

University of Galway Research Repository

Clann Project submission re consultation process on the development of an ex-gratia 'Restorative Recognition Scheme'

Title	Clann Project submission re consultation process on the development of an ex-gratia 'Restorative Recognition Scheme'
Author(s)	McGettrick, Claire;O'Rourke, Maeve
Publication Date	2021-03-31
Publication information	McGettrick, Claire, & O'Rourke, Maeve. (2021). Clann Project submission re consultation process on the development of an ex-gratia 'Restorative Recognition Scheme': Clann Project.
Publisher	Clann Project
Link to publisher's version	http://clannproject.org/wp-content/uploads/Clann-Project-Submission-to-Oak-Consulting_31.3.21.pdf
Item record	http://hdl.handle.net/10379/16680



**ADOPTION RIGHTS ALLIANCE
JFM RESEARCH**

Clann Project Submission to Oak Consulting

**Re: Consultation Process on the Development of
an *Ex-Gratia* 'Restorative Recognition Scheme'**

31st March 2021

Claire McGettrick

Clann Project Co-Director

Irish Research Council Scholar, School of Sociology, University College Dublin

Email: clairemcgettrick@gmail.com

Dr Maeve O'Rourke

Clann Project Co-Director

Irish Centre for Human Rights, School of Law, NUI Galway

Email: maeve.orourke@nuigalway.ie

INTRODUCTION

Since 2015, the Clann Project (which is a collaboration between [Adoption Rights Alliance](#) (ARA), [Justice for Magdalenes Research](#) (JFMR) and Hogan Lovells International LLP) has been gathering [witness statements](#) of those affected by unlawful and forced family separation in Ireland. The Clann Project spoke to 164 people and assisted 82 witnesses to provide statements to the Mother and Baby Homes Commission of Investigation (MBHCOI) and published a [public group report](#) and recommendations in October 2018.

Our recommendations on a 'Restorative Recognition Scheme', which we set out in this document, are informed by the witness statements and other evidence gathered and are supported the Clann Project's Constitutional and human rights analysis of the State's legal obligations. They are also guided by our experience over the past two decades in assisting adopted people, survivors, natural parents and family members. Our recommendations are further guided by our experience in making recommendations on and engaging with the Government's 'Ex Gratia' Restorative Justice Scheme for Magdalene survivors.¹ These recommendations are also consistent with and should be read alongside the [Recommendations](#) of the Collaborative Forum of Former Residents of Mother and Baby Homes.

We are disappointed that the Government has allowed less than a month for people to contribute to this consultation process. Moreover, we are extremely concerned that the Government has not engaged in sufficient outreach efforts to ensure as many people as possible are empowered and enabled to participate in the consultation. **Simply advertising the consultation is not enough.** The people affected by this issue are, to a large extent, marginalised and disenfranchised; most still feel unable to speak out about their experiences. This is further compounded by the fact that 90% of the institutions, agencies and individuals involved in forced family separation in Ireland were excluded from the remit of the MBHCOI and, more recently, by the irrationally limited and factually

¹ See JFM's 2011 Restorative Justice and Reparations Proposals (**Appendix 1**) and JFM's 2013 submission to Mr Justice John Quirke (**Appendix 2**).

inaccurate findings of that Commission. Many people who were not covered by the Commission's Terms of Reference feel they are not entitled to participate in this consultation. Many people feel the abuses perpetrated against them have been minimised and denied. **It is difficult for people in this position to feel they have a right to be heard and unfortunately, the Government has failed to ensure that everyone affected feels welcome to contribute.** The Government's Submission Guidelines do not explain who can take part in the consultation. The Government could have easily written to all of the people who gave evidence to the MBHCOI to invite them to participate. Given the extent to which this population feels disenfranchised, a video broadcast on television and social media platforms would have gone a long way towards ensuring maximum participation in the consultation.

The Clann Project has created a [guide](#) to help people make submissions and provide more information about their views on how the 'Restorative Recognition Scheme', including a non-adversarial compensation process, could work.

Due to the State's direct involvement in, oversight of and knowing failure to prevent gross and systematic human rights violations in the adoption and informal child care systems, and in Mother and Baby Homes, County Homes and related institutions, the Irish Government is obliged by Irish Constitutional law and European and international human rights law (including international customary law) to provide **effective** remedies and reparation.

The elements of reparation which the Government must provide, according to international [human rights law](#), include:

- Compensation, proportional to the gravity of the violations and the harm suffered;
- Rehabilitation, including medical and psychological care as well as legal and social services;
- Unfettered access to information and archives in order to establish the facts of one's own identity and experiences and the fate of the disappeared;

- An official apology (see section 11 below);
- Judicial and administrative sanctions against individuals responsible for abuse;
- Commemorations and tributes to those who suffered; and
- Inclusion of an accurate account of the human rights violations that occurred in educational material at all levels and in the training of state agents.

The Government must restore the citizenship rights of **all** those subjected to unlawful deprivation of liberty, unlawful family separation, loss of identity, disappearance and unmarked burial, medical experimentation, violence, neglect and exploitation. **This includes adopted people and people placed in informal care arrangements, as well as mothers and all family members affected by Ireland’s 20th century coercive, secret adoption and family separation system that extended far beyond Mother and Baby Homes, and also includes those who were removed unlawfully as children to other jurisdictions.** Because the Irish State supported and failed to prevent these grossly discriminatory and systematic abuses, the State has clear and numerous legal obligations under Irish, European and international law to cease all ongoing abuse and to provide effective remedies.

As an absolute first step, in order for any other redress measure to have integrity, the Government must engage in truth-telling. **Access-to-records legislation must be introduced immediately. All people in Ireland must be guaranteed access to their birth certificate.** Mothers, adopted people and people placed in ‘informal’ care arrangements, and other relatives, must have **access to their personal data.** Those affected must also have access to the **administrative records** of the State and private institutions, agencies and individuals involved.

We look forward to the Government fulfilling its [promise of 28 October](#) last to implement our recommendations for (1) the creation of a **National Archive of Institutional, Adoption and Other 'Care'-Related Records**, which affords survivors and family

members full access to all personal information held by the State in accordance with best international practice, and (2) **proper implementation of EU GDPR rights** by all controllers of institutional, adoption and other 'care'-related records.

The Government must also change litigation procedures so that it is **easier for people to access court**. A dedicated **criminal investigations unit and human rights-compliant coroner's inquests** must also be established. Crucially, survivors of abuse must have **statutory rights to compensation and to all rehabilitative supports** that they require. National education and other memorialisation measures led by those affected must also be undertaken as part of a Transitional Justice process.

