



Bill Digest

Retention of Records Bill 2019

No. 16 of 2019

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Abstract

The [Retention of Records Bill 2019](#) provides for the retention of records belonging to the Commission of Inquiry into Child Abuse, the Residential Institutions Redress Board and the Residential Institutions Redress Review Committee (the relevant bodies). The purpose of retention is to assign these records as Departmental records so they can be transferred to the National Archives for a sealing period of 75 years, after which time they will be made available for public inspection. This Digest provides an analysis of the 2019 Bill and its principal provisions as well as background detail on the relevant bodies, confidentiality and archiving.

22 March 2019

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Bill published: 26 February 2019

Second stage debate: 29 March 2019

This Digest may be cited as:

Oireachtas Library & Research Service, 2018, *Bill Digest: Retention of Records Bill 2019*.

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Glossary

Acronym	Explanation
CC	Confidential Committee
CICA	Commission to Inquire into Child Abuse (also referred to as the Ryan Commission)
DRI	Digital Repository of Ireland
ECtHR	European Court of Human Rights
FOI	Freedom of Information
RIRB	Residential Institutions Redress Board
RIRRC	Residential Institutions Redress Review Committee

Summary

The [Retention of Records Bill 2019](#) provides for the retention of records belonging to the Commission of Inquiry into Child Abuse, the Residential Institutions Redress Board and the Residential Institutions Redress Review Committee (collectively referred to as the relevant bodies). The purpose of retention is to assign these records as Departmental records¹ so they can be transferred to the National Archives for a sealing period of 75 years, after which time they will be made available for public inspection, subject to regulation to be made by the Minister at that time.

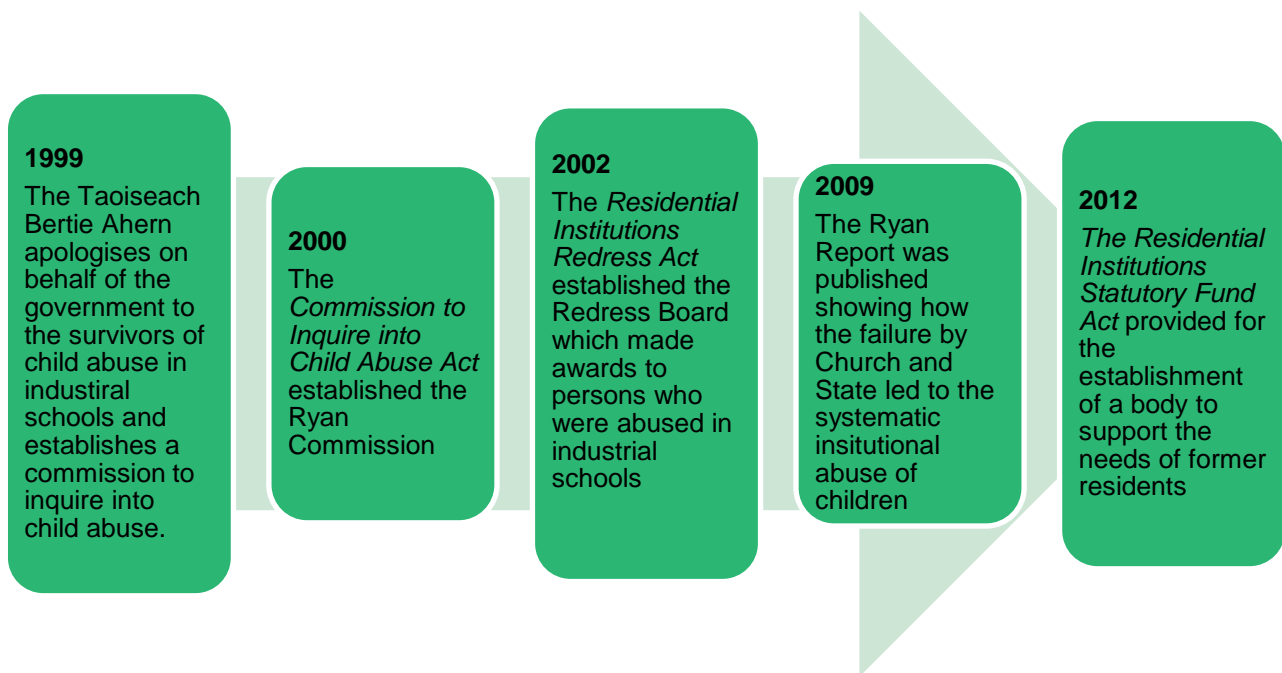
Under current legislation the relevant bodies are prohibited from disclosing any information provided to them, subject to regulations. Unauthorised disclosure currently constitutes a criminal offence. Current legislative provisions also provide for the relevant bodies' records to be destroyed when their work is complete. The proposed legislation aims to remove these restrictions. It also revokes the protections of anonymity given to those that attended the Confidential Committee to tell their story of institutional child abuse. It would also result in the making public of uncontested evidence, such as allegations of abuse against individuals who would not have had the opportunity to contest it. Finally, it places a restriction on any Freedom of Information requests being made on the documents by persons who gave evidence to the relevant bodies. This means that an individual cannot access his or her personal records until they are made publically available in 75 years time. The Bill also dis-applies the current protections dealing with confidential information under the Archives Act.

The Digest provides background detail on the relevant bodies and the type of information contained in their records. It also provides an examination of the ethics and privileges associated with confidentiality. Finally, it provides a comparative analysis of similar child abuse inquiries and how they managed their records.

Following on from the RTE documentary called "States of Fear"² the Taoiseach at the time, Bertie Ahern, apologised on behalf of the government to the survivors of child abuse in industrial schools. This led to a chain of events resulting in the establishment of the relevant bodies. See below for a timeline of events:

¹ [Section 2\(2\)](#) of the 1986 Act defines Departmental records as : Books, maps, plans, drawings, papers, files, photographs, films, microfilms and other micrographic records, sounds recordings, pictorial records, magnetic tapes, magnetic discs, optical or video discs, other machine-readable records, other documentary or processed material.

² The television documentary series by journalist Mary Raftery which detailed abuse suffered by children between the 1930s and 1970s in the state child care system of Ireland was broadcast on RTÉ One, 27 April 1999. For more detail see [RTE Archives](#).

Diagram 1: Timeline of events

Source: L&RS

Summary of the Bill's provisions

Table 1 below summarises the provisions of the [Retention of Records Bill 2019](#). Further discussion of key provisions of the Bill can be found in the Principal Provisions section of this Bill Digest.

Table 1: Provisions of the *Retention of Records Bill 2019*

Section	Title	Effect
Part 1	Preliminary and General	
1.	Interpretation	This section defines various terms used within the Act.
2.	Disposal of certain records	<p>This section allows for the disposal of records belonging to the relevant bodies which no longer need to be retained. Disposal is only authorised where a designated officer of the National Archives is satisfied that they do not require preservation.</p> <p>It also sets out that disposal of such records must comply with the conditions set out in the authorisation and ensure that the confidentiality of the records is not compromised.</p>
3.	Transfer of records	<p>Once the relevant body is dissolved, all its records will be deemed Departmental records and transferred to the National Archives for a 75 year “sealing period” before they can be accessed by the public.</p> <p>Access will only be permitted where regulations providing for such are granted. Where there are no regulations for a record it will remain sealed and withheld from public inspection.</p>
4.	Amendment of the <i>National Archives Act 1986</i>	Section 2 of the 1986 Act is to be amended to include the records of the relevant bodies under the list of archival material for the purposes of the National Archives.
5.	Application of <i>the National Archives Act 1986</i> to records	This section lists the conditions, as set out in the 1986 Act, which the current records do not have to comply with. These are conditions relating to the transfer, disposal and inspection of records.
6.	Regulations	<p>Twelve months prior to the 75 year period the Minister can make regulations granting access to the records. The regulations will not take effect until the 75 year period is reached.</p> <p>The Minister is required to have regard to the well-being and emotional state of the persons alive who may be affected by the disclosure of the records.</p> <p>Before the regulation is passed a draft copy must be laid before the Houses of the Oireachtas for approval.</p>

7.	Amendment of the <i>Commission to Inquire into Child Abuse Act 2000</i>	<p>This section removes the obligation on CICA to make arrangements for the custody and disposal of its documents.</p> <p>It also deletes the provision which allows for the refusal to grant a FOI access request regarding Confidential Committee records transferred to a public body after CICA is dissolved.</p>
8.	Amendment of the <i>Residential Institutions Redress Act 2002</i>	<p>This provision amends the 2002 Act by exempting it from the requirements of section 28(6). This provision places a prohibition on publishing information related to applications and awards made by the Redress Board and Review Committee. Therefore, records transferred under the Bill for the 75 year sealing period will be exempt from this prohibition.</p> <p>It also deletes the sections of the 2002 Act which give both the Redress Board and the Review Committee the power to dispose of documents concerning applications made to them.</p>
9.	Disapplication of <i>Freedom of Information Act 2014</i>	<p>This provision makes the 2014 Act inapplicable to the records transferred to the National Archives for the purposes of this Bill. This means that individuals cannot access their files.</p>
10.	Expenses	<p>Expenses incurred in the administration of this Bill will be paid out of monies of the Oireachtas.</p>
11.	Short title, commencement and collective citation	<p>It provides that the Act, or particular sections of the Act, will come into force by a commencement order of the Minister. The Minister may commence different sections of the Act at different times.</p> <p>This section provides that this Act may be cited as the <i>Retention of Records Act 2019</i>. It also provides for the collective citation of the <i>National Archives Acts 1986 and 2019</i>; the <i>Commission to Inquire into Child Abuse Acts 2009 to 2019</i> and the <i>Residential Institutions Redress Acts 2002 to 2019</i>.</p> <p>This is a standard provision.</p>

Background to the Bill's Introduction

On 10 March 2015, the then Minister for Education and Skills, Jan O'Sullivan, published the draft [General Scheme for a Retention of Records Bill 2015](#) which was approved by the Cabinet.³ The draft General Scheme proposals relate to the records of the Commission to Inquire into Child Abuse, the Residential Institutions Redress Board and the Residential Institutions Redress Review Committee. It proposes that, on the dissolution of the bodies, their records will be deposited with the National Archives where they will be preserved and sealed for a period of 75 years. Those records which the Director of the National Archives certifies do not warrant preservation will, following the consent of the Minister for Education and Skills, be destroyed. After the 75 year period the records will be available for public inspection, subject to such conditions as are determined by the Director and the regulations of the National Archives:⁴

*"In keeping with the Motion adopted by Dáil Éireann following the publication of the Ryan Report, these proposals will allow the documentation received by the Commission to Inquire into Child Abuse to be **preserved for posterity** and not destroyed. They will also preserve the documentation of the Residential Institutions Redress Board and Review Committee. These records are highly sensitive and contain the personal stories of victims of institutional child abuse. I believe that it is very important that these records are not destroyed both to ensure that future generations will understand what happened and out of respect to the victims who came forward. By sealing the records for 75 years and ensuring appropriate safeguards on the release of the records thereafter, we are in a position to preserve these sensitive records"*

Source: Jan O'Sullivan, press release, 10 March 2015

The proposed legislation is therefore a significant departure from the position provided for in existing legislation. Under [The Commission to Inquire into Child Abuse 2002](#):

- [Section 27](#) prohibits the disclosure of information provided to the confidential committee.⁵ Any unauthorised disclosure constitutes a criminal offence;
- [Section 28](#) provides that the Commission cannot be required to disclose information provided to it, except to the Gardaí or an appropriate person in order to prevent child abuse;
- [Section 5\(3\)](#) sets out that the Commission is only allowed to identify those accused of abuse in its report where they are satisfied that abuse occurred. The report is not allowed to identify anyone who was the subject of abuse or contain any findings in relation to particular instances of alleged child abuse.

