



Irish Council for
Civil Liberties

26 February 2021

By email

RE: General Scheme of a Certain Institutional Burials (Authorised Interventions) Bill

To the members of the Oireachtas Committee on Children, Disability, Equality, and Integration:

The Irish Council for Civil Liberties (ICCL) has worked for over 40 years to defend and strengthen constitutional rights protections and to ensure the full implementation of international human rights standards in Ireland. ICCL is a founding member of the International Network of Civil Liberties Organisations (INCLO). Domestically focused and internationally informed, ICCL has played a leading role in some of Ireland's most important human rights campaigns.

We are pleased to enclose a submission for the purpose of your consultation towards the examination at the Committee Stage of the **General Scheme of a Certain Institutional Burials (Authorised Interventions) Bill**.

We hope that our observations will be of assistance and we encourage you to contact us should you require any further information.

Kind regards,

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Civil Liberties

ICCL Submission on the General Scheme of a Certain Institutional Burials (Authorised Interventions) Bill

To: The Oireachtas Committee on Children, Disability, Equality, and Integration

Date: February 2021

Written by: Elizabeth Carthy, Doireann Ansbro

26 February 2021

Overview

The Irish Council for Civil Liberties (ICCL) commends the Government's commitment to addressing the problematic issues relating to institutional burials. However, ICCL has some significant concerns about the proposed General Scheme of a Certain Institutional Burials (Authorised Interventions) Bill. Appropriately addressing this issue is vital and pressing, particularly given the recently published findings of the Mother and Baby Homes Commission of Investigation. The final report of the Mother and Baby Homes Commission highlighted "appalling levels of infant mortality" in the homes¹ and that mortality "directly or indirectly relating to childbirth was higher than the national figure."² This report is limited as it only examined 14 mother and baby homes and county homes. It is important that the scope of this Bill and the focus of the Government extends beyond this to other Mother and Baby Home settings, other institutional settings, and potentially other mass grave situations, defined below.

This submission provides a brief overview of the relevant human rights framework and the State's obligations in this area (*Part 1*). It then highlights the problematic approach and specific provisions of the Bill from a human rights law perspective (*Part 2*). Finally, it recommends that the Government can take one of two possible approaches:

- Reform the Bill significantly in line with international human rights law and transitional justice principles to ensure that the exhumation of remains in mass graves can take place, all reasonable steps are taken to identify the remains and all reasonable steps are taken to establish cause of death where the Coroner's jurisdiction would ordinarily be triggered; or
- Amend existing legislation to grant relevant powers to existing bodies to address mass graves, such as the Coroners Acts, removing the need for this Bill (*Part 3*).

¹ Mother and Baby Homes Commission of Investigation, *Final Report*, 30 October 2020, p. 67. Available at: <https://assets.gov.ie/118565/107bab7e-45aa-4124-95fd-1460893dbb43.pdf>.

² Mother and Baby Homes Commission of Investigation, *Final Report*, 30 October 2020, p. 68. Available at: <https://assets.gov.ie/118565/107bab7e-45aa-4124-95fd-1460893dbb43.pdf>.

Part 1: Relevant human rights issues and legal framework

Institutional burials and mass grave sites give rise to violations of different human rights, particularly the right to life, prohibition of torture, inhumane or degrading treatment, rights linked to enforced disappearances, and “‘last rites’ linked to the dignified treatments of the body in death.”³

The failure to provide information to family members regarding the circumstances of the death of an individual and the location of their body may constitute a violation of the international prohibition on torture, inhumane or degrading treatment.⁴ Additional human rights considerations include the right to family life and the right to a remedy. These rights are protected under international and European human rights law and encompass additional related rights and State obligations. For example, the European Court of Human Rights has interpreted the right to respect for private and family life as providing a number of rights for family members of deceased persons. These include the right to information about the death and/or burial of a family member⁵, the right to have their body returned to them⁶, and the right to attend their funeral.⁷

1.1 Right to a remedy: Victims of human rights violations have the right to an effective remedy.⁸ The right to a remedy under international law includes the right to equal and effective access to justice, reparation for harm suffered, and access to relevant information concerning violations and reparation mechanisms.⁹ A “victim” also includes the immediate family or dependants of the direct victim.¹⁰

1.2 Obligation to investigate: States have positive obligations to effectively investigate unlawful or suspicious deaths and allegations of torture, inhumane or degrading treatment under international

³ UN, *Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions* (12 October 2020) A/75/384, para. 48. Available at: https://www.ohchr.org/Documents/Issues/Executions/A_75_384_AdvanceUneditedVersion.pdf. The Irish Constitution refers to the “dignity and freedom of the individual” (Preamble) and case law has affirmed the importance of dignity in relation to the circumstances of a person’s death (e.g. PP v HSE, 2014 IEHC 633). See Geoffrey Shannon, *Human Rights Issues at the Former Site of the Mother and Baby Home, Tuam, Co. Galway*, 2018. Available at: <https://assets.gov.ie/25217/0abb576368b14e2081c447b417544fb2.pdf>.

