

# **INQUIRY INTO HISTORICAL INSTITUTIONAL ABUSE BILL**

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## **EXPLANATORY AND FINANCIAL MEMORANDUM**

### **INTRODUCTION**

1. This Explanatory and Financial Memorandum has been prepared by the Office of the First Minister and deputy First Minister (OFMDFM) in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.
2. The Memorandum needs to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require an explanation or comment, none is given.

### **BACKGROUND AND POLICY OBJECTIVES**

3. On 29 September 2011 the Executive announced there would be an investigation and inquiry into historical institutional abuse. The inquiry's terms of reference were set out in a written statement to the Assembly on 31 May 2012.
4. The inquiry is to make findings and recommendations on whether there were systemic failings by the state or institutions in their duties towards those children under 18 for whom they provided residential care between 1945 and 1995 (both years inclusive). An institution is any body, society or organisation with responsibility for the care, health or welfare of children in Northern Ireland, other than a school (but including a training school or borstal) which provided residential care accommodation and took decisions about and made provision for the day to day care of children.
5. The inquiry will also make findings and recommendations on an apology (by whom and the nature of the apology); an appropriate memorial or tribute to those who suffered abuse; and the requirement or desirability for redress to be provided by the institutions and/or the Executive to meet the particular needs of victims.

6. The inquiry's findings and recommendations will be considered by the Executive, which will decide the way forward.
7. The presiding member of the inquiry panel, who will chair and direct the inquiry, is a member of the judiciary. The inquiry will include a confidential "acknowledgement forum" in which victims and survivors can recount their experiences in institutions to members of the inquiry panel who have been particularly chosen to progress this element of the inquiry's work. As well as hearing and acknowledging people's experiences, the acknowledgement forum will result in an anonymised report outlining the experiences of victims and survivors.
8. The inquiry will also include an inquisitorial process by which the presiding member, supported by two dedicated inquiry panel members, will examine evidence and question witnesses under oath in order to make findings and recommendations. At the discretion of the presiding member and for the protection of witnesses and information, some sessions of this work are likely to be held in private.
9. While it is hoped that evidence requested by the inquiry would be provided voluntarily and that witnesses invited would come forward willingly, this may not always be the case. It is therefore necessary for the presiding member of the inquiry to have powers to compel witnesses and evidence, and for these to be supported by appropriate enforcement measures, offences, penalties and sanctions.
10. The work of the presiding member and the panel will be supported by legal, and research and investigation teams. Dedicated staff with appropriate skills will support victims and survivors during their involvement with the inquiry process.
11. The costs of the inquiry (including the cost of legal advice for certain witnesses) will come from within OFMDFM's budget. OFMDFM requires the power to pay these expenses and to ensure that the inquiry, as well as being conducted fairly, will be conducted with due regard to cost to OFMDFM, to witnesses (including Departments, institutions and individuals) and to others.

## **CONSULTATION**

12. A cross-departmental taskforce was established by OFMDFM in December 2010 to consider the needs of victims of historical institutional abuse. A formal consultation exercise was carried out in March 2011 on how best to meet the needs of victims and survivors. This included consultation events in Belfast and Londonderry/Derry.

13. Throughout, Ministers and officials have had ongoing engagement with victims and survivors, including on the establishment and terms of reference for this inquiry.
14. The inquiry terms of reference have been discussed in detail with victims and survivors, and agreed with the presiding member of the inquiry. The presiding member has been consulted on the contents of the Bill.

### **OPTIONS CONSIDERED**

15. OFMDFM considered three options – an amendment to the Inquiries Act 2005 by way of an Assembly Bill, to allow for its application to a Historical Institutional Inquiry; an Assembly Bill which sets out comprehensive provision for an Inquiry into Historical Institutional Abuse; and an Assembly Bill which provides the inquiry panel with powers only to compel witnesses and documentation.
16. The current Bill provides a robust framework and comprehensive provision for the inquiry, while allowing for scrutiny by the Assembly.

### **OVERVIEW**

17. The Bill consists of 23 clauses.

### **COMMENTARY ON CLAUSES**

18. A commentary on the provisions follows below. Comments are not given where the wording is self-explanatory.

#### **Clause 1: The inquiry**

This clause authorises the First Minister and deputy First Minister acting jointly to set up an inquiry into historical institutional abuse between 1945 and 1995, the terms of reference for which were announced to the Assembly on 31 May 2012 and which the Ministers acting jointly may amend.

#### **Clause 2: Appointment of members**

The expectation is that members will remain with the inquiry until their task is completed; nonetheless, vacancies may arise. This section therefore enables the Ministers acting jointly, after consulting the presiding member, to make further appointments, either to fill vacancies which arise or, if necessary, to increase the number of panel members.

### **Clause 3: Duration of appointment of members**

Should a panel member have to leave the panel before the end of the inquiry, it is likely that he/she will do so by resigning, and this is dealt with by *Subsection (2)*. *Subsection (3)* sets out circumstances in which the Ministers acting jointly may terminate the appointment.

