

INSTITUTIONAL CHILD ABUSE BILL 2009

PRINCIPAL FEATURES

Introduction

Since the scandal of the systematic abuse of children in institutions to which they were sent and detained by the State, or in institutions which were meant to be regulated and inspected by the State, became a major public concern at the turn of the century, two major pieces of legislation have been passed.

The first was the Commission to Inquire into Child Abuse Act 2000. This Act established the Commission which reported earlier this month: the Ryan Report. The Commission's job was, in short, to inquire into the abuse of children in institutions; to determine the causes, nature, circumstances and extent of such abuse; and to determine the extent to which the institutions themselves, the systems of management, administration, operation, supervision, inspection and regulation and the manner in which management and oversight functions were performed by the persons in whom they were vested all contributed to the occurrence of abuse.

The other Act was the Residential Institutions Redress Act 2002. That Act set up a Redress Board, whose function was, through an informal and non-adversarial procedure, to make awards to former residents of institutions who had received injuries consistent with abuse.

Following from the Ryan Report, it is now clear that both of these Acts suffered from significant defects. Many of these defects have been highlighted by the victims and survivors of these institutions, who have now had to deal with the Acts.

The Bill accordingly attempts to rectify the defects in the two original Acts, so far as they continue to apply to the group of citizens whose lives continue to be affected by the defects in those two Acts.

It goes without saying that this Bill is not of itself by any means a full or satisfactory response. But it is a necessary part of any sufficient response.

This Bill is part, but only a part, of an attempt to acknowledge the failure of the State and of religious congregations to protect children from abuse, the pain and suffering they endured and that the Ryan Report vindicates their claims of abusive crimes committed against them by members of religious congregations and others while they were ostensibly in State care or under State supervision.

“Child”

In the Redress Act a child is defined as being a person under 18. While that is a good modern definition, it fails to take into account that, until 1985, a child did not achieve full age until the age of 21. Some persons have been refused redress under

the Act because, although they were underage under the law as it stood at the time they were in institutions, they would not be considered to be underage in modern law. The High Court has held this distinction to be unconstitutional. A substitute definition is required. The Bill therefore replaces the definition of “child” with a definition that a child is a person who, under the law as it applied at the relevant time, had not reached full age. In other words, if the law at the time said that a person did not arrive at full age until the age of 21, then that person will be deemed to be a child for the purposes of this Bill.

“Institution”

The Bill includes a replacement definition of “institution”, which is at present defined by reference to specified residential institutions listed in the Schedule to the Redress Act.

A number of residents of institutions have come forward to make applications to the Redress Board over the years, only to discover that their applications must fail, because the institution in which they were resident is not listed in the schedule.

As a matter of fact, the Redress Act contains a power on the part of the Minister for Education to extend the scheduled list. But that power was except to a minor extent, not exercised.

We simply do not know the basis on which the original list was drawn up. Nor do we know the basis on which the Minister’s power to add to the list – or to refuse to add – was exercised. What we do know is that the end result is unfair. The unfairness is that all these individuals were as children resident in institutions in respect of which some State or public body had a regulatory or oversight function. But some of those institutions were scheduled, while others were not. If a child was abused in a non-scheduled institution, then no redress is available.

The Bill therefore extends the definition of “institution” to include all places in respect of which the Minister had power under the Redress Act to make an order. These include: an industrial school; reformatory school; orphanage; children’s home; special school established for the purpose of providing education services to children with a physical or intellectual disability; or hospital providing medical or psychiatric services to people with a physical or mental disability or mental illness in which children were placed and resident.

The proviso is that such a place must, in order to qualify as an “institution”, be a place in respect of which a public body had a regulatory or inspection function.

Records of Redress Board and Child Abuse Commission

A number of records have been generated by both the Redress Board and the Commission. Many of these consist of the written or oral testimony of victims of child abuse.

Some records were made in the course of making specific allegations against named wrongdoers, while others were made in a confidential, non-adversarial setting, in

which survivors were invited simply to tell their personal stories so as to form part of an overall story.

Our understanding at present is that the Commission proposes to destroy all records (including all records of evidence given to its Confidential Committee) in its possession. This strikes us as an offence to the dignity of those who gave evidence and also as a wrong committed against their memory and against the rights of future generations to know about their country's past.

There may well be difficult and different considerations about different classes of records held by these two bodies. Some of them should perhaps be released to those immediately involved. Some should, because of the strict conditions of confidentiality under which survivors decided to tell their stories, not be released until after the deaths of all those involved.

But none of these records should be destroyed. To do that would be a further insult: an attempt to wipe the slate clean and to lose all record of a generation we had already done our best collectively to forget.

