

**Advisory Paper to the
Interdepartmental Group on the
Government's Planned Development
of a 'Restorative Recognition Scheme
for former residents of Mother and
Baby Homes and County Homes'**

Irish Human Rights and Equality Commission

April 2021



**Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas**

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Contents

Contents	1
Introduction	2
IHREC engagement with survivors and key stakeholders	4
The purpose of the proposed scheme.....	6
Principles underpinning the proposed scheme	7
Survivor participation	10
Scope of proposed reparations	11
Apology as a form of reparation	11
Financial, rehabilitative and transformative reparations	13
Waivers	17
The universe of survivors eligible for proposed reparations	19
Trauma informed approach.....	25
Accessibility	29
Independence and oversight.....	32

Introduction

The Irish Human Rights and Equality Commission (the 'IHREC') is both the national human rights institution and the national equality body for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014* (the 'IHREC Act 2014').

IHREC has a statutory duty to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality, and to make recommendations to the Government to strengthen and uphold human rights and equality in the State.¹

IHREC welcomes the invitation from the Minister for Children, Disability, Equality, Integration and Youth to provide an advisory paper to the Interdepartmental Group on the planned development of a 'Restorative Recognition Scheme² for former residents of Mother and Baby Homes and County Homes'.

IHREC provides these observations without prejudice to its broader position on the right to redress, which encompasses the right to truth, reparations and guarantees of non-repetition, restitution and rehabilitation.

With particular regard to the matter of human rights abuses in Mother and Baby Homes, IHREC has raised serious concerns about the establishment of the Commission of Investigation into Mother and Baby Homes and certain related matters, due to:

- the narrow remit of the Commission of Investigation, in terms of the institutions that it investigated, as well as the types of abuses and issues covered.³
- the exclusion from the Terms of Reference of any requirement for the Commission of Investigation to be informed by human rights standards, despite IHREC's clear recommendation to do so.⁴ This has meant that, in effect, the

¹ Section 10(2) (b) and (d) of the Irish Human Rights and Equality Commission Act, 2014 (the 'IHREC Act, 2014').

² Concerns have been expressed by survivors regarding the use of this terminology. This will be discussed later in the paper.

³ IHREC, [Submission to the United Nations Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland](#) (August 2020). It also highlighted its concern that the exclusion of unaccompanied children in mother and baby homes from the remit of the Residential Institutions Redress Scheme represented an arbitrary barrier to accessing redress.

⁴ IHREC (Designate), [Proposed Commission of Investigation to Inquire into Mother and Baby Homes Submission on behalf of the Irish Human Rights and Equality Commission \(Designate\)](#) (2014): "it is critically important that any such investigation should take place within a human rights and equality framework and in particular that it conforms with the State's human rights obligations under the Constitution and under international human rights law". The Commission of Investigation itself noted it in its final report that the Government 'did not opt for that approach in its mandate to the Commission.' Department of Children, Equality, Disability, Integration and Youth (the 'DCEDIY'), [Final Report of the Commission of Investigation into Mother and Baby Homes](#), Chapter 36.

Commission of Investigation was not mandated to examine what occurred in Mother and Baby Homes as potential violations of human rights.

Notwithstanding the serious inadequacies of the State's approach to investigating the Mother and Baby Homes, IHREC is of the view that subsequent actions, including the development of a redress scheme, could mark a pivotal and systemic change in the treatment of survivors seeking justice for abuse and trauma, and must be human rights and equality compliant in both design and delivery.⁵ In this regard, it is to be welcomed that, while the Government has signalled an intention to "take account" of the recommendations of the Commission of Investigation, it has also indicated that it does not intend to be "solely limited to those recommendations".⁶ Indeed, IHREC is of the firm view that any such scheme cannot be bound by the significant limitations of the Commission of Investigation's report and recommendations.

A comprehensive approach to redress informed by human rights and equality standards and transitional justice is key to a successful and survivor-centred scheme. Not only can it provide the State with a clear framework in terms of how to provide survivors with an effective and comprehensive remedy, but also it can contribute to breaking the 'cycle of violence' and human rights abuses by:

"delivering a sense of justice to victims and prompting examinations of deficiencies in State institutions that may have enable, if not promoted, those cycles."⁷

This advisory paper will outline some of the core principles that can contribute to the development of a scheme that will better meet the needs of survivors, and which complies with human rights and equality standards. IHREC wishes to make it clear that the development of such a scheme will not, in and of itself, relieve the state of its more general obligation under the Constitution and international human rights law.

⁵ IHREC (Press Release, 12 January 2021), [Taoiseach's Mother and Baby Homes Apology Must Mark Start of Human Rights Compliant Redress and Restitution Process](#).

⁶ Interdepartmental Group on Restorative Recognition for Former Residents of Mother and Baby Homes, [Terms of Reference](#) (March 2021).

⁷ UN General Assembly, [Report of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Advisor to the Secretary-General on the Prevention of Genocide: Joint study on the contribution of transitional justice to the prevention of gross violations and abuses of human rights and serious violations of international humanitarian law, including genocide, war crimes, ethnic cleansing and crimes against humanity and the recurrence](#), A/HRC/37/65 (6 June 2018), para 11.

IHREC engagement with survivors and key stakeholders

To inform this submission, IHREC embarked on a series of one-to-one 'listening sessions' with survivors and key stakeholders (the 'participants') to get their personal views on redress during March 2021.⁸

The participants across the eight listening sessions all acknowledged the difficulties and complications around redress, given the diversity of experiences, needs and personal situations of survivors. However, an adversarial approach to redress was, without doubt, viewed by participants as invasive, inappropriate and re-traumatising. There was a clear message from participants that such an approach must be avoided. Redress needs to be trauma-informed, transparent and accountable and prioritise the dignity and well-being of survivors above any personal, financial or professional interests of the State or, associated actors.

For these participants, a financial compensation scheme and apology are not enough. The integration of broader reparation efforts, including health and social services, housing, and pensions is required – and only when these are in place will the apologies and memorialisation be meaningful to survivors. Participants stated that financial compensation should not be contingent on signing a waiver that precludes future litigation. Participants also stated that survivors should have access to a state-funded legal aid scheme should they wish to pursue redress through the courts.

According to participants, international human rights law and terminology can more effectively capture the magnitude of suffering and systemic failures that occurred. Participants stated that a human rights framing and approach can inform the design and execution of a redress scheme that meets international standards. As part of this, participants stated that a meaningful participatory process is crucial, with the caveat that there may be survivors who choose to remain silent.

Across a majority of the listening sessions, the right to truth was one of the most important issues for participants. The broad consensus was there was a need for survivors to have 'free and unfettered' access to their own personal information and

⁸ A total of eight participants ('the participants') took part in the process – which included seven survivors and one representative of survivors.

records.⁹ To deny these records can be re-traumatising for the survivor and a further violation of their human rights, particularly in the light of the survivors who may be approaching end of life. There were other reflections which emerged across the listening sessions in relation to the right to truth, including:

- access to and provision of specialist DNA screening;¹⁰
- investigations and information regarding unexplained and unmarked burials; and
- access to medical records, including details of vaccinations.

Most of all, the participants all stated that there was a need for a more coordinated, transparent and organised response around access to records.

However, one participant highlighted that there was a significant number of women – most of whom are approaching older age – who may have had a baby in these institutions but who do not wish to be contacted. The participant explained that some of these women may have repressed their personal traumas (including in cases of rape leading to pregnancy) and this has been their strategy to cope while others may have not told their family members. This is an important consideration as the voices of these survivors are, by their nature, unlikely to be prominent in the current discussions and debate. Therefore there is an argument to ensure that these women are protected, including ensuring their privacy is protected.

The participants expressed deep frustration, upset, anger, exhaustion and feelings of being let down by the State, repeatedly. All participants expressed concern of the *Final Report of the Commission of Investigation into Mother and Baby Homes*. This is relevant in approaching the redress scheme, given that it may be rooted in the findings and recommendations of the Report. Notably, based on the views of these participants, it would not be considered in any way acceptable or, appropriate for survivors to have to accept the findings of the Report in order to access redress of any kind.

⁹ This included access to records including: long birth certs, early life information, medical information, admission records, payment records where relevant, vaccine information, foster care details and legal status of adoptions – all of which, in combination, can offer a fuller picture for survivors. For mothers, it includes the provision of details of their children’s adoptive identities, copies of all forms they are reported to have signed, and copies of their medical records for the time before, during and after they gave birth. The relevant data holders include the Church, Tusla, government departments and the Adoption Authority.