### **Clause 4: Assessors**

Assessors may be appointed to provide the inquiry with expertise it needs to fulfil its terms of reference. They are not members of the inquiry panel, do not have powers under this Bill and are not responsible for the inquiry's findings or its report. An assessor may be appointed for all or part of the inquiry.

### **Clause 5: End of the inquiry**

*Subsection (1)* provides that the inquiry ends when its report has been submitted and its terms of reference fulfilled. However, there could arise circumstances (as yet unforeseen) in which it would be impossible for the inquiry to continue. Therefore, as a safeguard, *Subsection (2)* provides for the Ministers acting jointly, after consulting the presiding member, to close the inquiry.

### **Clause 6: Evidence and procedure**

*Subsection (3)* requires the presiding member of the inquiry to act fairly throughout the inquiry. This will include considering whether certain witnesses to the inquiry require legal advice or representation.

*Subsection (3)* also requires the presiding member to have regard to the need to avoid unnecessary cost in planning and conducting the proceedings. Every decision to hold a hearing, to call for evidence or to grant legal representation adds to the cost of the inquiry. This subsection strengthens the presiding member's ability to defend decisions in which the need to limit the cost of the inquiry is a factor.

### **Clause 7: Public access to inquiry proceedings and information**

*Section 7* requires the presiding member to take whatever steps he judges reasonable to ensure that the public (including reporters) can attend the inquiry or see and hear a transmission of it, and can access evidence available to it. Recording and broadcasting of inquiry proceedings is at the presiding member's discretion.

### **Clause 8: Restrictions on public access, etc.**

This section enables the presiding member, during the course of the inquiry, to issue restriction orders. The purpose of such orders is to restrict attendance at all or part of the inquiry, or to restrict disclosure of information in the context of the inquiry, or to

restrict disclosure by those who have received the information only by virtue of it being given to the inquiry.

*Subsection (4)* sets out a number of matters that must be taken into account when determining whether it is in the public interest to issue a restriction order.

*Subsection (4)(c)* covers cases in which the presiding member's powers of compulsion have been used to override confidentiality restrictions, so that information can be provided to the inquiry by enabling the presiding member to consider preventing the information from wider disclosure.

*Subsection (5)* enables the presiding member to vary restriction orders. This allows for situations in which it becomes apparent that more information can be made public than was originally envisaged, or that more people can be given access to information than allowed by the original order, as well as any situations in which it becomes apparent that further restrictions are necessary.

Orders restricting attendance will be relevant only during the course of the inquiry. However, orders restricting disclosure or publication of evidence, or preventing the identification of witnesses, may need to continue beyond the end of the inquiry. Unless the presiding member specifies in a restriction order when it will end, varies it, or revokes it under *Subsection (6)*, the order will remain in force indefinitely.

*Subsection (7)* is designed to ensure that restrictions do not create a barrier to disclosure of information from inquiry records under the Freedom of Information Act 2000.

In due course, after the end of the inquiry, circumstances may change in a way which requires an order to be varied or revoked, *Subsection (8)* will therefore give OFMDFM the power to revoke or vary a restriction order after the inquiry ends.

Restrictions under *Section 8* could prevent a person from passing on information that he/she learned through involvement in, or attendance at, the inquiry. Nothing in *Section 8* is intended to prevent witnesses from passing on evidence that they themselves have given to the inquiry, either during the inquiry or after it has ended.

### **Clause 9: Powers to require production of evidence**

It is expected that requests from the inquiry for people to appear before it as witnesses, or to provide it with evidence, will generally be complied with voluntarily. However, some people may be motivated to refuse. Others may be unable to provide the information required by the inquiry without a formal notice, either because there is a statutory bar on disclosure or because of concerns about breaking confidentiality agreements. *Subsections (1) and (2)* therefore give the presiding member powers to compel by notice witnesses and evidence.

*Subsection (4)* enables the presiding member to vary or revoke a notice, either because the person does not have the required evidence; or because the terms of the initial notice were unreasonable, for example, because the timescale set is unrealistically short, the cost unreasonably high or the volume of material unreasonably great; or when the evidence requested is unlikely to be of material assistance to the inquiry.

**Clause 10: Privileged information, etc.**

*Subsection (1)* ensures that witnesses before the inquiry have the same privileges, in relation to requests for information, as witnesses in civil proceedings. This means that a witness will be able to refuse to provide evidence if it is covered by legal professional privilege, or because it might incriminate them, or their spouse or civil partner.

**Clause 11: Expenses of witnesses, etc.**

This section enables OFMDFM to award reasonable amounts to cover witness costs. These include the legal costs of certain witnesses called to the inquiry. OFMDFM will set out broad conditions under which payment may be granted, and the presiding member will then advise in relation to the individual cases. It is anticipated that reasonable travelling expenses will be reimbursed for people who come forward to recount their experiences to the acknowledgment forum.

*Section 18(1)(c)* provides for OFMDFM to make rules in relation to *Section 11*.