⁴ UN Human Rights Committee, *General Comment no. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights on the right to life*, 30 October 2018, CCPR/C/GC/36, para. 56. Available at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf. See Communication No. 1225/2003, *Eshonov v. Uzbekistan*, Views adopted on 22 July 2010, para. 9.10; Communication No. 2120/2011, *Kovalev v. Belarus*, Views adopted on 29 Oct. 2012, para. 11.10.

⁵ *Hadri Vionet v. Switzerland* Number 55525/00, 14 February 2008; *MAric v. Croatia* Application no. 50132/12; *Zorica Jovanovic v. Serbia* Number 21794/08, ECHR 2013. See Geoffrey Shannon, *Human Rights Issues at the Former Site of the Mother and Baby Home, Tuam, Co. Galway*, 2018. Available at: <https://assets.gov.ie/25217/0abb576368b14e2081c447b417544fb2.pdf>.

⁶ *Pannullo and Forte v. France* Number 37794/97, ECHR 2001-X; *Girard v. France* Number 22590/04, 30 June 2011.

⁷ *Solska and Rybicka v. Poland*, Applications 30491/17 and 31083/17, paras 104-108.

⁸ 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).

⁹ UN General Assembly, *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*, 2005, Principle VII. Available at: <https://www.ohchr.org/en/professionalinterest/pages/remedyandrepairation.aspx>.

¹⁰ UN General Assembly, *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*, 2005, Principle V. Available at: <https://www.ohchr.org/en/professionalinterest/pages/remedyandrepairation.aspx>.

human rights law.¹¹ These investigations must be independent, prompt, thorough, and transparent.¹² This obligation is triggered “whether the death occurs at the hands of State actors or private persons or persons unknown, and regardless of whether there is evidence of criminal action requiring investigation and prosecution under criminal law. An investigation is not dependent on a formal complaint or request from a next of kin, rather it should be automatically triggered.”¹³ European human rights case law has highlighted the importance of family and next of kin participation and involvement in the inquiry “to the extent necessary to safeguard his or her legitimate interests.”¹⁴ Taking reasonable steps to identify the deceased and to determine the cause of death are key components of a State’s obligation to conduct an effective investigation.¹⁵

1.3 Relevance of the Convention on Enforced Disappearances: Unfortunately, Ireland has only signed and not yet ratified the Convention on Enforced Disappearances. However, its provisions are still relevant as it is indicative of international good practice. Further, some of its provisions may constitute international customary law.¹⁶ For example, it provides for the right of family members “to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.”¹⁷ The ICCL has previously called on the Government to ratify this Convention.¹⁸ It is recommended that the Government ratify this Convention and adopt an approach to this Bill informed by its provisions.

1.4 Transitional justice process: Taking a transitional justice process to address institutional burials, in particular engaging survivors and victims of abuses in Mother and Baby homes, is an appropriate approach, which has previously been proposed by Government. Transitional justice is based on five pillars: the right to truth, justice, reparation, guarantees of non-recurrence, and memorialisation.¹⁹ As Katherine Zappone, then Minister for Children and Youth Affairs, stated in the Seanad:

“Transitional justice puts survivors and victims at the heart of the process. It commits to pursuing justice through truth. It aims to achieve not only individual justice, but a wider societal transition from more repressive times, in order to move from one era to another. Taking a transitional justice approach means that we will find out and record the truth,

¹¹ UN, *Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions* (12 October 2020) A/75/384, para. 54. Available at: https://www.ohchr.org/Documents/Issues/Executions/A_75_384_AdvanceUneditedVersion.pdf.

¹² *Kukhalashvili and others v Georgia*, Judgement, ECtHR Application Nos 8938/07 and 41891/07 (2 April 2020); See Human Rights Committee, General Comment No. 31, op. cit., para. 15.

¹³ UN Human Rights Council, Annex to the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Investigation into the unlawful death of Mr. Jamal Khashoggi, 19 June 2019, A/HRC/41/CRP1, para. 260; *Cyprus v. Turkey* (2002) 35 E.H.R.R. 731, and *Kelly and Others v. United Kingdom* CEDH 2001 4.05.2001.

