



Irish Council for
Civil Liberties

Briefing Note

Human Rights Obligations of Government following publication of Mother and Baby Homes Commission's Final Report

March 2021

Introduction

The process around, and content of, the publication of the final report of the Commission of Investigation into Mother and Baby Homes earlier this year has caused serious distress to many survivors of those institutions. The methodology of the Commission was consistently criticised by ICCL¹ and others² over the five years of its operation. Its approach to survivor testimony and evidence was identified as deeply problematic, and our concerns in this regard have been borne out with the news of the destruction of the recordings of survivor testimony. While it is important to recognise the valuable work of the Commission in documenting what happened in these institutions over several decades, much of the analysis of the Commission around the role of the State, and religious orders and hierarchy in human rights abuse is deeply disappointing.

A key missing element of the Mother and Baby Homes Commission's investigation and report is a comprehensive analysis of abuses that occurred in and around the Mother and Baby Homes against the clear human rights standards and obligations on the State that were in place at that time, including in the Irish Constitution and in the European Convention on Human Rights (ratified by Ireland in 1953).

This was a fundamental flaw in the framework set by the Government for the Commission. The Irish Human Rights and Equality Commission, the State's internationally accredited National Human Rights Institution, clearly advocated for such a framework but the Government chose, wrongly, to ignore its submission.³ At the same time, the Commission should have been aware that a comparative analysis of standards of living in State care and in ordinary family homes was not an appropriate approach given that the State is required to meet much higher standards when it comes to protecting the rights of those that reside in its care. Many of the Commission's recommendations

¹ See for example ICCL follow up report to UN Committee against Torture 2018, available here: <https://www.iccl.ie/wp-content/uploads/2018/11/ICCL-Follow-up-report-to-UNCAT-final-23.11.18.pdf>

² Maeve O'Rourke, Claire McGettrick, Rod Baker, Raymond Hill *et al.*, *CLANN: Ireland's Unmarried Mothers and their Children: Gathering the Data: Principal Submission to the Commission of Investigation into Mother and Baby Homes*. Dublin: Justice For Magdalenes Research, Adoption Rights Alliance, Hogan Lovells, 15 October 2018, available here: http://clannproject.org/wp-content/uploads/Clann-Submissions_Redacted-Public-Version-October-2018.pdf. [The Clann Project Report]. For the Clann Project's Briefing on the Commission's report see <http://clannproject.org/commission-report/>

³ IHREC (designate), 'Proposed Commission of Investigation to Inquire into Mother and Baby Homes: Submission on behalf of the Irish Human Rights and Equality Commission (Designate)' (July 2014). Available at: https://www.ihrec.ie/download/pdf/ihrec_designate_submission_on_mother_baby_commission_investigation_june_2014.pdf

appear to be rooted in a social analysis rather than a legal or human rights analysis. This approach is severely limiting for an investigation into abuses and when it comes to recommendations on how best to remedy them.

Ultimately the report itself is not the most important focus from a human rights perspective. The key outstanding human rights obligations that arise from the violations and abuse that survivors suffered lie with the State. The Government's action plan in response to the publication of the Mother and Baby Homes Commission's final report, published on 12 January 2021⁴, outlines eight areas where the Government intends to take action to provide redress for survivors.⁵ This plan is an important but incomplete response to the appalling abuse that took place in Mother and Baby Homes in Ireland in the 20th Century, as documented in the Commission's report and elsewhere.

Having accepted responsibility on behalf of the Irish State and apologised for some of the human rights abuses that occurred, the Government must fulfil a range of obligations under human rights law to ensure proper redress and reparation for survivors. Other organisations including the Irish Human Rights and Equality Commission⁶, the Clann Project,⁷ Adoption Rights Alliance,⁸ and UN Human Rights Treaty Bodies⁹ have previously addressed Ireland's human rights obligations in relation to proper and sufficient redress and reparation for survivors of Mother and Baby Homes. We would also highlight the recommendations by the Collaborative Forum of Former Residents of Mother and Baby Homes and call on the Government to publish its report.¹⁰ This Briefing Note should be read alongside these documents.

The purpose of this Briefing Note is twofold. First, we highlight the evidence of human rights violations in the Report and set out the extent of the State's responsibility (*Part 1*). Second, we highlight the State's obligations to remedy these abuses and identify how these obligations must now inform the State's response.