The Bill insists therefore that, when it comes to making an order for the dissolution of the Board or the Commission, the Minister must include in the order his or her proposals for the maintenance of these records and to provide access to them "as a consistent reminder of the damage done to children whose upbringing, care and welfare was consigned to the State".

The Bill does not specify the details of the scheme by which this must be done. (It may be, for example, that a certain class of record should only be released decade by decade, depending on the dates involved, while a different class of record should be released or made publicly available immediately but only in a redacted form.)

But an order of the Minister dealing with the matter must first be published in draft form and then submitted to, debated by and then approved by both Houses of the Oireachtas.

The Bill insists that no steps must be taken by either the Redress Board or the Child Abuse Commission in relation to the transfer, disposal or custody of their records until relevant draft orders have been prepared dealing with the issue and approved by both Houses of the Oireachtas.

Extension of time

The Bill, because it contains new definitions of "child" and "institution" extends the time within which new applicants can make applications to the Redress Board.

The Bill also expands upon the present power of the Redress Board to extend its present 3 year time limit for making applications. At present the Board can extend time "in exceptional circumstances", but that phrase is undefined.

The Bill says that the Redress Board should also consider whether an applicant, by reason of living outside the State, of being housebound or illiterate, or for other valid

reasons, was not aware of the establishment of the Board or of his or her entitlement to make an application to the Board.

The extended deadline for applications to the Board will be 3 years from the passing of this Bill into law.

Redress Board: obligation of secrecy

The Bill proposes the deletion of section 28 (6) of the Redress Act. That subsection prohibits an applicant to the Board from publishing any information concerning their application to or their award by the Redress Board, if it refers to any other person or institution by name or could reasonably lead to the identification of another person or an institution.

Any breach of the rule is a criminal offence, resulting in a maximum fine of €25,000 or 2 years in jail, or both.

As a result of that provision, applicants are effectively prohibited by law from recounting the stories of their childhood.

Court records

Some persons detained in reformatory schools under the Children Act 1908 were sent there as a result of criminal convictions imposed on them as children. Those crimes remain on their record.

The Bill proposes that those persons must be treated for all purposes in law as persons who have not committed or been charged with or prosecuted for or convicted of or sentenced for any offence. Their records will, in other words, be wiped clean.

Other children were sent and detained in institutions by court order following proceedings that did not involve a criminal charge or conviction. The Bill seeks to make plain that persons sent to institutions under detention orders must not be subject to any disqualification or any other restriction that is a consequence of a conviction for an offence and must be treated for all purposes in law as persons who have not committed or been charged with or prosecuted for or convicted of or sentenced for any offence.

Regardless of the manner in which children were detained by court order, the Bill proposes that every such person is entitled, where a question seeking information about his or her childhood is put, to treat the question as not relating to his or her stay in an institution. The person shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose his or her stay in a residential institution or any ancillary circumstances, in the answer to the question.

Furthermore, any obligation imposed on any person by any rule of law or under any agreement or arrangement to disclose any matters to any other person shall not

extend to requiring him or her to disclose a stay in an institution or any ancillary circumstances.

And a stay in an institution, or any failure to disclose a stay in an institution, shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him or her in any way in any occupation or employment.

The deed of indemnity

The Bill has two provisions relating to the deed of indemnity of the 5th June 2002 between the Ministers for Finance and for Education and Science, on behalf of the State, and 18 named Roman Catholic religious congregations, in respect of contributions by the congregations to redress and court compensation payments made by the State.

First, the Bill provides for a waiver of any claim to privilege, including legal professional privilege, in respect of records consisting of or relating to that agreement. The Bill disapplies the privileges belonging the Attorney General under the Freedom of Information Act 1997 in relation to records held by him. Those records will therefore become publicly available.

Second, the Bill requires that any future proposed agreement that seeks to amend or that is supplemental or ancillary to the original deed of indemnity, whether with any or all of those congregations cannot be made unless a draft of the agreement is first laid before both Houses of the Oireachtas and then approved by resolution of both Houses.

Religious congregations: audit of assets

The Bill confers power on the Government to appoint an auditor to examine the financial affairs of the 18 Roman Catholic religious congregations who entered into the deed of indemnity.

A Government auditor may carry out such examinations and investigations as the Government considers appropriate of the affairs and the books of accounts and deposits held or maintained by or on behalf of the congregations since the 5th June 2002 to date, including all dispositions of property.

The purpose of such an audit is to ascertain the true extent and nature of the real and personal property assets, however and wherever held, available to the congregations.

The section confers on the auditor so appointed all the powers available to the Comptroller and Auditor General under the Comptroller and Auditor General and Committees of the Houses of the Oireachtas (Special Provisions) Act 1998 – the Act passed to confer special powers on the Comptroller in order to deal with the DIRT Inquiry into the banks.