¹⁴ OHCHR, *Last Rights, The Dead, the Missing and the Bereaved at Europe’s International Borders, Proposal for a Statement of the International Legal Obligations of States*, May 2017, p. 12. Available at: https://www.ohchr.org/Documents/Issues/Migration/36_42/TheLastRightsProject.pdf.

¹⁵ OHCHR, *Last Rights, The Dead, the Missing and the Bereaved at Europe’s International Borders, Proposal for a Statement of the International Legal Obligations of States*, May 2017, p. 12. Available at: https://www.ohchr.org/Documents/Issues/Migration/36_42/TheLastRightsProject.pdf.

¹⁶ See for example, ICRC *Customary IHL Study*, Rule 114. Available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule114#:~:text=international%20armed%20conflicts-,Rule%20114.,of%20their%20next%20of%20kin.&text=State%20practice%20establishes%20the%20customary,rule%20in%20international%20armed%20conflicts.

¹⁷ Convention on Enforced Disappearances, 2006, art. 24(2).

¹⁸ See for example, ICCL, *ICCL calls for action on disappeared children* (2019) Available at: <https://www.iccl.ie/press-release/iccl-calls-for-action-on-disappeared-children/>.

¹⁹ UN, *Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions* (12 October 2020) A/75/384, para. 21. Available at: https://www.ohchr.org/Documents/Issues/Executions/A_75_384_AdvanceUneditedVersion.pdf.

ensure accountability, make reparation, undertake institutional reform and achieve reconciliation”.²⁰

1.5 Current legislative basis for exhumations and inquests: The current legislative framework provides that exhumations are only permitted by license granted by the Minister for Local Government under section 46 of the Local Government (Sanitary Services) Act 1948 or by order of the Minister for Justice under section 47 of the Coroners Act 1962, amended in 2019.

There is a general duty to conduct an inquest if the coroner is of the opinion that “the death may have occurred in a violent or unnatural manner, or unexpectedly and from unknown circumstances” or if “the deceased person was, at the time of his or her death or immediately before his or her death, in State custody or detention or the death of the person is a maternal death or a late maternal death.”²¹

1.6 Relevant guidelines and reports which have informed this submission include:

- The Bournemouth Protocol on Mass Grave Protection and Investigation (2020)²²
- UN Special Rapporteur on Extrajudicial, summary or arbitrary executions report on mass graves to the UN Human Rights Council (2020)²³
- The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)²⁴
- The International Commission on Missing Persons, standards from the International Committee of the Red Cross (2002)²⁵

1.7 Terminology: The Institutional Burials Bill focuses on “manifestly inappropriate burials.” It does not explicitly define this term. However, it identifies relevant factors to assessing whether there were “manifestly inappropriate burials” (*Head 5(2)*), discussed further below. The UN Special Rapporteur defines a mass grave as a burial site where the “circumstances surrounding the death and/or the body-disposal method warrant an investigation as to their lawfulness.”²⁶ This definition is adopted for this submission and it is recommended that this should be adopted in this Bill.

Part 2: Significant problems from a human rights law perspective

Significant problems with the General Scheme from a human rights perspective are highlighted below.

2.1. Impedes an effective investigation into the deaths of those buried at mass grave sites

The Bill, in its current form, would impede an effective investigation into the deaths of those buried at mass grave sites. First, it disapplies the Coroner Acts, second, it is inapplicable if the remains were buried following death in violent or unnatural circumstances or if there is an ongoing criminal investigation. Third, its scope is limited and its discretion for Government.

2.1.1 Temporarily disapplies the jurisdiction of the Coroner

²⁰ <https://www.oireachtas.ie/en/debates/debate/seanad/2017-03-09/16/>

²¹ Coroners Act, 1962, as amended by Coroners (Amendment) Act 2019, section 17.

²² https://issuu.com/bournemouthuniversity/docs/the_bournemouth_protocol_on_mass_grave_protection_fr=sMjc3OTIOMjAyNzM

²³ UN, *Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions* (12 October 2020) A/75/384. Available at: https://www.ohchr.org/Documents/Issues/Executions/A_75_384_AdvanceUneditedVersion.pdf.

²⁴ <https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf>

²⁵ https://www.icrc.org/en/doc/assets/files/other/icrc_themissing_102002_en_3.pdf

²⁶ UN, *Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions* (12 October 2020) A/75/384, para. 12. Available at: https://www.ohchr.org/Documents/Issues/Executions/A_75_384_AdvanceUneditedVersion.pdf.