³ Joe McHugh is the current Minister for Education and Skills. Jan O'Sullivan is currently the Labour party spokesperson on Housing, Planning and Local Government and on Business, Enterprise and Innovation.

⁴ Jan O'Sullivan (10 March 2015), "[Minister for Education and Skills publishes draft General Scheme of Retention of Records Bill](#)", Press Release.

⁵ The purpose and function of the confidential committee is discussed in greater detail below.

[Section 28](#) of the [Residential Institutions Redress Act 2002](#) also prohibits the disclosure of information provided to those bodies, other than to the Gardaí or to an appropriate person in relation to the prevention of child abuse. The proposed legislation aims to remove these restrictions so that the documents can be preserved for posterity and not destroyed. In the discussion of the General Scheme of the Bill at pre-legislative stage, Dermot Mulligan, of the Department of Education and Skills noted that the aim of the legislation was to strike a balance between those who gave evidence to the commission and redress bodies, against the need to ensure that *“as a society we never forget the harm that was done to children and the need to ensure that the protection of children is always to the forefront of our minds”*.⁶

The Oireachtas had previously considered the retention of the Commission’s records. The Government sponsored motion, which was adopted by Dáil Éireann on 12 June 2009, noted that the rationale for the legislation was *“the desirability that, in so far as possible, all of the documentation received by and in possession of the Commission to Inquire into Child Abuse is preserved for posterity and not destroyed”*.⁷

Pre-legislative scrutiny

In 2015 the Joint Committee on Education and Skills scrutinised the General Scheme. It made the following recommendations:⁸

1. Consideration should be given to how a legitimate expectation of confidentiality can be reconciled with opening the records for public inspection and the potential ‘chilling effect’ it could have on the work of future bodies;
2. Consideration should be given to how the right to a good name will be protected as these records are not legal findings of guilt but records of evidence;
3. Consideration should be given to how the privacy of those that did not want their personal testimonies disclosed can be protected, whether this be through anonymisation or contacting the survivors for their consent;
4. Further consideration should be given to the rationale for transferring the records for 75 years and whether there is an international precedent for this approach;
5. Finally, it should be considered whether the disclosure of records given in confidence could be considered a breach of good faith and could cause distress or danger to living persons.

On 28 February 2019, the then Minister for Education and Skills, Joe McHugh, announced the publication of the *Retention of Records Bill 2019*. The Minister noted that the Bill aims to strike a balance between the original confidentiality provisions around the work of the relevant bodies and the need to preserve records for future generations. The Minister commented that *“we want to ensure records of such huge historical importance are preserved while at the same time respecting the real life stories and deeply personal testimony of all the individuals who engaged with the*

⁶ Mulligan, *infra* note 7.

⁷ Dáil Éireann, [“Ryan Report on the Commission to Inquire into Child Abuse: Motion \(Resumed\)”](#) (12 June 2009) and

Mulligan, D., [“Joint Oireachtas Committee on Education and Social Protection General Scheme of Retention of Records Bill 2015: Discussion”](#) (15 April 2015).

⁸ Joint Committee on Education and Social Protection (2015) “General Scheme of the Retention of Records Bill 2015 Recommendations”.

redress bodies".⁹ The Minister also indicated that he will be bringing forward the necessary provision at Committee Stage to provide for an interim review of the operation of the legislation, 25 years after the legislation is commenced.¹⁰

Reaction to the Bill

In response to the proposed Bill some survivor groups have expressed anger at the intention to seal the documents for 75 years. Tom Cronin of the 'Irish Survivors of Institutional Abuse International' responded that he did not understand why the records would be sealed for so long and by doing so the Government might unwittingly frustrate any future legal action taken by the survivors.¹¹ Mr. Cronin was anxious that the records be made publically available sooner so that those affected will be able to access the information while they are still alive. Maeve Lewis of One in Four charity expressed a different view and emphasised that there needs to be a balance between those who regard the documents as a vital piece of history that should be made public and those who demanded that all documentation be destroyed on confidentiality grounds.¹² Caitriona Crowe, the former head of special projects at the National Archives, said that the decision of the Government to override the 1986 *National Archives Act* sets a dangerous and unnecessary precedent.¹³ She added that *"there is no reasonable argument for setting them aside in the case of these particular records, which will be extraordinary sources for scholars in the years ahead"*.¹⁴ She went on to say that *"the bill proposes to put the records beyond the scope of the Freedom of information Act, a very serious step which weakens citizens' rights to access vital information pertaining to themselves"*.¹⁵

In addition, it is important to consider that when many people gave evidence to the Ryan Commission they spoke of their experiences for the first time and this was done on the condition that their information remained confidential:¹⁶

A number of witnesses reported that they had never disclosed their experiences to anyone before, either to their parents, spouse, partner, their own children, their siblings or others.

⁹ Department of Education and Skills (28 February 2019), "[Minister McHugh announces publication of the Retention of Records Bill 2019 to transfer records relating to residential institutional child abuse to the National Archives](#)" Press Release.

¹⁰ *Ibid.*

¹¹ Riegal, R., "[Survivors outraged at plan to seal abuse reports for 75 years](#)" *Irish Independent* (23 March 2015).

¹² *Ibid.*

¹³ Caitriona Crowe (03 March 2019), "[Evil brought to light must not be hidden away again](#)" *Irish Examiner*.

¹⁴ Conall Ó Fátharta (01 March 2019), "[A dangerous precedent: 75-year seal put on child abuse testimony](#)" *Irish Examiner*.

¹⁵ *Ibid.*

¹⁶ Commission to Inquire into Child Abuse, "[Methodology](#)" (Stationary Office; Dublin, 2009) para. 2.23.

Policy Background and Context

The following section provides a synopsis of the three different institutions to which the Bill relates. It briefly sets out their background, functions, legislative basis and discussion of the information they collected while in existence. This serves to clarify the type and nature of sensitive information which the Bill intends to retain and eventually make publically accessible.

Commission to Inquire into Child Abuse

The Commission to Inquire into Child Abuse (the Commission) was established under the [Commission to Inquire into Child Abuse Act 2000](#). The main functions of the Commission were to report on the abuse of children in various institutions and to provide, to those who were resident in the institutions during the relevant period, an opportunity to describe the abuse they suffered. The Commission's final report consisted of five volumes:

Box 1: Overview of Commission to Inquire into Child Abuse Report

Volumes I and II:	The Investigation Committee Report on Institutions.
Volume III:	The Confidential Committee Report.
Volume IV:	The Department of Education; Finance; Society and the Schools; Development of childcare policy in Ireland since 1970; report on witnesses attending for interview; Conclusion and recommendations.
Volume V:	The ISPCC, Expert Reports, Commission Personnel and legislation.

Source: Commission to Inquire into Child Abuse, [Report-Commission to Inquire into Child Abuse Executive Summary](#) (Stationary Office; Dublin, 2009) p.1.

The Commission comprised of two committees: the investigation committee and the confidential committee. The **investigation committee** examined the manner in which children were placed in the institutions, the abuse they suffered while resident there as well as the rules and regulations regarding corporal punishment issued by the Department of Education throughout the relevant years. The investigation committee examined the period spanning from 1936 to 2000. However, the majority of complaints received were during the period of 1936¹⁷ and 1970¹⁸. Over 20 industrial and reformatory institutions were covered by the investigation committee.

¹⁷ The peak of large scale institutionalisation is considered to have commenced around the time of the [Cussen Report](#). Commission of Inquiry into the Reformatory and Industrial School, *The Cussen Report (Commission of Inquiry into the Reformatory and Industrial School System, 1934-1936)* (Stationary Office; Dublin, 1936).

The **confidential committee** listened to the **uncontested evidence** of those who were resident in the institutions and reported being abused as children. Abuse was reported to the Committee in relation to 216 schools and residential settings including industrial and reformatory schools, children's homes, hospitals, national and secondary schools, day and residential institutions including laundries and hostels. The committee heard evidence from 1,090 men and women. The reports of these witnesses related to the period between 1914 and 2000, of which 23 refer to abuse experienced either before 1930 or after 1990.¹⁹ Of the 1,090 witnesses interviewed, 77% were aged over 50 at the time of interview and 3% were under 30 years of age (this would be approximately 33 people).²⁰ Between the two committees the commission received evidence from in excess of 1,500 witnesses.²¹ The Report outlines that the most cited reason for individuals attending the confidential committee was the opportunity to tell their story and have accounts of their abuse officially recorded. The report goes on to say:²²

“Most witnesses experienced the hope that a formal record of their experiences would contribute to a greater understanding of the circumstances in which such abuse occurs and would assist in the future protection of children.”

However, it is important to remember a desire to have their experiences formally recorded does not equate to consent for having their confidentiality waived.