Our recommendations, explained further below, concern:

1. Access to records legislation
2. HAA Medical Card
3. Recommendations regarding the compensation process in a 'Restorative Recognition Scheme'
4. Implementation of the Mother and Baby Homes Collaborative Forum Recommendations
5. Explicit rights for people adopted overseas
6. Proper implementation of EU GDPR rights
7. Access to court
8. Dedicated Criminal Justice Unit & Human Rights-Compliant Coroner's Inquests
9. Repeal of 'gagging' orders
10. Amendment of the *Status of Children Act 1987*
11. Official acknowledgement of human rights violations

1. ACCESS TO RECORDS LEGISLATION

We urge the Government to consider the [alternative Adoption \(Information and Tracing\) Bill](#) which ARA published and submitted to the then-Minister for Children in November 2019. Drafted by Claire McGettrick, Dr Maeve O'Rourke, Reader Máiréad Enright and Dr James Gallen, the proposed Bill draws on the EU General Data Protection Regulation (GDPR) provisions and amends the Government's stalled 2016 Bill to provide for:

- a) Unconditional access to birth certificates for adopted people and people placed in informal care arrangements;
 - b) A clear statutory right of access to one's own 'care' or adoption file and to records concerning a family member who died in 'care' or adoption;
 - c) A statutory right of access to administrative records for natural mothers, survivors and adopted people;
 - d) The safeguarding and centralisation of all relevant records in an independent repository where access is provided by professional archivists;
 - e) An enhanced tracing service;
 - f) Placement of the National Adoption Contact Preference Register (NACPR) on a statutory footing; and
 - g) The right to know you are adopted.
- a) Unconditional access to birth certificates for adopted people and people placed in informal care arrangements**

Since 1864 all Irish birth certificates have been publicly available in the General Register Office. Adopted people are the only people in Ireland who are denied the ability to retrieve their own birth certificate, because institutions and individuals in control of adopted people's files (including TUSLA and the Adoption Authority of Ireland) refuse to inform

adopted people of their name at birth or to provide adopted people with their unredacted adoption / early life file.

The continuing refusal to tell adopted people their name at birth, or to provide them with their publicly registered birth certificate, is in our view **unconstitutional and contrary to the GDPR**.

In February 2020 the Court of Appeal [decided](#) in *Habte v Minister for Justice and Equality* [2020] IECA 22 that there is an unenumerated Constitutional right 'to have [one's] identity correctly recognised by the State'. Mr Justice Murray explained (at para 31):

The trial Judge rooted this conclusion, in part, in the widespread recognition of the right in international instruments (Article 24(2) of the International Covenant on Civil and Political Rights, and Article 7 of the Convention on the Rights of the Child) and the view that this right both necessarily inhered in Article 8 of the European Convention on Human Rights and was a corollary to the right to protection of data provided for in Article 8 of the Charter on Fundamental Rights of the European Union (in which connection the Judge further referred to section 74(3) of the Data Protection Act 2018 and [section 9 of the Freedom of Information Act 2014](#)). He said (at para. 44):

'...there is an implied constitutional onus on the State arising from the inherent dignity of the individual referred to in the Preamble and the personal rights of the citizen in Article 40.3 of the Constitution to accurately record and represent central aspects of personal identity.'

As explained in this [Legal Opinion](#) by Professor Conor O'Mahony, Dr Fred Logue, Dr Maeve O'Rourke, Dr James Gallen, Dr Eoin Daly, Reader Máiréad Enright, Dr Sinéad Ring, Rossa McMahon (solicitor) and Dr Laura Cahillane, the outdated decision in *IO'T v B* [1998] 2 IR 321 creates no barrier to the Oireachtas legislating to provide automatic access to birth certificates. *IO'T v B* was decided in a legislative vacuum, did not address

the issue of access to publicly available birth certificates, and does not affect the position expressed by the Supreme Court in *Fleming v Ireland* [2013] 2 IR 417 that legislation ‘concerned with the implementation of public policy in respect of sensitive matters of social or moral policy’ will attract a particularly strong presumption of constitutionality.

Under EU law (which is supreme over any conflicting Irish law), a person’s name is their personal data to which they have a right under Article 15 GDPR. According to Article 23 GDPR and the European Data Protection Board’s related [guidance](#), the fundamental right of access to one’s personal data can lawfully be restricted **only if** there is clear legislation that allows for such restriction and the restriction is a necessary and proportionate measure in a democratic society and respects the essence of the fundamental rights and freedoms at issue. The withholding from adopted people of their name at birth does not meet any of these requirements. It is arbitrary, discriminatory, unnecessary and disproportionate.

The [Legal Opinion](#) mentioned above concludes that a proportionate way of balancing the rights of adopted people and their parents would be to properly resource the voluntary National Adoption Contact Preference Register (NACPR) while providing personal data access so that all relatives are enabled to manage their own family relationships without unnecessary and arbitrary State coercion. This is what ARA’s draft Bill proposes.

Adopted people have been categorised as a ‘threat’; the Irish State has consistently taken a punitive and restrictive approach to providing them with their personal data. Rather than advocating reparation for a closed and secret adoption system, Government proposals have framed adopted people as untrustworthy individuals from whom their mothers need to be protected. No other cohort of Irish citizens is discriminated against in this manner and it is time to resolve this issue once and for all. Since 2001, the Government has made [a number of unsuccessful attempts](#) to legislate for access to records for adopted people. Each of these Government schemes has prescribed (unwarranted) measures designed to ensure that adopted people do not infringe on their

natural mothers' privacy. These proposals have been rejected by adopted people as gross infringements of their rights.

The evidence simply does not support the 'adoption myths' upon which previous Government proposals have been based. This [briefing note](#) by Claire McGettrick demonstrates how this is the case. The briefing note also outlines (i) how adopted people can already obtain their birth certificates, (ii) how they are marginalised by the current system, (iii) what legislative proposals would be acceptable to them, and (iv) a simple short-term solution which would allow adopted people to access their birth certificates.

It should not be forgotten that adoption (and 'informal' adoption) during the 20th century in Ireland was generally forced and frequently illegal. This closed, secret system obliterated the identities of thousands of adopted people. The Irish State is obliged to remedy these abuses, rather than continuing to unjustifiably and unlawfully deny adopted people their identity.

b) A clear statutory right of access to one's own 'care' or adoption file and to records concerning a family member who died in 'care' or adoption

The Government must ensure a clear pathway for mothers, adopted people and all those placed in care arrangements to access their own care and adoption files.

In addition, relatives must be provided with a clear right of access to information about the fate and whereabouts of their family member(s) who died while in an institutional or other 'care' setting. Worryingly, such a right is not included in the Government's current General Scheme of Bill on exhumations.

We recommend, at d) below, that the Government create a central independent repository of all adoption and related 'care' records, into which records (or copies of records) are statutorily requisitioned from all relevant state and non-state data controllers to be administered by professional archivists. However, in the meantime and in any event, a

statutory right of access to one's own file and to records of a relative who died in 'care' must operate in respect of **all** the many diverse data controllers currently in possession of records so that no person's access is delayed in the time that it takes to create the independent repository. Time is not on the side of those affected, whose rights to their own information and to knowledge of their loved ones' fate have been denied for far too long already.

c) A statutory right of access to administrative records for natural mothers, survivors and adopted people

The Government must establish a statutory right of access to all administrative records concerning the historical institutional, adoption and 'care'-related system (which would of course be subject to the usual provisions to protect the rights of individuals in their private capacity).

Administrative records include, for example, financial records, inspection files, contracts, governance records and correspondences. Many of these records lie in the archives of previous inquiries into institutional abuse, where they remain effectively 'sealed' (e.g. the archives of the Commission to Inquire into Child Abuse, the Inter-departmental Committee to inquire into State involvement with the Magdalen Laundries and the Mother and Baby Homes Commission of Investigation). Many additional administrative records remain in the custody of a wide array of State and non-State bodies.