The Coroners Acts 1962 to 2019 sets out the jurisdiction of the Coroner, as noted above. Other reports have highlighted how the jurisdiction of the Coroner is and should continue to be “the primary basis for addressing human remains related to institutional burials.”²⁷ However, this Bill temporarily disapplies the Coroners Acts (*Head 7*). It provides for a duty to inform the coroner and An Garda Síochána if the remains found “do not appear to be in the scope of the exhumation” of the General Scheme, discussed further below. Further, the Bill provides for the suspension of works relating to excavation or exhumation on the grounds that a criminal investigation is being conducted (*Head 32(1)*) and the Agency should provide access to any information which may assist the investigation (*Head 32(5)*).

This disapplication of the Coroners Acts and lack of provision for inquests impedes the State’s obligation to carry out effective investigations into institutional burials and access to an effective remedy for survivors and families. This must be remedied.

2.1.2 Inapplicable if the remains were buried following death in violent or unnatural circumstances or if there is an ongoing criminal investigation

The fact that this Bill does not apply if “[t]here is evidence that human remains at the site were buried there following death in violent or unnatural circumstances” (*Head 6(2)*) or if there is “an ongoing Garda investigation into the circumstances surrounding the burials or the way the deaths took place” (*Head 6(3)*) is problematic for a number of reasons.

In addition to inhibiting the scope of the Bill, the process for determining whether the deceased were buried following death in violent or unnatural circumstances is unclear. Those who carry out the exhumations would need expertise or training in identifying indicators of violent or unnatural deaths. ICCL considers that evidence within the Mother and Baby Homes Commission’s report of children dying from malnutrition or neglect, in addition to the high numbers of deaths of babies in these institutions compared to numbers in wider society during certain periods of time, creates a presumption that deaths occurred in unnatural circumstances. Trained investigators therefore must participate in exhumations to determine whether the Coroner’s jurisdiction is triggered.

ICCL considers that, as part of the obligation to conduct effective investigations, inquests and Garda investigations should be carried out into mass institutional burials as a matter of course. As the UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions notes, “**Mass graves are crime scenes**, depositories of evidence of likely gross human rights violations, invoking thus investigative and formal accountability obligations. The mass grave suggests that remains too were handled unlawfully, intended to obstruct not only repatriation to loved ones but formal justice too. In other words, a mass grave signifies commission of a multiplicity of crimes.”²⁸

2.1.3 Potentially limited scope of the Bill related to definition of institutions

Head 3(1) provides that the Government shall only intervene where “manifestly inappropriate burials have taken place at a site, associated with an institution of persons who died while ordinarily resident at that institution.” Further, one of the restrictions applies if the burial site “is not associated with a current or former institutional setting” (*Head 6(4)*). While “ordinarily resident” and “institution” or “institutional setting” are not defined, the purpose of the General Scheme states it is to “provide the statutory basis and framework under which Government may decide to authorise interventions at certain sites where manifestly inappropriate burials have taken place associated

²⁷ See for example, Adoption Rights Alliance, JFM Research, Clann Project, *Briefing notes re the Final report of the Mother and Baby Homes Commission of Investigation*, 2021, p. 16. Available at: http://clannproject.org/wp-content/uploads/Clann-Project-Briefing-Notes_Mother-Baby-Homes-Commission-Report.pdf.

²⁸ UN, *Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions* (12 October 2020) A/75/384, para. 32. Available at: https://www.ohchr.org/Documents/Issues/Executions/A_75_384_AdvanceUneditedVersion.pdf.

with institutions operated by or on behalf of the State or in respect of which the State had clear regulatory or supervisory responsibility.”

This may limit the scope of the Bill. Other stakeholders have identified up to 182 agencies, institutions and individuals that may have been complicit in the Mother and Baby Homes system.²⁹ Further, there are other settings where burials associated with institutions may have taken place, such as hospitals. As noted above in the terminology section, it may be more appropriate to consider and adopt the UN Special Rapporteur’s definition of mass graves.

2.2 . Complicated and challenging requirements must be met to set up an Agency

The requirements for setting up an Agency are complicated and challenging. Further, there is an unclear proportionality test relating to an intervention by the Agency.

