



Irish Council for  
**Civil Liberties**

## ICCL Briefing on Mother and Baby Institutions Payment Scheme Bill

October 2022

## A. Background

1. Survivors challenged the Final Report of the Mother and Baby Homes Commission of Investigation in the High Court by arguing that the Commission failed to adhere to the legislation that established it, and that their rights under the Constitution and the European Convention on Human Rights had been breached. A settlement was reached<sup>1</sup> whereby the State consented to a declaration that the Commission acted in breach of statutory duty. A statement was also agreed which recognised that “survivors do not accept the accounts given in the Final Report... as a true and full reflection of the oral and documentary evidence they gave”. This is followed by a list of 64 paragraphs which can no longer be relied on. The State has expressed that the Redress Scheme is a part of the measures being used in “responding to the report”.<sup>2</sup> ICCL is concerned that the Redress Scheme is therefore based on a report which the State itself agreed was flawed.
2. The Final Report omitted survivors’ testimony and drew conclusions that do not align with survivors’ testimony. For example:
  - a) There was “no evidence” that the women who gave birth were denied pain relief (Executive Summary, para. 245) and that there was “no evidence” that at the time of adoption women thought “their consent was not full, free and informed” (Executive Summary, para. 254).

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<sup>1</sup> Department of Children, Equality, Disability, Integration and Youth, ‘Commission of Investigation into Mother and Baby Homes and Certain Related Matters’ <https://www.gov.ie/en/publication/316d8-com-mission-of-investigation/#outcome-of-judicial-review-applications>.

<sup>2</sup> Department of Children, Equality, Disability, Integration and Youth, ‘Government approves proposals for Mother and Baby Institutions Payment Scheme and publishes An Action Plan for Survivors and Former Residents of Mother and Baby and County Home Institutions’ (16 November 2021) <https://www.gov.ie/en/press-release/ce019-government-approves-proposals-for-mother-and-baby-institutions-payment-scheme-and-publishes-an-action-plan-for-survivors-and-former-residents-of-mother-and-baby-and-county-home-institutions/>.

- b) Mothers were “not ‘incarcerated’ in the strict meaning of the word” (Recommendations, para. 27).
- c) Certain evidence was merely “the product of a creative writing class” (Chapter 18, footnote 78).

## **B. Proposed Independent Review**

- 3. On 2 June 2021, it was reported that the vast majority of evidence given by survivors, those who gave evidence to the Confidential Committee, was effectively not considered for the Final Report.<sup>3</sup> This led to the proposal from the Department of Children of a review of survivor testimony.<sup>4</sup> However, Minister O’Gorman recently announced<sup>5</sup> that this would not proceed due to “significant legal complexities”. These have not been adequately identified.

## **C. Problems with the Mother and Baby Institutions Payment Scheme Bill 2022**

- 4. The Mother and Baby Institutions Payment Scheme Bill 2022 omits over 40% of survivors,<sup>6</sup> including children who spent less than six months in an institution and those who were boarded out.<sup>7</sup> The six-month requirement is arbitrary and permits no consideration of context: a child resident for 180 days receives €12,500. A child resident for 179 days receives €0.

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<sup>3</sup> Órla Ryan, “‘Yet another blow to survivors’: Women get few answers as Commissioner defends report” (2 June 2021) <https://www.thejournal.ie/dr-mary-daly-mother-and-baby-homes-commission-5456003-Jun2021/>.

<sup>4</sup> Conall Ó Fátharta and Elain Loughlin, ‘Government abandons independent review of mother and baby home testimony’ (29 August 2022) <https://www.irishexaminer.com/news/arid-40949582.html>.

<sup>5</sup> Elaine Loughlin, ‘Review of testimony by mother and baby home survivors scrapped due to “significant legal complexities”’ (4 October 2022) <https://www.irishexaminer.com/news/politics/arid-40975529.html>.

<sup>6</sup> Elaine Loughlin, ‘Mother and baby home survivors wants redress scheme scrapped after High Court victory’ (18 December 2021) <https://www.irishexaminer.com/news/arid-40768593.html>.

<sup>7</sup> See, ‘ICCL submission on the General Scheme of a Mother and Baby Institutions Payment Scheme Bill’ (13 May 2022) <https://www.iccl.ie/wp-content/uploads/2022/05/ICCL-Submission-on-the-General-Scheme-of-a-Mother-and-Baby-Institutions-Payment-Scheme-Bill.pdf>, para. 12 (“ICCL Submission”).

5. The Bill makes it more difficult for survivors who resided in an institution at a young age to claim compensation. Whereas the General Scheme of the Bill allowed child survivors to claim a payment if they were, *or had reasonable grounds for suspecting they were*, residents (Head 2), the Bill only allows a child to claim who “was resident” (s.2). For children who may have no documentary evidence of their residence, this sets the standard of proof too high.
6. The Bill provides no compensation for forced and illegal adoptions, forced labour, unlawful vaccine trials, abuse as an adopted child, and death.<sup>8</sup> Nor does the Bill provide compensation for discrimination whether based on gender, disability or race. The latter issue of systemic racism in institutions was recently highlighted as a serious gap in this Bill by UN Special Rapporteurs.<sup>9</sup>
7. The term “work-related payment” used by the Bill (s.2) does not adequately describe lived experiences. It should properly be described as “forced labour”<sup>10</sup>.
8. The levels of payment provided by the Bill in respect of the “work-related payment” are inadequate. They must correspond to the wages that survivors should have earned at the time and be linked to the average industrial wage.<sup>11</sup>

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<sup>8</sup> Clann Project, ‘Irish High Court Declares that Mother and Baby Homes Commission of Investigation Treated Survivors Unlawfully’ (17 December 2021) [http://clannproject.org/wp-content/uploads/Clann-Press-Release\\_17-12-21.pdf](http://clannproject.org/wp-content/uploads/Clann-Press-Release_17-12-21.pdf).