It is a violation of the right to an effective investigation under European and international human rights law that so many of the State's previous inquiries into so-called 'historical' abuse have happened in secret, refusing survivors and adopted people access to the administrative records gathered and refusing them the opportunity to comment on these records. The Government must (1) create an immediate right of access to these administrative files for those affected by the historical institutional, adoption and 'care'-related system, wherever they may currently be; and (2) ensure that administrative records are gathered into and made available in the central independent repository that

will also provide individuals with access to their personal data and to information about the fate of their loved ones who died in 'care' settings.

d) The safeguarding and centralisation of all relevant records in an independent repository where access is provided by professional archivists

In October 2020, we warmly welcomed the Government's promise to establish a national archive of records related to institutional trauma during the 20th century. This is a hugely important opportunity for Ireland to establish a human rights-based, world-leading inclusive approach to acknowledging and documenting our history of institutional and gender-related abuse. However, the State must depart from previous habits of excluding and compartmentalising people. **Nobody can be left behind.**

In preparation for this national archive, which will take years to build, there is an **immediate need to create dedicated repository** of adoption and other 'care'-related records with professional archivists providing the various forms of information that we describe above.

e) An enhanced tracing service

The Government should immediately put in place an enhanced tracing service for those who wish to avail of it. However, we have grave concerns about TUSLA's current involvement in the existing service. TUSLA operates legally troubling and discriminatory practices, including defining adopted people's birth name as third party data and undertaking 'risk assessments' of all adopted people who request their records. Indeed, the Collaborative Forum of Former Residents of Mother and Baby Homes, which was established to advise the Government, has repeatedly stated that TUSLA should have no further role in adoption information and tracing. Therefore, it is absolutely imperative that:

- The tracing service is operated according to **international best-practice models, including a robust complaints mechanism;**
- The tracing service is adequately resourced;

- All research relating to adoption traces is carried out by **trained genealogists** and not social workers;
- If two or more service users state that they wish to be put in direct contact with each other with no further intervention or assistance from TUSLA or any other State agency, they are not obstructed from availing of this option;
- The tracing service is regularly advertised internationally and on social media in order to facilitate people who were exported from Ireland for adoption as children;
- The Government resources an independent assessment of how TUSLA is interpreting the GDPR rights of adopted people, their natural relatives and others affected by so-called historical abuses.

We are extremely concerned that TUSLA is not currently considered to be an ‘accredited body’ as prescribed under the *Adoption Act 2010*, and it is therefore unregulated in its role as an adoption service provider. Section 126 of the *Adoption Act 2010* must be amended by inserting the following:

(5) Tusla: The Child and Family Agency shall be registered as an accredited body and thus regulated by the Adoption Authority.

f) Placement of the National Adoption Contact Preference Register (NACPR) on a statutory footing

Since the launch of the NACPR in 2005, ARA and its predecessors have called for the Register to be put on a statutory footing. Unfortunately, despite ministerial promises of regular advertising both in Ireland and abroad, the NACPR has not been advertised since it was first launched, nor has it ever been placed on a statutory basis. A contact register is only ever as good as its advertising, and thus the NACPR has never reached its full potential. If prospective registrants do not know of the existence of the NACPR, they will not know to register, and this can lead to registrants believing that the other party is not interested in meeting them. Legislative measures should also adhere to the following:

- The AAI has operated the NACPR since 2005 and it is imperative that the institutional memory and expertise developed since then is maintained. For this reason, and for the reasons set out above, **under no circumstances should the NACPR be handed over to TUSLA.**
- If two or more registrants have been matched with each other on the NACPR and they wish to be put in direct contact with each other with no further intervention or assistance from the AAI, Tusla or any other State agency, they should not be obstructed from availing of this option.
- If two or more registrants have been matched on the register and they do not wish to be reunited through TUSLA, another service must be offered to them.
- The NACPR must be adequately resourced.
- The NACPR must be advertised both nationally and internationally at least every two years.
- The NACPR must be advertised regularly on social media platforms.

g) The right to know you are adopted

The State should ensure that it is every adopted person's right to know they are adopted, by amending existing legislation to remove any provisions that hide an adopted person's status. As evidenced in the witness testimony set out in the [Clann Report](#), many adopted people grew up not knowing they are adopted, only to discover this fact later in life when, for example, trying to obtain a passport. We recommend that a statutory provision be introduced immediately to provide the right for adopted people to know they are adopted.

Relatedly, as outlined in the ARA draft bill, the Government must delete Section 89 (2) of the *Adoption Act 2010* which states that:

(2) A[n abridged] certificate referred to in subsection (1) may not disclose that the person to whom the certificate relates is an adopted person.

2. HAA MEDICAL CARD

In its final report the MBHCOI recommended an 'enhanced medical card' for some survivors. In fact, the **full HAA card** is required for **all survivors of adoption-related, state care-related and institutional abuse**.

In 2013, the very first recommendation that Mr Justice Quirke made as part of his recommended Magdalene Laundries restorative justice scheme was that: 'Magdalen women should have access to the full range of services currently enjoyed by holders of the Health (Amendment) Act 1996 Card ("the HAA card")'.² This recommendation responded to what the Magdalen Commission Report described as the 'principal' concerns voiced by survivors during the Commission's consultations.³

This HAA card (or its equivalent) has never been provided to the Magdalene survivors, in breach of the promises made to them (in return for which they signed legal waivers of their rights against the State when accepting the 'restorative justice' scheme). We explain this in detail below.

It is clear from internal governmental records from 2013 that one of the reasons why the Magdalene survivors were not given the HAA card was because the Department of Health feared it would be requested by other survivors of abuse.

It is absolutely critical that all survivors of adoption-related abuse, foster care / boarding out-related abuse, Magdalene Laundries, industrial and reformatory schools and other forms of institutional abuse are provided with the full HAA card.

In addition to being recommended by Judge Quirke for Magdalene survivors (and never provided to them), Industrial school survivors also need this because of the closing down of Caranua, and the Collaborative Forum of Mother and Baby Homes Survivors

² Magdalen Commission Report, p36.

³ Magdalen Commission Report, p33.

specifically recommended the HAA card in its report for those who suffered forced family separation.

The **HAA card is far more than an ordinary medical card**. Judge Quirke's Report ([*The Magdalen Commission Report*](#)) noted that, even though 91% of 231 women who spoke to Judge Quirke explained that they already had a free medical card or GP visit card, they still had substantial 'complaints and worries' regarding their ability to access health and social care services.⁴ For example, the Report explained: 'Many women indicated that they wished to be provided with access to counselling. Some wished to have access to a medical card and to be given an opportunity to see their GP on a more regular basis. Others described how they were currently on waiting lists awaiting surgery and how their scheduled surgery has been delayed or cancelled. Some women described how they struggled with mobility issues and a number of women stated that they believed that their lives would be greatly improved were they to be provided with walking frames or stair-lifts. Some described how they required improvements and alterations to be made to their homes to accommodate their health conditions.'⁵

The contents of the HAA card were explained in the Magdalen Commission Report. Judge Quirke clarified that '[d]etails of the range, extent and diversity of the community services to be provided to the women are described within Appendix G.'⁶ [Appendix G](#) of Judge Quirke's report is 10 pages long and explains that it is largely a reproduction of the information guide provided to current holders of the HAA card—who are those infected by the State with Hepatitis C in the 1990s. The services set out in Appendix G are:

- access to a Liaison Officer who arranges and pays for all services, either in advance or upon the production of receipts;
- chiropody and podiatry services, provided by any qualified professional as frequently as needed without any requirement to obtain prior approval or a doctor's referral;

⁴ Magdalen Commission Report, p33.

⁵ Magdalen Commission Report, p34.

⁶ Ibid.