2.2.1 Head 3(1): Need for clearer and more transparent process of identifying and locating potential burial sites

The Minister must be “satisfied on reasonable grounds, that manifestly inappropriate burials have taken place at a site” (*Head 3(1)*). While manifestly inappropriate burials is not defined, Head 5(2) provides that the Government should consider the presence of two or more factors as particularly significant. If the Minister is satisfied of this, they may bring a proposal to Government to establish an “Agency”. However, the process for identifying or locating burial sites where “manifestly inappropriate burials” have taken place is unclear and not provided for by this Bill. This is a key gap. For example, to date, there has been a failure to locate the burial site of 836 children at the Bessborough Mother and Baby Home.³⁰ In order to uphold its human rights obligations and effectively investigate suspicious deaths, Government must provide for a clear and transparent process to identify and locate potential burial sites.

2.2.2 Head 3(3) provides for overly broad discretion afforded to Government to decide when to set up an agency:

The Government must consider that it is “necessary for the purposes of safeguarding important objectives of general public interest” (*Head 3(3)*) in order to order the establishment of an Agency. This appears to give the Government discretion in deciding when to order the establishment of an Agency. While it is unclear when this could be perceived as not being necessary to safeguard important objectives of general public interest, this appears to be another unnecessary provision designed to maximise the Government’s discretion in deciding whether or not to set up an Agency under this Bill.

2.2.3 Head 5 provides for overly broad additional criteria to set up an agency

The Government must also assess whether the criteria of Head 5 apply in order to establish an Agency. These criteria include that the burial site is associated with a current or former institutional setting (*Head 5(3)*) and the land on which the burial site is located is owned by a public authority, available to access due to consent by the owner, or consent has been unreasonably withheld (*Head 5(4)*). Unreasonably withheld consent by the owner can be on the basis that either they were also the owner of the land at the time that the manifestly inappropriate burials were carried out or they acquired the site on or after the date of publication of the General Scheme (*Head 5(4)(c)*). Head 27A provides for the entitlement to compensation for people who have an interest in land which the Agency seeks access to. Head 28A provides further details on access to land for exhumation works, particularly in relation to access adjoining land in order to commence or continue an exhumation.

²⁹ 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*, p. 22. Dublin: Justice For Magdalenes Research, Adoption Rights Alliance, Hogan Lovells, 15 October 2018. Available at: http://clannproject.org/wp-content/uploads/Clann-Submissions_Redacted-Public-Version-October-2018.pdf.

³⁰ <https://www.iccl.ie/press-release/iccl-calls-for-action-on-disappeared-children/>.

However, one of the restrictions, is that this does not apply if the “land on which the burial site is located contains one or more dwellings” (*Head 6(8)*). This potentially limited access to land is an important gap. The Commission of Investigation into the Mother and Baby Homes recognised that “it is highly likely that the burials did take place in the grounds of Bessborough. The only way that this can be established is by an excavation of the entire property, including those areas that are now built on.”³¹ This Bill appears to exclude the possibility of doing this. There is a need to balance the property rights of individuals against the rights of survivors and families. Restricting an exhumation on the basis of property rights without a clear balancing of rights is highly problematic.

2.2.4 Overly restrictive obstacles to establishing Agencies (Head 6)

The restrictions outlined in Head 6 create significant barriers to the setting up of agencies, which could unduly prevent institutional exhumations from going ahead. These restrictions include the following:

- No agency can be set up where there is evidence that human remains were buried following death in violent or unnatural circumstances or that there is an ongoing Garda investigations into the circumstances surrounding the burials or the way the deaths took place. This presents particular difficulties in light of findings in the Mother and Baby Homes Commission in relation to the death rates in institutions.
- an “Exhumation would be unreasonably difficult and unsafe” (*Head 6(5)*);
- where “Evidence is insufficient to determine the existence of manifestly inappropriate burials or the location of the alleged burials” (*Head 6(7)*), and
- the “land on which the burial site is located contains one or more dwellings” (*Head 6(8)*).

These restrictions pose significant barriers to the establishment of an Agency and provide overly broad discretion to Government to decide not to set up an Agency.

Head six provides for two particularly problematic restrictions to setting up an Agency relating to limiting the temporal scope of agencies and providing for government to decide that memorialisation may be more appropriate than exhumation.

(i) Time limitation of 70 years (Head 6(6))

Head 6(6) sets out a restriction where “the lapse of time since the last known burial exceeds 70 years in relation to the date on which the circumstances of the burials concerned become widely known.” This would limit the scope of burial sites to those conducted from 1951 onwards. The rationale for this is unclear and appears to exclude a time frame when, according to the Commission on Mother and Baby Homes, some of the highest levels of mortality occurred in the institutions. The time frame should be extended to reflect the time scale addressed by the Commission.

