

SIGNED, SEALED & DELIVERED
by SA HELENA O'DONOGHUE
for and on behalf of the
CONGREGATION OF THE SISTERS OF MERCY
(SOUTH CENTRAL PROVINCE)
in the presence of:

Helena O'Donoghue

Nicholas G. Moore
Solicitor
A. Carr

SIGNED, SEALED & DELIVERED
by ANN MARIE Mc GUARD
for and on behalf of the
CONGREGATION OF THE SISTERS OF MERCY
(NORTHERN PROVINCE)
in the presence of:

Ann Marie Mc Guard

Nicholas G. Moore
Solicitor
A. Carr

SIGNED, SEALED & DELIVERED
by SR MARGARET CASEY
for and on behalf of the
CONGREGATION OF THE SISTERS OF MERCY
(WESTERN PROVINCE)
in the presence of:

SR Margaret Casey

Michael Ball
Special
Att. Gen.

SIGNED, SEALED & DELIVERED
by SR LORETTA CROWLEY
for and on behalf of the
CONGREGATION OF THE SISTERS OF MERCY
(SOUTHERN PROVINCE)
in the presence of:

SR Loretta Crowley

Michael Ball
Special
Att. Gen.

SIGNED, SEALED & DELIVERED
by SR Catherine Mulligan
for and on behalf of the
DAUGHTERS OF CHARITY OF
ST. VINCENT DE PAUL
in the presence of:

SR Catherine Mulligan

Michael Ball
Special
Att. Gen.

SIGNED, SEALED & DELIVERED
by BR MICHAEL REYNOLDS AND BR JOHN BURKE
for and on behalf of the
CONGREGATION OF CHRISTIAN BROTHERS
in the presence of:

BR Michael Reynolds
John Burke

Michael Ball
Special
Att. Gen.

SIGNED, SEALED & DELIVERED
by SR AILEEN D'ALTON
for and on behalf of the
CONGREGATION OF OUR LADY OF CHARITY
OF THE GOOD SHEPHERD
in the presence of:

Sr. Aileen D'Alton

Michael Egan
Solicitor
Bell Co.

SIGNED, SEALED & DELIVERED
by BR PATRICK FITZGIBSON
for and on behalf of the
CONGREGATION OF PRESENTATION BROTHERS
in the presence of:

Br. P. Fitzgibbon

Nicholas G. Moore
Solicitor
A. Cox

SIGNED, SEALED & DELIVERED
by MATT GAFFNEY
for and on behalf of the
INSTITUTE OF CHARITY (ROSMINIANS)
in the presence of:

Matt Gaffney

Nicholas G. Moore
Solicitor
Arthur Cox, Solicitor.

SIGNED, SEALED & DELIVERED
by THOMAS MURPHY
for and on behalf of the
CONGREGATION OF OBLATES OF
MARY IMMACULATE
in the presence of:

Thomas Murphy

David Lynch,
Solicitor,
Arthur Cox.

SIGNED, SEALED & DELIVERED
by *RONAN LEWYNN*
for and on behalf of the
HOSPITALLER ORDER OF
ST. JOHN OF GOD
in the presence of:

Joanne O'Leary
Solicitor
Arthur Cox

Ronan Lewynn

SIGNED, SEALED & DELIVERED
by *UNA O'NEILL*
for and on behalf of the
CONGREGATION OF THE
RELIGIOUS SISTERS OF CHARITY
in the presence of:

Nicholas G. Moore
Solicitor
Arthur Cox, Solicitors

Una O'Neill

SIGNED, SEALED & DELIVERED
by *ANN MARIE RYAN*
for and on behalf of the
CONGREGATION OF THE SISTERS OF
OUR LADY OF CHARITY OF RERUGE
in the presence of:

Mark Dine
Solicitor
Arthur Cox

Ann Marie Ryan

SIGNED, SEALED & DELIVERED
by *PATRICIA ROGERS*
for and on behalf of the
CONGREGATION OF THE
SISTERS OF ST. CLARE
in the presence of:

David Lynch
Solicitor
Arthur Cox

Patricia Rogers

SIGNED, SEALED & DELIVERED
by **NOREEN SHANKEE**
for and on behalf of the
INSTITUTE OF ST. LOUIS
in the presence of:

Noreen Shanley

Nicholas G. Moore
Solicitor
A. Cox

SIGNED, SEALED & DELIVERED
by **SR. PIUS Mc HUGH**
for and on behalf of the
UNION OF THE PRESENTATION SISTERS
in the presence of:

Sr. Pius McHugh

Mal Lou
Solicitor
A. Cox

SIGNED, SEALED & DELIVERED
by **BR. STEPHEN DEIGAN**
for and on behalf of the
**INSTITUTE OF THE BROTHERS
OF THE CHRISTIAN SCHOOLS
(DE LA SALLE)**
in the presence of:

Stephen Deigan

Mal O'Leigh
Solicitor
Arthur Cox

SIGNED, SEALED & DELIVERED
by **GEORGE MANNING**
for and on behalf of the
DOMINICAN FRIARS' ORDER OF PREACHERS
in the presence of:

Georad Manning of

David Lynch
Solicitor
Arthur Cox

**Letter from Office of the Attorney General to the Committee –
September, 2004**



Oifig an Ard-Aighne
Office of the Attorney General
Oifig an Ard-Stiúrthóra
Office of the Director General

Tithe an Rialtais, Sraith Mheiriceánach, Bóla Átha Cliath 2
Government Buildings, Upper Merion Street, Dublin 2
Telephone: 01 661 6944 Fax: 01 676 1506
email: linola@anagardag.gov.ie url: www.og.gov.ie

Our Ref: AD/07/001380

23 September 2004

Mr Derek Dignam,
Clerk to the Committee
Committee of Public Accounts,
Leinster House,
Dublin 2.

Dear Mr Dignam,

I refer you to your letter dated 26th July 2004.

(1) General

I understand from your letter that the Committee sees a contradiction between "the documentation" and correspondence sent by this Office to the Department of Education and Science. I have assumed that you are referring to the letter dated 31st January 2002 from the then Attorney General and a letter of 1st February 2002 from Mr. Liam O'Daly of this Office.

I wish to clarify this perceived contradiction. But in doing so this Office is not at liberty to disclose or indeed discuss any material or information covered by legal privilege. This letter therefore only addresses an issue of fact to which the Committee has adverted and that creates this perceived contradiction in the documentation now available to the Committee.

(2) Correspondence

The relevant correspondence from this Office issued immediately after the announcement on 30th January 2002 by the then Minister for Education and Science of an agreement in principle which he had reached with the religious congregations. This agreement in principle was reached at meetings of which this Office had no prior knowledge and did not attend.

The correspondence from this Office sought information as to the content of what was agreed at those meetings in order that this Office could give legal advice to the Department thereafter. It is the factual position that this Office had not then (i.e. at the date of the correspondence from this Office) been apprised of what had been discussed or agreed at the meetings which took place in the period from October 2001 to January 2002 between the then Minister and the religious orders. The correspondence is clear in this respect.

Up to October 2001, this Office had participated as legal advisers in negotiations conducted by the Department of Education with representatives of the religious orders. During this period negotiations had been conducted on the basis that "nothing was agreed until everything was agreed". The announcement of the agreement in principle by the then Minister necessitated a clarification by this Office of what had actually been agreed in principle.

Thereafter, upon being briefed on the content of the meetings and instructed by the Department, this Office provided legal advices up to the signing of the agreement. As the Committee is aware from the Comptroller and Auditor General's report, the then Attorney General gave advice in respect of the Memorandum for Government which sought a decision on 5th June 2002 permitting the signing of the agreement.