The **confidential committee report** contains accounts on physical, sexual and emotional abuse, as well as neglect by religious and lay adults. In excess of 800 individuals were identified as carrying out physical and/or sexual abuse on the witnesses interviewed during their time in the institutions.²³ In relation to physical abuse the accounts describe beatings, floggings, kicking, being physically assaulted, scalded, burned and held under water. The section on sexual abuse details both acute contact and non-contact sexual abuse including vaginal and anal rape, molestation and voyeurism over extended periods of time. The reports of neglect detail conditions where there was inadequate heating, food, clothing and personal hygiene facilities as well as leaving injuries and medical conditions untreated. Finally, in terms of emotional abuse, the report illustrates how the witnesses experienced a loss of identity, deprivation of family contact, humiliation, criticism, exposure to fear and threat of harm. Witnesses were incorrectly told their parents were dead and were given false information about family members. The report also depicts how the abuse suffered by the witnesses impacted on them in later life. A proportion of individuals spoke of how they experienced trouble in relationships and loss of contact with siblings and extended family.

¹⁸ Large scale institutionalisation is considered to have ended around the time of the [Kennedy Report](#). Committee on Reformatory and Industrial Schools, *The Kennedy Report* (Stationary Office; Dublin, 1970).

¹⁹ Commission to Inquire into Child Abuse, [Report-Commission to Inquire into Child Abuse Executive Summary](#) (Stationary Office; Dublin, 2009) p.12.

²⁰ *Ibid.*

²¹ Joint Oireachtas Committee on Education and Social Protection, *General Scheme of Retention of Records Bill 2015: Discussion* (15 April 2015). See contribution by Mr Dermot Mulligan at <https://www.kildarestreet.com/committees/?id=2015-04-15a.5>

²² *Ibid.*

²³ Commission to Inquire into Child Abuse, *supra* note 19.

Approximately half of the witnesses reported having attended counselling services at some stage. While there were some positive reports there were also descriptions of poverty, isolation, alcoholism, mental illness, sleep disturbance and self-harm. Some people experienced suicidal behaviour, depression, alcohol and substance abuse and eating disorders which required treatment such as psychiatric admission, medication and counselling.²⁴

Prohibition on disclosure of information

Under [section 27 of the Commission to Inquire into Child Abuse Act 2000](#) a prohibition was placed on the disclosure of information provided to the Confidential Committee. [Section 16](#) of the Act provides anonymity to those that furnished their story to the Confidential Committee. It placed an obligation on the Committee not to identify witnesses or produce information which may lead to the identification of persons that suffered abuse in the institutions examined. The same provision also precluded the report from naming the institutions in which the abuse was alleged to have occurred. Breach of the assurance of confidentiality is a criminal offence under section 27(6). The provisions of the Act also prevent persons about whom allegations of abuse were made to challenge those statements.²⁵ The Committee was even prevented from disclosing documents or evidence it received during the course of its work to the Investigation Committee.²⁶ Only a limited number of exceptions to the prohibition on disclosure of information were provided for in section 27:

Box 2: Prohibition on disclosure of information

Section 27 Commission to Inquire into Child Abuse Act 2000

(2) A person referred to in subsection (1) (“the person”) shall disclose information so referred to—

- (a) for the purpose of the performance of the functions of the person under this Act,
- (b) to the legal representatives of the parties to any proceedings referred to in subsection (3)
- (c) to a member of the Garda Síochána if the person is acting in good faith and reasonably believes that such disclosure is necessary in order to prevent the continuance of an act or omission constituting a serious offence, and
- (d) to an appropriate person (within the meaning of the Protections for Persons Reporting Child Abuse Act, 1998) if the person is acting in good faith and reasonably believes that such disclosure is necessary to prevent, reduce or remove a substantial risk to life or to prevent the continuance of abuse of a child.

(3) Information referred to in subsection (1) shall, if so ordered by a court in connection with proceedings before it for the judicial review of a decision of the Confidential Committee, be disclosed by a person referred to in that subsection to the court if, and to the extent only, that the court is satisfied that such disclosure is necessary in the interests of justice; and any disclosure

²⁴ *Ibid*, p.14.

²⁵ Commission to Inquire into Child Abuse, [Report-Commission to Inquire into Child Abuse Volume Three Methodology](#) (Stationary Office; Dublin, 2009) para 2.04.

²⁶ [Section 27\(1\)](#).

pursuant to this subsection shall not identify, or contain information that could lead to the identification of, persons the subject of abuse in childhood.

The Committee's methodology **outlined that witnesses were informed, prior to their hearings, that it would be entirely confidential and that no documents or material from their hearing would be transferred for use in any other forum.**²⁷ This undertaking of confidentiality by the Committee was converted into rules and protocols which applied to all Commissioners as well as all members of the secretarial, administrative, executive and managerial staff of the Committee. In addition confidentiality applied to technology experts, researchers and any other person in contact with the work of the Committee. This duty of confidentiality was understood to extend beyond the termination of their employment contracts and the dissolution of the Commission itself.²⁸

When asked by the Committee why participants came forward to tell their story the most frequently cited reasons were to have the abuse they experienced officially recorded and a desire to tell their story. The protection of children and the prevention of future abuse were other reasons regularly given. Witnesses hoped that by placing their experiences on public record there would be recognition that greater vigilance and protection would be provided to children in out-of-home care.²⁹

Residential Institutions Redress Board

The Redress Board was set up under the [Residential Institutions Redress Act 2002](#) to make awards to persons who, as children, were abused while resident in industrial schools, reformatories and other institutions subject to state regulation or inspection. Once the relevant persons made applications it was the function of the Redress Board to determine whether the applicant was entitled to an award, and, if so, to make an award in accordance with the Act, having regard to the circumstances of the applicant. According to the Board's most recent annual report, a total of 16,650 applications were received. Of that figure:

- 12,016 awards were made following settlement;
- 2,994 awards were made following hearings;
- 571 awards were made following Review;
- 1,069 applications were withdrawn, refused or resulted in no award.³⁰

In order to be eligible for redress, applicants needed to satisfactorily establish four matters in order to qualify for an award:

- (i) Identity;
- (ii) Residence during childhood in an institution listed in the schedule to the Act;
- (iii) That he/she was abused while resident in the institution and suffered injury; and,
- (iv) That the injury was consistent with any abuse that is alleged to have occurred while so resident.

²⁷ Commission to Inquire into Child Abuse, [Report-Commission to Inquire into Child Abuse Volume Three Methodology](#) (Stationary Office; Dublin, 2009) para 2.05.

²⁸ *Ibid*, para. 2.06.

²⁹ *Ibid*, para 2.44.

³⁰ Residential Institutions Redress Board, [Annual Report 2016](#) pp.11-12.

In order to be entitled to redress, applicants were required to establish they suffered child abuse within the definition provided by the Act.³¹ The various **examples of abuse** that were likely to be awarded compensation were set out as:

Table 2: Abuse suffered in the institutions that received compensation

TYPE OF ABUSE	EXAMPLES
Sexual abuse	<ul style="list-style-type: none"> ○ Violent anal or vaginal penetration; ○ Victim made to masturbate member of staff or perform oral-genital acts; ○ Sexual kissing; indecent touching of private parts over clothing.
Physical abuse	<ul style="list-style-type: none"> ○ Serious injuries requiring hospitalisation; profound deafness caused by blows to ears; ○ Severe beating causing e.g. a fractured limb or leaving permanent scars; ○ Corporal punishment more severe than was legally sanctioned at the time, but leaving no permanent physical signs. Gross over-work involving inadequate rest, recreation and sleep.
Emotional abuse	<ul style="list-style-type: none"> ○ Depersonalisation e.g. through family ties being severed without justification or through deprivation of affection. ○ General climate of fear and apprehension. ○ Stigmatisation by staff, e.g. through repeated racist remarks or hurtful references to parents.
Neglect	<ul style="list-style-type: none"> ○ Severe malnutrition; failure to protect child against abusive placements; inadequate guarding against dangerous equipment in work-place. ○ Failure to provide legally prescribed minimum of school instruction; lack of appropriate vocational training and training in life skills. ○ Inadequate clothing, bedding or heating.

Source: The Residential Institutions Redress Board, [A Guide to the Redress Scheme Under the Residential Institutions Redress Act, 2002 as amended by the Commission to Inquire into Child Abuse \(Amendment\) Act, 2005](#) (Residential Institutions Redress Board; Dublin, 2005), para. 12.

Written evidence was required to establish the applicant was exposed to abuse. Under section 6 of the [application form](#) a description of the abuse was required to be detailed and the names of their abusers identified.

³¹ Child abuse is defined under [section 1 of the Residential Institutions Redress Act 2002](#) as:

- (a) the wilful, reckless or negligent infliction of physical injury on, or failure to prevent such injury to, the child;
- (b) the use of the child by a person for sexual arousal or sexual gratification of that person or another person;
- (c) failure to care for the child which results in serious impairment of the physical or mental health or development of the child or serious adverse effects on his or her behaviour or welfare; or,
- (d) any other act or omission towards the child which results in serious impairment of the physical or mental health or development of the child or serious adverse effects on his or her behaviour or welfare.

With regard to establishing injury the Redress Board requires that the symptoms of the injury are consistent with the abuse suffered while in the institution. A list is provided by the Board of the **type of injuries** which the applicant must satisfactorily establish.³²

Table 3: Symptoms of injuries required to establish abuse was suffered

Nature of Injury	Examples
<u>Physical or Psychiatric Illness</u> 1. Physical injury 2. Physical illness 3. Psychiatric illness	1. Loss of sight or hearing. Loss of or damage to teeth. Permanent scar(s)/disfigurement. 2. Sexually transmitted diseases. Respiratory diseases. Skin diseases. 3. Severe depression with suicide attempts. Personality disorder. Post-traumatic stress disorder.
<u>Psychological Injury</u> 1. Emotional disorder 2. Cognitive impairment/ educational retardation 3. Psychosocial maladjustment 4. Anti-social behaviour	1. Inability to show affection or trust Low self-esteem; persistent feelings of shame or guilt. Recurrent nightmares or flashbacks. 2. Literacy level well below capability. Impoverished thought processes. Limited vocabulary leading to communication difficulties. 3. Marital difficulties involving sexual dysfunction. Low frustration tolerance. Shyness and withdrawal from mixing with people. 4. Substance abuse. Compulsive stealing. Physical aggressiveness.
<u>Loss of Opportunity</u>	1. Having to refuse employment opportunity because of illiteracy 2. Need to concoct a false identity and to live a lie with workmates. 3. Unable to pursue certain occupations, e.g. police, because of "record".