¹⁰ Several participants reported that DNA screening may be particularly important for people who are mixed race, or where parents are not recorded in relevant records.

The purpose of the proposed scheme

The Government has agreed to establish an Interdepartmental Group to develop detailed and costed proposals for a 'Restorative Recognition Scheme for former residents of Mother and Baby Homes and County Homes'. In terms of its overall purpose, the Government has stated that it has:

"committed to a comprehensive action plan to respond to the needs of the former residents. A key element is the establishment of Restorative Recognition Scheme including financial recognition and a form of enhanced medical card".¹¹

It is further noted that the stated intention of the Minister, is to:

"address the wrongs of the past and assist with providing some long-awaited healing and comfort".¹²

Redress schemes should be comprehensive and include explicit recognition and official acknowledgement of the harm done and human rights violations that occurred. The former UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Professor De Greiff states that:

"[i]n order for something to count as a reparation, as a justice measure, it has to be accompanied by an acknowledgement of responsibility and it has to be linked, precisely, to truth, justice and guarantees of non-recurrence."¹³

Indeed this was particularly important for participants. Participants believed that the findings of the Commission of Investigation Report lacked consequential accountability either on part of the religious orders or the State. 'Restorative recognition' was described by participants as "unacceptable", "jarring" and "insufficient", especially in the absence of any reference to justice.

More explicit terminology such as 'redress', 'reparations', or 'restorative justice' which are clearly linked to human rights and transitional justice based approaches are likely to

¹¹ DCEDIY (Press Release, 10 March 2021), [Call for submission on a Restorative Recognition Scheme for former residents of Mother and Baby Homes](#).

¹² DCEDIY (Press Release, 10 March 2021), [Minister O'Gorman launches Consultation Process on the development of a Restorative Recognition Scheme for Former Residents of Mother and Baby Homes and County Homes](#).

¹³ United Nations General Assembly, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/69/518 (14 October 2014), para 11.

be more acceptable to survivors. Furthermore, if the State's purpose is to provide meaningful redress to survivors for the harms and human rights violations that have occurred, then the scheme should state this in clear and unequivocal terms.

IHREC recommends that the title and purpose of the scheme be framed using human rights and equality terminology and further, that the purpose be clearly linked to the objective of providing redress to survivors of human rights and equality abuses that arose from the operation of Mother and Baby Homes and other related institutions.

Principles underpinning the proposed scheme

As part of the consultation process the Government makes reference to a human rights based approach which includes principles of "participation, accountability, respect, access to services, diversity, empowerment and support."¹⁴

Human rights and equality law sets out a number of standards that should guide the development and operation of a redress process.¹⁵ While a number of principles are captured above, it is important to ensure that they are as comprehensive as possible. Core human rights and equality principles relevant to the proposed redress scheme include:

- The right to an adequate, effective and prompt remedy:¹⁶ The remedy should meet the needs of the survivor and should be capable of being enforced. Redress should be provided within a reasonable timeframe and without delay, a factor that is heightened by the fact that many survivors of Mother and Baby Homes are advancing in age;
- Fair procedures and accountability:¹⁷ Fair and transparent procedures must be followed and obstacles for survivors in accessing the scheme should be

¹⁴ DCEDIY (Press Release, 10 March 2021), [Minister O'Gorman launches Consultation Process on the development of a Restorative Recognition Scheme for Former Residents of Mother and Baby Homes and County Homes](#).

¹⁵ See Article 2 of the ICCPR and Article 13 of the ECHR. Also see for example 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.

¹⁶ Article 13 of the ECHR and Article 2 of the ICCPR. Also 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 which states that States should make available "adequate, effective, prompt and appropriate remedies

¹⁷ The right to fair procedures in decision making and the right to natural and constitutional justice as protected under the Constitution and Article 6 of the ECHR.

removed, including overly burdensome standards of proof and short application times;

- Equality and non-discrimination: The scheme must comply with the principle of equality and non-discrimination in its design and implementation.¹⁸ Under equality legislation discrimination is prohibited where it is grounded on age, gender, disability, civil or family status, race (including nationality) or ethnic background, including membership of the Traveller community, religious belief, or sexual orientation;¹⁹
- Proportionality: Redress should reflect the gravity of the situation and the harm done,²⁰ and should take account of pecuniary and non-pecuniary harms;²¹
- Gender dimensions: Given that many survivors of Mother and Baby Homes, County Homes and related institutions are women, an assessment of gender perspectives must inform the design and implementation of the scheme, including any assessment of the harm suffered;²²
- Accessibility and support: redress measures must be accessible to all survivors and remedies should be adapted to take account of the “special vulnerabilities of certain categories of persons”.²³ Support mechanisms should be incorporated throughout the process to ensure survivors can engage meaningfully;

¹⁸ Article 40.1 of the Irish Constitution and Article 14 of the ECHR.

¹⁹ See for example Equal Status Acts 2000-2018.

²⁰ The decisions respect the gravity of the violation and the resulting harm. The 2005 UN Principles state that compensation should be “provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: (a) Physical or mental harm; (b) Lost opportunities, including employment, education and social benefits; (c) Material damages and loss of earnings, including loss of earning potential; (d) moral damage, (e) costs required for legal or expert assistance, medicine and medical services, and psychological and social services.”

²¹ In *Varnava and others v. Turkey*, 16064/90, 16065/90, 16066/90 et al. Judgment 18.9.2009 [GC], the European Court of Human Rights justified non-pecuniary harm to dignity on the ground that survivors have suffered moral harm and this needs to be recognised due to their “evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption of life, or real loss of opportunity’ caused by such gross violations of their rights” at para 224.

²² “The Committee reiterates that State parties obligations also require them to ensure women’s right to a remedy, which encompasses the right to adequate and effective reparations for violations of their rights under the Convention. An assessment of the gender dimension of the harm suffered is essential to ensure that women are provided with adequate, effective and prompt reparations for violations suffered during conflict, notwithstanding whether remedies are ordered by national or international courts or by administrative reparation programmes. Rather than re-establishing the situation that existed before the violations of women’s rights, reparation measures should seek to transform the structural inequalities which led to the violations of women’s rights, respond to women’s specific needs and prevent their re-occurrence.” See UN Committee on the Elimination of Discrimination against Women, [General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations](#), CEDAW/C/GC/30 (18 October 2018), para 79.

²³ United Nations Human Rights Committee, [General Comment No 31 \[80\] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant](#), CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para 15.

- Participation: Survivors and their representatives should be meaningfully involved in the design, development and implementation of the proposed redress scheme.²⁴ This will also ensure that reparations are accessible and do not exclude or marginalise any particular group; and
- The 'do no harm' principle: the process and the outcomes of the scheme must avoid the re-traumatisation of survivors and family members.²⁵ Accordingly a non-adversarial²⁶ and holistic²⁷ approach is required.

²⁴ See Principle 6 of the UN Principles on Justice for Victims which emphasises the importance of victim participation: "The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information; (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system...". See United Nations, [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#), adopted by General Assembly resolution 40/34 of 29 November 1985. Also, the UN Guidance Note of the Secretary-General for Reparations for Conflict-Related Sexual Violence recommends that meaningful participation and consultation of victims in the mapping, design, implementation, monitoring and evaluation of reparations should be supported. See United Nations, [Guidance Note of the Secretary-General: Reparations for Conflict-Related Sexual Violence](#) (2014).

²⁵ 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; Principle 10: "Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation."

²⁶ Dr Mairead Enright and Dr Sinead Ring observe that the Residential Institutional Redress Board (RIRB) proved harrowing for many victims-survivors. In particular they report that survivors have described the RIRB as re-traumatising and as discouraging future help-seeking. They state that research shows that some felt so strongly about their treatment that they never spent their awards. They further state that the hostile environment of the panel hearings distressed many survivors who appeared before them. In this regard they explained that partners or friends of victim-survivors were not allowed to be present when they gave their evidence. Furthermore, they state that victim-survivors taking part in panel hearings were subjected to cross-examination by legal advisors to the board on the information provided by the religious orders, but without any oral evidence having been given by the orders. Also, they state that despite the no-fault basis of the scheme, the Christian Brothers were permitted to issue repeated letters denying that any abuse took place in their institutions, thereby adding to victim-survivors' distress. See "State Legal Responses to Historical Institutional Abuse: Shame, Sovereignty, and Epistemic Injustice" *Eire Ireland: An Interdisciplinary Journal of Irish Studies* 55:1-2, 21 February 2020, pages 10-11.