(3) Legal Privilege and Litigation

I refer you to my letter of 4th November 2003 in relation to your previous request for attendance by officers of this Office at the PAC to give evidence to the Committee in relation to this matter. Again, I respectfully refer you to Section 3(5) of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997. The intention of the Oireachtas is quite clear in this provision. A Committee does not have the power to direct this Office to produce any documentation or give any evidence except in matters relating to the "general administration of the Office of the Attorney General".

The value to the State of the confidentiality of legal advices and the independence of those giving that advice is recognised by this section. This is clearly the basis for this provision in the legislation. Moreover, as legal advice can enter the area of potential litigation it could be damaging to the State's interest for its lawyers to be required to give evidence before a committee. Such evidence could be of assistance to the State's opponents in actual or future

litigation. Hence, the limit placed on the circumstances in which I or any other officer in this Office can be required to give evidence. There is a clear recognition in the legislation of the value of preserving legal privilege and confidentiality in legal advices given by this Office and the potential for damaging the State's interests in litigation. Compelling an officer in the Attorney General's Office to give such evidence would clearly be inimical to the best interests of the State in litigation.

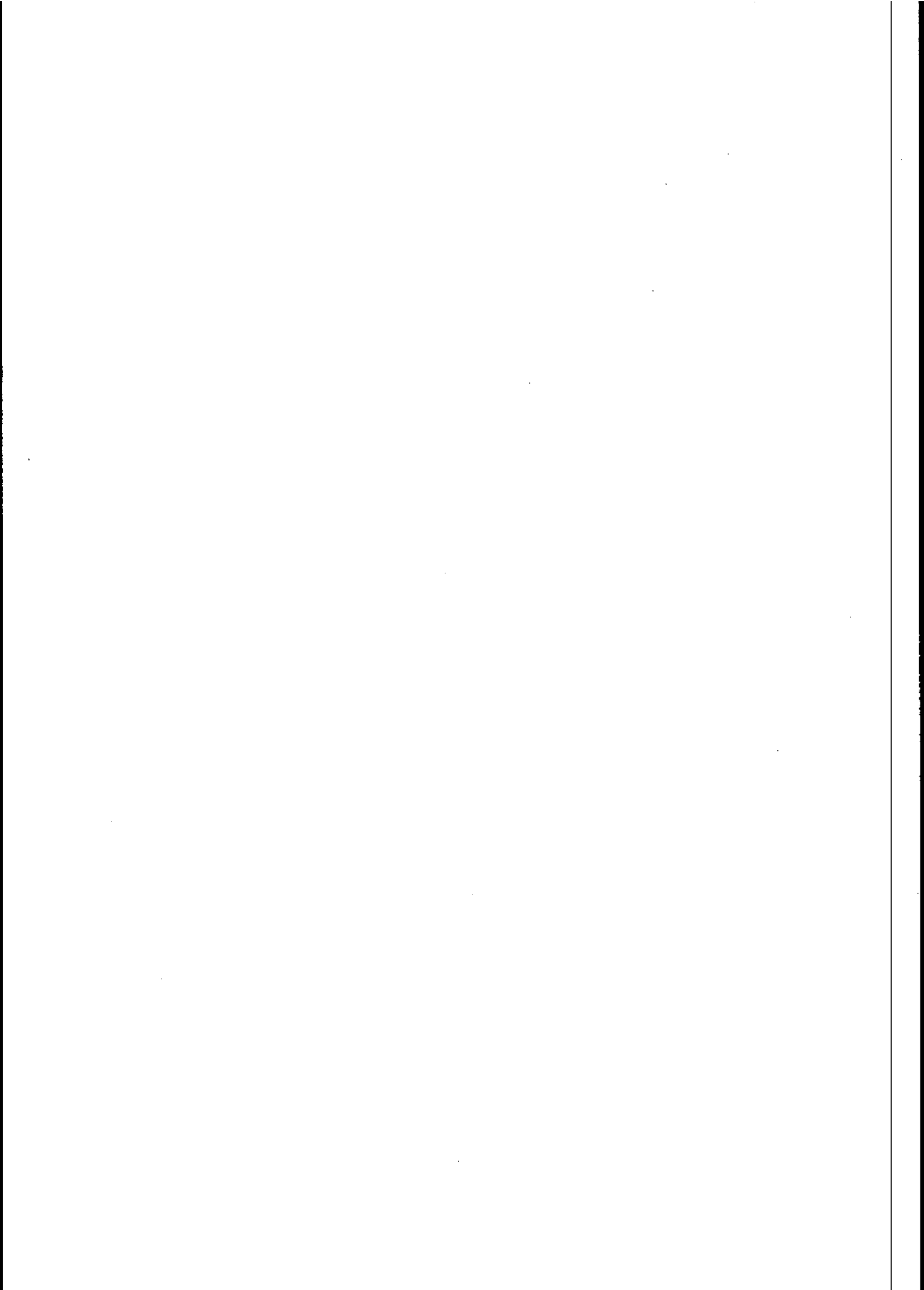
(4) Conclusion

The matters which the Committee wishes to address are matters which cannot be described as "general administration of the Office of the Attorney General". Accordingly, I must respectfully decline your request to provide a witness or documentation from this Office as to matters which do not pertain to the general administration of this Office, having regard to Section 3(5) of the 1997 Act. The Committee cannot circumvent Section 3(5) in the circumstances.

Yours sincerely,



Finola Flanagan
Director General



Letters between the Minister for Education and Science and the Attorney General



**AN tARD-AIGHNE
THE ATTORNEY GENERAL**

Tithe an Riaras, Siot Mhicléin Uacht. Baile Átha Cliath 2
Government Buildings, Upper Merion Street, Dublin 2
Telephone: 01 661 6944 Fax: 01 673 1898