(ii) Government has the view that memorialisation is more appropriate (Head 6(10))

Head 6(10) provides for a restriction where “Government has formed the view that memorialisation of the site without further intervention is more appropriate.” Memorialisation is an important pillar of a transitional justice response. However, as the UN Special Rapporteur notes “Families should hold a central place in associated decision-making processes” relating to mass graves.³² A survivor centred approach is crucial. Whether to consider memorialisation instead of an exhumation is a

³¹ Mother and Baby Homes Commission of Investigation, *Final Report*, 30 October 2020, Chapter 38 Addendum to Burials Report, para. 38.17. Available at: <https://assets.gov.ie/118565/107bab7e-45aa-4124-95fd-1460893dbb43.pdf>.

³² UN, *Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions* (12 October 2020) A/75/384, para. 36. Available at: https://www.ohchr.org/Documents/Issues/Executions/A_75_384_AdvanceUneditedVersion.pdf

significant decision that may have serious implications for families. As such, this is not a decision that should be left solely to the Government.

Further, as the Expert Technical Group appointed to provide technical assistance to Government in relation to the site of the former Mother and Baby Home in Tuam, Co. Galway noted, “In order to memorialise, it is essential to know what and whom are being acknowledged. Further investigation on behalf of Government would be required in order to memorialise effectively.”³³ There is a need to conduct excavation, exhumation, and take all reasonable steps to identify remains in order to be able to carry out meaningful memorialisation. This restriction should be removed.

2.2.5 Lack of clarity around the proportionality of an intervention (Head 3(8))

Another limitation is a lack of clarity around the “proportionality of an intervention”. Head 3(8) provides that the “Government shall consider the proportionality of any intervention with regard to factors including the following – public health, respect for the deceased, respect for the views of the relatives of the deceased, the potential impacts on the site and the surrounding area, including any potential impact on – (i) residents whose dwelling adjoins the site, and (ii) archaeological features of the site; the social interest to be served by carrying out an intervention; the economic impact of an intervention; avoidance of obstructions to any official or legal inquiry, investigation or process, proceedings pending or due before court, tribunal of inquiry or commission of investigation, possible alternative options available to accord dignity to persons buried there.”

A proportionality assessment should be strictly rights based. Including factors such as “the economic impact of an intervention” is not in line with a human rights based approach and should be excluded.

2.2.6 These restrictions combine to make the creation of an agency into a complicated and onerous task

This combination of these factors means that the task of setting up an Agency under this Bill is complicated and onerous. It significantly restricts the scope and potential of the Bill to provide access to a remedy for families of those who died in institutional settings and to guarantee the right to an effective investigation into these deaths.

3. Unclear if the Bill provides for the taking of all reasonable steps to identify the deceased

The Bill allows for the establishment of “a pilot programme of analysis” to be carried out on a proportion of the bodies exhumed from the site (*Head 47*). Based on the results from the pilot programme, the Director of the Agency determines whether or not to proceed to a full identification programme and shall only do so if they have reason to believe “there is a reasonable prospect that bodies exhumed from a site may be identified through such a programme” (*Head 47*).

As noted, the obligation to effectively investigate suspicious or unlawful deaths includes the responsibility to take all reasonable steps to identify the deceased. Thus, it is important to take all reasonable steps to identify each of the bodies that have been exhumed, rather than only examining a proportion of them and basing a decision on this.

4. Concerns regarding the DNA database system

The collection and storage of DNA data raises different human rights issues, relating to privacy and the constitutionally protected right to bodily integrity.³⁴ The EU General Data Protection Regulation

³³ Expert Technical Group, *Technical Report on the Tuam Site* (2017) p. 38. Available at: <https://www.gov.ie/en/press-release/a3f353-minister-zappone-publishes-expert-technical-group-report-on-the-site/>.

³⁴ *Ryan v Attorney General* [1965] IR 294. See ICCL, ICCL Position Paper: Human Rights Compatibility of the Establishment of a DNA Database (2003). Available at: <https://www.iccl.ie/wp-content/uploads/2017/11/ICCL-DNA-Position-Paper.pdf>.