⁴ The Final Report of the Commission of Investigation into Mother and Baby Homes, 12 January 2021, available at <https://www.gov.ie/en/publication/d4b3d-final-report-of-the-commission-of-investigation-into-mother-and-baby-homes/>

⁵ The Action Plan is outlined in a Press Statement, published on 12 January 2021 and available here: <https://www.gov.ie/en/press-release/4f64f-government-statement-on-the-final-report-of-the-commission-of-investigation-mother-and-baby-homes-and-certain-related-matters/>

⁶ IHREC (designate), 'Proposed Commission of Investigation to Inquire into Mother and Baby Homes: Submission on behalf of the Irish Human Rights and Equality Commission (Designate)' (July 2014). Available at: https://www.ihrec.ie/download/pdf/ihrec_designate_submission_on_mother_baby_commission_investigation_june_2014.pdf

⁷ The Clann Project Report, see FN 2

⁸ Adoption Rights Alliance, JFM Research, Clann Project (2021) Briefing Notes re the Final Report of the Mother and Baby Homes Commission of Investigation. Available at: http://clannproject.org/wp-content/uploads/Clann-Project-Briefing-Notes_Mother-Baby-Homes-Commission-Report.pdf.

⁹ See Committee on the Elimination of Racial Discrimination, Concluding Observations on Ireland's Combined 5-9th Report (December 2019) UN Doc CERD/C/IRL/CO/5-9 para 17,18; Committee Against Torture, Concluding Observations on the initial report of Ireland (17 June 2011) UN Doc CAT/C/IRL/CO/1.; Committee Against Torture, Concluding Observations on the second periodic report of Ireland (31 August 2017) UN Doc CAT/C/IRL/CO/2; Committee on Economic, Social and Cultural Rights, Concluding Observations on the Third Periodic Report of Ireland (8 July 2015) UN Doc E/C.12/IRL/CO/3; Committee on the Elimination of Discrimination Against Women, Concluding Observations on the Combined Sixth and Seventh Periodic reports of Ireland (3 March 2017) UN Doc CEDAW/C/IRL/CO/6-7; Human Rights Committee, Concluding Observations on the Fourth Periodic Report of Ireland (19 August 2014) UN Doc CCPR/C/IRL/CO/4; Council of Europe, Parliamentary Assembly, Periodic review: Ireland, Doc 14450 Part 5 (IE), 14 December 2017; Council of Europe Commissioner for Human Rights, Nils Muzinieks, Report following visit to Ireland from 22 to 25 November 2016, CommDH(2017)8, 29 March 2017.

¹⁰ See Recommendations by Collaborative Forum here: <https://www.gov.ie/pdf/?file=https://assets.gov.ie/25774/085e9ecf9bb4495c94b8a21b4c143998.pdf#page=1>

Part 1: Evidence of Human Rights Abuses¹¹

The final report of the Mother and Baby Homes Commission contains evidence of a range of gross human rights abuses that took place in Mother and Baby Homes, some County Homes, and as part of the connected system of forced adoption, 'boarding out' and fostering of children.

ICCL considers the Commission's report contains evidence of the following gross human rights abuses:

- **Arbitrary Detention (deprivation of liberty and security of person)¹²:** There is evidence that many mothers and their children were effectively detained in Mother and Baby Homes without their consent¹³ and women and children were forcibly returned to Mother and Baby Homes without legal authority.¹⁴ This can be considered arbitrary detention.
- **Violations of the Right to Life¹⁵:** The Commission has stated that conditions in some of the Mother and Baby Homes were, during particular periods, so dire that residence in these homes was detrimental to a child's chances of survival.¹⁶ Babies and young children were reported to have died from malnutrition, a form of neglect.¹⁷ There is a positive duty on the state to prevent violations of the right to life and gross neglect can be considered a form of manslaughter. Given the evidence in the Commission's report that inspectors were highlighting the conditions in these homes but the government failed to intervene, the State can be considered responsible for violations of the right to life.
- **Torture and Ill Treatment¹⁸:** Women and children were subjected to appalling mental and some physical abuse¹⁹ in these homes, including the denial of medical treatment during birth, humiliating treatment, and ongoing violations of the right to dignity.²⁰ Women were separated from their children without informed consent, detained and institutionalised. Children were neglected with long term effects on their physical and mental health including death, and buried without identification or registration of place of burial. The ongoing denial of access to information about personal identity is an ongoing denial of the right to dignity, as well as related rights. This treatment can be framed as evidence of cruel, inhuman or

¹¹ For an in depth analysis of the human rights abuses that occurred in these institutions framed in terms of Ireland's human rights obligations and the duty to remedy such violations in line with human rights law and relevant jurisprudence see S.4 of the Clann Project Report, see FN 2.

¹² The right to liberty is enshrined in Article 40.4.1 of the Irish Constitution, which provides that "no citizen shall be deprived of his personal liberty save in accordance with law"; and article 5 ECHR. In *De Wilde, Ooms and Versyp ("vagrancy") v Belgium*, the ECtHR stated that detention cannot be considered voluntary merely because a person presents themselves to State authorities as destitute. Series A no. 12 p 36 (18 June 1971); see also article 9 International Covenant on Civil and Political Rights.