²⁷ Human Rights Law Centre and School of Law, Queen's University Belfast, [Response to Historical Institutional Abuse Consultation by Queen's University Belfast Human Rights Centre and School of Law](#) (February 2019); "A holistic and comprehensive response is required when providing support to victims and survivors of historical institutional abuse. It has been found that child abuse and neglect can have severe long-term consequences, affecting the victims physically, psychologically, and behaviourally. Therefore, in line with trauma-informed practice, medical treatment and long-term care for past injuries should be appropriately funded including psychiatric care." At pages 13-14.

IHREC recommends that the design and implementation of the scheme must be underpinned by a comprehensive set of human rights and equality principles including:

- the right to an adequate,
- effective and prompt remedy;
- fair procedures and accountability;
- equality and non-discrimination;
- proportionality;
- gender dimensions;
- accessibility and support;
- participation; and
- the 'do no harm' principle.

Survivor participation

As identified above, international law recognises that persons have a right to participate and be consulted if they are directly affected by state decision-making.²⁸ In the context of redress schemes, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (the 'UN Special Rapporteur') has set out that the consultation with, and participation of, survivors in a redress scheme is "essential in order to fulfil their right to reparation".²⁹ International guidance and standards set out that states should ensure and facilitate meaningful consultation with and participation of survivors in the design, implementation and monitoring of reparation programmes.³⁰ In particular, there should be a focus on ensuring women, members of minority groups and persons with a disability participate in public

²⁸ United Nations Human Rights Council, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/HRC/34/62 (27 December 2016), paras 31-35.

²⁹ United Nations Human Rights Council, [Report of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/HRC/42/45 (11 July 2019), para 71.

³⁰ United Nations General Assembly, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/69/518 (14 October 2014), para 80; United Nations Human Rights Council, [Report of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/HRC/42/45 (11 July 2019), paras 44(b), 61, 129(l). See also Principle 32 of the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* which provides that victims and civil society should have a meaningful role in the design, implementation and assessment of reparation programmes: United Nations Commission on Human Rights, [Updated Set of principles for the protection and promotion of human rights through action to combat impunity](#), E/CN.4/2005/102/Add.1 (8 February 2005).

consultations.³¹ To ensure meaningful participation, some survivors may require advocacy supports to enable engagement.

Effective participation is essential as the aim of a redress programme should not only be to provide recognition to survivors as victims but also to recognise their status as rights holders and to foster the trust of survivors in institutions and actors that either contributed to their abuse or failed to protect them.³²

All participants emphasised the importance of meaningful consultation and participation of survivors (noting that not all survivors wish to engage in this way). Participants stated that the emphasis on the term 'meaningful' can be characterised by ensuring full transparency in the processes of consultation, strong and open communication channels, and ideally, independent oversight. Otherwise, participants felt that survivor's efforts are regarded as tokenistic.

IHREC recommends meaningful participation with survivors in the design, development and implementation of the redress scheme, including special measures to support the participation of survivors of minority groups, persons with a disability, and survivors who require advocacy support due to low education, poor literacy, including IT skills and resources.

Scope of proposed reparations

Apology as a form of reparation

It is understood from the Minister's press release that the scheme will be provided on an 'ex gratia' basis.³³ Previous redress schemes set up by the State have been strictly on an 'ex-gratia' basis where no liability was accepted by the State, or other relevant private actors.³⁴

³¹ United Nations Human Rights Council, [Report of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/HRC/42/45 (11 July 2019), para 44(b).

³² United Nations General Assembly, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/69/518 (14 October 2014), paras 47 and 92; United Nations Human Rights Council, [Report of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/HRC/42/45 (11 July 2019), para 61.

³³ DCEDIY (Press Release, 10 March 2021), [Minister O'Gorman launches Consultation Process on the development of a Restorative Recognition Scheme for Former Residents of Mother and Baby Homes and County Homes](#).

³⁴ For example provisions for financial redress under the Residential Institutions Redress Act 2002, were made on an ex gratia basis without admission of liability by the religious orders or the State. No blame was assigned or accepted. The 2002 Act required that awardees to agree that they would sue neither the

In terms of transitional justice, apologies fall within the reparations pillar.³⁵ The Human Rights Committee³⁶ and the Committee against Torture include public apologies as a means of 'satisfaction'.³⁷ Various international reports consider apologies as a symbolic and collective reparation measure aimed at providing satisfaction to survivors.³⁸ It is further noted that other jurisdictions have placed apologies on a statutory footing.³⁹

Failure to acknowledge wrong-doing and terming payments as 'ex gratia':

"implies that such a payment is charitable, rather than based on any legal obligation, identifiable responsible actor or entitlement for such victims to a remedy".⁴⁰

Monetary compensation alone without an acknowledgement can be offensive and inadequate, and it can be perceived as 'blood money' to buy a survivors silence.⁴¹

State nor the religious order. In similar terms the Magdalen laundries – the Restorative Justice scheme, the symphysiotomy scheme and the O'Keefe Scheme (all administrative schemes) were set up on an ex-gratia basis with no admissions of wrong-doing.

³⁵ See Principle 22(e), 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.

³⁶ United Nations Human Rights Committee, [General Comment No 31 \[80\] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant](#), CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para 16.

³⁷ United Nations Committee against Torture, [General comment No. 3 \(2012\) on the implementation of article 14](#), CAT/C/GC/3 (13 December 2016), para 16.

³⁸ See for example, United Nations Human Rights Council, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence: Report on apologies for gross human rights violations and serious violations of international humanitarian law](#), A/74/147 (12 July 2019). Also see United Nations Office of the High Commissioner for Human Rights (the 'OHCHR'), [Rule of Law Tools for Post-Conflict States: Reparations programmes](#) (2008); Pablo de Greiff "The Role of Apologies in National Reconciliations Processes: On Making Trustworthy Institutions Trust" in the Age of Apology.

³⁹ See for example Scotland - [Apologies \(Scotland\) Act 2016](#).

⁴⁰ See Luke Moffet, A pension for injured victims of the Troubles: reparations or reifying victim hierarchy? Northern Ireland Legal Quarterly 66(4) (2016) 297-319, page 310. Also cited in Human Rights Law Centre and School of Law, Queen's University Belfast, [Response to Historical Institutional Abuse Consultation by Queen's University Belfast Human Rights Centre and School of Law](#) (February 2019), page 49.

⁴¹ Brandon Hamber, *Transforming Societies after Political Violence: Truth, Reconciliation and Mental Health* (Springer 2009); Claire Moon, "'Who'll Pay Reparations on My Soul?' Compensation, Social Control and Social Suffering' (2012) 21(2) *Social and Legal Studies* 187, page 194; Dyan Mazurana and others, *Making Gender-Just Remedy and Reparation Possible: Upholding the Rights of Women and Girls in the Great North of Uganda* (Feinstein International Centre: Tufts University 2013); Margaret Urban Walker, Making Reparations Possible: Theorizing Reparative Justice, in C. Coradetti N. Eisikovits and J. Rotondi (eds) *Theorizing Transitional Justice* (Ashgate 2015), 211.

Moreover, awards provided in this manner can have the effect of re-traumatising survivors.⁴²

Sincere and meaningful apologies were considered important by the participants. They reported that such apologies help to validate the suffering of survivors and recognise that what they suffered was wrong. Participants stated that most importantly, apologies help to alleviate the shame and stigma that many survivors have internalised for decades.

The redress scheme should be designed in a manner that facilitates and encourages apologies from officials representing the State and relevant private entities (such as religious orders or, other private institutions) to survivors. Such apologies can be facilitated in public or made in private, for example by way of a mediated settlement.⁴³ Moreover, and as an important starting point, terms such as 'ex gratia' and provisions that seek to deny or, fail to acknowledge, wrong doing by the State or other private entities should not find expression in the proposed redress scheme.

IHREC recommends that the scheme should be designed to facilitate apologies from officials representing the State and relevant private entities to survivors.

IHREC further recommends that the basis of the scheme should not be on an 'ex gratia' basis and that provisions seeking to deny or limit liability should not find expression in the proposed scheme.

Financial, rehabilitative and transformative reparations

It is understood that redress will include both financial payments and provide for enhanced medical cards. The Government states that the enhanced medical card:

“will be similar to the enhanced medical card provided to former residents of Magdalen Laundries”.