email: info@ag.tg.ie url: www.ag.ie/ag

31 January 2002

Mr. Michael Woods Esq. T.D.
Minister for Education
Department of Education
Marlborough Street
Dublin 1

Re: Residential Institutions Redress

Dear Michael,

I refer to our conversation today in the Taoiseach's Office and wish to reiterate the need for this office to have sight of all documents, (including documents which evidence demands in the course of negotiations which were refused) which were used in the course of your recent negotiations with CORI in relation to the religious orders' contribution to the redress fund.

I would ask you to send me any note or memorandum or minute that you have of what was agreed.

I would also ask you to arrange for your Secretary General, John Dennehy, to make a detailed memorandum of his negotiations and agreement in principle for the purposes of this Office.

Also, I would be most anxious that any agreements, even agreements in principle, to amend the legislation in any way should be fully set out in the minute.

You will appreciate that this office has been effectively out of the loop since the last negotiations broke down; therefore Liam O'Daly, who is the official in this office and in the matter is operating in a knowledge vacuum at the moment.

Likewise, the terms upon which we can offer an indemnity are of crucial importance and it seems to me that any form of agreement embodying such an indemnity will have to set out *in extenso* our rights as indemnifier to handle completely and definitively any claims in respect of which the indemnity is sought to be operated.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Michael McDowell', written over a horizontal line.

Michael McDowell SC
Attorney General



AN tARD-AIGHNE
THE ATTORNEY GENERAL

Tithe an Rialtais Soidé Mhóirfrán Uacht. Baile Átha Cliath 2
Government Buildings, Upper Merrion Street, Dublin 2
Telephone: 01 661 3944 Fax: 01 676 1806
email: info@ag.nigov.ie url: www.nigov.ie/ag

Our Ref: B8023

12 March 2002

Mr. Michael Woods Esq. TD,
Minister for Education,
Department of Education,
Marlborough Street,
Dublin 1.

Re: Residential Institutions Redress

Dear Michael,

I refer you to my letter dated 31 January 2002 (copy herewith). Further I refer you to a letter dated 1 February 2002 from the Deputy Director General of this Office to Mr. Tom Boland, Director of Legal Services in your Department (copy herewith).