- complementary therapies such as massage, reflexology, acupuncture, aromatherapy, hydrotherapy, chiropractic services and osteopathy, provided by a registered medical practitioner such as a GP, registered nurse or physiotherapist, following an initial doctor's referral;
- counselling, including psychological and psychotherapy services, for cardholders and their immediate relatives (including adult children), provided by an accredited professional, without any requirement to obtain prior approval or a doctor's referral;
- all necessary dental services, provided by dentists participating in the State's Dental Treatment Services Scheme;
- hearing tests and aids, without limitation;
- ophthalmic services, without any requirement to obtain prior approval or a doctor's referral;
- a specialist home nursing service, involving a clinical nurse-led home care plan that is 'individualised, client focused, flexible and easily accessible...which meets the assessed needs at any given time of each client and which is reviewed on a regular basis to reflect changing needs', the aim being 'to provide and support client focused care in the community to enable the individual to be cared for at home and to reduce unnecessary admissions to hospital';
- a home support service to assist with household chores, either provided by the State or through direct employment by the cardholder which is reimbursed;
- all necessary aids and appliances as prescribed by a GP, Consultant, Occupational Therapist or Public Health Nurse;
- physiotherapy services, provided by any chartered professional, following a doctor's referral;
- GP services from any licenced professional without limitation;
- no charge for any prescription by a GP; and
- referrals to a consultant doctor by a GP to be facilitated within two weeks.

In response to our advocacy seeking the full HAA card for Magdalene survivors, the Government has claimed that not everything in the HAA card is relevant to institutional abuse survivors because it covers some Hepatitis C specific matters. However, this argument does not make sense because if a survivor does not require something specific to Hepatitis C they will not use that service.

The following is an explanation of how the Magdalene survivors have been denied the promised HAA card. **We urge the Government to remedy this situation immediately and to include all survivors of Magdalene Laundries and residential schools, and all survivors of foster care/boarding out-related abuse, adoption-related abuse, Mother and Baby Homes and County Homes in the proper HAA card scheme.**

a) Comparison between HAA and RWRCI Guides

Compare the **five-page** [HSE Guide to Health Services under the Redress for Women Resident in Certain Institutions Act 2015](#) with the **forty-eight-page** [HSE Guide to Services Provided with the HAA Card](#).

b) Complaints by the dental profession

In 2015 three dentists published a [letter to the editor](#) of the *Journal of the Irish Dental Association* noting that the RWRCI card entitles Magdalene survivors ‘to the limited and incomplete treatment that the DTSS [Dental Treatment Services Scheme] provides for most medical card holders’. The dentists ‘urge[d] the Council of the Irish Dental Association to publicly disassociate itself from this act by the Government and to speak out publicly on behalf of its members who do not accept the injustice we are expected to support.’

c) Complementary therapies

During debates in 2014 on the Redress for Women Resident in Certain Institutions Bill, when several parliamentarians argued that complementary therapies assist in relieving

stress, then-Minister for Justice, Frances Fitzgerald, agreed to ‘come up with proposals for a separate, carefully laid out scheme – an administrative rather than a statutory scheme’ to provide complementary therapies. This never happened.

In a letter to a survivor known to us, in May 2018, the Department of Health stated:

The RWRI Act 2015 does not include complementary therapies, such as reflexology, aromatherapy, massage, hydrotherapy and acupuncture, or other alternative therapies such as health services meeting the medical needs of the Magdalen Women. It should be noted that Judge Quirke’s Report did not identify these services for Magdalen Women. Should you wish to raise the issue of complementary therapies you should contact the Department of Justice & Equality, who have responsibility for the RWRCI Act 2015, in the first instance.

d) Kathleen R.

In August 2015, Kathleen R. told Claire McGettrick she felt ‘hoodwinked’ by the State. Kathleen’s HSE ‘home help’ hours had been reduced and she was completely distraught. Having been confined in institutions for most of her first twenty-three years, Kathleen had fought hard for her independence and she could not face the thought of re-institutionalization in adulthood. Kathleen phoned the HSE Contact Person in her area, and that person told her bluntly that she was not entitled to extra hours and that the RWRCI card was merely there to provide free medicine.

e) Beth

Claire McGettrick’s experience of attempting to obtain mobility aids and counselling for a survivor of both a Magdalene Laundry and a Mother and Baby Home, ‘Beth’, who is also now deceased, further illustrates the problems that arose immediately for Magdalene survivors. In August 2015 Claire emailed the HSE regional Contact Person for the RWRCI scheme to say that Beth ‘has difficulty getting up and down the stairs at her home due to ongoing medical issues which severely affect her mobility’ and that she

'would like to apply for a stair lift under the RWRCI Card.' The reply stated: *'Unfortunately the Health Service Executive do not provide stair lifts.'* Claire asked if the RWRCI card might help Beth to obtain specially designed walking sticks, as she had arthritis in both hands. The reply stated: *'Unfortunately, there is no priority given to holders of the RWRCI Cards'*.

In late September 2015, Claire again emailed the RWRCI Contact Person to ask if it was possible for Beth to be prioritised for counselling. Beth had been experiencing suicidal thoughts and self-harm, and she had been placed on a waiting list by the HSE National Counselling Service in early August following a GP's referral several months previously. A response from the RWRCI Contact Person in mid-October conveyed a message from the National Counselling Service that: *'they do not prioritise their waiting list at all. They adhere strictly to this policy. Seemingly they receive numerous requests from G.P.'s.'* It was only following letters from *pro bono* lawyers, with the support of a *pro bono* expert psychological report, that Beth began to receive counselling in late February 2016. Responding to Beth's solicitor's letter, and while agreeing that the National Counselling Service would clinically review Beth's GP's referral, the HSE National Director of Primary Care clarified that RWRCI cardholders were not entitled to HAA-standard psychological care. The letter said: *'The terms of the Redress for Women Resident in Certain Institutions Act 2015 (Section 2(1)(f)) states that the 'HSE shall make available without charge to relevant participants a counselling service, following a referral made in that regard by a registered medical practitioner.'* Please note that the act does not make specific mention of payment for private counselling services.' Beth died just over a year later.

f) Internal government records from 2013

Internal notes released to [Conall Ó Fátharta](#) under Freedom of Information show that before Judge Quirke's report and recommendations had reached the Department of Justice (DoJ) at the end of May 2013, Mr Jimmy Martin had discussed with the Department of Health (DoH) the cost of providing only the ordinary public medical card to

survivors who did not already have one. Other documentation demonstrates that, upon receiving *The Magdalen Commission Report*, the DoH resisted the idea of providing HAA-standard care.

An email from Jimmy Martin to a colleague on 4 July 2013 relayed that the 'observations of the Department of Health' on Judge Quirke's report were as follows: *'The notion of an 'enhanced' medical card is unclear. However, health legislation could be prepared to deem a person that has received a cash payment relating to her stay in a Magdalen laundry from the Minister of Justice and Equality to have full eligibility regardless of her means/income. Full eligibility entitles a person resident in Ireland to a range of public health and the public acute hospital services. The cost of this would be in the region of €3m per year. If the legislation was changed for the Magdalen women there will be an expectation by other groups (e.g. symphysiotomy, thalidomide, narcolepsy etc.) who are receiving medical card type services through the HSE that a similar legislative provision would apply to them. This precedent would require further detailed analysis.'* The DoJ did not force the issue, informing health officials that the extent of the services provided was their prerogative. A note of a meeting on 8 July 2013 between Mr Martin and DoH officials records: *'[DoH] has concerns re giving medical cards over and above the norm or providing them to people living outside the State. [Mr] Martin indicated that the Government had already agreed to provide the Magdalen women with medical cards. What these would cover was a matter for the Department of Health. Counselling had been mentioned repeatedly.'*

g) Most recent survivor correspondence

Dr Maeve O'Rourke received the following messages in recent months from a Magdalene survivor:

'Hi Dr Maeve O Rourke as s Magdalene Survivors who has been emailing and writing to Taoiseachs and Health ministers since 2014 but refused the HAA Card every time . As i suffer bad Health Fibromyalagia cervical Rib Syndrome both 24/7

pain .And AFIB Of the Heart and i am a Diabetic type 2. I Would like to ask you is there any other steps i could take to the Government to fight for my HAA CARD ...