¹³ Commission's Report, Confidential Committee, see eg p.14,15,16,18

¹⁴ Commission's Report, Confidential Committee, see eg p 1108, 2437

¹⁵ The right to life is enshrined in Article 40.3.2 of the Irish Constitution, Article 2 ECHR, article 6 ICCPR. Both the Irish High Court and the ECtHR have recognised that the right to life places positive obligations on the State to protect life by its laws.

¹⁶ Commission's Report, Executive Summary, p.4: "In the years before 1960 mother and baby homes did not save the lives of 'illegitimate' children; in fact, they appear to have significantly reduced their prospects of survival. The very high mortality rates were known to local and national authorities at the time and were recorded in official publications."

¹⁷ Commission's Report p.47,750

¹⁸ The right to freedom from torture and ill-treatment has been recognised by the Irish Courts as an unenumerated right (and part of the right to bodily integrity) under Article 40.3 of the Constitution

¹⁹ Commission's Report, Confidential Committee, see eg p1308, 2444, 2445, 2548

²⁰ Commission's Report, Confidential Committee, see eg p1306, p2435, 2473

degrading treatment or punishment.²¹ Where pain or suffering is deliberately inflicted and particularly severe it may amount to torture.

Pharmaceutical companies were permitted to perform vaccine trials on the children of unmarried mothers without the consent of their mothers and contrary to international standards on medical treatment without consent.²² This is contrary to international law and may constitute a form of ill treatment, as well as a violation of private and family life.²³

- **Modern slavery or servitude or forced labour**²⁴: Women and children in the homes and when 'hired out' were forced to work without remuneration under threat of abuse and in abusive circumstances.²⁵ The Commission's suggestion that domestic work was of the type they might have performed at home is irrelevant and misses the point entirely. These women and children were in the care of the State. Work towards the upkeep of an institution is on the face of it not equivalent to the upkeep of a domestic home, the work was not voluntary and unremunerated. Depending on the extent and severity of these practices, they can be framed as a form of modern slavery, servitude or forced labour.²⁶
- **Enforced Disappearance**²⁷: The separation of mothers and children without their consent and without means of tracing each other,²⁸ with the refusal by the state to allow access to identifying documents such as birth certificates, may amount to a form of enforced disappearance. Where death certificates register deaths without registering a place of burial, this can be considered a form of enforced disappearance.
- **Violation of Private and Family Life**²⁹: Mothers and their children experienced a range of violations of their right to private and family life through their forced institutionalisation, the forced separation of mothers and children through adoption without consent,³⁰ through the

²¹ The ECtHR has held that States are obliged under Article 3 ECHR to "provide effective protection in particular of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge". For example, *Z and Others v United Kingdom* (2002) 34 EHRR 3 para 73; *O'Keeffe v Ireland* (2014) 59 EHRR 15 para 144; *X and Y v The Netherlands* (1986) 8 EHRR 235 paras 21–27; *A v United Kingdom* (1999) 27 EHRR 611 para 22.

²² Commission's Report, Confidential Committee, see eg p2026, p2048

²³ It is also a violation of the right private or family life. See *M.A.K. and R.K. v. the United Kingdom* [2010] ECHR 363; *Glass v. the United Kingdom* no. 61827/00, 9 March 2004 116

²⁴ Ireland's obligations to prohibit slavery include the 1926 Slavery Convention; 1930 ILO Forced Labour Convention; 1957 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; ILO Abolition of Forced Labour Convention; ICCPR; ECHR; and arguably the personal rights provisions in Article 40.3 of the Irish Constitution. See also reports of UN Special Rapporteur on Contemporary Forms of Slavery, available here: <https://www.ohchr.org/en/issues/slavery/srslavery/pages/srslaveryindex.aspx#:~:text=In%20March%202020%2C%20the%20Human,prohibited%20in%20all%20their%20forms>.

²⁵ Commission's Report, Confidential Committee, see pp 115,118

²⁶ In *Van der Musselle v Belgium*, the ECtHR recognised that consent to labour which is essentially forced or constrained, and is not essentially voluntary, should not be a defence to charges of forced labour.

²⁷ Ireland has not yet ratified the UN Convention on the Protection of All Persons from Enforced Disappearance but signed the treaty in 2007, meaning it must not contravene its object and purpose. See also the United Nations Declaration on the Protection of All Persons from Enforced Disappearances, UNGA Res 47/133 (1 December 1992) UN Doc A/RES/47/133

²⁸ See eg Commission's Report, Confidential Committee, p2444

²⁹ The right to privacy is protected under the Irish Constitution, as is the unmarried mother's constitutional right to the custody of her child. The right to respect for private and family life is protected by the ECHR, the EU Charter, the International Covenant on Civil and Political Rights (ICCPR) and the UN Convention on the Rights of the Child (UNCRC). Article 8 of the EU Charter contains an explicit right to protection of personal data, which is part of the right to privacy.