(GDPR) is also relevant in setting out robust safeguards for handling this data, which must be respected.³⁵

Head 48 provides for the use of a DNA (Historic Remains) Database System to confidentially store DNA profiles. This may be a standalone database or may use the DNA Database System established under the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014. The Irish Human Rights and Equality Commission recommends that “legislation of this kind should be underpinned by rigorous safeguards governing the taking, retention, storage, sharing and destruction of bodily samples and DNA profiles, and the operation of the DNA (Historic Remains) Database System.”³⁶

Specific concerns relating to this system include the specific categories of persons who can participate in the identification programme. The Bill currently only allows for the sampling of first-degree relatives (*Head 53*). This may limit the possibility of identifying human remains. Another concern relates to the duty of staff to provide a biological sample where requested to do so by the Director of the Agency (*Head 58(1)*). While the rationale for this to establish an elimination (Agency) Index of the DNA (Historic Remains) Database makes sense, staff members must not feel obliged to provide a biological sample. There should be a requirement of consent and a transparent process where staff consent in writing to the sharing of their DNA, similar to the approach taken to the taking of samples for elimination processes in the Criminal Justice (Forensic Evidence Database) Act 2014, in line with human rights law and the GDPR.³⁷

5. Lack of transparency regarding the Agency’s documents and records

The Bill effectively provides for the sealing of all documents and records in the Agency’s possession upon its dissolution for a period of 30 years (*Heads 44 and 45*).³⁸ This is problematic and inconsistent with transitional justice principles, in particular the right to truth and right to reparation, which includes “[v]erification of the facts and full and public disclosure of the truth.”³⁹ Access to information is a key right that has taken on a particular significance in the context of justice for Mother and Baby Homes survivors and their families. Transparency must be a key principle in this Bill and in the functioning of Agencies created under the Bill.

6. Lack of a rights-based, survivor-centred approach and inconsistent with a transitional justice approach

6.1 Rights-based approach: It is striking that the only mention of rights in this General Scheme is the reference to property rights of landowners of burial sites. There is no mention of the rights of the deceased or their family members, which should be at the centre of this work.

6.2 Survivor-centred approach: Similarly, a survivor-centred approach is lacking in the Bill, despite the importance of survivor and family participation in this area, as noted above.

6.3 Transitional justice approach: This Bill is inconsistent with a transitional justice approach. It does not adequately or sufficiently provide for the right to truth or justice, reparation for survivors and

³⁵ See for example, PHG Foundation, *The GDPR and genomic data* (2020). Available at: <https://www.phgfoundation.org/documents/gdpr-and-genomic-data-report.pdf>.

³⁶ Irish Human Rights and Equality Commission, *Submission to the Joint Committee on Children, Disability, Equality, and Integration on the General Scheme of a Certain Institutional Burials (Authorised Interventions) Bill, February 2021* (2021), p. 27. Available at: <https://www.ihrec.ie/app/uploads/2021/02/IHREC-Submission-to-the-Joint-Committee-on-Children-Disability-Equality-and-Integration-on-the-General-Scheme-of-a-Certain-Institutional-Burials.pdf>.

³⁷ Criminal Justice (Forensic Evidence) Act 2014, Part 5.

³⁸ National Archives Act 1986, section 2(2).

³⁹ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of IHRL and Serious Violations of IHL (2005), Principle 22(b).

their families, or memorialisation. While it does reference memorialisation, as noted above, it does not take a survivor-centred approach, but rather proposes it as an alternative to truth seeking.

Part 3: Recommendations

ICCL recommends that Ireland ratify the UN Convention against Enforced Disappearances, as this provides a clear roadmap for dealing with enforced disappearances and is relevant for addressing mass graves and institutional burials.

ICCL recommends that the Government takes one of two possible approaches, either:

- significantly reform the bill in line with international human rights law and transitional justice principles, or
- amend existing legislation to provide for relevant powers for existing bodies to address institutional burials.

Recommendations relating to each option are set out below.

Option 1: Reform the Bill significantly in line with international human rights law and transitional justice principles

- Expand the scope of the Bill to address burial sites that may constitute mass graves, in line with the UN Special Rapporteur’s definition of a mass grave, which is a burial site where the “circumstances surrounding the death and/or the body-disposal method warrant an investigation as to their lawfulness.”⁴⁰
- Fulfil the State’s relevant human rights obligations and duties, in particular the right to an effective remedy for survivors and family members.
- Ensure that the obligation to conduct an effective investigation into mass burials is fulfilled, including through the following:
 - Ensure the Coroner has jurisdiction over burial sites and can conduct inquests into deaths and properly resource the Coroner’s system in Ireland;
 - Ensure that any agency created is properly trained and tasked in identifying cause of death or identifying prima facie evidence that there has been a violent or unnatural death to ensure referral to the Coroner;
 - Ensure that the provisions of the Coroners (Amendment) Act 2019 are properly reflected in provisions relating to the need or trigger for inquests or other forms of investigation into cause of death. In particular, amendments regarding the need for inquests into maternal deaths should be reflected. Do not entirely exclude burial sites from exhumations on the basis that there is an ongoing criminal investigation related to the site: any exhumation of a mass burial site should complement and support criminal investigations, including through gathering evidence.
- Clarify and simplify the process for establishing an Agency and remove any unnecessary discretionary powers and unclear proportionality tests:
 - Clarify and simplify the process for identifying and locating burial sites;
 - Remove the criterion that the Government should view it to be “necessary for the purposes of safeguarding important objectives of general public interest” (*Head 3(3)*)