Hi Maeve i certainly would be very happy if you foward my email to the lady you mentioned i have been writing myself for my friend and myself to A few Taoiseachs and Many TD.s to no avail i feel my health is not been cared for Enough . But i know if i had tha HAA Card would be given more Priority by my Health Officials . My eyes are in a bad state ive had many bad falls over a few years . And this enhanced card do not cover me'

h) Dublin Honours Magdalenes Listening Exercise

On 6th June 2018, a formal 'Listening Exercise' took place in the Round Room of the Mansion House as part of [Dublin Honours Magdalenes](#) (DHM), an historic two-day event in Dublin from June 5th-6th.

As many of the transcripts make clear, the women insisted (repeatedly) that the Health Card, as recommended in Justice Quirke's Magdalen Commission Report (and explained in detail in [Appendix G](#) to that report) and agreed to 'in full' by the government, was not what was delivered to them by Government under the Magdalen Restorative Justice Ex Gratia scheme.

The benefits offered to them are essentially nothing more than the routine healthcare service offered to state medical cardholders, which most of them already have due to their low income or advanced age. A number of survivors living outside Ireland also expressed frustration at the state's failure to deliver healthcare benefits to women in the Diaspora - indeed, some women did not know they were entitled to such a benefit in the first place. The following excerpts from the women's testimonies speak for themselves:

- *We're not able to use ours in England. I spoke to Judge Quirke*

- *Did you get the medical card in England?
–No, no...*
- *'...there's also a point I want to bring up, and it's one of the reasons I'm here today...is what we were promised in the Quirke Report. The stuff that we're entitled to, as...being survivors.*
- *Now, this is a letter I got at the time... 'This, the bill, provides for a broad range of health services, which we will receive free of charge. These services will include general practitioner, medical and surgical. Drugs, medicine and surgical. Nursing services, home help services. Dental, ophthalmic and aural services. Counselling services, chiropody services and physio services'. Now out of that, at the moment...the only thing I have...is... my medicine free. And... I have got free counselling.*
- *You're asking what we'd like the government to do. I would actually like them to fully implement Judge John Quirke's recommendations. He recommended a medical card of a HAA. You know, that would give us a lot of benefits that we could access things that's wrong with us in life because this medical card he gave us, enhanced medical card, it's not much more than the ordinary medical card. ...We get our medications. We don't have to pay for our medication, but other things they said we're entitled to, it's not happening.*
- *[Judge Quirke] recommended a medical card...that would give us a lot of benefits that we could access things that's wrong with us in life because this medical card he gave us, enhanced medical card, it's not much more than the ordinary medical card.*
- *You know, we're pensioners. We got this booklet telling us that we could get our eyes tested twice a year. But you get that anyway as a pensioner! But they thought they were giving us something extra... But still...still if I want to go and get my eyes tested, I still have to get permission from the HSE, but this card was telling us, and the booklet was telling us... as far as we were concerned we didn't have to fill in no forms. We get the same benefits as a pensioner and that needs to be rectified.*
- *[Judge Quirke] recommended a medical card...that would give us a lot of benefits that we could access things that's wrong with us in life because this medical card they gave us...it's not much more than the ordinary medical card.*

- *And even with this magic medical card...you have to pay for your blood. So, I have no sense on the principle of the thing...The physiotherapist is actually the same as when you have an ordinary medical card.*
- *But you know with it all we were supposed to get ...counselling... and the dentist. We were supposed to get all those. But you get them automatically as a pensioner...When I accepted my money that time, I had to sign a form that said I would never take another penny off them...you have to pay €600 then to the solicitor and he signed off that you accepted your money.*
- *Don't make promises they're not going to keep to people. Because I really thought like, this is the opportunity for us all to get counselling, to talk to someone. This [the Listening Exercise] is counselling to me. Everybody sharing, you know.*
- *It is really embarrassing when you see the card.*
- *We were promised the medical card that would give us a climb up on the ladder for our teeth, for our eyes... everything. Haven't got it... We got the card, but we never got anything to go with it. And I got a private number to ring and they never answer it.*

3. THE COMPENSATION PROCESS IN A 'RESTORATIVE RECOGNITION SCHEME'

This section draws from and should be read alongside the recent [recommendations](#) of Dr Maeve O'Rourke to the Scottish parliament (**Appendix 3**). As noted above, the right to an effective remedy for grave Constitutional and human rights violations requires the provision of compensation proportional to the gravity of the violations and the harm suffered.

a) Waiver of rights is unacceptable

The 'Restorative Recognition Scheme' should not under any circumstances have a waiver of legal rights as a condition of receiving a payment from the scheme. In order to support those who may wish to seek a judicial remedy in addition to a payment from the scheme, the scheme's establishing legislation could direct the courts to reduce

any future damages award by the amount already paid by the relevant Defendant under the scheme. This approach would recognise the absolute and inalienable human right of survivors of torture and other cruel, inhuman or degrading treatment to accountability for such abuse, and to compensation commensurate with the gravity of the harm suffered. Such recognition and any ensuing litigation would strengthen current and future protections against torture and ill-treatment.

In January 2020, the United Nations Committee Against Torture found the waivers imposed upon a participant in Ireland's Residential Institutions Redress Board (RIRB) and Magdalene 'ex gratia restorative justice' scheme to be unenforceable. The Committee's admissibility judgment in the ongoing individual case under article 22 of the Convention Against Torture of *Elizabeth Coppin v Ireland* is available [here](#). As noted at para 4.5 of the judgment, the Irish Government argued that Mrs Coppin's prior waivers under the Residential Institutions Redress Act 2002 and the non-statutory Magdalene 'ex gratia restorative justice' scheme should preclude her from bringing subsequent legal action against the State arising from the abuse concerned. At para 6.4, the Committee affirmed that articles 12, 13 and 14 of the Convention Against Torture require the state to investigate every individual case where there is reasonable ground to believe that torture or ill-treatment occurred and that article 14 requires the state to allow civil proceedings related to allegations of acts of torture or ill-treatment. At para 6.7, the Committee dismissed the legal waivers as having no effect on Mrs Coppin's absolute rights under the Convention; the Committee stated that 'collective reparation and administrative reparation programmes may not render ineffective the individual right to a remedy and to obtain redress (general comment No. 3, para 20), including an enforceable right to fair and adequate compensation, and that judicial remedies must always be available to victims, irrespective of what other remedies may be available (general comment No. 3, para. 30)'.

Many survivors will not pursue litigation following an application to the scheme. There are many obstacles to litigating 'historical' abuse and survivors' personal preferences will vary. However, the presence of a waiver disproportionately harms every applicant to a

scheme, and the general public, in addition to harming most obviously those who may have wished to litigate but felt obliged to take the scheme payment.