**Clause 12: Payment of inquiry expenses by OFMDFM**

This section requires OFMDFM to meet the expenses of the inquiry and delineates the circumstances in which these will not be paid.

Under *Subsections (4) and (5)*, OFMDFM is not obliged to fund activities that it has notified to the presiding member as being outside the inquiry's terms of reference. It is anticipated that withdrawal of funding would occur only in the unlikely circumstances that the inquiry did not take the opportunity to resume operating within its terms of reference. OFMDFM would resume funding if satisfied the inquiry is again working within its terms of reference.

*Subsection (5)* requires OFMDFM to publish the total cost it has incurred under this section.

**Clause 13: Offences**

*Subsection (1)* makes non-compliance with a notice served under *Section 9* or a restriction order served under *Section 8* an offence.

*Subsections (2) and (3)* make it an offence to do anything which is intended to distort or otherwise alter evidence, or to conceal evidence. Both these subsections are drafted so

that it should not be possible for a person to commit an offence unwittingly (for example by destroying a document that he/she does not know to be relevant).

*Subsection (4)* ensures that it is not an offence to withhold privileged information under *Section 10*. This subsection also ensures that offences of altering or distorting information do not apply to actions authorised by the presiding member – for example, if material is redacted from documents in accordance with guidance issued by the inquiry.

Only the presiding member may institute proceedings for non-compliance with a notice issued under *Section 9* or a restriction order. This is because it is for the presiding member to decide whether to enforce notices issued under his power of compulsion, and how best to do this. There are two enforcement options: prosecution of an offence under *Section 9*, or enforcement of the notice by the High Court under *Section 14*.

Prosecutions for offences under *Subsections (2) or (3)* may be brought only by, or with the consent of, the Director of Public Prosecutions for Northern Ireland; this means that it is not possible for anyone with an interest in the outcome of the inquiry to bring a private prosecution against witnesses with whose evidence they disagree. It also means that prosecutions can be brought after the inquiry has finished.

#### **Clause 14: Enforcement by the High Court**

Where a person breaches a restriction order or a notice issued under *Section 9*, or threatens to do so, the presiding member may certify the matter to the High Court, which can then take steps to enforce the order.

#### **Clause 15: Immunity from suit**

This section provides immunity for the inquiry panel, the inquiry's legal advisers, assessors, staff and anyone else engaged to assist it from any civil action for anything done or said in the course of carrying out their duty to the inquiry. For the purposes of defamation law, witness statements and inquiry reports are covered by the same privilege as proceedings before a court.

#### **Clause 16: Time limit for judicial review**

The time limit of two weeks in this section runs from the date on which the applicant becomes aware of the decision, not from the date on which the decision was made.

#### **Clause 17: Power to make supplementary, etc. provision**

This section is self-explanatory.

**Clause 18: Rules**

This section enables OFMDFM to make rules subject to negative resolution in relation to the evidence and procedure under *Section 6*, the return or keeping of documents under *Section 9* and in particular to the award of witness expenses under *Section 16*.

**Clause 19: Application to the Crown**

This section binds the Crown so that the powers conferred by this Bill can be exercised in relation to Departments.

**Clause 20: Consequential amendments**

This section is self-explanatory.

**Clause 21: Interpretation**

This section is self-explanatory.

**Clause 22: Commencement, etc.**

This section is self-explanatory.

**Clause 23: Short title**

This section is self-explanatory.

**FINANCIAL EFFECTS OF THE BILL**

19. This Bill obliges OFMDFM to meet the costs of the inquiry acting within its terms of reference. This includes meeting or reimbursing reasonable witness expenses, including the reasonable legal expenses of certain witnesses. It enables OFMDFM to make rules by negative resolution to govern the payment of expenses to witnesses. It is estimated that the cost of the inquiry will be around £7.5-£9 million, depending on the numbers of victims and survivors who come forward and the extent of the issues to be examined in the inquisitorial sessions.
20. The Bill also requires the presiding member in making any decision as to the procedure or conduct of the inquiry, to have regard to the need to avoid any unnecessary costs to public funds, to witnesses or to others.

## **HUMAN RIGHTS ISSUES**

21. The provisions of the Bill are, in the Department's view, not incompatible with the provisions of the Human Rights Act 1998.

## **EQUALITY IMPACT ASSESSMENT**

22. A screening exercise on the proposals given effect in the Bill concluded that there would be no adverse impact on equality of opportunity. A full Equality Impact Assessment was therefore considered unnecessary.

## **SUMMARY OF THE REGULATORY IMPACT ASSESSMENT**

23. The Bill will not impact on business, the voluntary sector or the environment. It has not therefore been subject to a regulatory impact assessment.

## **LEGISLATIVE COMPETENCE**

24. The First Minister and deputy First Minister had made the following statement under section 9 of the Northern Ireland Act 1998:

*“In our view, the Inquiry into Historical Institutional Abuse Bill would be within the legislative competence of the Northern Ireland Assembly.”*