Such services would including medical, social (home-help) and counselling services.⁴⁴

⁴² Human Rights Law Centre and School of Law, Queen's University Belfast, *Response to Historical Institutional Abuse Consultation by Queen's University Belfast Human Rights Centre and School of Law* (February 2019), page 38.

⁴³ Private apologies from those responsible for past harms can be valuable for some victims. See for example, Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford, California University Press, 1991).

⁴⁴ HSE, Medical cards, Redress for women resident in certain institutions – <https://www2.hse.ie/services/medical-cards/redress-for-women-resident-in-certain-institutions.html>

Compensation should be proportionate to the gravity of the violation(s) and reflect both pecuniary and non-pecuniary harm.⁴⁵ The 2005 *UN 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* (the 'UN Principles') provide that compensation should:

"provide for any economically assessable damage, as appropriate and proportional to the gravity of the violations and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- Physical or mental harm;
- Lost opportunities, including employment, education and social benefits⁴⁶;
- Material damages and loss of earnings, including loss of earning potential;
- Moral damage;
- Cost required for legal or expert assistance, medicine and medical services, and psychological and social services."⁴⁷

While financial compensation is insufficient on its own,⁴⁸ it is a tangible acknowledgement of the seriousness of wrongdoing and should be part of a package of measures. Financial compensation allows survivors to manage how they wish to address the effects of the harm caused. Research carried out in both Northern Ireland and the Republic of Ireland found that financial compensation combined with appropriate services (such as counselling) is a valuable means of reparations.⁴⁹

⁴⁵ Supra fn 21.

⁴⁶ Lost opportunities for intimacy and affiliation due to emotion and/or psychological damage should also be included within the meaning of compensation. See Jonathan Herring, *Law and the Relational Self* (Cambridge University Press 2020).

⁴⁷ Principle 20, 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.

⁴⁸ See for example Ulster University, Professor Patricia Lundy, [What Survivors want from Redress](#) (March 2016), page 16..

⁴⁹ See ongoing field research with HIA survivors as part of the ESRC funded project 'Apologies, Abuses and Dealing with the Past' [Grant ref: ES/N010825/1]. See project website: <https://apologies-abuses-past.org.uk/> Also see, Human Rights Law Centre and School of Law, Queen's University Belfast, [Response to Historical Institutional Abuse Consultation by Queen's University Belfast Human Rights Centre and School of Law](#) (February 2019), page 47-48.

While as noted above redress must be adequate and proportionate, Professor de Greiff notes;

“There should not be anything in a reparations program that invited either their designers or their beneficiaries to interpret them as an effort to put a price on the life of the victims or on the experience of the horror. Rather, they should be interpreted as making a contribution to the quality of life of survivors.”⁵⁰

IHREC welcomes financial compensation as part of a package of reparations measures. IHREC recommends that redress should be adequate, proportionate and reflect both pecuniary and non-pecuniary harm.

IHREC recommends that such compensation should focus on improving the quality of life of survivors.

Rehabilitation is a recognised form of reparation that aims at providing survivors with physical and mental health services, as well as other legal and social services.⁵¹ It can go beyond physical and mental care and includes services such as education. Education is a tool that can provide “inclusion, recognition and empowerment”.⁵²

The proposal in relation to an enhanced medical card is welcome. However, there should be direct engagement with survivors on the framing and scope of such reparations. This will ensure that rehabilitative measures are both adequate and effective. Survivors have vastly different needs, different experiences and live in different jurisdictions, so a multi-faceted approach to reparations is needed. For example, although many Irish based survivors would benefit from an enhanced medical card, survivors living outside the jurisdiction might require alternative mechanisms to access rehabilitative supports. Other survivors living in poverty may benefit from a

⁵⁰ Pablo de Greiff, *Handbook of Reparations* (Oxford University Press), page 466.

⁵¹ Principle 21, 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.

⁵² United Nations Human Rights Council, [Report of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/HRC/42/45 (11 July 2019), para 103. The UN Special Rapporteur states that depending on the type of harm, education can also be conceived of as a form of satisfaction or restitution or as a guarantee of non-recurrence. See also Roger Duthie and Clara Ramírez-Barat, “Education as rehabilitation for human rights violations”, *International Human Rights Law Review*, vol. 5, issue 2 (2016), pp. 241–273.

pension, whilst others may require supports relating to education, housing or other social supports, including personal assistants or home help services. Moreover, whilst general counselling services may be sufficient to meet the health needs of certain survivors, others might require specialised trauma informed counselling services. According to the Office of the High Commissioner for Human Rights (the 'OHCHR'), the goal of compensation in transitional justice is not *restitutio in integrum*.⁵³ Rather, it is to provide measures of recognition to survivors and to contribute to the full recovery of their dignity. The UN Special Rapporteur states that, from a gender perspective, transformative reparations are more appropriate:

"The traditional restitutive approach to reparations is insufficient for women, who traditionally find themselves in conditions of exclusion, inequality and discrimination. A return to the situation before the violation is insufficient as it does not imply the effective enjoyment of their rights. Reparations should aspire to subvert the pre-existing structural inequality that may have engendered the violence suffered by women."⁵⁴

Such 'transformative' reparations might include measures that:

- impact on survivors' lives in practical terms, including for example access to records⁵⁵, and where relevant repatriation;⁵⁶

⁵³ Restoring the situation as it existed prior to the violations of human rights.

⁵⁴ United Nations General Assembly, [The gender perspective in transitional justice processes: Report of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/75/174 (17 July 2020), para 37. Also see United Nations Human Rights Council, [Report of the UN Special Rapporteur on violence against women its causes and consequences, Rashida Manjoo](#), A/HRC/14/22 (23 April 2010), para 31: "Even in non-conflict scenarios, acts of violence against women are part of a larger system of gender hierarchy that can only be fully grasped when seen in the broader structural context. Therefore, adequate reparations for women cannot simply be about returning them to where they were before the individual instance of violence, but instead should strived to have a transformative potential. Reparations should aspire, to the extent possible, to subvert, instead of reinforce, pre-existing structural inequality that may be at the root causes of the violence the women experience before, during and after the conflict."

⁵⁵ Supra fn 9.

⁵⁶ A majority of the participants described how the traumas, abuse and family separation often led to survivors to leave the jurisdiction and going to the UK and elsewhere. For those who were never to return, there was evidently complex emotions towards the country given the multiple traumas which characterised their childhoods. One participant felt a feeling of 'statelessness' for many years, while another described survivors being 'exiled' to the UK. One participant reported that a birth mother who immediately left Ireland following pressure to give her child up for adoption; she never returned and related the reason to this trauma. Consideration towards survivors currently living outside Ireland – and how their emigration journey could be directly related to their interaction with Mother and Baby Homes and related institutions – is therefore important when considering suitable approaches to redress relevant to those living outside the jurisdiction. In this respect some survivors need support to be

- facilitate the narrowing of gender equality and inequality on other grounds; and
- promote a new positioning of survivors within the community, and encourage economic (through educational and employment programmes) and other forms of autonomy.⁵⁷

IHREC recommends that there should be direct engagement with survivors when developing rehabilitative and transformative reparations and that a multifaceted approach to reparations is taken to reflect the different circumstances and needs of survivors. With regard to transformative reparations, the Government should adopt education and employment measures that are age and context appropriate, as well as measures that aim to address inequality including for example on the grounds of gender, race, disability and socio-economic status.

Research indicates that some survivors of the Magdalen Laundry Scheme have yet to receive the enhanced medical card promised under the Restorative Justice Scheme, describing their entitlement as nothing more than “an ordinary medical card”.⁵⁸ The UN Special Rapporteur has stated that the:

“lack of effective provision of rehabilitation measures for vulnerable victims constitutes inhuman treatment and generates new victimization.”⁵⁹

IHREC recommends that any form of rehabilitative or transformative reparation be holistic and accessible to all survivors.

Waivers

Redress schemes which require survivors to waive their right to litigate before accepting an award are not, *per se*, contrary to international human rights standards. The OHCHR has recognised that an element of finality in a reparations programme, while making courts inaccessible to survivors, may be beneficial:

repatriated to Ireland and in need of housing upon arrival. Others would like to be able to visit for a period of time.

⁵⁷ United Nations General Assembly, [The gender perspective in transitional justice processes: Report of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/75/174 (17 July 2020), para 38.

⁵⁸ Justice for Magdalen Research, [Listening Exercise Vol 1: Report on Key Findings](#) (2020).