<sup>9</sup> United Nations, ‘Ireland: UN experts call for adequate redress for systemic racism and racial discrimination in childcare institutions’ (23 September 2022) <https://www.ohchr.org/en/statements/2022/09/ireland-un-experts-call-adequate-redress-systemic-racism-and-racial>.

<sup>10</sup> ICCL Submission, paras. 26–29.

<sup>11</sup> *ibid.*

9. The Bill does not count a “temporary absence” of 180 days or more (s.19(2)(b)(ii)). There is no room for context. A survivor may have excellent reasons for having left the institution and returning. For example, a survivor may have escaped for 181 days before being caught and returned. That period of 181 days could not reasonably be separated from their time in the institution.
10. The enhanced medical card proposed in the General Scheme has been replaced by health services without charge and is available for anyone resident for 180 days (s.13(4)). This residency requirement is arbitrary and should be removed.
11. Survivors resident outside of Ireland are entitled to a payment of €3000 instead of health services without charge (s.13(5)). This figure is far too low and is not reflective of the value of the services available to those receiving health services without charge.<sup>12</sup>
12. Survivors have called specifically for trauma-informed counselling and therapies. This is not provided for in the Bill.
13. There is no requirement in the Bill that those charged to administer the Redress Scheme must be qualified for the position and be subject to ongoing training in international human rights law and trauma-informed responses to gross human rights violations.<sup>13</sup>

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<sup>12</sup> *ibid*, paras. 45–48.

<sup>13</sup> *ibid*, para. 32.

14. The Chief Deciding Officer (“CDO”) has a narrower role in notifying survivors under this Bill. The General Scheme required the CDO to “make all reasonable efforts, *through public advertisement in Ireland and abroad, and otherwise*, to ensure that persons who were residents of an institution are made aware of the Scheme” (Head 7(1)(e)). The Bill provides that the CDO must “mak[e] all reasonable efforts, including by the holding of a *public information* campaign, *as he or she considers appropriate* to promote awareness among the public and, in particular, relevant persons, of the Scheme” (s.9(1)(f)). The Bill does not expressly reference advertisement abroad. Moreover, the General Scheme imposed an objective standard in assessing whether the CDO had discharged this duty, whereas the Bill provides a subjective standard.
15. The Bill requires survivors to waive their entitlement to initiate litigation in order to access the Redress Scheme. This waiver must be removed to provide for access to an adversarial action as, presently, it will preclude victims from exercising their right to access justice and pursue further legal action. This can be contrasted to the Symphysiotomy Payment Scheme which did not require or compel any woman to forgo her right to initiate legal proceedings.<sup>14</sup> Therefore, the introduction of a waiver into this Scheme is inconsistent with previous schemes and risks violating the right to access justice. The UN Human Rights Committee specifically recommended to remove this waiver.<sup>15</sup>
16. There is a minimum duration of the Redress Scheme of one year (s.6(1)(b)(ii)). This must be significantly extended.

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<sup>14</sup> *ibid*, para. 71.

<sup>15</sup> UN Human Rights Committee, ‘Concluding observations on the fifth periodic report of Ireland’, CCPR/C/IRL/CO/5 (27 July 2022), para 12(d) [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRL/CCPR\\_C\\_IRL\\_CO\\_5\\_49292\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/IRL/CCPR_C_IRL_CO_5_49292_E.pdf).

17. Additionally, the Bill states that a survivor will be entitled to no compensation where they have “received an award from a court or settlement in respect of an action arising out of any circumstances relating to the same period of residence in the institution” (s.13(7)). This provision does not take into account the possibility of a Court awarding a survivor a lower amount of compensation than they would receive under the Bill. Moreover, court proceedings may not necessarily be directed towards the State, yet the Bill precludes such an individual from later claiming compensation from the State.
18. Payment rates under Head 11 should be amended to remedy the failure to offer payments to all survivors and to adequately compensate those who receive payments in line with, *inter alia*, the current Personal Injuries Guidelines and other comparable schemes.<sup>16</sup> This includes PTSD payments under the Guidelines: “moderate PTSD” equates to compensation of €10,000-€35,000, whereas “serious PTSD” equates to €35,000-€80,000.<sup>17</sup>
19. The Bill does not require that free legal aid be made available to all applicants in circumstances where legal aid is likely to be required in applying for compensation, reviewing or appealing a determination, and in swearing an affidavit that could be required of them. This should be provided for.

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<sup>16</sup> ICCL Submission, paras. 36–39.

<sup>17</sup> *ibid.*