Source: The Residential Institutions Redress Board, [A Guide to the Redress Scheme Under the Residential Institutions Redress Act, 2002 as amended by the Commission to Inquire into Child Abuse \(Amendment\) Act, 2005](#) (Residential Institutions Redress Board; Dublin, 2005), para. 14.

Injuries

Section 7 of the application form required the applicant to detail in writing the injuries resulting from the abuse. This description was to be supported by medical reports related to such injuries. The purpose of the medical report was to assist the Board in its task of determining the amount of redress payable, based on the effects of the abuse suffered while resident in an institution as a child. The report also needed to contain a description of the immediate and long-term effects of such abuse. In particular, descriptions of the following were desired:

- ❖ The nature, severity, treatment and prognosis of any psychiatric disorder;
- ❖ The nature, severity, treatment and prognosis of any personality disorder;
- ❖ The presence of any medical condition;
- ❖ The psychosocial consequences of the abuse;
- ❖ The general adaptation and global level of functioning of the applicant; and,
- ❖ The loss of opportunity resulting from any of the above, or from lack of appropriate education.³³

Considerations

[Section 13 of the Redress Act](#) sets out the various considerations the Redress Board needs to undertake in order to determine if an award should be made. [Section 5\(3\)](#) provides that **the Redress Board does not have to address any issues of fault or negligence arising out of applications made under the Act and does not have to make any findings of fact relating to that fault or negligence.** A person who committed abuse could therefore only be identified where they have been the subject of a criminal conviction. Under [section 26\(4\)](#) the Commission report could not contain any information that would reveal the identity of the person abused in the institutions, the institution itself or the person referred to in the application as the abuser.³⁴ [Section 13\(11\)](#) specifies that an award made by the Board does not constitute a finding of fact relating to a fault or negligence on the part of the alleged abuser named in the application. The total awards made by 31st December 2016 amounted to €969.9 million. The average value of awards made was €62,250; the largest award made was €300,500.³⁵

Disclosure

[Section 28 of the Redress Act 2002](#) placed a prohibition on the disclosure of information relating to the scheme. Disclosure by any member of the Board or the applicant themselves would have been considered an offence. Only in limited circumstances was disclosure permitted, for example, circumstances where the information was required by a body with statutory powers to undertake an inquiry or where a disclosure was made to the Gardaí, in good faith, in order to prevent serious harm or further abuse to children.

³³ The Residential Institutions Redress Board, [A Guide to the Redress Scheme Under the Residential Institutions Redress Act, 2002 as amended by the Commission to Inquire into Child Abuse \(Amendment\) Act, 2005](#) (Residential Institutions Redress Board; Dublin, 2005), paras. 37-38.

³⁴ Joint Oireachtas Committee on Education and Social Protection, *General Scheme of Retention of Records Bill 2015: Discussion* (15 April 2015). See [contribution by Mr Dermot Mulligan](#).

³⁵ Redress Board Annual Report, note 30, p.12.

Residential Institutions Review Committee

The Review Committee was established under [Section 14](#) of the 2002 Act. Its functions are set out under [Section 15](#) which states that its purpose is to review decisions and awards made by the Redress Board by having regard to any evidence or reports submitted to that Board. For example, if a person was not satisfied with an award made by the Redress Board, following a hearing, they were entitled to apply to the Review Committee for a review of the Board's award. The Review Committee could either uphold the Board's award, or, increase or decrease the amount of the award.

Records

[Section 28\(3\)](#) provides that documents provided to the Board or Review Committee, or documents prepared by them, shall not constitute departmental records within the meaning of the [Section 2\(2\) National Archives Act 1986](#).³⁶ This means they are not a category of document which must be transferred to and accepted for preservation by the National Archives. Under [section 28\(7\) and 28\(8\)](#) the Board and Review Committee, respectively, are empowered to determine how the applications made to them are disposed of. Therefore the retention of records which identify individual survivors and alleged abusers and are held by the Commission of Investigation, the Redress Board or the Review Committee would constitute a breach of the 2000 Act under the current legal set-up.

³⁶ For the purposes of this Act, “**Departmental records**” means any of the following—

- books,
- maps,
- plans,
- drawings,
- papers,
- files,
- photographs,
- films,
- microfilms and other micrographic records,
- sound recordings,
- pictorial records,
- magnetic tapes,
- magnetic discs,
- optical or video discs,
- other machine-readable records,
- other documentary or processed material,

made or received, and held in the course of its business, by a Department of State within the meaning of section 1 (2) or any body which is a committee, commission or tribunal of enquiry appointed from time to time by the Government, a member of the Government or the Attorney General, and includes copies of any such records duly made, but does not include—

- (i) grants, deeds or other instruments of title relating to property for the time being vested in the State, and
- (ii) any part of the permanent collection of a library, museum or gallery.

The Ethics of Confidentiality

This section examines comparative scenarios where the retention and disclosure of sensitive information is also an issue. Firstly it looks at confidentiality in terms of medical records, instances where breach of confidentiality is necessary and the precautions medical practitioners are required to take in order to maintain confidence. It also examines situations where the patient is deceased and the consequent factors that must be considered by the practitioner when deciding if they should disclose without having received their prior consent. Finally, it considers confidentiality obligations in the academic sphere.

Medical ethics and confidentiality

For comparative purposes it is helpful to examine the medical code of practice in relation to confidentiality and sharing of patient information. Patient confidentiality is protected by professional codes such as the [Medical Council's guide on professional conduct and ethics](#)³⁷ as well as laws such as the right to privacy under the Irish Constitution and the European Convention for the Protection of Fundamental Rights and Freedoms. The right to confidentiality is not absolute however and scenarios where the professional may qualify the principle hinge on concerns about protecting the well-being of the patient or protecting others from harm. Where disclosure is considered, the medical practitioner must be clear about the purpose of the disclosure; whether or not the patient consents to it and if there is any other legal basis for disclosing the information.³⁸ A practitioner must also be satisfied that:

- a) Anonymisation has been considered and is definitely not an option;
- b) The minimum information is being disclosed to the minimum amount of people;
- c) The person to whom the information is disclosed knows that it is confidential and they have their own duty of confidentiality.³⁹

Patient consent is considered an integral part of the disclosure process, even where it is to the patient's relatives or close friends. The Medical Council instruct that anonymisation and coding should be used whenever possible, before disclosing the records to anyone outside of the health care team.⁴⁰ Where a disclosure is required by law or is in the public interest the patient should be informed of the intended disclosure. A disclosure in the public interest is where the disclosure may protect the patient, other identifiable people or the community more widely. Before such a disclosure is made, the practitioner should be satisfied that any harm experienced by the patient is outweighed by the benefits that are likely to arise.

Relevance to the current Bill

Taking these standards into consideration, the retention and disclosure of Commission of Inquiry into Child Abuse records could raise some questions about the appropriateness of retention. Comparing rationales for disclosure, in the medical sphere it is to protect the well-being and safety

³⁷ 8th edition (2016).

³⁸ Medical Council, "[Guide to Professional Conduct and Ethics for Registered Medical Practitioners](#)" (May 2016) pp.25-26.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

of both the patient and others; in the press release announcing the publication of the General Scheme of the Bill these highly sensitive records are retained and later made public for the purpose of posterity and to ensure that future generations will understand what happened.

Anonymisation of the data, the minimum information needed and consent of the individuals who gave information are not standards provided for in the Bill.

Public Interest Value in Confidentiality

Hogan puts forward the idea that, the [Freedom of Information Act 1997](#) allows some access to medical records held by public bodies; there is no overarching legislation which effectively outlines the parameters of a doctor's duty of confidentiality.⁴¹ She outlines, however, that one of the major principles underlying this duty is that it is beneficial to the individual and the wider public when medical records remain confidential. Due to the sensitive and personal nature of information shared with a doctor, there is a genuine risk that sharing of such information with colleagues, spouses or relatives could deter them from divulging important information, or from seeking medical treatment. This could have implications for the wider public and undermine trust placed in the medical profession. Confidentiality is therefore important to protect public health.⁴²

In the 2008 European Court of Human Rights (ECtHR) case [I v Finland](#), the applicant instituted civil proceedings against the District Health Authority.⁴³ She worked as a nurse in a public hospital and was also receiving treatment there for HIV. She made a claim for pecuniary⁴⁴ and non-pecuniary damages for the alleged failure to keep her patient records confidential. It was recognised by the court that the need for sufficient guarantees is particularly important when processing highly intimate and sensitive data. Commentary points out that only relevant personnel involved in the treatment of the patient should have access to the patient's records and the State is obliged to adopt practical and effective measures designed to secure respect for private life in this regard.⁴⁵

In England the [Hidden Lives Revealed Project](#) provided an archival resource of information on children's homes from Victorian and Edwardian times. The archive provides material not previously accessible by the public such as material about the poor and disadvantaged children cared for by the Waifs and Strays' Society. Even though some of these cases are from over 100 years ago the Children's Society (successor organisation of the Waifs and Stray's Society) still owes them a duty of care and so their names have been fully anonymised to prevent the children's identification. Addresses and the names of people involved in the children's lives have also been anonymised in accordance with ethical obligations.

⁴¹ Hogan, H., "[The Duty of Confidentiality in Irish Medical Law: Individualistic and Communitarian Rationales](#)" (2017) 20(1) *Trinity College Law Review* pp.53-63.

⁴² *Ibid.*

⁴³ (2009) 48 E.H.R.R. 31

⁴⁴ Pecuniary damages are damages that can be estimated in and compensated by money; not merely the loss of money or saleable property or rights, but all such loss, deprivation, or injury as can be made the subject of calculation and of recompense in money. Source [The Law Dictionary](#).

⁴⁵ Sheikh, A. "[Confidentiality and Privacy of Patient Information and Records: A Need for Vigilance in Accessing, Storing and Discussing Patient Information](#)" (2010) 16(1) *Medico-legal Journal of Ireland* pp.2-6.

Relevance to the current Bill

When considering this with regards to the Commission of Inquiry records, the step taken to ensure the privacy of individuals is protected is the 75 year guarantee and the expectation that they will be deceased by the time the records are made public. While this will most likely be the case, they may have extended family that will still be alive. There is potential that the future disclosure of such information could deter others from disclosing information to other Commissions of Investigation or even undermine the trust placed in them in the future.