³⁰ See Commission's Report, Confidential Committee, eg p2435, p 2496, p2497

“boarding out” or fostering of their children, where many suffered abuse³¹, and by their placement in industrial schools or other settings which denied them familial contact.³² The State is responsible for continuing violations of the right to respect for private and family life today, which include lack of access to information about personal identity and family history,³³ and lack of access to information about the fate and whereabouts of family members, including those who were buried without record.

- **Discrimination³⁴:** The Commission recognised discrimination on the basis of the application of the term illegitimate, marital status and the marital status of the parents of children and babies. However, other forms of discrimination evident from the report including, gender-based discrimination, racial discrimination, discrimination on the basis of disability and discrimination on the basis of socio-economic class, were not given the attention or analysis that is required to fully understand the extent of the violations. A comprehensive investigation into discriminatory practice in the institutionalisation, separation and adoption of all individuals must be carried out.
- **Right to Remedy and continuing violations:³⁵** Individuals and their families who suffered human rights violations through the institutionalisation and separation of unmarried mothers and their children in Mother and Baby Homes and County Homes are entitled to an effective remedy under the Irish Constitution and the numerous human rights treaties that Ireland has ratified.

Some of the violations that survivors have suffered are continuing violations including the lack of access to identity documents and relevant records, violation of family and private life, and the lack of adequate investigation into deaths and the violations that can be classified as enforced disappearance, as referred to above. Remedying these violations is particularly urgent given the age of many of the survivors.

State Responsibility for human rights abuses

Under the Irish Constitution and European and international human rights law the State is responsible for human rights violations not only when State officials or institutions directly

³¹ See Commission’s Report, Confidential Committee, eg p

³² Commission’s Report, Confidential Committee, eg p.2455

³³ Article 7 UNCRC states that every child “shall have the right from birth to a name [and] the right to know and be cared for by his or her parents”. Article 8 UNCRC requires States to “respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference”. Article 8 continues: “Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity”.

³⁴ Discrimination on the basis of a protected characteristic is prohibited by the ECHR, and all of the UN Human Rights Treaties Ireland is party to. Equality is a key right under the Irish Constitution.

³⁵ The right to remedy is contained within the ECHR, EU Charter and the range of UN human rights treaties that Ireland has ratified, see United Nations, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005. Available at: http://legal.un.org/avl/ha/ga_60-147/ga_60-147.html

perpetrate abuse but also when the State fails to act in order to safeguard individuals' rights when it knows or ought to know that abuse of fundamental human rights is occurring.³⁶

Direct State responsibility for the treatment of unmarried mothers and their children can be attributed where the State managed an institution directly, funded organisations and institutions, regulated, supervised and inspected institutions, monitoring and responding to deaths in care settings and where bodies took on the function of the state, such as arranging and supervising adoptions. The State has indirect responsibility where it became aware of abuses but failed to intervene. This is clearly the case with the situation in Mother and Baby Homes, where the Commission specifies that inspectors were reporting on dire conditions but the government took no action to improve them.

We consider that while the State has primary responsibility for remedying these abuses, other organisations including the Catholic Church, specific religious orders and others with responsibility should be held accountable and contribute to remedies and reparations, including by contributing to a reparation fund and providing access to information, in particular documents relating to personal identity. It is important to recognise that, under the Irish Constitution, non-State entities and individuals are obliged to respect the Constitutional rights of others.³⁷

Part 2: Remedy and Reparation

The State must fulfil its obligations to remedy the abuses that occurred. International human rights law provides that the right to an effective remedy requires the State to: (a) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (b) Provide those who claim to be victims of a human rights law violation with equal and effective access to justice, irrespective of who may ultimately be the bearer of responsibility for the violation; and (c) Provide effective remedies to victims, including reparation.³⁸

The State's obligations in this regard can be usefully identified and assessed through the four pillars of the UN transitional justice framework of the right to truth, justice, reparations and guarantees of non-recurrence.

1. The right to truth

1.1. Establish additional human rights compliant fact-finding mechanisms

The Mother and Baby Homes Commission was flawed as a human rights compliant fact finding mechanism from its outset. First, its scope was too limited. Other stakeholders have identified up to

³⁶ See for example *Belgian Linguistics case* *Belgian Linguistic (No 2)* (1968) 1 EHRR 252 para 7; *Marckx v Belgium* (1979) 2 EHRR 330 para 31; *X and Y v Netherlands* (1985) 8 EHRR 235; *O'Keefe v Ireland* App no. 35810/09 (2014) 59 EHRR 15; HRC General Comment No 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 8; *Storck v Germany* (2006) 43 EHRR 6, para 102.

³⁷ See for example *Educational Co of Ireland v Fitzpatrick (No 1)* [1961] IR 323; *Re Ward of Court (withholding medical treatment) (No 2)* [1996] 2 IR 79.