To illustrate:

- i. In forcing survivors to choose between a guaranteed financial payment and accountability, a waiver arguably emits a message to survivors themselves and to the general public about survivors that they are interested in money above all else. This is simply untrue and degrading to survivors.
- ii. If barriers to litigation are removed, individual cases may establish precedents that are of benefit to many, in terms of truth-telling and legal interpretations and standard-setting regarding the nature of and responsibility to protect from human rights abuse. There is every reason to believe that a waiver will prevent cases that could have enhanced legal protections from human rights abuse from being taken.
- iii. The absence of cases due to a waiver may also lead to revisionism by some institutions or individuals who contributed to the scheme and benefitted from a waiver's protection against suit. In this regard, it is worth noting the response by the Rosminians (Institute of Charity), to the Department of Education's proposal to retain, but 'seal' for at least 75 years, all records gathered by the RIRB. The Rosminians opposed any retention of the records, rejecting the veracity of survivors' accounts of abuse generally and ignoring the fact that the RIRB made awards following an adversarial process:

Those who were involved in the Redress Scheme know well that it was purposely designed with a very low burden of proof to facilitate the State. The motivation was as much to do with politics as with justice. ... Future generations will naively take as truth the submissions to the Redress Board

*and lead to the eternal besmirching of the names of good people. Injustice heaped upon injustice.*⁷

- iv. It is also worth noting that the legal waiver under the Magdalene ‘*ex gratia* restorative justice’ scheme has led to a situation where Irish Government officials have made repeated statements to United Nations human rights treaty bodies to the effect that the State knows of ‘no factual evidence to support allegations of systematic torture or ill treatment of a criminal nature’⁸ and that:

‘No Government Department was involved in the running of a Magdalen Laundry. These were private institutions under the sole ownership and control of the religious congregations concerned and had no special statutory recognition or status.’⁹ These contentions have been disproved

⁷ See enclosure in Dr Maeve O’Rourke submission to the Scottish parliament: https://aran.library.nuigalway.ie/bitstream/handle/10379/16315/20201001Dr_ORourke_ltr_to_convener_additional_evidence_with_appendix.pdf?sequence=1&isAllowed=y

⁸ Ireland, Second Periodic Report to the Committee Against Torture, UN Doc CAT/C/IRL/2, 20 January 2016, para 241, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2f2&Lang=en Ireland, Information on follow-up to the concluding observations of the Committee against Torture on the second periodic report of Ireland, UN Doc CAT/C/IRL/CO/2/Add.1 (28 August 2018), para 15. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2%2fAdd.1&Lang=en Human Rights Committee, Replies of Ireland to the list of issues, UN Doc CCPR/C/IRL/Q/4/Add.1 (received 27 February 2014, published 5 May 2014) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIRL%2fQ%2f4%2fAdd.1&Lang=en Ireland, Information on follow-up to the concluding observations of the Human Rights Committee on the fourth periodic report of Ireland, UN Doc CCPR/C/IRL/CO/4/Add.1, 15 August 2017, para 5 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIRL%2fCO%2f4%2fAdd.1&Lang=en (third round) Ireland, Follow-Up Material to the Concluding Observations of the UN Human Rights Committee on the Fourth Periodic Review of Ireland under the International Covenant on Civil and Political Rights, 17 July 2015, p3, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fAFR%2fIRL%2f21460&Lang=en Ireland, Combined sixth and seventh periodic reports to the United Nations Committee on the Elimination of All Forms of Discrimination Against Women, 30 September 2016, p 8; https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRL%2f6-7&Lang=en

⁹ Ireland, Second periodic report to the Committee against Torture, UN Doc CAT/C/IRL/2 (20 January 2016) para 237.

not only by extensive survivor testimony but also by the contents of the Government's Inter- departmental Committee to establish the facts of State involvement with the Magdalene Laundries, a substantial report of the Irish Human Rights Commission and the report of Mr Justice John Quirke on his proposals for the Magdalene 'ex gratia restorative justice' scheme.¹⁰ The absence of litigation on the matter, however, continues to influence the State's official position—and, as a result, the national historical record and other structures.

Magdalene Laundries survivors have not, in fact, received all aspects of the promised scheme—and the waiver is key to this situation. Financial payments were administered by the Department of Justice first, before other elements of the scheme were provided, and the women had to sign a waiver to receive their payment. This meant that they were left with little recourse when the other elements failed to appear (particularly because the scheme is a non-statutory administrative scheme, making judicial review more difficult—aside from the ordinary barriers to taking legal action). And, as discussed above, numerous survivors have spoken about the joint failure of the Department of Justice and Department of Health to provide the promised healthcare.

b) Procedural fairness

In establishing the Magdalene scheme in 2013, the Irish Government expressed a desire to avoid the re-traumatising adversarial procedures of the previous RIRB. Therefore, it was decided that a woman need only demonstrate her duration of detention in an institution in order to qualify for a payment. Payments were based on a scale of up to 10 years+ which correlated with lump sum payments of up to €50,000 and further weekly payments up to €50,000 in total, paid in actuarially calculated instalments with any remainder reverting to the State if a woman dies earlier than predicted. (The scheme

¹⁰ See Maeve O'Rourke, 'Justice for Magdalenes Research, 'NGO Submission to the UN Committee Against Torture in respect of Ireland' (JFMR, July 2017) pp 7-13, https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT_CAT_CSS_IRL_27974_E.pdf

includes other material elements, automatically provided or promised upon a woman's qualification for a specific payment amount.)

An investigation by the Ombudsman and judicial review proceedings established, respectively, that the Magdalene scheme lacked fairness because: (1) the Department of Justice, which administered the Scheme, required the production of documentary evidence, i.e. records, and had no mechanism for receiving the women's own testimony or that of their family or friends in the event that records were not available or were disputed; and (2) the Department did not provide the women with a copy of all evidence which it had received (e.g. from the nuns), in order to allow comment. Legal fees were not provided to help women through the application process—rather, €500 + VAT was available only for a solicitor to advise each woman on the legal waiver once she had received an offer. Neither did the Government provide any independent advocacy services under the Scheme such that, by November 2017, the Ombudsman reported that women 'deemed' by the Department to lack sufficient decision-making capacity to apply to the scheme had been abandoned.

Therefore, in light of the experience of Magdalene survivors, in order to be admitted to the scheme **there should be no absolute requirement for documentary evidence and testimony must be permitted to ground an application in the absence of records.** In addition, applicants to the scheme must be provided with independent advocacy assistance and legal assistance to safeguard their rights and to enable them to provide their best evidence.

c) Time limit

The 'Restorative Recognition Scheme' should have no time limit. Many survivors of Irish residential schools did not have the opportunity to apply to the RIRB because they were unaware of its existence, or unaware of its relevance to their experiences, before the deadline for applications had passed. Their exclusion from the RIRB had a compounding effect because eligibility for the later material supports provided by

'Caranua' was premised on a prior award from the RIRB. In 2013, Mr Justice John Quirke recommended that the Magdalene scheme have no time limitation and the Government has applied no time limit to the Magdalene scheme, which remains open.

4. IMPLEMENTATION OF THE COLLABORATIVE FORUM RECOMMENDATIONS

The Government must implement the Recommendations of the Collaborative Forum of Former Residents of Mother and Baby Homes (**Appendix 4**), which relate to:

- i. Identity and information;
- ii. Health and well-being supports; and
- iii. Memorialisation and personal narratives.

5. EXPLICIT RIGHTS FOR PEOPLE ADOPTED OVERSEAS

People who were adopted from Ireland to America and other overseas locations should be included in any information and tracing services provided by the State. A **guarantee of Irish citizenship, and assistance to claim such citizenship**, should be provided.

For people who are interested, **repatriation options** should be made available. We also recommend that the State, in conjunction with the equivalent authorities in the US and elsewhere, provide subsidised 'homeland tours' for people who were sent abroad for adoption. Doing so would be consistent with the recently published Department of Foreign Affairs' Ireland's Diaspora Strategy 2020.