Where the patient is deceased

According to the Medical Council, a patient's information remains confidential even after death. Where it is unclear whether the patient consented, the practitioner is directed to consider how the disclosure might affect the deceased's family or carers, the effect it may have on the deceased's reputation and the purpose of the disclosure.⁴⁶

In 2009 [S.I. no. 387 of 2009](#) (the 2009 Regulations) updated section 28(6) of the 1997 FOI Act in relation to access to posthumous information. It sets out the three categories of persons who can make an access request in relation to a deceased person's medical records:

- 1) Personal representatives acting in the course of administration of the deceased's estate;
- 2) A person on whom a particular function has been conferred by law, either as a personal representative or a trustee; access will only be granted to such individuals insofar as they are performing the function specified;
- 3) Spouses and next of kin.

[Guidance Notes](#)⁴⁷ drawn up by the Minister for Finance,⁴⁸ pursuant to the 2009 regulations, provide further clarity on how the matter of public interest should be dealt with. It provides a list of considerations which the decision maker should have regard to:

- Confidentiality as set out in section 28(1) of the Act;
- Whether the deceased would have consented to the release of the records while they were alive;
- Is there any reference in their will indicating consent to the release of records;
- Would the release damage the good name of the deceased person;
- The nature of the relationship between the requester and the deceased person, particularly prior to death;
- The nature of the records to be released;
- Can the requester source the information they seek through another source?

Relevance to the current Bill

In terms of retention and disclosure of documents in the current context, it must also be considered that some of the individuals who told their story to the Confidential Committee might now be

⁴⁶ *Ibid*, p.27.

⁴⁷ Minister for Finance, "[Guidance Note on: Access to records by parents/guardians, Access to records relating to deceased persons under section 28\(6\) of the Freedom of Information Act 1997](#)" (2009).

⁴⁸ The Minister for Finance in 2009 was Brian Lenihan.

deceased. Reflecting on the obligations outlined above, consideration should therefore be given to how the disclosure would affect the family of the deceased in 75 years time and the effect it would have on the reputation and good name of the individual involved. Also, because the documents contain such sensitive information, scrutiny of other forms or methods for ensuring this chapter of history is not forgotten could be examined.

Academic research and ethical considerations

The European Commission's Information Society Technologies (IST) Programme established and funded the [RESPECT project](#) which set up professional and ethical guidelines for the conduct of socio-economic research.^{49, 50} The project recognises that socio-economic research deals with human beings and therefore raises a range of ethical issues about the researcher's responsibility to:

- Society;
- Funders and employers;
- Colleagues; and,
- **The human subjects of the research.**

The project drew on existing professional and ethical codes together with current legal requirements in the EU to compile a voluntary [code of practice](#) for conducting socio-economic research in Europe. The code is based on three main principles:

1. Upholding scientific standards;
2. Compliance with the law, and:
3. Avoidance of social and personal harm.

The purpose of the code is to protect researchers from unprofessional or unethical demands.⁵¹ One of the overriding aims of research should be that its results benefit society by improving human knowledge and understanding. As a result, researchers should aim to minimise social harm to groups and individuals and should consider the consequences of participation in the research for all subjects and stakeholders.⁵² No participants should be worse off as a result of their involvement in the research. One of the considerations outlined in the code is to ensure that research participants are protected from undue intrusions, distress, indignity, physical discomfort, personal embarrassment or psychological harm.⁵³

The [Digital Repository of Ireland](#) (DRI)⁵⁴ subscribes to the RESPECT code of practice and recognises that under exceptional circumstances, professional research ethics can come into

⁴⁹ The IST is one of seven sectors of the European Union's Fifth Framework Program for Research and Technological Development for 1998-2002. It also continued under the Sixth Framework program. The IST program features four key actions, each focused on technologies, issues and objectives of strategic importance to Europe. The objective is to ensure that all European citizens and companies benefit from the opportunities of the emerging Information Society.

⁵⁰ See [RESPECT website](#) for further details.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ The [Digital Repository of Ireland](#) is a national digital repository for Ireland's humanities, social sciences, and cultural heritage data.

conflict with the law, especially where the law may compel disclosure.⁵⁵ The DRI therefore promotes compliance with the Law of the Land position but advocates for an ethics first approach for how research is conducted. In the case of demands or requests for disclosure of restricted data the DRI will seek to negotiate with the requesting body to agree an acceptable course of action, with particular consideration for protecting confidentiality of participants. If negotiation is not possible the DRI will consider applying to the appropriate court to protect the confidentiality of the data and the participants. If confidential, non-anonymised information must be released, the DRI will endeavour, as far as possible, to inform any person to whom a commitment of confidentiality has been made, prior to the data being released. Unless precluded from doing so by the court, the DRI will make the legal threat to confidentiality public.⁵⁶ The DRI will also provide advocacy to archival staff who adopt an ‘ethics first approach’ to consent, that is, they will support archivists who refuse to enable access to data which would be in contravention of a depositor’s wishes.⁵⁷ According to the DRI depositors must ensure that data generated through research with human subjects has been processed with due consideration for core ethical principles. The DRI will only ingest data generated through research with human subjects where the participants have provided informed consent for sharing and re-use.⁵⁸ The DRI’s data policy requires that the Organisational Manager and Depositors must not deposit un-anonymised data collected under consents which promise to protect confidentiality without recognising legal limitations on such promises of confidentiality.⁵⁹ Therefore, depositors should be aware, from the outset, that there is a risk of legally mandated disclosure attached to depositing data, even where that data was deposited as a restricted data set. Depositors should therefore ensure that the data is anonymised and any personal or organisational identifiers are removed or disguised before depositing the data.

⁵⁵ Digital Repository of Ireland, “[Restricted Data Policy](#)” (May 2015).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

Historical Research, Archiving and Data Protection

The Irish National Archives

Under [section 8](#) of the [National Archives Act 1986](#) Departmental records⁶⁰ more than 30 years old can be transferred to the National Archives and made available for public inspection. [Section 13](#) provides that the Taoiseach, at the request of a public service organisation, may declare the records or documents of that organisation to be Departmental records for the purpose of the Act. All Departmental records must be preserved unless their destruction is authorised in writing by the Director of the National Archives. The National Archives provides a range of services to government departments, in particular the transfer of records eligible for public release under the 30 year rule. Other functions include:

Box 3: Functions of the National Archives of Ireland

- Preservation, restoration, arrangement and description of archives;
- Preparation of guides, lists, indexes and other finding aids to archives;
- Making archives available for public inspection;
- Making and providing copies of archives;
- Publication of archives, finding aids and other material relating to archives;
- Provision of educational services relating to archives.

The Department must identify which records warrant long-term preservation by the National Archives. The 1986 Act does not define what “warrants preservation”, but according to a [guidance note](#) issued by the National Archives, appraisal is based on professional assessment of the records by their staff.⁶¹ Such assessments include interviews with relevant staff to obtain details of why the records were created and the functions they support. Generally, the 1986 Act only applies to records over 30 years old but records which are less than 30 may be accepted for transfer at the discretion of the Director of the National Archives, in accordance with [section 4](#) of the Act. In addition, records with data protection concerns should be withheld by the Department of State following the appropriate certification under [section 8\(4\)](#) of the 1986 Act.

Data protection concerns are outlined under section 8(4) as scenarios where the release of the records would:

- Be contrary to public interest;
- Constitute a breach of statutory duty or a breach of confidence on the grounds that the documents contain information provided in confidence;

⁶⁰ [Section 2\(2\)](#) of the 1986 Act defines Departmental records as : Books, maps, plans, drawings, papers, files, photographs, films, microfilms and other micrographic records, sounds recordings, pictorial records, magnetic tapes, magnetic discs, optical or video discs, other machine-readable records, other documentary or processed material.

⁶¹ National Archives, “Guidance note on the compatibility of the National Archives Act, 1986 and the General Data Protection Regulation (GDPR)” (May 2018). Please note the link to this Guidance Note was not available at time of publication.

- Cause distress or danger to living persons on the grounds that they contain information, or they could lead to an action for damages for defamation.

This Bill dis-applies section 8(4) of the 1986 Act.

The National Archives advise that access to departmental files should be restricted and no further processing should take place. An access policy should be developed by the Department of State which includes stipulations that access can only be given to individuals named in the file until data protection no longer applies.⁶² The National Archives recommend that the access policy should contain a mechanism for any approaches by other interested parties such as academic historians. It should also stipulate any requirements for anonymisation/pseudonymisation of personal data to be published.⁶³

National Archives (Amendment) Act 2018

The [National Archives \(Amendment\) Act 2018](#) was enacted on 14 July 2018 but has not yet been commenced. **The purpose of the Act is to amend the 1986 Act so as to provide for the phased transfer of Departmental records after 20 years.**⁶⁴ This will replace the current 30 year rule under [section 8\(1\)](#). The main driving force behind this amendment was to bring Ireland in line with the UK where records are released after 20 years (the UK reduced the period from 30 years to 20 in 2013);⁶⁵ this means that historians or other members of the public interested in Anglo-Irish affairs have had to rely on British records to understand the events of that time. In a press release at the time of the Bill's publication in August 2017, the then Minister for Culture, Heritage and the Gaeltacht, Heather Humphreys,⁶⁶ noted that the legislation would:⁶⁷

“provide the flexibility for Government Departments to commence the transfer of records to the National Archives for public release after 20 years rather than the current 30 years...The United Kingdom began to take this step in 2013, and it was a concern of mine that, if our Government did not take action, an incomplete view of our shared history could develop over the coming years... This legislation is a positive step which will allow for the early release of records which are of historical importance or public interest”.

Some concerns were expressed about the potential for possible ‘chilling effects’. Professor Diarmaid Ferriter, a former member of the National Archives Advisory Council,⁶⁸ commented in the Irish Times in October 2015,⁶⁹ “...is a 20-year rule wise for either state? Surely individuals involved in government will be more reluctant about the views they express or what they document if the

⁶² *Ibid*, p.10.

⁶³ *Ibid*.

⁶⁴ [National Archives \(Amendment\) Bill Explanatory Memorandum](#).

⁶⁵ <http://www.nationalarchives.gov.uk/about/our-role/plans-policies-performance-and-projects/our-projects/20-year-rule/>

⁶⁶ Minister Humphreys is currently Minister for Business, Enterprise and Innovation; the current Minister for Culture, Heritage and the Gaeltacht is Josepha Madigan.