³⁸ The right to a remedy is protected in various international human rights law treaties: Universal Declaration of Human Rights ("UDHR"), art. 8; International Covenant on Civil and Political Rights ("ICCPR"), art. 2; Convention on the Elimination of Racial Discrimination ("CERD"), art. 6; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("CAT"), art. 14; Convention on the Rights of the Child ("CRC"), art. 39. Other relevant international declarations include the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of IHL and Serious Violations of IHL (2005).

182 agencies, institutions and individuals that may have been complicit in the abusive system that so many mothers and their children were subjected to.³⁹ The Commission was tasked with looking at just 14 of these homes. We know from the Commission's report that they were contacted by a number of people wishing to give evidence who were turned away because they were resident in County Homes rather than Mother and Baby Homes.⁴⁰ Second, the government did not give the Commission the remit to frame its investigation in human rights terms as so clearly recommended by the Irish Human Rights and Equality Commission in its submission to the government.⁴¹ The Irish Constitution, European Convention on Human Rights and the UN Human Rights treaties⁴² that Ireland has ratified would have provided a crucial interpretative framework in identifying the rights that were violated as well as identifying the State's obligations to remedy these violations. This was a failure by the government to either understand or appreciate the significance of its human rights obligations to the Commission's work.

The Commission states that it "has not carried out a comprehensive review of adoptions".⁴³ Given the evidence that adoptions were done outside of a system of regulation or law, and, in some cases, without the informed consent of the mother, there is a need to shed much greater light on this system. Many survivors of illegal adoptions have been calling for a comprehensive investigation into the system for years and continue to do so.⁴⁴

The Commission's final report has been criticised by survivors and other stakeholders for a number of reasons. As an exercise of truth telling it is severely limited in part because of its methodology and in part because of its narrative framing of serious human rights abuses as social ills. Many survivors have expressed dismay and a feeling of betrayal at this narrative framing, which minimises both the extent and effect of abuses and the State's responsibility to provide redress.⁴⁵ It also minimises the responsibility of the State and appears to absolve religious orders and hierarchy of blame.

Some have also criticised the research methodology used by the Commission, highlighting the absence of a reference to standard of proof when drawing conclusions, an unclear approach to the use or definition of evidence, and narrow recommendations that fail to highlight relevant human rights law and standards.⁴⁶

The report states that the Committee told each witness that recordings of their testimony given to the Confidential Committee would be destroyed. However, some survivors have said they were not told this.⁴⁷ The report also notes that: "At each hearing, there was one member of the Confidential Committee and one researcher. The researcher took notes of the hearing."⁴⁸ ICCL considers these notes should be made available to witnesses, on request. If these notes were destroyed as well as

³⁹ See the Clann Project Report, FN2

⁴⁰ Commission's Report, Confidential Committee, p.10

⁴¹ IHREC (designate), 'Proposed Commission of Investigation to Inquire into Mother and Baby Homes: Submission on behalf of the Irish Human Rights and Equality Commission (Designate)' (July 2014) p5. Available at: https://www.ihrec.ie/download/pdf/ihrec_designate_submission_on_mother_baby_commission_investigation_june_2014.pdf

⁴² A full list of the relevant human rights instruments is appended to this letter.

⁴³ Commission's Report, Chapter 32, p.2

⁴⁴ See eg <https://www.thejournal.ie/susan-lohan-illegal-adoption-ireland-5326289-Jan2021/>

⁴⁵ See eg <https://www.irishtimes.com/news/social-affairs/helplines-extremely-busy-with-calls-from-devastated-survivors-1.4457552>; <https://www.irishmirror.ie/news/irish-news/noelle-browns-passionate-discussion-mother-23328782>

⁴⁶ See eg article in The Examiner, *Mother and Baby Homes Commission report misses the point on redress*, Mairead Enright, January 23 2021, <https://www.thejournal.ie/readme/mother-and-baby-homes-2-5324302-Jan2021/>

⁴⁷ <https://www.thejournal.ie/mother-and-baby-homes-survivors-contact-gardai-after-audio-recordings-are-destroyed-5348528-Feb2021/>

⁴⁸ Commission's Report, Confidential Committee, p. 10

the recordings, this could constitute a criminal offence under the Commission of Investigation Act 2004. This should be investigated. This is of particular importance given the request by many survivors for access to records of their testimony. Some survivors have stated that they never would have given evidence if they knew it was going to be destroyed and have referred to this development as further re-traumatisation.⁴⁹ This also indicates that an accessible and comprehensive informed consent process, as mandated by research ethics and law – the General Data Protection Regulation (GDPR) – for the collection and processing of sensitive personal data was not carried out. This collection, processing and destruction of personal data without consent could also constitute a breach of GDPR. There are also worrying reports that those survivors who did receive a copy of their testimony received a copy of a questionnaire containing questions they say were not actually asked and containing inaccuracies. This places a question over the reliability of the capturing of witness testimony and places significant questions over the procedures in place for the Confidential Committee.

