



Irish Council for
Civil Liberties

ICCL press briefing on report of the Mother and Baby Homes Commission

The wrong approach

It is deeply unfortunate that Government chose to ignore advice¹ from the Irish Human Rights and Equality Commission that the Mother and Baby Homes Commission's report be framed in terms of human rights. The comparative analysis of standards of living in State care and in ordinary family homes was not appropriate to deal with the systemic human rights violations which took place. The State is required to meet much higher standards when it comes to protecting the rights of those that reside in its care.

There is a very real danger that, by implementing only the recommendations contained in the report, the Government can sell a narrative that it is doing what it should. In fact, if it follows only the recommendations in the report, the State will fall far short of its human rights obligations.

ICCL *here provides a full analysis* of the human rights violations documented by the Commission, and the obligations on the State, irrespective of the recommendations contained in the Commission's report. Below is a summary of same.

Evidence of Human Rights abuses

Despite not using a human rights lens to investigate the abuses, evidence of human rights abuses leap off many pages of the Commission's report.

- **Arbitrary Detention (deprivation of liberty and security of person)²:** There is evidence that many mothers and their children were effectively detained in Mother and Baby Homes without their consent³ and women and children were forcibly returned to Mother and Baby Homes without legal authority.⁴ This can be considered arbitrary detention, one of the most serious violations of rights possible.
- **Violations of the Right to Life⁵:** Conditions in some of the homes were so dire that residence in these homes was detrimental to a child's chances of survival.⁶ Babies and young children were reported to have died from malnutrition, a form of neglect.⁷ The State

¹ 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

² 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.

³ Commission's Report, Confidential Committee, see eg p.14,15,16,18

⁴ Commission's Report, Confidential Committee, see eg p 1108, 2437

⁵ 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.

⁶ 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."

⁷ Commission's Report p.47,750

must protect against gross neglect, which can be considered a form of manslaughter. There is evidence in the Commission's report that inspectors were highlighting the conditions in these homes but the government failed to intervene. Therefore the State can be considered responsible for violations of the right to life.

- **Torture and Ill Treatment**⁸: Women and children were subjected to appalling mental and physical abuse⁹ in these homes, including the denial of medical treatment during birth, humiliating treatment, and ongoing violations of the right to dignity.¹⁰ 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. This treatment can be framed as evidence of cruel, inhuman or degrading treatment or punishment.¹¹ Where pain or suffering is deliberately inflicted and particularly severe it may amount to torture.

Vaccine trials were carried out on children without the consent of their mothers.¹² This is contrary to international law and may constitute a form of ill treatment, as well as a violation of private and family life.¹³

- **Modern slavery or servitude or forced labour**¹⁴: Women and children in the homes and when 'hired out' were forced to work without remuneration under threat of abuse and in abusive circumstances.¹⁵ Depending on the extent and severity of these practices, they can be framed as a form of modern slavery, servitude or forced labour.¹⁶
- **Enforced Disappearance**¹⁷: The separation of mothers and children without their consent and without means of tracing each other,¹⁸ with the refusal by the state to allow access to identifying documents such as birth certificates, may amount to enforced disappearance. Children were buried without identification or registration of place of burial. Where death certificates register deaths without registering place of burial, this can be considered an enforced disappearance.
- **Violation of Private and Family Life**¹⁹: Mothers and their children experienced a range of violations of their right to private and family life through their forced institutionalisation, the

⁸ 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

⁹ Commission's Report, Confidential Committee, see eg p1308, 2444, 2445, 2548

¹⁰ Commission's Report, Confidential Committee, see eg p1306, p2435, 2473

¹¹ 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.

¹² Commission's Report, Confidential Committee, see eg p2026, p2048

¹³ 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

¹⁴ 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'>

¹⁵ Commission's Report, Confidential Committee, see pp 115,118

¹⁶ 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.

¹⁷ 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

¹⁸ See eg Commission's Report, Confidential Committee, p2444

¹⁹ 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.

forced separation of mothers and children through adoption without consent,²⁰ through the “boarding out” or fostering of their children, where many suffered abuse²¹, and by their placement in industrial schools or other settings which denied them familial contact.²² 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,²³ and lack of access to information about the fate and whereabouts of family members, including those who were buried without record.

- **Discrimination²⁴:** Discrimination evident from the report includes gender-based discrimination, racial discrimination, discrimination on the basis of disability and discrimination on the basis of socio-economic class. This was 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:²⁵** Individuals and their families who suffered human rights violations are entitled to an effective remedy under the Irish Constitution and the numerous human rights treaties that Ireland has ratified.

Some of the violations are continuing violations. 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 includes 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 enforced disappearances. Remediating these violations is particularly urgent, in particular in light of the age of many of the survivors.

The State’s Obligations

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 State is responsible for human rights violations not only when State officials or institutions directly 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.²⁶

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

²⁰ See Commission’s Report, Confidential Committee, eg p2435, p 2496, p2497

²¹ See Commission’s Report, Confidential Committee, eg p

²² Commission’s Report, Confidential Committee, eg p.2455

²³ 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”.

²⁴ 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.

²⁵ 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

²⁶ 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.

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 Mother and Baby Homes, where the Commission specifies that inspectors were reporting on dire conditions but government took no action to improve them.

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 providing access to information and contributing to a reparation fund. It is important to recognise that, under the Irish Constitution, non-State entities and individuals are obliged to respect the Constitutional rights of others.²⁷

The government's action plan is an important but incomplete response to the appalling abuse. The Government must fulfil a range of obligations under human rights law to ensure proper redress and reparation for survivors. 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

- The government must establish additional human rights compliant **fact-finding mechanisms to address the entire system of incarceration** of unmarried mothers and their children, forced separation and human rights abuse. This should include an investigation into all agencies, bodies and individuals involved in the system and a wide-ranging inquiry into the system of forced adoptions.
- An **investigation into the circumstances around the destruction of the testimony** of survivors to the Commission on Mother and Baby Homes must be launched without delay.
- **Exhumations** that lead to identification of remains, establishment of cause of death and dignified burials must take place where remains have been buried without identifying who was buried, or, in some cases, where they were buried.
- **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.
- The right to access personal identity must be fulfilled by **legislating to provide immediate access to birth certificates** and to provide access to other relevant records

2. The Right to Justice

- An Garda Síochána or another appropriate body should set up a **special unit to investigate potential criminal activity** highlighted in the report, and to support victims in the process of making criminal complaints.

3. The Right to Reparation

- Government should provide a **comprehensive and generous compensation scheme** without prohibitive administrative hurdles or an unnecessary adversarial scheme.
- Appropriate **health, housing and other supports** should be provided for survivors.

²⁷ 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.

4. The Right to Guarantees of Non-Recurrence.

- Appropriate **memorialisation of those that died or suffered** in Mother and Baby Homes and related institutions.
- Appropriate **record keeping and access** to archives.
- **Public education** on institutional abuse and the system of incarceration and forced separation of mother and children.
- Ensuring the conditions for institutional abuse cannot be repeated, including by appropriate **human rights focused inspections of places of detention and residential care.**