⁶⁷ Department of Culture, Heritage and the Gaeltacht, “[Minister Humphreys announces publication of the National Archives \(Amendment\) Bill 2017](#)” (08 August 2017).

⁶⁸ Currently Professor of Modern Irish History at UCD:
<http://www.ucd.ie/research/people/history/professordiarmaidferriter/>

⁶⁹ Ferriter, D. “[Case for releasing State papers after 20 years is not clear cut](#)” *Irish Times* (24 October 2015).

material will be released when they are likely to be alive or, indeed, still in public life or even in government". As a result, it was feared that the legislation would lead to less documentation being produced or recorded by government.

Archives and the General Data Protection Regulation

The [National Archives Act 1986](#) and [Regulations 1988](#)⁷⁰ are the principal statutes applicable to the archival management of records of Departments of State, including their disposal or retention as archives. The General Data Protection Regulation (GDPR) is a regulation in EU data protection law that came into force in May 2018. Departments of State and the National Archives must consider the requirements of the GDPR when processing personal data. [Article 89](#) of the GDPR allows for the processing of personal data for archiving purposes that are in the public interest, provided the data was obtained using one of the legal principles set out in [Article 6](#).⁷¹ Article 89(1) requires that safeguards are put in place when processing for archival purposes to ensure the rights and freedoms of the data subject. *"Those safeguards shall ensure that technical and organisational measures are in place ... in order to ensure respect for the principle of data minimisation."* Such measures could include pseudonymisation provided they achieve the appropriate level of protection. Consequently, Departmental records that have been identified as warranting permanent preservation as archives must be retained by Departments of State and transferred to the National Archives after 30 years, including records that contain personal information. Departmental records which are identified as warranting permanent preservation as archives must not undergo any further processing other than their preparation for transfer to the National Archives. Any attempt by the Department of State to use this information for any purpose other than the original purpose for which the information was obtained will be in breach of [Article 5](#) of GDPR.

⁷⁰ S.I. no 385/1988

⁷¹ Article 6 sets out the obligations to be attained in order to ensure the lawfulness of data processing.

The Right to a Good Name

[Section 11](#) of the [Commission of Investigation Act 2004](#) provides that legal representatives of other parties will be present only if the commission is satisfied that their presence is necessary in the interests of the investigation and of fair procedures. Cross-examination by or on behalf of other parties will take place only where the commission agrees. These provisions represent a departure from current practices in the context of tribunals. In support of the section the Minister emphasised that because the proceedings will generally be held in private, the risk that a person's good name or reputation will be tarnished is greatly reduced and therefore the same safeguards (for example, having a legal team present, and being able to cross-examine, as set down in the case of in [Re Haughey](#))⁷², are not necessary. According to the then Minister for Justice and Equality, Michael McDowell:⁷³

“There is no opportunity for anyone involved to challenge the veracity of the statements made. The hearings were conducted in an informal manner, in an informal setting and were recorded on an audio system, with the witness’ consent...Witnesses were not legally represented at these hearings.”

Information given to the Confidential Committee and Residential Institutions Redress Board about alleged abusers was often uncontested. The evidence given to the relevant bodies were personal testimonies rather than legal findings. According to the Commission:⁷⁴

“Private hearings also have the advantage of avoiding circumstances in which claims are publicly made by one party, but remain unanswered for a considerable period until the person affected comes to give his or her evidence. There is a real risk in those circumstances that unfounded or inaccurate claims can appear to go unchallenged and the good name and reputation of certain persons can be gravely and unjustly damaged.”

A submission made by the Congregation of Our Lady of Charity of the Good Shepherd (the Good Shepherd Sisters) to the Joint Committee on Education and Social Protection highlighted concerns that relevant bodies were not a court and did not have the same standard of proof or transparency of process.⁷⁵ Fears were expressed that “*where a Congregation, or indeed an Applicant, did not counter an allegation made in relation to them that this would be taken as in some way proving or corroborating the allegation made*”.⁷⁶

⁷² [1971] I.R. 217.

⁷³ Dáil Éireann debates, “[Commissions of Investigation Bill 2003: Second Stage](#)” (04 March 2004).

⁷⁴ The Commission of Investigation into Child Abuse, [About the Commission](#).

⁷⁵ Sisters of Our Lady of Charity, “Submission to the Joint Oireachtas Committee on Education and Social Policy Re: General Scheme of the Retention of Records Bill 2015” (31 March 2015).

⁷⁶ *Ibid.*

Pre-legislative Scrutiny

In a press release issued on the 10th March 2015, the then Minister for Education and Skills, Ms Jan O’Sullivan, noted that a draft [General Scheme](#) for a Retention of Records Bill was published and approved by Cabinet. The main intentions set out in the scheme were:

- To preserve the records of the Commission to Inquire into Child Abuse, the Residential Institutions Redress Board and the Residential Institutions Redress Review Committee;
- To retain these records in the National Archives;
- To seal these records for 75 years so that they can be later accessed by the public, subject to conditions set out by the Director of the National Archives.

The general scheme was referred to the Joint Committee on Education and Social Protection for pre-legislative scrutiny (PLS) by the Minister on the 9 March 2015. The Committee met on 15 April 2015 to discuss the scheme. Participation at the meeting by individuals from the Department of Education and Skills was facilitated.

The Committee received seven submissions on the general scheme from individuals, religious orders and survivor groups. In their submission, the Sisters of Our Lady of Charity outlined how their engagement with the RIRB was based on the guarantee of prohibitions on disclosure and publication contained in section 28 of the [Residential Redress Act 2002](#). They also provided documents on such things as reports on the home life of a child and psychiatric reports on the understanding that they would not become a document of public record.⁷⁷ Given that the records contain detail of difficult familial abuse, parental neglect, psychiatric and learning difficulties as well as drug and alcohol abuse about former residents and their infant children who would now be in their 20s and 30s; there is a chance that a number of these subjects could still be alive in 75 years. The Order also points out that the RIRB was not a court and did not apply the same standard of proof or transparency to their process. They expressed concern that the records would be interpreted as corroborating an allegation of abuse against people who did not have the opportunity to challenge their veracity. **They also point out that the information, which was provided for one purpose, is now going to be used for a different purpose but without seeking the consent of the individuals the files relate to.** The further processing of the data, beyond the purposes for which it was provided, could contravene section 2(1)(c)(i) and(ii):

Box 5: Data Protection

2.—(1) A data controller shall, as respects personal data kept by him, comply with the following provisions...

(c) the data—

(i) shall be kept only for one or more specified and lawful purposes,

(ii) shall not be used or disclosed in any manner incompatible with that purpose or those purposes.

⁷⁷ Sisters of Our Lady of Charity, submission provided to the Joint Committee on Education and Social Protection in relation to the General Scheme of the Retention of Records Bill 2015, (31 March 2015).

During the Committee discussion a number of arguments were raised in favour of the legislation and against it:

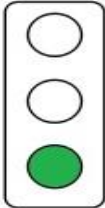
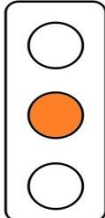
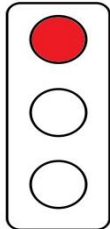
Table 4: Oireachtas Committee of Education and Social Protection considerations of the General Scheme

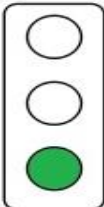
Arguments against retention and disclosure	Arguments in favour of retention and disclosure
Some people will not have discussed what happened to them in the institutions with extended family. Knowing that this information will come out after their death could cause pain and distress to them now.	If nothing is done to preserve the records they will be destroyed and the more the records are anonymised the greater risk there is that society will forget what happened.
If it was decided to opt for consent from participants who were still alive, it would constitute a significant operation to seek the signature of over 16,000 individuals who made applications to the Redress Board	The records should be preserved and not anonymised as they are a valuable resource which shines a light on an area of Irish life that was unpleasant.
Consideration should be given to the individuals' next generation who will be alive in 75 years time and may be upset by the documents being made public as many communities in Ireland are small and based on townlands and parishes making people easily identifiable.	
Allegations of abuse may be read as statements of legal fact rather than statements of testimony	
Testimonies were made in good faith and on the understanding that their stories would be kept confidential	
Some of those that gave testimonies are now deceased and passed away in the belief that their stories would remain confidential and so there is no way of knowing if they would agree to the new proposition	

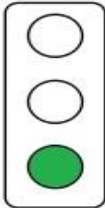
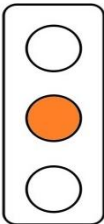
Source: Prepared by the L&RS, drawn from Joint Oireachtas Committee on Education and Social Protection, "[General Scheme of Retention of Records Bill 2015: Discussion](#)" (15 April 2015)

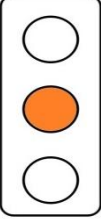
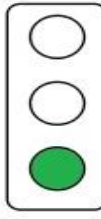
The Committee adopted four recommendations based on its scrutiny of the General Scheme and issued the recommendations, set out below in Table 5, to the Minister in May 2015.