Recommendation:

- I. We call for the government to initiate a wider independent investigation into all individuals, agencies and bodies that were involved in the abuse of mothers and children and, particularly, in the system of illegal and forced adoptions in Ireland in the 20th Century. This investigation should be survivor-centred, guided by human right law and standards, comprehensive in its scope and powers and transparent, including by ensuring proper and appropriate recording, analysis, archiving and access to the evidence it gathers.**
- II. The government must initiate an investigation into why all records of testimony were destroyed.**

1.2 Provide for exhumations and inquests

Given the evidence that has emerged from the Mother and Baby Homes Commission's report that remains were buried without a dignified burial, including lack of identification, in particular at the Mother and Baby Home in Tuam, exhumations, identification, investigation and reburials are necessary.

The Certain Institutional Burials (Authorised Intervention) Bill, currently before the Oireachtas Justice Committee, seeks to provide for the establishment of agencies that can carry out exhumations of remains, identification and dignified burials. It is positive that the government is committed to an exhumation of the mass grave at Tuam. However, the Bill in its current form is flawed in a number of respects. First and foremost, it is absolutely vital that the cause of death is established. The Bill in its current form appears to exclude the Coroner's Act from applying to certain exhumations. Inquests are vital to ensure the cause of death can be established and the jurisdiction of the Coroner should not be excluded. The Bill should not provide temporal, geographic or undue procedural obstacles to exhumations at other sites.

Recommendation:

- III. Exhumations that lead to identification of remains, establishment of cause of death and dignified burials must take place where remains have been buried without proper identifying markers.**

⁴⁹ See eg <https://www.thejournal.ie/mother-and-baby-homes-survivors-contact-gardai-after-audio-recordings-are-destroyed-5348528-Feb2021/>

- IV. Inquests, or equivalent investigative mechanisms, must be established to make findings on the cause of deaths of those in the care of Mother and Baby Homes and County Homes where the cause was unknown or suspected to be an unnatural or violent death, or otherwise falls within the Coroner's jurisdiction.**
- V. Amend the Certain Institutional Burials (Authorised Intervention) Bill to ensure inquests can take place into deaths of residents in Mother and Baby Homes and other institutions and ensure the Bill does not contain undue procedural obstacles to carrying out of exhumations at sites on or near the grounds of institutions.**

1.3 The right to access documents relating to personal identity

The State has an obligation to fulfil the right of all individuals to access documents that contain their personal data and provide information about their personal identity.⁵⁰ It is vital that every individual born in Ireland has access to their birth certificate. Birth certificates have been a matter of public record in Ireland since 1864 and it is high time all individuals were afforded access to such a fundamental record of their own personal identify.

We are aware that the government intends to legislate for a system of information and tracing. Given the advanced age of many survivors of the system of forced adoption we urge the government to prioritise this legislation; to ensure the legislation is drafted in consultation with survivors; and to ensure the legislation complies with relevant human rights law and standards.

In addressing the issue of enabling access to personal identity records, the government must also take into account the right to privacy of mothers and any infringement must be provided for by law, demonstrably necessary and proportionate to the aim of fulfilling the right to personal identity. We would highlight the difference between a right to identity and a right to contact a person. In our view, the centrality of the right to access personal history to the core of a person's identity provides a factor of considerable weight in providing access to such information. We also note the requirements of the GDPR to ensure every individual has the right to access their personal data.

As noted above, this Briefing Note should be read alongside other briefing notes and reports, including by the Adoption Rights Alliance, which focuses its work in this area⁵¹.

Recommendations:

- VI. Prioritise legislative reform that gives adopted people the right to access their birth certificates, as well as a right to access other relevant documents that can shed light on their personal identity and origins.**

2. The right to access justice

Accountability is a key part of ensuring the right to access justice is upheld. The State, and in particular An Garda Síochána, has a duty to investigate a crime where there is a reasonable suspicion that a crime has occurred. The Mother and Baby Homes Commission's report documents testimony relating to physical abuse, rape, arbitrary detention or false imprisonment, among others.

⁵⁰ This obligation stems from the right to privacy, an unenumerated right under the Irish Constitution. The right to privacy is found in the ECHR, ICCPR and EU Charter. And the General Data Protection Regulation provides a clear right to access personal data.

⁵¹ See more at <http://adoption.ie/>

The report contains allegations of sexual offences including of girls under 15, incest and indecent assault. Criminal prosecutions could also potentially be brought for false imprisonment, kidnapping and child-stealing, an offence under the Offences against the Person Act.

It has been reported in the media that the Commission's report has been referred to the DPP to assess whether prosecutions may be appropriate. We also understand that An Garda Síochána are looking at the report and that a number of reports were made by the confidential committee to "authorities"⁵². We would highlight the Garda's duty to investigate allegations of criminal behaviour, which includes the power to seek judicial warrants to search places or records.