Unfortunately, no reply has issued from your Department in respect of either letters. I have been made aware that there is a meeting tomorrow morning with CORI and their legal advisers and the Department to discuss the oral agreement in principle concluded by yourself and the religious congregations in relation to the religious orders' contribution to the redress fund. It will not be possible for this Office either to participate in such discussions or give legal advice thereon if this Office does not have sight of all documents (including documents which evidence demands in the course of negotiations which were refused) which were used in the course of the negotiations with CORI leading to the agreement in principle. Further, it must be possible at this time, notwithstanding that there is no written memorandum of the oral agreement that a note or memorandum or minute could be prepared by your Secretary

General, John Dennehy, to set out the negotiations and agreement in principle for the purposes of this Office participating in any further discussions from a legal point of view.

You may remember our conversation of 31 January 2002 in the Taoiseach's Office and the need to provide such documentation to this Office so that this Office can participate in discussions with the legal advisers for the religious congregations in order to bring finality to the agreement in principle. I look forward to receiving this documentation and being of assistance to the Department in its endeavours to conclude this matter.

Yours sincerely,



Michael McDowell SC
Attorney General

13 April, 2002

Mr. Michael McDowell, SC,
Attorney General,
Government Buildings,
Dublin 2.

Dear Michael,

Re: Agreement with congregations on contribution to redress scheme

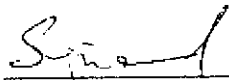
I understand that, in order to assist your Office in advising on legal matters, you have requested that I outline the policy approach which I propose should be adopted in the negotiations with the religious congregations on the detail of the indemnity which it is intended to put in place in return for their contribution to the child abuse redress scheme. As you will be aware from earlier correspondence between my Department and your Office, the issue of the indemnity was not discussed in detail in reaching the agreement in principle with the congregations. However, it was understood by both sides that an indemnity would form a key part of the agreement and that the details would be agreed at a later stage. It was stated, for the congregations, that a draft indemnity had been made available to officials, and while this had not been agreed to in discussions with them, or with me, it was clear that it was the preferred course for the congregations.

The approach to considering the terms of the indemnity should be to provide certainty for the congregations and finality as regards litigation, for a period of time which is reasonably proportionate to their contribution. To that end the indemnity should cover any liability with which the congregations may be fixed in litigation arising out of child abuse occurring up to the execution of the indemnity, provided the circumstances of the case are such as to bring it within the terms of the Residential Institutions Redress Act, 2002. Specifically, this would cover cases where the award of the Redress Board is refused by an applicant and court proceedings taken; cases in which an application is not made to the Board but the plaintiff proceeds to litigation directly and cases where the congregations alone are the Defendants in proceedings.

As regards the operative period of the indemnity, for the congregations, I understand, it is argued that the indemnity should be totally open-ended. This could mean that in 50, 60 or even 70 years time the indemnity would operate to protect the congregations against the cost of claims relating to abuse which occurred up to the signing of the indemnity. This is not acceptable since the State could well be taking on responsibilities well beyond what we can now envisage.

Two possible options present themselves. Firstly the operative period of the indemnity could be limited to cases initiated during the lifetime of the Redress Board, probably five years or so. It is arguable that the indemnity, contribution and the redress scheme are so interlinked that once the Board completes its work, the benefit of the indemnity should end. I believe that this is a position which should be explored with the congregations, but in my view it is unlikely to lead to agreement. Another option is find a balance between the risks for the State of an indefinite operative period and a reasonable level of certainty for the congregations, proportionate to their contribution. This is the approach which I consider should be adopted. In negotiations with the congregation the objective should be to keep the operative period of the indemnity as short as possible but in any case the period concerned should not be longer than ten years from the date the indemnity is executed. I appreciate that this is a somewhat arbitrary period but it is nevertheless a substantial period from the congregations viewpoint and provides a limited exposure on the part of the State.

Yours sincerely,



Dr. Michael Woods, T.D.,
Minister for Education and Science.