Table 5: The impact of PLS-Department’s response to the Joint Committee’s recommendations

L&RS categorisation of the Department’s response to the key issues identified by the Committee	‘Traffic light dashboard’ used in Table 2 to highlight the impact of the Committee’s PLS report
<p>Key issue has had an impact on the drafting of the Bill.</p>	
<p>The Bill may be described as adopting an approach consistent with the key issue <u>or</u> the impact of the key issue on the drafting of the Bill is unclear.</p>	
<p>Key issue has not had an impact on the drafting of the Bill.</p>	

No.	Recommendation as per Joint Committee on Education and Social Protection Report		Response from Department of Education and Skills on whether addressed (either in whole or in part) in the Bill or elsewhere
<p>1.</p>	<p>Legitimate expectation of confidentiality</p> <p>The Committee recommended that consideration be given to:</p> <ul style="list-style-type: none"> • The extent to which a legitimate expectation of confidentiality can be reconciled with opening the records for public inspection, albeit in 75-years’ time; • The potential for a ‘chill effect’ on the work of future bodies seeking disclosures from the public and offering guarantees of confidentiality. 		<p>The expectation of confidentiality and the potential for a “chill effect” has been carefully considered.</p> <p>The provision in the general scheme for sealing the records for 75 years has been modified to provide that the records be sealed for at least seventy five years and that the release of records will only be on foot of regulations which may be made no earlier than the 74th year after commencement of the legislation. If regulations are not made, the records remain sealed.</p> <p>These strengthened provisions further</p>

			address the matter of expectations of confidentiality and the potential for a “chill effect”.
2.	<p>Protecting the right to a good name</p> <p>The Committee recommended that consideration be given to:</p> <ul style="list-style-type: none"> • Clarifying (now and in the future) that the records are not legal findings of guilt but are a record of evidence given by survivors of childhood institutional abuse; • Protecting the right to a good name. 		<p>A key rationale for the sealing of the records is that, as a matter of fact, the relevant records are not the result of a judicial process and, as such, cannot be construed as legal findings of guilt.</p> <p>The strengthened provisions in the Bill referred to under section one are also designed to protect the right to a good name.</p>
3.	<p>The right to privacy/anonymising records</p> <p>The Committee recommended that consideration be given to:</p> <ul style="list-style-type: none"> • How the right to privacy of those who may wish that their personal testimonies of abuse should not be disclosed, albeit in 75-years' time, can be guaranteed by the proposed legislation; • Whether the records should be anonymised as an alternative approach to the proposed legislation's historical purpose of retaining and eventually allowing access to the records; • Alternatively, or in the absence of anonymisation, whether survivors should be contacted to ascertain whether or not they wish their confidential testimonies and other information to be made public. 		<p>The Bill aims to strike a balance between the need to retain the records, given their historic importance, and the need to protect the rights of individuals referred to in the records, including the right to privacy. The Department believes that the regulation making provision will provide a mechanism to address concerns in regard to matters such as right to privacy.</p> <p>Consideration has been given to alternative approaches including anonymization. There are concerns that anonymization of the records could rob them of part of their historical significance. As the records are to be sealed and withheld from public scrutiny, the matter of anonymization does not arise during the sealing period. However, that does not preclude the matter being considered by the Minister of the day if regulations releasing the records are being made in the future.</p> <p>Given the stringent confidentiality restrictions that applied to the work of the bodies and for reasons relating to data protection and the right to privacy, it would not be permissible to directly contact survivors or indeed other individuals to ascertain their wishes in regard to records relating to them.</p>

<p>4.</p>	<p>75-year confidentiality period, international precedent, categorisation of documents</p> <p>The Committee recommended that consideration be given to:</p> <ul style="list-style-type: none"> • The rationale for transferring the records to the National Archives and for the period of 75 years; • Whether there is any international precedent for this approach; • Clarifying the category of document that the records concerned consist of. 		<p>Following the issuing of the Committee’s recommendations the then Minister reviewed the rationale for the retention of the records and for the proposed 75 year period. The Minister decided to proceed to have the Bill drafted without altering the 75 year period.</p> <p>In many respects Ireland is further advanced in terms of national level investigations into child abuse and related redress schemes and therefore there is limited international experience to draw on. Following the Committee’s recommendation, enquiries were made with Canadian and Australian commissions but no definitive information was available at that time.</p> <p>From more recent reviews it appears that the confidential records of Australia’s Royal Commission into Institutional Responses to Child Sexual Abuse, which has recently completed its work, will, in due course, be transferred into the custody of Australia’s National Archives and will not be open for access for 99 years.</p> <p>In the case of Northern Ireland’s Historical Institutional Abuse Inquiry, a Restriction Order was made prohibiting access to the Inquiry records for a period of 100 years with some limited exceptions. The Records are to be transferred to the Public Record Office of Northern Ireland (PRONI).</p> <p>Under the Bill the records to be retained will be the key working papers of the redress bodies, including personal testimony, together with, for example, individual applicant files of the Redress Board and associated correspondence.</p>
<p>5.</p>	<p>Conditions and regulations in relation to access</p> <p>The Committee recommended that consideration be given to:</p> <ul style="list-style-type: none"> • Whether it is envisaged that access to records could be limited as under section 8.4 of the <i>National Archives Act 1986</i>; • Whether it is a breach of good faith to allow access to information given in confidence, and if the information could cause distress or danger to living 		<p>The Bill as published provides that the records will become records of the Department of Education and Skills and transferred to the National Archives. While the National Archives Act 1986 does provide for a certification process to limit access to records that could potentially be open for access after 30 years, this provision does not give sufficiently robust assurances of confidentiality. As such, in respect of these records, the relevant provision in the 1986 Act is being dis-applied and replaced with the provision to</p>

	persons.		<p>seal the records for at least 75 years.</p> <p>In retaining the records, the Government has taken into account the assurances of confidentiality, the wider public interest and the potential for distress if the records are ultimately released. A key aspect of the regulation making provision in the Bill is that if and when making regulations, the then Minister will be required to have regard to the effects on the well-being and emotional state of persons alive at that time that are reasonably possible as a consequence of the release of information contained in records.</p>
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Principal Provisions

The [Retention of Records Bill 2019](#) consists of 11 sections. This part of the Digest is structured around the principal themes of the Bill:

- Preliminary and general;
- Disposal of records;
- Transfer and archiving of records;
- Public inspection of records;
- Exemptions.

This Bill provides for the retention of records generated from the work of the Commission to Inquire into Child Abuse, the Residential Institutions Redress Board and the Residential Institutions Redress Review Committee. The purpose of the retention of these records is to allow them be designated as Departmental Records which can be transferred to the National Archives where they will be sealed for 75 years after which time they will be made available for public inspection.

Preliminary and General

Section 1 sets out definitions. **Section 11** of the Bill empowers the Minister to commence various parts of the Act by way of order for different purposes. **Section 10** provides that the expenses incurred in the administration of the Bill be paid out of monies of the Oireachtas.

Disposal of records⁷⁸

Section 2 of the Bill provides for the disposal of records belonging to the relevant bodies which are deemed by them and the National Archives Director as not warranting retention. The Director may inspect the records before they are authorised for disposal. It allows for an exemption from the prohibition of disclosure of information provided to the relevant bodies. It also sets out that the disposal of such records must comply with the conditions set out in the authorisation and ensures that the confidentiality of the records is not compromised.

Transfer and archiving of records

Under **section 3**, once the relevant body is dissolved all of its records will become records of the Department of Education and Skills and transferred to the National Archives. The records will then be withheld from public inspection for a 75 year period known as the 'sealing period'.⁷⁹ The sealing period commences on the date of the transfer of the record and ends once a regulation granting

⁷⁸ The term disposal in archives terminology means what you do with the records when you're finished with them. This may be destruction (which it usually is), but could also be transfer to an archive. Source: Records Management in the L&RS.

⁷⁹ There is no universal standard for how long a record should be kept - 75 years is very common, but you will also find 50 years, 90 years and 100 years. This is a decision that is usually made, and should be made, on an assessment of the original records. 75 years is the period for UNHCR refugee files; 100 years for UK Coroners records, NHS patient records and Children's home records. An example of the diversity of retention periods is here, from [Somerset Archives](#). The closure period would usually be set by the Archives rather than being specified in legislation. Source: Records Management in the L&RS.

access is passed by the Minister. Access will only be permitted where regulations providing for such are granted. Where there are no regulations for a record it will remain sealed and withheld from public inspection.

Section 4 amends the *National Archives Act 1986* to include the records of the relevant bodies under the list of archival material considered as records to be transferred to the National Archives.

Public inspection of records

Section 6 provides that, 12 months prior to the end of the 75 year sealing period, the Minister for Education and Skills can make regulations granting access to the records of the relevant bodies. The regulations will not take effect until the 75 year sealing period has expired. When the Minister is preparing regulations for the release of the records for public inspection, s/he is required to take into consideration the impact a disclosure of this sort could have on the well-being and emotional state of persons alive at that time. Such a disclosure is defined as a disclosure of information that would occur as a result of granting public access to the records.

Before the regulations are passed a draft copy must be laid before the Houses of the Oireachtas for approval.

Exemptions

Section 5 lists the conditions, set out in the [National Archives Act 1986](#), which the current records do not have to comply with:

Table 6: Exemptions

Section of the National Archives	Conditions that the Bill proposes exemption from
The transfer of records from the relevant bodies does not have to adhere to the following provisions of the 1986 Act:	
Section 2(3)	Prevents Government Department from retaining copies of records transferred to the National Archives.
Section 7	Requires Departmental records, not transferred to the National Archives, to be retained and preserved by the Department of State or disposed of, if authorised by the Director of the National Archives.
Section 8	The requirement to transfer Departmental records, more than 30 years old, to the National Archives for public inspection. This includes a power given to an authorised officer to refuse Departmental records be made available for public inspection where to do so would be contrary to public interest, where it would breach a statutory duty of confidentiality or where it might result in distress or danger to a living person.
Section 15	That the owner of a document has the right to recover that

	document.
Records transferred and withheld from the public during the sealing period do not have to comply with:	
Section 9	The disposal requirements of archives not deemed appropriate by the Director of the National Archives.
Section 10	This provision allows for the public inspection of records.
Section 11	The Taoiseach can direct that departmental records which are either more than 30 years old and still retained by the Department or are with the National Archive but withheld, be made available for public inspection.
Section 12	The transfer of records to the National Archives shall not affect their authenticity.
Section 16	Archives in the possession of the National Archives shall be authenticated and a seal approved by the Taoiseach.
Section 19(1)	The Taoiseach may make regulations in relation to: <ul style="list-style-type: none"> (c) The disposal of archives/records; (d) The inspection of archives; (e) The publication of archives; (f) The authentication of archives.

Section 7 amends the [Commission to Inquire into Child Abuse Act 2000](#) by removing the obligation on the Commission of Inquiry to make arrangements for the custody and disposal of its documents. It also deletes the provision which allows for the refusal to grant an FOI request regarding the Confidential Committee records transferred to a public body after CICA has been dissolved.

Section 8 amends the [Residential Institutions Redress Act 2002 Act](#) by exempting it from the requirements of [section 28\(6\)](#). This section places a prohibition on publishing information related to Redress Board applications and awards. Therefore, records transferred under the current Bill for the 75 year sealing period will be exempt from this prohibition. It also deletes the sections of the 2002 Act which give both the Redress Board and Review Committee the power to dispose of documents concerning applications made to them.

Section 9 provides for the disapplication of the [Freedom of Information Act 2014](#) to the records transferred to the National Archives for the purposes of this Bill. This means that a person cannot access information that relates to them.