⁵⁹ United Nations Human Rights Council, [Report of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/HRC/42/45 (11 July 2019), para 107.

“once a Government has made a good-faith effort to create an administrative system that facilitates access to benefits”.⁶⁰

The UN Special Rapporteur has said that domestic reparation programmes should “aim at finality, addressing the question of the potential coexistence of judicial reparation and domestic reparation programmes”.⁶¹

However, the OHCHR states that compensation must not be seen as a means of buying the silence and acquiescence of survivors, rather compensation should be part of a comprehensive justice policy.⁶² The United Nations Committee against Torture has emphasised that judicial remedies should always be available to survivors regardless of the availability of other remedies such as collective reparation and administrative reparation programmes.⁶³ In the case of Elizabeth Coppin, the Committee against Torture determined that an individual’s right to remedy and to obtain redress, including an enforceable right to fair and adequate compensation, is not impaired if she previously waived any right of action as a condition of receiving an ‘ex-gratia’ award.⁶⁴ The Scottish Human Rights Commission (the ‘SHRC’) has argued that requiring survivors to choose between accessing the redress scheme and civil proceedings is an arbitrary, unnecessary, and disproportionate restriction on the right to remedy. In this regard, the SHRC has highlighted the need for more proportionate approaches such as requiring courts, when awarding damages, to take into account any previous receipt of redress under the scheme.⁶⁵

IHREC previously expressed concern in relation to payments under the ‘ex gratia’ scheme for victims of symphysiotomy, which required signature of a ‘deed of waiver and indemnity’ precluding the applicant from further legal recourse against State and non-State actors.⁶⁶ The experience of redress schemes in Ireland is that no wrongdoing

⁶⁰ OHCHR, *Rule of Law Tools for Post-Conflict States: Reparations programmes* (2008), page 35.

⁶¹ United Nations Human Rights Council, *Report of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, A/HRC/42/45 (11 July 2019), para 45.

⁶² OHCHR, *Rule of Law Tools for Post-Conflict States: Reparations programmes* (2008), page 12.

⁶³ Committee Against Torture, *General comment No. 3*, CAT/C/GC/3 (13 December 2012), para 30.

⁶⁴ Committee Against Torture, *Decision adopted by the Committee under article 22 of the Convention concerning communication No. 879/2018* (14 January 2020) CAT/C/68/D/879/2018, para 6.7.

⁶⁵ Scottish Human Rights Commission, *Response to Pre-legislative Public Consultation on Financial Redress for Historical Child Abuse in Care* (November 2019), pages 28-29.

⁶⁶ IHREC, *Ireland and the Convention on the Elimination of All Forms of Discrimination Against Women: Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland’s combined sixth and seventh periodic reports* (January 2017), page 43.

or liability is admitted on behalf of State and non-State actors, which can be a key desire of victims/survivors.⁶⁷ Waivers applied on this basis are not in line with international human rights standards. The right to litigate is important to survivors not only as a means of accessing compensation but also as a means of disclosing the truth in a public forum and for findings of liability by a court.⁶⁸ Moreover, requiring survivors to choose between receiving redress through a scheme or retaining their right to access court places survivors in a difficult position which may lead to re-traumatisation and secondary victimisation.⁶⁹

IHREC recommends that redress scheme that are provided on an 'ex gratia' basis with no admission of liability should not be contingent on survivors waiving their procedural rights and right to an effective remedy, including the right to take further legal recourse against the State and non-State actors through the judicial processes or other fora.

The universe of survivors eligible for proposed reparations

In broad terms, the Government proposes that all persons who were resident in Mother and Baby Homes for a period of six months, or more shall be entitled to an enhanced medical card and that it intends to provide 'restorative recognition' payments:

"taking account of the recommendations of the Commission relating to redress (but which may not be solely limited to those recommendations)."

The Government has identified the following three categories of survivors based on the Commission of Investigation report:

⁶⁷ IHREC, *Ireland and the Convention against Torture: Submission to the United Nations Committee against Torture on Ireland's second periodic report* (July 2017), page 55; Queens University Belfast, *Apologies & Institutional Child Abuse* (September 2018), page 4.

⁶⁸ Scottish Human Rights Commission, *Response to Pre-legislative Public Consultation on Financial Redress for Historical Child Abuse in Care* (November 2019), page 28.

⁶⁹ Human Rights Law Centre and School of Law, Queen's University Belfast, *Response to Historical Institutional Abuse Consultation by Queen's University Belfast Human Rights Centre and School of Law* (February 2019), page 57.

“The Commission recommends that three groups be eligible for a reparations scheme similar to the Magdalen scheme on the basis that they did carry out what might be termed “commercial work”:

- Women in county homes
- Women in Tuam Mother and Baby Home
- Women who worked outside the institutions without pay

A further category suggested by the Commission for consideration in a reparation scheme is those women who spent lengthy periods (for example, in excess of six months) in mother and baby homes, before 1974.

The Commission also identified people who were resident as unaccompanied children in a mother and baby home or county home as a child under the age of 18 years and who did not qualify for a reparation under the Residential Institutions Redress Board Scheme.⁷⁰

Defining eligibility is based on identifying the *ratione materiae* (the type of harm or, human rights violation arising from the subject matter) and the *ratione personae* (the category of survivor). Such decisions will in turn lead to inclusions and exclusions. In this respect, the UN Special Rapporteur has warned;

“These are not merely technical decisions but have a political impact that will affect the scope and credibility of the reparations programme, and by extensions the political capital of the transitional justice process.”⁷¹

Reparations schemes must provide adequate and effective remedies to all survivors, without discrimination. Moreover, they should not reproduce patterns of gender discrimination. In order to understand the nature and extent of the harm that a reparations scheme seeks to address, it is necessary to understand the complexity of the harm suffered and its consequence on the daily lives of the those effected and further “to consider the stigmatising effect of the violations suffered.”⁷²

⁷⁰ DCEDIY (Press Release, 10 March 2021), [Call for submissions on a Restorative Recognition Scheme for former residents of Mother and Baby Homes](#), page 3.

⁷¹ United Nations General Assembly, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence: The gender perspective in transitional justice processes](#), A/75/174 (17 July 2020), para 28.

⁷² United Nations General Assembly, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence: The gender perspective in transitional justice processes](#), A/75/174 (17 July 2020), para 31.

In light of the above, the proposed framing of the eligibility of the scheme raises the following concerns.

The length of time in a Mother and Baby Home, County Home or related institution may be a relevant aggravating factor when assessing the level of non-pecuniary reparations⁷³. However, the six month length of stay requirement is not *per se* an indicator of whether or not survivors suffered harm, including for example in relation to forced separation of mother and child; deaths while under institutional or, state care; unauthorised burials of relatives, abuse and ill-treatment, and forced labour. Moreover, even where a length of stay requirement could be properly linked to the relevant harms, the proposed six month requirement is based on the estimated length of stay in Homes in other countries.⁷⁴ This time-frame has no rational or, reasonable link to the harm suffered by survivors in the Irish context.

IHREC recommends that the six month length of stay requirement be removed as it has no rational connection to the violations suffered by survivors in the Irish context.

The proposed exclusion of all persons who resided in Mother and Baby Homes after 1974 is problematic. The decision to limit the recommendation for redress for women to those who entered Mother and Baby Homes before 1974 is based on the introduction of the unmarried mothers allowance by the Social Welfare Act 1973. In the Final Report, it is recorded that the introduction of the allowance was not publicised, did not have instantaneous effect, did not cover accommodation and was paid at a very low rate (lower than the capitation grant paid to the Mother and Baby Homes). Chapter 32 states that:

“[a] number of witnesses said that they were not aware of the existence of the Unmarried Mothers’ Allowance from 1973. They claimed that, had they been so aware, they might have made the decision to keep the baby”.⁷⁵

⁷³ European Court of Human Rights, [Q&A on the European Court of Human Rights award of “just satisfaction”](#) (23 March 2019).

⁷⁴ The six-month period referred to in paragraph 33 of the Final Report of the Commission of Investigation is said to be based on the average length of time women spent in Mother and Baby Homes in other countries.

⁷⁵ Department of Children, Equality, Disability, Integration and Youth, [Final Report of the Commission of Investigation into Mother and Baby Homes](#) (12 January 2021), Chapter 32, para 32.194.