⁴⁰ UN, *Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions* (12 October 2020) A/75/384, para. 12. Available at: https://www.ohchr.org/Documents/Issues/Executions/A_75_384_AdvanceUneditedVersion.pdf.

- Reform the restrictive access to land provisions, including by removing the restriction where “land on which the burial site is located contains one or more dwellings” (*Head 6(8)*) and remove the provision allowing for additional grounds for a private landowner to unreasonably withholding consent, beyond the two limited grounds (*Head 5(4)(c)*);
 - Remove the restriction that provides there can be no exhumation where it “ would be unreasonably difficult and unsafe” (*Head 6(5)*). The process for determining this is unclear and gives too much discretion to the Government to determine this unilaterally, without providing clear and transparent reasons;
 - Remove the restriction “Evidence is insufficient to determine the existence of manifestly inappropriate burials or the location of the alleged burials” (*Head 6(7)*): the process for determining this is also unclear and gives too much discretion to the Government to determine this unilaterally, without providing clear and transparent reasons;
 - Remove the time limitation of 70 years (*Head 6(6)*);
 - Remove the restriction “Government has formed the view that memorialisation of the site without further intervention is more appropriate.” (*Head 6(10)*).
- Take all reasonable steps to identify the remains: while a pilot programme might be a suitable means to assess the methodology used to gather DNA samples, all reasonable steps should be taken to identify each body.
 - Provide for an increased role for survivors and family members, such as by including a:
 - Duty to inform survivors and any possible family members of a proposed exhumation;
 - Clear process to engage survivors and family members in discussions around memorialisation efforts of institutional burials, such as inviting oral or written submissions and facilitating open meetings about this;
 - Increased possibility of the participation of family members in the DNA (Forensic Remains) Database by extending eligibility to do so beyond direct relatives.

If this approach is decided upon, it is important that there is consideration of how an Agency to be established under this Bill can best support the Coroner, who would continue to have primary jurisdiction in this area, and relevant associated practical considerations.

Option 2: Amend existing legislation to grant relevant powers to existing bodies to address mass graves, including institutional burials, removing any need for this Bill

The other option is to amend existing legislation to grant relevant powers to existing bodies to address mass graves. The relevant laws include: Coroners Acts 1962-2019 and the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014.

- Amendments to the Coroners Acts 1962-2019
 - As noted, the jurisdiction of the Coroner is key and should be maintained.
 - Additional relevant provisions relating to exhumations could be included to address the particular situation of conducting exhumations of mass graves, post-mortem examinations, and inquests, to ensure the effective investigation into these deaths and the right to a remedy of survivors and families.

The Coroner Service currently has limitations and is in need of reform. ICCL will be publishing a detailed report on this, in April 2021. Specific recommendations related to the reform of the Coroner Service, particularly relevant to addressing mass graves, include:

- Rationalisation of the thirty-nine Coroner districts to a region-based, distinct agency reflecting population distribution, demography and case numbers;
 - Need to significantly increase the funding necessary to meet the requirements of an independent, professional Coroner Service in its routine work and in conducting thorough investigations into deaths in contested circumstances and in mass grave situations;
 - Development of a national training programme for coroners in post and new appointees on international human rights law and the conducting of exhumations, post-mortem examinations, and inquests in the context of mass graves and institutional burials;
 - 'Special Procedure' inquests should be introduced in the aftermath of tragedies involving multiple deaths or when a pattern of systemic failure is discernible across the jurisdiction, including mass graves and institutional burials.
- Amendments to the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014.
 - Include relevant provisions to establish a DNA (Historic Remains) Database System, ensuring that this is underpinned by safeguards relating to its operation and the taking, retention, storage, sharing, and destruction of bodily sample and DNA profiles in line with human rights law and GDPR.