Appendix: Comparative Analysis

Australia

Royal Commission into Institutional Child Abuse

A Royal Commission is a formal independent public inquiry instigated by the Commonwealth Government or by a State Government. They can be inquisitorial or investigatory in nature. Commissioners are appointed to investigate allegations of impropriety or gross administrative incompetence or provide research, advice and policy options to government on major and complex issues. Royal Commissions are established under specific legislation that confers wide-ranging coercive powers of investigation.⁸⁰ In November 2012, the then Prime Minister, Julia Gillard, recommended that a Royal Commission would be established to investigate institutional responses to child sexual abuse. It was established in January 2013 and its final report was presented in December 2017. The report focused on systemic issues, individual cases, and made findings and recommendations to better protect children against sexual abuse and alleviate the impact of abuse when it does occur. The inquiry operated under three pillars:⁸¹

1. Personal accounts (provided in a private session or in writing);
2. Public hearings;
3. Research and policy work.

The **private sessions** were set up to hear the stories of people who experienced child sexual abuse while resident in the institutions investigated.⁸² Each private session was conducted by one or two Commissioners and was an opportunity for a person to tell their story of abuse in a protected environment. Written accounts were also accepted which allowed individuals, who did not attend private sessions, to share their experiences with Commissioners. More than 8,000 personal stories were told through these private sessions and over 1,000 written accounts were received.⁸³

Records created and collected by the Royal Commission are governed by the [Royal Commission Act 1902](#). [Section 60M](#) of the Act allows for records derived from or relating to the private sessions to be made publicly accessible when in the “[open access period](#)”.⁸⁴ For these records the open access period begins 99 years after the calendar year in which the record came into existence; even if that record came into existence after the private session.

⁸⁰ Public Record Office Victoria, [Royal Commission Records](#)

⁸¹ Royal Commission into Institutional Responses to Child Sexual Abuse, [Final Report Preface and Executive Summary](#) (Commonwealth of Australia, 2017) pp.7-8.

⁸² A range of institutions were investigated including historical residential institutions; contemporary out-of-home care; schools; sport/arts and culture/community and hobby group settings; contemporary detention environments and religious institutions. For more details see <https://www.childabuseroyalcommission.gov.au/particular-institutions>.

⁸³ Royal Commission into Institutional Responses to Child Sexual Abuse, note 22, p.8

⁸⁴ Access to archival records is governed by the [Archives Act 1983](#). Under the Act a person has a right of access to Commonwealth government records that are in the open access period.

[Section 22 of the Archives Act 1983](#) sets out further provisions relating to records of the Royal Commission. [Section 22\(2\)](#) entitles the Commonwealth to possession of records that were kept by the Royal Commission, but which are no longer required for the purpose of the Commission. Such records will be deemed Commonwealth records. It is the responsibility of the appropriate Minister to direct where the records should be maintained. The National Archives of Australia are not entitled to the care of such records unless it is directed that they should be ([Section 22\(3\)](#)). A direction by the Royal Commission prohibiting the publication of any documents does not apply to any records in the 'open access period' ([Section 22\(4\)](#)).

[Section 9 of the Royal Commissions Act 1902](#) provides for the custody and use of records of the Commission. In accordance with this section regulations may provide for the custody, use or transfer of, as well as access to the records. They can specify the purposes for which a custodian may use the records and can provide for circumstances where the custodian can give the records to other persons or bodies.⁸⁵ The regulations may also impose conditions by which the custodian or persons and bodies must comply with in relation to maintaining the records. Under section 9(10) a custodian may retain possession of the record for so long as the custodian considers desirable for the performance of their functions, despite any request by the record owner to return it. Legal professional privilege continues to apply to Royal Commission records even when custody is transferred to a person or body.⁸⁶

Scotland

Scottish Child Abuse Inquiry

The Scottish Historical Child Abuse Inquiry was established in October 2015. The Inquiry is still in operation and looking at the abuse of children who were in care in Scotland. It will examine what happened, why and where abuse took place, the effects of abuse on children and their families and whether the organisations responsible for children in care, failed in their duties. Finally, it will also examine whether any failures have been corrected and if changes to the law, policies or procedures are needed. Under its terms of reference it is to cover the time period within living memory of anyone who suffered abuse and not beyond December 2014.⁸⁷ Under [section 19 of the Inquiries Act 2005](#) the Chair of the Inquiry has the power to make a restriction order to restrict disclosure or publication of any evidence or documents given, produced or provided to the Inquiry. Consequently, the Chair issued a [General Restriction Order](#) to protect the identities of people who tell the Inquiry their experience of abuse. This means that their identities cannot be published

⁸⁵ See [section 9\(3\)](#) for list of persons and bodies.

⁸⁶ Legal professional privilege is a right whereby evidence of communications between counsel or solicitor and a client may not be given without the client's consent. It is a fundamental feature of the administration of justice and the rule of law; communications which qualify as privileged communications are those which contain legal advice. See <http://www.milc.ie/NXT/gateway.dll?f=templates&fn=default.htm>.

⁸⁷ Scottish Child Abuse Inquiry, [Terms of Reference](#).

without their prior consent.⁸⁸ In coming to the decision to issue a restriction order the Chair took into consideration the sensitive and personal nature of the evidence being provided to the Inquiry and the potential for information to be provided in the future. Regard was also given to the potential harm that could be caused to people identified. The restriction order identified the different categories of protected people that the order applies to:

- a) Applicants;⁸⁹
- b) Any person who was a child in care in Scotland;
- c) Family members of the applicants;
- d) People who have complained about being abused as a child but are not applicants or not within the Terms of Reference.

Any evidence of documents given, produced or provided to the Inquiry which identify these protected persons must not be disclosed or published without the consent of the person concerned. A number of exceptions exist:

- Disclosure may be made to individuals and organisations that are named as being involved in the abuse;
- Disclosure to persons or organisations that the Inquiry believes may hold information that would assist them in their investigations;
- Disclosure to the Scottish Police to enable them to assess current risk to others by the alleged abuser;
- Disclosure of identities of individuals whose allegations are already public.

In relation to persons who are the subject of allegations but who have not been convicted of abusing children in care, similar protections apply. The Inquiry must not disclose or publish any evidence or documents provided which identify such people prior to the publication of the report. The Chair may make further orders preventing the alleged abuser from being identified in the report or disclosed after publication.⁹⁰ Similarly exceptions to disclosure exist where the Inquiry believes a person/organisation holds relevant information; where a disclosure to the Scottish police is necessary to assess the current risk of the alleged abuser; where a disclosure to the Scottish police is necessary because the alleged abuser has been the subject of harassment or intimidation and finally, the Inquiry may disclose where the allegations are already in the public domain.⁹¹

Under [section 41\(1\)\(b\) of the Inquiries Act 2005](#) it is left to the discretion of the appropriate authority⁹² to make rules on the 'return or keeping' of documents given to or created by the inquiry once the inquiry comes to an end. In the [Protocol on Information](#) the Chair indicates that the Inquiry will transfer the record of its work to the 'Keeper of the Records' of Scotland to be archived. The Inquiry will therefore have to retain some information and records, even if they are not publicly available, to transfer to the Keeper.

⁸⁸ Scottish Child Abuse Inquiry, "[Protocol on Information](#)" (21 March 2018).

⁸⁹ 'Applicant' means any person who tells the Inquiry, whether in a written statement or otherwise, that they were abused in circumstances which fall within the Inquiry's Terms of Reference.

⁹⁰ Scottish Child Abuse Inquiry, "[General Restriction Order](#)" (21 March 2018).

⁹¹ *Ibid.*

⁹² Under [section 41\(3\)\(b\)](#) the appropriate authority is the Scottish Ministers, as regards inquiries for which they are responsible.

The National Confidential Forum

In addition to the Scottish Child Abuse Inquiry a [National Confidential Forum](#)⁹³ was set up under [sections 30 and 31 of the *Victims and Witnesses \(Scotland\) Act 2014*](#) with the purpose of listening to and collecting the experiences of adults who were in institutional care. The Forum is part of the [Survivor Scotland Strategy](#) which aims to ensure that help and advice is available for any adult survivor of childhood abuse. The Confidential Forum provides an opportunity for adult survivors to speak of their childhood experience which will form the basis of an annual report compiled by the Head of the Forum. The aim of analysing the experiences of adult survivors is to inform and make recommendations so that children currently in care have a positive experience. Under [section 9\(2\)](#) of the 2014 the Forum is required to take steps to ensure the anonymity of the participant providing the information, as soon as practicable. According to the [forum website](#) this will be achieved by removing all information which could identify the person once uploaded to their database.

Northern Ireland

Historical Institutional Abuse Inquiry (HIA)

The HIA Inquiry was set up under the [Inquiry into Historical Institutional Abuse Act \(Northern Ireland\) 2013](#) and operated between January 2014 and July 2016. The statutory inquiry examined child abuse between 1922 and 1995 in 22 institutions across Northern Ireland. A second and independent strand of the Inquiry, called the **Acknowledgement Forum**, involved members listening to the experiences of those individuals who were resident in the institutions as children during the relevant time period. The final report was launched in January 2017. According to the Inquiry's [Terms of Reference](#), records relating to the Acknowledgement Forum cannot be used for any purpose other than what they were intended and once the Inquiry has concluded they are to be destroyed.

The Investigative Inquiry had to comply with a [protocol](#)⁹⁴ on redaction, anonymity and restrictions. This was guidance on how the inquiry should deal with matters related to anonymity; this protocol did not apply to the Acknowledgement Forum. The Chairperson can make a restriction order under [section 8](#) of the 2013 Act to protect the identity of witnesses appearing before it by preventing or limiting the publication of information given to the Inquiry. Information which is subject to a restriction order will be either redacted or anonymised in all versions of the documents published. This includes the names of the applicants or witnesses who were identified as abused; those accused of the abuse; any individual who is the subject of criticism and any other individuals whom the Inquiry considers ought not to be disclosed. Breach of the restriction orders can result in a conviction subject to a fine or term of imprisonment under [section 16](#) of the 2013 Act.

⁹³ The Forum is a committee of the [Mental Welfare Commission](#) for Scotland. The Head of the Forum is accountable to the Chair of the Commission.

⁹⁴ Redaction, Anonymity and Restriction Orders Protocol.



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