6. PROPER IMPLEMENTATION OF EU GDPR RIGHTS

This recommendation should be read alongside our Joint Submission to the Oireachtas Joint Committee on Justice Regarding the General Data Protection Regulation of 26th March 2021 (**Appendix 5**).

In October 2020, following the reversal of its policy to 'seal' for 30 years all records received from the MBHCOI, the Government promised additional resources to the Department of Children, Equality, Disability, Integration and Youth and TUSLA to ensure the immediate implementation of GDPR rights in respect of the MBHCOI archive. In January the Clann Project called for the swift recruitment of data protection law expert committees, who are independent of government Departments and TUSLA, to administer the data protection obligations of the Department and TUSLA. In addition, independent expertise should also be provided to the Adoption Authority of Ireland and to the **myriad other controllers of adoption and institutional records.**

We strongly believe that it is necessary to immediately create and resource a **dedicated unit of the Data Protection Commission, with a dedicated Advisory Committee** including those with direct experience of adoption, institutionalisation and State care, and human rights expertise, to ensure in relation to all institutional, adoption and 'care'-related records:

- i. Cataloguing / identification of the location of all archives of historical institutional, adoption and care-related records;
- ii. Major improvements in data controllers' practice, including through published guidance and proactive monitoring and investigating of such practice;
- iii. The provision of accessible information and assistance to data subjects (bearing in mind the varied and particular needs of those affected);
- iv. Efficient and transparent appeals from contested decisions of data controllers; and
- v. Detailed recommendations, following consultation with those affected, on future elements of the legislation to underpin the promised National Archive of Historical Care-Related Records.

Section 12 of the Data Protection Act 2018 provides that 'the functions assigned to the [DPC] by virtue of its being the supervisory authority for the purposes of the Data Protection Regulation and the Directive, the general functions of the Commission shall

include...such other functions as may be assigned to it from time to time by or under any other enactment’.

7. ACCESS TO COURT

International [human rights law](#) confirms that ‘statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.’

The State must amend the Statute of Limitations 1957 to explicitly grant discretion to judges to disapply the normal limitation period where it is in the interests of justice. A precedent for such an approach is to be found in England. There, section 33 of the *Limitation Act 1980* permits a court to disapply the statutory time period where ‘*it would be equitable to allow an action to proceed.*’ In coming to a decision whether to disapply the limitation period, a court is required to consider a number of factors, including the level of prejudice that would be caused to a plaintiff were the statutory limitation period to apply and the level of prejudice that would be caused to the defendant were the court to lift the limitation period.

In the meantime, the State must direct the Chief State Solicitor and State Claims Agency not to plead the Statute of Limitations in so-called ‘historical’ institutional abuse cases. The Courts will retain their residual discretion to refuse to allow cases to proceed where it would not be in the interests of justice.

The State should also reform the civil legal aid scheme and rules of court procedure to enable multi-party litigation in line with the 2005 [Law Reform Commission Report](#).

The availability of evidence and the opening of archives is vital to individuals’ ability to take claims to court if they wish to do so.

8. DEDICATED CRIMINAL JUSTICE UNIT AND HUMAN RIGHTS-COMPLIANT INQUESTS AND EXHUMATIONS

a) Criminal justice and Garda accountability

A standalone unit within An Garda Síochána, made up of specially trained officers and supported by the Garda Síochána Ombudsman Commission (GSOC) where there is any suggestion of Garda involvement in criminal behaviour, should be established and tasked with investigating all suspected and alleged criminal offences concerning institutional and family separation abuses during the 20th century. In addition, a special unit of GSOC should respond to complaints regarding Garda misconduct short of criminal allegations.

The State should ensure that all individuals affected by institutional and family separation abuses are provided with their full entitlements to information and support under the EU Victims Directive and associated *Criminal Justice (Victims of Crime) Act 2017*. Crucially, the State should provide legal aid to victims and survivors so that they can be advised of their legal entitlements; as noted by [McDonald](#), Article 47 of the EU Charter states that ‘legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice’.

In addition, Section 42 of the *Garda Síochána Act 2005* should be amended to provide for special inquiries established under this provision to draw conclusions in respect of criminal conduct allegedly perpetrated by members of An Garda Síochána, **including** former members of An Garda Síochána, in the course of their duties and/or in respect of institutional and family separation abuses. In particular, individuals tasked with chairing such inquiries should be provided with the power to furnish investigative files to the Director of Public Prosecutions and/or to make recommendations regarding prosecutions of members for alleged criminal behaviour.

b) Human rights-compliant inquests and exhumations

This recommendation should be read alongside our [Joint Submission to the Oireachtas Committee on Children, Equality, Disability and Integration on the General Scheme of a Certain Institutional Burials \(Authorised Interventions\) Bill](#) of 26th February 2021 (**Appendix 6**).

The jurisdiction of the Coroner is and should remain the primary basis for addressing human remains related to institutional burials. Under existing legislation inquests are clearly required, as per [section 17 of the Coroners Act 1962](#). Death by neglect or maltreatment falls under ‘unnatural manner’; ‘unknown causes’ may apply in many cases, but more broadly, the obligation to hold an inquest generally applies to instances where an individual is in the care of the State.

The government’s proposal for a statutory Agency for burials can be designed in a way that is compatible with and subject to the Coroner’s jurisdiction. It is completely unacceptable that the Government’s General Scheme of Bill regarding institutional burials, published in December 2019, proposes to disapply the powers of the Coroner in relation to Tuam and other exhumation sites.

The Coroner system must be reformed in order to comply with the European Convention on Human Rights. The system at present, even as amended, lacks independence (due to its heavy reliance on An Garda Síochána outside of Dublin to conduct its work); it also lacks transparency, promptness, accessibility and consistency. Variation in procedures is apparent between each district. There is no training for coroners, and indeed the majority of coroners in Ireland are in acting positions. Families experience vast difficulties in being permitted to present their own experts, and the ability of inquests to present narrative verdicts has not developed apace with neighbouring jurisdictions. In addition to human rights and procedural reforms of the coroners system, a special coroners unit needs to be established, with a team of coroners, a full team of staff, investigators, lawyers, and a team of pathologists in order to conduct such inquiries, and any required inquests, in a timely fashion which respects Article 2 ECHR requirements.

It is important to note that in addition to the coronial system, the government has also established the Independent Child Death Review Group, which examines and makes recommendations relating to the deaths of children in or following State care. Its most recent report provides an overarching [review of deaths from 2000-2020](#). This approach already indicates an ability to institute special mechanisms and groups to review such deaths.

The 2017 [Expert Technical Group report](#) suggested that a multi-disciplinary body of experts would be an appropriate mechanism to address the complex tasks involved in exhumation, examination and identification of infant human remains. Such an approach can be consistent with the exercise of the coroner's jurisdiction. Section 33 of the *Coroners Act 1962* provides that a coroner may request the Minister for Justice to arrange post-mortem examination of the body by any person appointed by the Minister; special examination by way of analysis, test or otherwise. These broad powers could cover the use of appropriate national and international expertise and best practices and processes related to exhumation and DNA analysis, while retaining coronial jurisdiction.

See [here](#) for a record of the Clann Project's efforts in 2018 to assist those affected to respond to the Government's consultation on the Tuam burial ground.