There is also a need for more information around the role of the Gardaí themselves in assisting with the detention or return without consent of people to these institutions. The Garda Síochána Ombudsman Commission (GSOC) should establish a unit to investigate historical wrongs by Gardaí.

We also note the duties and obligations within the Criminal Justice (Victims of Crime) Act 2017, which provide standards on first contact with Gardaí, including informing the victim of support services⁵³, and also provide for the right to information regarding investigation and criminal proceedings.⁵⁴

There is an urgent need to remove obstacles to litigation in Ireland to enable access to justice. Reforming the civil legal aid scheme and providing for class actions in our Courts should be two key priorities.⁵⁵

Recommendation

VII. An Garda Síochána or another appropriate body should set up a special unit to support survivors of Mother and Baby Homes to make criminal complaints and to investigate such complaints, in line with their duty to investigate criminal activity.

VIII. GSOC should set up a special unit to investigate the role of the Gardaí in facilitating abuses in Mother and Baby Homes and other places of state care.

IX. Government should ensure access to justice including by removing obstacles to litigation by providing for class actions, protective mechanisms against prohibitive cost orders and clarity around obstacles that statutory limitation periods may pose.

3. The right to reparation

It is vital that the right to reparation is properly fulfilled. The government has accepted responsibility for the abuses outlined in the Commission's report. The acceptance of responsibility carries with it a significant duty to remedy violations.

A range of international human rights bodies have already called on the Irish State to recognise its duty to remedy rights violations related to the institutionalisation of unmarried women in the State.⁵⁶

⁵² Commission's Report, Confidential Committee, p.7

⁵³ Criminal Justice (Victims of Crime) Act, 2017, section 7.

⁵⁴ Criminal Justice (Victims of Crime) Act, 2017, section 8.

⁵⁵ See further Adoption Rights Alliance, JFM Research, Clann Project (2021) *Briefing Notes re the Final Report of the Mother and Baby Homes Commission of Investigation*, p. 15. Available at: http://clannproject.org/wp-content/uploads/Clann-Project-Briefing-Notes_Mother-Baby-Homes-Commission-Report.pdf.

⁵⁶ See FN 3.

The State apology delivered by the Taoiseach was an important step in acknowledging the suffering of survivors but proper reparation includes a range of other actions, including financial redress. Government should provide a comprehensive and generous compensation scheme without prohibitive administrative hurdles or an adversarial scheme.

It is crucial that the government does not repeat past mistakes of previous redress schemes. We note that the Irish Courts found the redress scheme for Magdalene Laundries survivors was “maladministered”. Government must ensure that redress is sufficient, adequate and does not have unrealistic thresholds for access or adversarial procedures.

Adequate health, housing and other supports should be provided for survivors. We welcome the commitment by the government to provide enhanced medical cards and counselling for survivors and we urge the government to ensure that this system is administered in an inclusive and adequate manner.

The government’s human rights obligations extend to ensuring third parties do not commit human rights abuses against private actors. In our view, the government should take steps to ensure that other culpable actors are held accountable and contribute to redress schemes. This includes corporations that may have benefited from the illegal vaccination scheme and religious orders that were complicit in abuses. Survivors of mother and baby homes may need to access the courts to ensure their rights are upheld. Like all survivors of human rights abuses, access to justice is key in ensuring accountability. In this regard, we call on the government to remove existing obstacles to litigation in the Irish Courts including by providing for class actions, protective mechanisms against prohibitive costs orders and clarity around obstacles that statutory limitation periods may pose.

Recommendations:

- X. Government should provide a comprehensive and generous compensation scheme without prohibitive administrative hurdles or an adversarial scheme. Adequate health, housing and other supports should be provided for survivors.**
- XI. Government should take steps to ensure that other culpable actors are held accountable and contribute to redress schemes, including religious organisations and corporations.**

4. Guarantees of non-recurrence

The State must take steps to guarantee non-recurrence of such abuses. The Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence has identified specific steps that should be taken under this pillar of the transitional justice framework.⁵⁷ These steps include appropriate memorialisation, which must be survivor-centred and ensure adequate consultation.⁵⁸ Awareness

⁵⁷ See range of reports by the Special Rapporteur here:

<https://www.ohchr.org/EN/ISSUES/TRUTHJUSTICEREPARATION/Pages/Index.aspx>

⁵⁸ In his July 2020 report to the UN Human Rights Council, the Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence emphasised the importance of memorialisation and suggested that this should in fact be considered a fifth pillar of transitional justice. See A/HRC/45/45, July 2020, para 21, <https://undocs.org/A/HRC/45/45>. "The approach to be taken to such crimes is based on the pillars of transitional justice: without the memory of the past, there can be no right to truth, justice, reparation, or guarantees of non-recurrence. For this reason, memory processes in connection with serious violations of human rights and international humanitarian law constitute the fifth pillar of transitional justice. It is both a stand-alone and a cross-cutting pillar, as it contributes to the implementation of the other four pillars and is a vital tool for enabling societies to emerge from the cycle of hatred and conflict and begin taking definite steps towards building a culture of peace."

campaigns and public education initiatives to ensure public knowledge and recognition of past harms must be implemented.