Moreover, the introduction of the allowance does not justify the harm suffered by survivors after 1974. Based on this information, a blanket exclusion of this nature is not proportionate and may breach Ireland's equality obligations under the Constitution and the *European Convention of Human Rights* (the "ECHR").⁷⁶

IHREC recommends that all persons (both women and children) who were in Mother and Baby Homes, County Homes and other related institutions after 1974 be eligible for reparations under the redress scheme.

The Commission of Investigation recommendations on the universe of survivors for the purpose of compensation are under-inclusive. By the Commission of Investigation's own admissions, it did not take a human rights-based approach. This has resulted in findings and recommendations that do not reflect Ireland's human rights or equality obligations and in turn is not an adequate mechanism for identifying the full universe of survivors.

In the past Ireland has been criticised for its narrow interpretation of the category of persons who should qualify for compensation under redress schemes. The Council of Europe Human Rights Commissioner, Nils Muižnieks observed that in respect of Irish redress schemes:

"In some cases, the redress schemes established are not inclusive enough, notably due to a narrow interpretation of the category of persons who qualify for compensation, as illustrated ... by the Scheme opened in the context of the O'Keeffe judgement on sexual abuse in school."⁷⁷

All participants' emphasised how the Final Report failed to recognise the gravity and magnitude of the human rights violations that occurred in Mother and Baby Homes and related institutions – in terms of the content of the report, its recommendations and in the language used. Participants reported that there was a perceived lack of recognition of trauma of being separated from mother or child and the 'family destruction' therein. Participants described the trauma of this separation as life long and that this needs to

⁷⁶ See for example *NHV v. the Minister for Justice and Equality*, [2017] IESC 35: the Supreme Court upheld a challenge to the absolute prohibition on employment of asylum seeker on the grounds that it was disproportionate and in breach of the principle of equality.

⁷⁷ Council of Europe, [Report by Nil Muižnieks, Commissioner for Human Rights of the Council of Europe, Following His Visit to Ireland, 22-25 November 2016](#) (29 March 2017), page 33.

be central in redress of mother and baby homes survivors. In addition, one participant stated that language such as 'diaspora' of survivors was not appropriate given that scale of what many survivors considered to be trafficking of children. Other participants also stated that there has been a lack of recognition of the trafficking of children who were in Mother and Baby Homes and related institutions. There was a clear consensus across the participants that the Commission's report and actions relating to redress need to be explicitly situated within a framework of constitutional and human rights law and international standards.

Accordingly, 'harm', for the purpose of redress should be defined inclusively and informed by relevant human rights and equality standards. In particular, it should adequately take into account the gender and care dimension of the harm suffered⁷⁸ by women and children who had no option but to remain in Mother and Baby Homes and other related institutions.⁷⁹

Taking a human rights and equality approach, 'harm' should, at a minimum, capture the following:

- loss of life due to malnutrition, or neglect;⁸⁰
- discriminatory treatment, including racism (including mixed race discrimination), sexism, classism, ableism, etc;⁸¹

⁷⁸ Council of Europe, [Report by Nil Muiznieks, Commissioner for Human Rights of the Council of Europe, Following His Visit to Ireland, 22-25 November 2016](#) (29 March 2017), page 34. In relation to the Symphysiotomy Scheme, the Commissioner stated that he was; "particularly struck by the patronising tone and the kind of information provided in the report. The report does not give acknowledgement to women's suffering and seems to perpetuate some gender stereotypes against (elderly) women".

⁷⁹ The sociocultural context of the Mother and Baby Homes was emphasised by the participants. In this regard, they reported that their experiences in the Mother and Baby Homes and other institutions occurred in a context where there was a profound symbiosis between Church and State and there was associated power dynamics that flowed from this, particularly relating to patriarchy and gender inequality, the power of religious orders on all aspects of life, classism and particular restrictions for those living in poverty. The participants emphasised this context repeatedly across the listening sessions, with particular reference to the way in which unequal power dynamics significantly problematizes the concept of 'choice' - choice to either enter or leave an institution and choice to give a child up for adoption.

⁸⁰ The right to life is protected under Article 40.3.2 of the Constitution and Article 2 of the ECHR. There is a positive obligation on the State to protect life. The Commission of Investigation's Final Report made stark findings in relation to the very high infant mortality rates of children whose mothers were not married and that the conditions in certain Homes were extremely poor, significantly reducing prospects of survival.

⁸¹ Equality before the law is protected under Article 40.1 of the Constitution and Article 14 of the ECHR. The Commission of Investigation recognised certain forms of discrimination on the basis of marital status, and illegitimate children. However, other grounds such as gender, race, disability and socio economic status were not adequately considered in the report.

- unauthorised burials;⁸²
- forced or unlawful separation of mother and child⁸³ and consequential relational loss of intimacy and affiliation with one's child/mother;⁸⁴
- arbitrary detention;⁸⁵
- abuse and ill-treatment that occurred in homes and related institutions, and where children born in said institutions were boarded out, adopted or fostered. Abuse should include both emotional, physical and sexual abuse, trafficking and include illegal or unethical vaccine trials;⁸⁶
- ongoing harms such as lack of access to information about one's identity (including the registration of false birth certificates) or about the fate or where about of relatives;⁸⁷
- all forms of forced labour (including domestic and other labour) which occurred within mother and baby homes.⁸⁸

IHREC welcomes the Government's position that it is not limited to the Commission of Investigations recommendations on compensation. IHREC recommends that a human rights and equality based approach is taken to identifying survivors and the harms

⁸² This engages the right to life and right to family life (including the right to have loved one's return and the right to know their fate). The Commission of Investigation found that many Mother and Baby Homes did not properly record the burials of children who died in these institutions. Family members still do not know the fate or whereabouts of these children.

⁸³ The right to privacy is protected under the Constitution. The right to respect for private and family life is protected by the ECHR, ICCPR, CEDAW and CRC. At paragraphs 34 and 35, the Commission rejected suggestions that children were taken forcibly from their mothers, although it accepts that mothers "did not have much of a choice". There is a conflict between these two findings. Further examination is required and it would seem appropriate that this would occur within the context of the proposed redress scheme.

⁸⁴ Lost opportunities for intimacy and affiliation due to emotion and/or psychological damage should also be included within the meaning of compensation. See Herring, *Law and Relational Self* (Cambridge: Cambridge University Press (2020)).

⁸⁵ The right to liberty is protected under Article 40.1 of the Constitution and Article 5 of the ECHR. Survivors gave evidence to the Confidential Committee (at pages 14-16 and 18 of the Confidential Report) regarding being taken to Mother and Baby Homes without their consent and being forcibly returned to Homes (at pages 13 -18 and 1108, 2437).

⁸⁶ It is noted that the Commission of Investigation found no evidence that children suffered injury as a result of vaccine trials. However, this finding was not based on an investigation of the subsequent medical histories of children experimented upon. Moreover, a medical procedure conducted without valid consent – at the time – was a batter as well as trespass to this person, which was actionable without proof of injury.

⁸⁷ This would not only have been unlawful at the time but were individual claims substantiated this would be in breach of privacy, and family rights under the Constitution and the ECHR.

⁸⁸ Article 4 of the ECHR prohibits forced or, compulsory labour. The Commission of Investigation's Final Report recommended that some women who were required to work on farms and forestry, should have been remunerated. However, it declined to recommend any payment in respect of work they were required to do on the basis that it was work they would have done at home. First, this appears to re-inforce gender discrimination. Second, this is problematic in that it is arguable that such work cannot fairly be compared with work they would have done at home – because it does not take into account that it was compulsory, or the fact that they would have derived the benefit of that work.

suffered by survivors of Mother and Baby Homes and related institutions and that this should inform eligibility to the proposed scheme.

The Commission of Investigation report was also limited in terms of the institutions that it covered. In the past, the exclusion of certain institutions in Ireland has created a barrier to seeking recourse to any meaningful reparation for survivors, despite having been subjected to serious harm.⁸⁹ Recent research from Queen's University identifies the difficulties of relying on previous investigations to inform the scope of reparation's schemes and which resulted in excluding certain institutions;

"Refusing redress for these victims or basing redress on the same assumptions and availability of evidence already collected through investigations, creates a hierarchy of victims, silencing those at other institutions and compromising the efficacy and justiciability of the redress scheme overall."⁹⁰

IHREC recommends that reparations should not be limited to those who gave birth in Mother and Baby Homes which were investigated by the Commission of Investigation.