9. REPEAL OF 'GAGGING' ORDERS

a) Section 28(6) *Residential Institutions Redress Act 2002* must be amended

The colloquially named 'gagging order' in section 28(6) of the *Residential Institutions Redress Act 2002* has caused untold harm to survivors of industrial schools through its 'chilling effect', despite the provision never actually being used to prosecute a survivor for speaking in public of the matters which they revealed to the Redress Board. For more on the impact of the gagging order, please see the [2017 report](#) of the voluntary organisation

Reclaiming Self to the UN Committee Against Torture (in particular p17, 23-24), and Mick Peelo's two-part documentary for RTE in March 2020, [Redress](#).

Section 28(6) states as follows:

A person shall not publish any information concerning an application or an award made under this Act that refers to any other person (including an applicant), relevant person or institution by name or which could reasonably lead to the identification of any other person (including an applicant), a relevant person or an institution referred to in an application made under this Act.

Under section 28(9), contravention of section 28(6) is a criminal offence with a maximum penalty under section 34 of a €25,000 fine and/or 2 years' imprisonment. In our view and the view of many lawyers whom we have consulted, this section on its face contravenes the guarantee of freedom of expression in Article 40.6.1 of the Constitution and Article 10 ECHR. It is unnecessary and disproportionate given the other legal protections available to alleged wrongdoers (e.g. defamation law and the protection from civil suit that the RIRA 2002 provides once a survivor has accepted a settlement).

Section 28(6) of the RIRA 2002 must be amended to clarify that 'a person' refers to those working for the RIRB and Review Committee and not survivors.

b) Section 11(3) Commissions of Investigation Act 2004 must be amended

The current section 11(3) of the 2004 Act criminalises the disclosure by **any person** of evidence or documents given to the Commission in private, on pain of a maximum penalty of a €300,000 fine and/or 5 years' imprisonment.

We believe that this provision, on its face, is in clear violation of the right to freedom of expression of those who experienced abuse, who should be enabled if they wish to contribute testimony or documents to the national historical record or otherwise to publish

their accounts. Furthermore, as recommended above, this provision should be amended so that all personal data given to the Commission in private is readily available to the individuals who own it as required by the GDPR, and so that State and other administrative records are publicly available (anonymised as necessary).

10. AMENDMENT OF THE STATUS OF CHILDREN ACT 1987

Section 35 (1) of the *Status of Children Act 1987* states that:

(1) (a) A person (other than an adopted person) born in the State, or

(b) any other person (other than an adopted person),

may apply to the Court in such manner as may be prescribed for a declaration under this section that a person named in the application is his father or mother, as the case may be, or that both the persons so named are his parents.

This is blatant discrimination against adopted people, enshrined in an act designed to abolish the shame associated with illegitimacy. As part of the redress measures, the State should amend Section 35 (1) of the *Status of Children Act 1987* so that adopted people (whether legally or illegally adopted) are included in the statutory right to a declaration of parentage.

11. OFFICIAL RECOGNITION OF HUMAN RIGHTS VIOLATIONS

On Wednesday 13 January 2021, An Taoiseach Micheál Martin issued an official State apology to the survivors of Mother and Baby Homes. While the State apology was most welcome, it did not acknowledge the full extent of the human rights violations experienced by people affected by this issue. The [Clann Project Report](#), which was submitted to the MBHCOI and to the Government in October 2018, recommended that the State apology must include:

- An apology for the shame and stigma imposed on unmarried mothers and their children through the State's policies and practices;
- An apology to adopted people who had to grow up with no knowledge of their origins;
- An apology to adopted people for the loss of their identity;
- An apology for the incarceration of women and children in Mother and Baby Homes and similar institutions;
- An apology to mothers and relatives whose children died in institutions due to abuse and neglect;
- An apology to adopted people who had to grow up in abusive families due to the lack of proper assessments and follow ups;
- An apology for the state policies and practices, and the fostering of a culture, that caused mothers and children to be separated from each other by forcing and coercing women into relinquishing their babies;
- An apology to natural fathers who wished to raise and/or have contact with their children but were denied the opportunity to do so;
- An acknowledgement of the effects on past and future generations of families affected by the system;
- An apology to mothers who were denied knowledge of their rights, which prevented them from giving informed consent;
- An apology for the continued stigma and discrimination imposed on adopted people and natural parents through the lack of statutory rights and services.

The Clann Project Report further recommended that the State should also do all within its power to encourage the religious orders and church hierarchies to acknowledge responsibility and participate in the process of making reparations for the damage caused by the churches' treatment of unmarried families.

Finally, we register our grave concern that the MBHCOI Final Report has caused further abuse by its findings that:

- There is 'no evidence' that girls or women were forced to enter mother and baby homes by the Church or State authorities;
- Girls and women were 'always free to leave' and were not incarcerated;
- The forced unpaid labour of girls and women in the Mother and Baby Homes 'was generally work which they would have had to do if they were living at home';
- There is 'very little evidence that children were forcibly taken from their mothers', even though 'mothers did not have much choice';
- Some women 'are of the opinion that their consent was not full, free and informed' but 'there is no evidence that this was their view at the time of the adoption';
- There is 'no evidence' that girls or women were denied pain relief;
- There is 'no evidence of discrimination' in relation to decisions made about fostering or adoption of mixed race children or children with disabilities;
- There is 'no evidence of injury to the children involved as a result of vaccine trials';
- Criticisms of Tusla regarding information and tracing are 'unfair and misplaced';
- Diocesan records and the records of the religious orders 'are the property of the holders and they have the right to determine who gets access'; and
- Where babies died while their mother was in the institution 'it is possible that [she] knew the burial arrangements or would have been told if [she] asked. It is arguable that no other family member is entitled to that information'.

These findings do not cohere with the evidence provided to the MBHCOI (as demonstrated within the Final Report's own pages) nor do they cohere with evidence provided to the MBHCOI through the Clann Project, or to the information that countless survivors and adopted people have shared with the general public over years. As mentioned above, it is a gross violation of the right to an effective investigation that the

MBHCOI proceeded effectively in secret, denying all those personally affected by abuse any opportunity to access or comment on any of the evidence being gathered by the Commission.

There is an ongoing [judicial review action](#) by at least one survivor, claiming that the MBHCOI breached its statutory duty under section 34 of the Commissions of Investigation Act 2004 by failing to provide to her (or any survivor or adopted person) a draft of the Report for comment. [Section 34 of the 2004 Act](#) obliges every Commission of Investigation, before submitting an interim or final report to the relevant Minister, to send a draft of the report or its relevant part ‘to any person who is identified in or identifiable from the draft report’. The legislation specifies that a person is ‘identifiable from a draft report if the report contains information that could reasonably be expected to lead to the person’s identification’. While the MBHCOI did not name survivors or adopted people in its Report, it provided many details of their lives. It also decided to make a blanket statement at the beginning of the Confidential Committee Chapter (p.12), without providing any detail regarding who or what it was referring to, and without providing any of those it was referring to with the opportunity to comment:

‘The Commission has no doubt that the witnesses recounted their experiences as honestly as possible. However, the Commission does have concerns about the contamination of some evidence. A number of witnesses gave evidence that was clearly incorrect. This contamination probably occurred because of meetings with other residents and inaccurate media coverage.’

The Government should not rely on the MBHCOI Report to devise the contents of its ‘Restorative Recognition Scheme’ and should consider repudiating the Report outright. An inaccurate official historical record is not only insulting to those who have suffered grave abuse; it denies the most basic element of a remedy, which is acknowledgement of the truth. It further impedes memorialisation, education, and efforts to ensure institutional reform and non-repetition of similar abuse in future.