Government must also take steps to ensure the conditions for similar forms of abuse cannot be repeated. In this instance, conditions that permit institutional abuse must be examined and removed. In the current Irish context, these steps should ensure, among others, a swift end to the Direct Provision system of housing international protection applicants; ratification of the Optional Protocol to the UN Convention against Torture to ensure independent human rights based inspections of all places of detention, including social and care settings; effective complaints mechanisms and a cultural shift from opaque systems to radical transparency, including access to records, appropriate archives and statutory reform where necessary.

Recommendations:

- XII. Appropriate memorialisation, which must be survivor centred and ensure adequate consultation. Public education to ensure public knowledge and recognition of past harms must be implemented.**
- XIII. Government must take steps to ensure appropriate retention of records and access to archives.**
- XIV. Survivors' experiences in Mother and Baby Homes and the entire system of institutionalisation and separation of families must be included in public education.**
- XV. Government must also take steps to ensure the conditions for similar forms of abuse cannot be repeated. Conditions that permit institutional abuse must be examined and removed. In the current Irish context, these steps should ensure, among others:**
 - a. a swift end to the Direct Provision system of housing international protection applicants;**
 - b. ratification of the Optional Protocol to the UN Convention against Torture to ensure independent human rights based inspections of all places of detention, including social and care settings;**
 - c. effective complaints mechanisms and**
 - d. a cultural shift from opaque systems to radical transparency, including access to records, appropriate archives and statutory reform where necessary.**

Summary of ICCL Recommendations:

- I. We call for the government to initiate a wider independent investigation into all individuals, agencies and bodies that were involved in the abuse of mothers and children and, particularly, in the system of illegal and forced adoptions in Ireland in the 20th Century. This investigation should be survivor-centred, guided by human right law and standards, comprehensive in its scope and powers and transparent, including by ensuring proper and appropriate recording, analysis, archiving and access to the evidence it gathers.**
- II. The government must initiate an investigation into why all records of testimony were destroyed.**
- III. Exhumations that lead to identification of remains, establishment of cause of death and dignified burials must take place where remains have been buried without proper identifying markers.**
- IV. Inquests, or equivalent investigative mechanisms, must be established to make findings on the cause of deaths of those in the care of Mother and Baby Homes and County Homes where the cause was unknown or suspected to be an unnatural or violent death, or otherwise falls within the Coroner's jurisdiction.**

- V. Amend the Certain Institutional Burials (Authorised Intervention) Bill to ensure inquests can take place into deaths of residents in Mother and Baby Homes and other institutions and ensure the Bill does not contain undue procedural obstacles to carrying out of exhumations at sites on or near the grounds of institutions.
- VI. Prioritise legislative reform that gives adopted people the right to access their birth certificates, as well as a right to access other relevant documents that can shed light on their personal identity and origins.
- VII. An Garda Síochána or another appropriate body should set up a special unit to support survivors of Mother and Baby Homes to make criminal complaints and to investigate such complaints, in line with their duty to investigate criminal activity.
- VIII. GSOC should set up a special unit to investigate the role of the Gardaí in facilitating abuses in Mother and Baby Homes and other places of state care.
- IX. Government should ensure access to justice including by removing obstacles to litigation by providing for class actions, protective mechanisms against prohibitive cost orders and clarity around obstacles that statutory limitation periods may pose.
- X. Government should provide a comprehensive and generous compensation scheme without prohibitive administrative hurdles or an adversarial scheme. Adequate health, housing and other supports should be provided for survivors.
- XI. Government should take steps to ensure that other culpable actors are held accountable and contribute to redress schemes, including religious organisations and corporations.
- XII. Appropriate memorialisation, which must be survivor centred and ensure adequate consultation. Public education to ensure public knowledge and recognition of past harms must be implemented.
- XIII. Government must take steps to ensure appropriate retention of records and access to archives.
- XIV. Survivors' experiences in Mother and Baby Homes and the entire system of institutionalisation and separation of families must be included in public education.
- XV. Government must also take steps to ensure the conditions for similar forms of abuse cannot be repeated. Conditions that permit institutional abuse must be examined and removed. In the current Irish context, these steps should ensure, among others:
 - a. a swift end to the Direct Provision system of housing international protection applicants;
 - b. ratification of the Optional Protocol to the UN Convention against Torture to ensure independent human rights based inspections of all places of detention, including social and care settings;
 - c. effective complaints mechanisms and
 - d. a cultural shift from opaque systems to radical transparency, including access to records, appropriate archives and statutory reform where necessary.