Trauma informed approach

Engaging with a redress scheme, to pursue the right to redress, can have a significant impact on survivors in terms of:

"exacerbating further harm and re-traumatising and re-victimising survivors."⁹¹

⁸⁹ For example, the Restorative Justice Scheme for survivors of the Magdalen Laundries adopted a very narrow interpretation of its terms which excluded many eligible women from redress on the basis that they were not resident in the Magdalen Laundry when they worked there. This approach was based on divisions between institutions maintained by those who ran them which were largely notional, and it ignored the fact that the Mother and Baby Homes, industrial schools and Magdalen Laundries functioned as an integrated mechanism. When this interpretation was challenged in *MKL and DC v. Minister for Justice and Equality* [2017] IEHC 389, White J, 1 June 2017, the High Court found that the Minister had unfairly relied on information from religious orders that had not been disclosed to the applicants. Following dozens of complaints about the administration of the scheme and a year-long investigation, the Office of the Ombudsman found that the Department of Justice was guilty of maladministration, leading, ultimately, to the redress scheme's amendment to clarify its eligibility criteria. See Office of the Ombudsman, [*Opportunity Lost - An investigation by the Ombudsman into the administration of the Magdalen Restorative Justice Scheme \(Under Section 4 of the Ombudsman Act 1980, as amended\)*](#) (November 2017).

⁹⁰ Human Rights Law Centre and School of Law, Queen's University Belfast, [*Response to Historical Institutional Abuse Consultation by Queen's University Belfast Human Rights Centre and School of Law*](#) (February 2019), page 53.

⁹¹ Ulster University, Professor Patricia Lundy, [*Historical Institutional Abuse: What Survivors want from Redress*](#) (March 2016), page 32.

In particular, complex gating systems with high evidential thresholds to establish eligibility/admission whether through a paper-based system, oral hearings or a combination of both can serve as a barrier to survivors accessing their right to reparation. In this regard, the administration of previous redress schemes in Ireland has illustrated a concerning approach to survivors of historical violations, as they have adopted a largely adversarial approach.⁹²

IHREC has previously noted a number of concerns with the Magdalen Restorative Justice Scheme, including the over reliance on the records of religious congregations in making assessments for eligibility under the revised Scheme, with ongoing ambiguity about the weight being afforded to the testimony of the women and/or their relatives, and requirements for applications to be accompanied by records from the relevant institution.⁹³

As set out above, concerns were raised by all participants regarding barriers and difficulties accessing personal records relating to their time at, and treatment in relevant institutions. This will inevitably impact on a survivor's ability to substantiate a claim and is a relevant factor when determining the standard and burden of proof.⁹⁴

The UN Special Rapporteur has stated that the objective of a registration process for a redress scheme was:

“not to challenge the veracity of the claims made by the survivors or the evidence they have provided, rather to assume in good faith that what has been said is a statement of truth.”⁹⁵

⁹² James Gallen, “Transitional Justice and Ireland's Legacy of Historical Abuse” (2020) 55(1-2) *Éire-Ireland* 35-67.

⁹³ See IHREC, *Submission to the United Nations Committee on the Elimination of Discrimination Against Women on the follow-up procedure to Ireland's combined sixth and seventh periodic report* (August 2020), pages 4-5.

⁹⁴ For many of the participants, they described the process of accessing personal records lasting for many years to access their full birth records, medical records, or information about family members. Upon receipt of their records, the information was usually limited and heavily redacted. Further complications arise when it comes to falsified or missing documents. A number of the participants were particularly keen to receive medical and vaccination trial records and are not sure whether they had been involved in these trials (but suspect they had). One participant knows she was hospitalised as a small child for a relatively lengthy period of time but does not know why this was the case. Indeed, one participant was not able to fill out a redress form because she did not have answers to some of the information they requested (including length of time in particular institutions).

⁹⁵ United Nations Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, A/HRC/42/45 (11 July 2019), para 57.

The UN Special Rapporteur has welcomed the approach of States who, in the administration of redress schemes, have placed the burden of proving the violation on State institutions rather than on survivors, or have applied lower standards of evidence for eligibility to the scheme.⁹⁶

IHREC recommends that the approach to evidentiary thresholds for the redress scheme should be survivor-centred, and appropriate weight should be given to the testimony of survivors.

There was a consensus among the participants that previous failures in the administration of financial compensation must be avoided – specifically relating to survivors having to endure a process that was adversarial in nature and approach. This was regarded by many as being highly stressful and re-traumatising.

To support a survivor-centred and non-adversarial approach, the redress scheme could, for example, provide for an option of a mediated settlement in the first instance.⁹⁷ In circumstances where settlement cannot be reached, non-adversarial procedures could be adopted when hearing and assessing the evidence.⁹⁸ Whatever the approach, the right to fair procedures and natural justice still applies.⁹⁹ In this regard, the extent to which procedural safeguards are necessary is not dictated by the characterisation of the process (adversarial/non-adversarial), but rather by the extent of its impact on the rights of the persons that the subject of it.¹⁰⁰ The process of

⁹⁶ *Ibid.*

⁹⁷ Ulster University, Professor Patricia Lundy, [Historical Institutional Abuse: What Survivors want from Redress](#) (March 2016), page 35.

⁹⁸ Human Rights Law Centre and School of Law, Queen's University Belfast, [Response to Historical Institutional Abuse Consultation by Queen's University Belfast Human Rights Centre and School of Law](#) (February 2019), page 15.

⁹⁹ Article 40.3 of the Constitution and Article 6 and 13 of the European Convention of Human Rights.

¹⁰⁰ As Barron J. put it in *Flanagan v. University College Dublin* [1988] IR 724 at pages 730-731: "Once a lay tribunal is required to act judicially, the procedures to be adopted by it must be reasonable having regard to this requirement and to the consequences for the person concerned in the event of an adverse decision. Accordingly, procedures which might afford a sufficient protection to the person concerned in one case, and so be acceptable, might not be acceptable in a more serious case. In the present case, the principles of natural justice involved relate to the requirement that the person involved should be made aware of the complaint against them and should have an opportunity both to prepare and to present their defence. Matters to be considered are the form in which the complaint should be made, the time to be allowed to the person concerned to prepare a defence, and the nature of the hearing at which that defence may be presented. In addition depending upon the gravity of the matter, the person concerned may be entitled to be represented and may also be entitled to be informed of their rights. Clearly, matters of a criminal nature must be treated more seriously than matters of a civil nature, but ultimately the criterion must be the consequences for the person concerned of an adverse verdict."

adjudicating on the nature and extent of historic human rights violations will always engage fair procedures for all parties involved. Accordingly, the process must ensure that fair procedures as protected under the constitution and human rights law are carefully and expressly articulated within proposed scheme, in a manner that is both accessible and understood by all parties engaged in the process.

IHREC recommends that the redress scheme should facilitate alternative dispute resolution, including the option of mediated settlements in the first instance.

IHREC recommends that the process for adjudicating that nature and extent of the harms should be non-adversarial in its approach.

IHREC further recommends that whatever approach is adopted, fair procedures must be clearly and expressly articulated within the proposed scheme.

Ensuring the privacy of survivors is protected is important in terms of mitigating against re-traumatisation. The redress scheme should include measures that will protect the identity and disclosure of information of survivors.¹⁰¹ However, it should not have blanket effect of silencing survivors in all cases. In this regard, it is understood that survivors who engaged in the Residential Institutional Redress Board process were required to sign confidentiality agreements promising not to talk about their experience of the scheme or, divulge how much compensation they received.¹⁰² It is further understood that survivors were subsequently sent letters quoting legislation criminalising the publication of information relating to a redress application or award that could lead to identification of a person or institution under pain of a maximum punishment of a €25,000 fine or two years' imprisonment.¹⁰³ Accordingly, the principle of privacy which should serve to protect survivors in the context of proceedings should not be utilised, or understood as a mechanism to silence survivors.

¹⁰¹ Human Rights Law Centre and School of Law, Queen's University Belfast, [Response to Historical Institutional Abuse Consultation by Queen's University Belfast Human Rights Centre and School of Law](#) (February 2019), page 11-12.

¹⁰² Ring & Enright, "State Legal Responses to Historical Institutional Abuse: Shame, Sovereignty, and Epistemic Injustice" *Eire Ireland: An Interdisciplinary Journal of Irish Studies* (February 2020) 55(1-2), page 21.

¹⁰³ *Ibid.*

IHREC recommends that the process should be developed to protect the identity and privacy of survivors. However, IHREC further recommends that this should be developed in a balanced and proportionate manner and should not be used as a mechanism to silence survivors.

Accessibility

In designing and implementing such a redress scheme, great care should be taken in ensuring the scheme is accessible for all victims to ensure that the right of victims to an effective remedy is protected and fulfilled.

As referenced above, international guidance and standards set out that redress programmes should be accessible, effective and expeditious for all victims, and be appropriately adapted to the special vulnerability of groups of people.¹⁰⁴ In developing redress schemes, states are obligated to develop means of informing the general public and in particular survivors of the rights and remedies for victims and the available services to which survivors may have right of access.¹⁰⁵ Specifically, survivors have a right to access relevant information concerning redress schemes.¹⁰⁶ In vindicating this right, states should engage with all survivors to inform them about their right to reparation, available redress schemes and the process for registering for the scheme.¹⁰⁷ Information on the redress scheme should be provided in an accessible formats, in particular for older persons and persons with disabilities,¹⁰⁸ including people who many not be literate or digitally literate, to ensure that applicants provide free and informed consent in participating in the scheme. If the redress scheme, no matter how well designed it is, is not accompanied by an effective communications campaign with

¹⁰⁴ Human Rights Committee, *General comment No. 31 (2004) on the nature of the general legal obligation imposed on State parties to the Covenant*, CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para 15; and United Nations Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his global study on transitional justice*, A/HRC/36/50/Add.1 (7 August 2017), para 64.

¹⁰⁵ Principle 24 of the 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.

¹⁰⁶ Principle 11(c) of the 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.

¹⁰⁷ United Nations Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, A/HRC/42/45 (11 July 2019), para 53.

¹⁰⁸ Article 21(a) of the United Nations Convention on the Rights of Persons with Disabilities.

survivors, there will inevitably be potential survivors who will not access the scheme due to a lack of awareness or knowledge.¹⁰⁹

IHREC recommends that the State takes positive and meaningful steps to ensure that all survivors are informed of the scheme in an accessible manner.

IHREC further recommends that the redress scheme is accompanied by an effective oral and written communications campaign with survivors both in Ireland and internationally.

Underpinning a redress scheme with a statutory basis can promote accessibility and clarity,¹¹⁰ by providing increased legal certainty about the terms of reference and the eligibility criteria. Through the legislative process, it also provides an opportunity for increased parliamentary and public scrutiny of the proposed scheme. However, the prioritisation of the required legislative measures and the use of secondary legislation as appropriate must be considered, to ensure that the adoption of a statutory scheme does not result in any further delays in the provision of redress for survivors and that an element of flexibility is incorporated if the scheme is found to be inadequate or under-inclusive in practice. Irrespective of the basis of the scheme, the priority must be that it is both clear and easily accessible.

In ensuring an expeditious access to an effective remedy for survivors, consideration should be given to prioritising certain categories of survivors due to age, health or disability. By the nature of a redress scheme addressing historic abuse, potential applicants may represent an older demographic in society and therefore, special measures should be taken to ensure that persons receive the remedy they are entitled to under international law in a timely and age and health-respectful manner. IHREC previously raised the concern that delays in commencing the *Assisted Decision-Making (Capacity) Act 2015* mean that women who were deemed to lack capacity were not able to access the Magdalen Restorative Justice Scheme, and a number of these women

¹⁰⁹ United Nations Human Rights Council, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/HRC/42/45 (11 July 2019), page 16.

¹¹⁰ According to the Special Rapporteur, "Legal frameworks establishing and regulating domestic reparation programmes are essential. Such framing provides legal certainty to the programme and sustainability regardless of political fluctuations." See United Nations Human Rights Council, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/HRC/42/45 (11 July 2019), para 74.

died without receiving any redress payment.¹¹¹ In Scotland, the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill provides that applications can be prioritised with regard to the age and health, such as terminal illness, of the applicant. The UN Special Rapporteur has said that reparation schemes could also facilitate reparation for survivors in urgent need of attention.¹¹²

A key element in designing and implementing a redress scheme is ensuring that the scheme is user-friendly and avoids further traumatisation for survivors.¹¹³ With regard to survivors with disabilities, special measures should be adopted in designing the application process to ensure survivors are not exposed to further trauma or victimisation.¹¹⁴

IHREC recommends that the State prioritises redress for certain categories of survivors on the ground of age, health and disability.

IHREC further recommends that reasonable and procedural accommodations are built into the design and operation of the scheme to ensure that older people, people with disabilities, including those with limited literacy skills, including digital skills, can meaningfully access the scheme.

It is critical that survivors, when engaging with the redress scheme have access to independent legal assistance to understand the redress process and how the level of reward is determined.¹¹⁵

The United Nations Human Rights Committee has said that:

¹¹¹ IHREC, *Submission to the United Nations Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland* (August 2020), page 18.

¹¹² United Nations Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, A/HRC/42/45 (11 July 2019), para 47.

¹¹³ Principle 10 of the 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.

¹¹⁴ United Nations Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, A/HRC/42/45 (11 July 2019), para 54.

¹¹⁵ Historical abuse survivors in Northern Ireland have said that legal advice is essential if survivors are to “know their rights and that redress (and particularly compensation) would not be shaped to suit the state and other powerful interests.” See Ulster University, Professor Patricia Lundy, *Historical Institutional Abuse: What Survivors want from Redress* (March 2016), page 31.

“The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.”¹¹⁶

Owing to their treatment in institutions, many of the survivors of abuse have not had the benefit of education, making bureaucratic schemes particularly difficult to navigate and increasing the stress and trauma involved in securing entitlements.¹¹⁷ Survivors may be placed in a vulnerable position in engaging in a redress process and without legal assistance they face difficulty in providing evidence for their claim which could lead to re-traumatisation and secondary victimisation.

In ensuring appropriate legal protection for survivors in engaging with the redress process, legal assistance should be provided to survivors when making the decision to apply, during the application process, and at the point of accepting a redress payment and signing a waiver. The provision of legal assistance should be covered by the redress scheme.

IHREC recommends that applicants are provided with legal advice and representation and advocacy support, including literacy and digital supports, if necessary, when making a decision to apply, during the application process and at the point of accepting a reparations.

Independence and oversight

The UN Special Rapporteur has set out minimum requirements that a domestic reparation programme should fulfil, including that the programme be:

“monitored through processes that include consultation with and the participation of survivors”.¹¹⁸

¹¹⁶ United Nations Human Rights Committee, *General Comment No. 32 - Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32 (23 August 2007), para 10.

¹¹⁷ See IHREC, *Submission to the United Nations Committee against Torture on Ireland's second periodic report* (July 2017).

¹¹⁸ United Nations Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, A/HRC/42/45 (11 July 2019), para 44(b).

Effective participation permits survivors to have a role in a decision-making process that involves them which in turn provides legitimacy to the redress programme.¹¹⁹

Professor de Greiff has also noted the positive impact that effective and meaningful consultation with, and the participation of, survivors can have on redress schemes, including that:

“[v]ictim participation can help improve the reach and completeness of programmes, enhance comprehensiveness, better determine the types of violations that need to be redressed, improve the fit between benefits and expectations and, in general, secure the meaningfulness of symbolic and material benefits alike”.¹²⁰

Establishing an independent body to make determinations under the redress scheme,¹²¹ and a monitoring mechanism within the scheme would contribute to effective oversight of the operation of the scheme and ensure that it is providing effective reparation to the survivors of abuse. To ensure meaningful participation and accountability, survivors should be represented on both the board and oversight mechanism. In addition, individuals with expertise in human rights and equality, transitional justice or alternative dispute resolution should also be represented on both bodies.

IHREC recommends that the Government establish both an independent redress body to administer the scheme and an oversight mechanism to review decisions of that body. Survivors and individuals with expertise in human rights and equality, transitional justice and alternative dispute resolution should be represented on the redress body and any oversight mechanism.

Central to any monitoring mechanism of the redress scheme would be the collection and reporting of disaggregated data to examine the effectiveness of the operation of the scheme. In particular, the collection of disaggregated equality data would allow an

¹¹⁹ United Nations Human Rights Council, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/HRC/42/45 (11 July 2019), para 62.

¹²⁰ United Nations General Assembly, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/69/518 (14 October 2014), para 92.

¹²¹ In Scotland, the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill will also set up an independent body, Redress Scotland, to assess applications for the scheme.

adequate and regular assessment of the extent to which the redress scheme was complying with the right to provide an effective remedy to all survivors.

IHREC recommends the collection and reporting of disaggregated data, including equality data to examine the effectiveness and operation of the redress scheme.



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