

# Submission on the General Scheme of a Mother and Baby Institutions Payment Scheme Bill

Irish Human Rights and Equality Commission

October 2022



Coimisiún na hÉireann um Chearta  
an Duine agus Comhionannas  
Irish Human Rights and Equality Commission

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The Irish Human Rights and Equality Commission was established under statute on 1 November 2014 to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.

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## Recommendations

The Commission makes the following recommendations on the legislation:

### A Human Rights and Equality Compliant Payment Scheme

**The legislation should be amended to include a list of guiding principles drawing from relevant human rights and equality standards.**

### Ex gratia nature of the Payment Scheme

**The establishment of the Payment Scheme should not be on an ‘ex gratia’ basis and provisions seeking to deny or limit liability by the State or other private entities should not find expression in the legislation or the Payment Scheme.**

**The Payment Scheme should be designed to facilitate apologies from officials representing the State and relevant private entities to survivors.**

### Duration of the Scheme (Head 5)

**Head 5 should be deleted.**

### Office of the Chief Deciding Officer of the Mother and Baby Institutions Payment Scheme (Heads 6–9)

**The legislation should be amended to establish a sufficiently independent body to administer the Payment Scheme. This body should include survivors and individuals with relevant experience or expertise.**

**If the Office of the Chief Deciding Officer is not replaced, Heads 6 and 8 should be amended to require that the Chief Deciding Officer and their deputy should have relevant expertise and knowledge of redress and/or human rights and equality standards before being appointed to their position. Head 9 should be amended to require that the staff of the Office of the Chief Deciding Officer should receive initial and ongoing training on relevant issues related to the operation of the Payment Scheme. Moreover, Head 6(4)**

should be amended to clarify the stated reasons why the Minister may remove the Chief Deciding Officer from office.

### Advertisement and awareness of the Scheme (Head 7(1)(e))

Head 7(1)(e) should be amended to clarify that the information on the Scheme and its operation should be provided to survivors in accessible formats.

### Payment Rates (Head 11)

Survivors should be consulted with before setting out the payment rates under Schedule 3.

The legislation should specify the purpose of the payments under the scheme and of the scheme itself.

The legislation should be amended to provide for a two track model for determining a payment under the Payment Scheme, so that survivors would have the choice of opting for either track:

#### Track One

- A flat/equal payment for all survivors to acknowledge the historic wrong of having been resident in a relevant institution for any length of time, which impacted on the mother and child bond.
- A time-based payment for all survivors who were resident in a relevant institution to acknowledge the harms experienced, which are distinct from the loss of the mother and child bond.
- A work-based payment for survivors who qualify, which increases based on length of stay.

#### Track Two

- A flat/equal payment for all survivors to acknowledge the historic wrong of having been resident in a relevant institution for any length of time, which impacted on the mother and child bond.

- A payment determined by an individualised assessment of harm that identifies categories of specific harms experienced, which are distinct from the loss of the mother and child bond.

The inclusion of additional categories of harm in the individualised assessment under the Payment Scheme, should be done in consultation with survivors and their representative groups, and in line with human rights and equality standards.

The evidentiary thresholds for the Payment Scheme should be survivor-centred, and appropriate weight should be given to the testimony of survivors. Fair procedures must be clearly and expressly articulated within the Payment Scheme, and legal advice and assistance should be provided to survivors throughout this process.

### Form of payment (Head 11)

The legislation should be amended to provide that individuals may choose to receive their payment/s in the form of a pension or as a lump sum and should be provided with free financial advice to assist them in making this choice and in managing any payment/s received.

### Accessibility of the application process (Head 14 and Head 15)

Reasonable and procedural accommodations should be built into the design and operation of the Payment Scheme to ensure that older people, disabled people, and those with limited literacy and/or digital skills, can meaningfully access the Payment Scheme.

### Prioritisation of applicants (Head 15(2)(f))

Consideration should be given to establishing an emergency Payment Scheme, separate to the one under this legislation, to provide immediate redress to victims.

Consideration should be given to establishing a victims' registry.



### Eligibility criteria for a child (Head 18(1))

Head 18(1) should be amended to remove the requirement of a six-month stay to ensure that all children who were resident in a relevant institution and/or who were adopted are eligible to apply to the Scheme.

### Eligibility criteria for work payment (Head 18(3)–(4))

Head 18(3) should be amended to provide that all relevant persons should be eligible for a work-related payment regardless of the institution they were resident in, the nature of the work, or length of stay.

### Eligibility if person received a prior award from a court or settlement (Head 18(6))

Head 18(6) should be removed from the legislation. Further, Head 18 should be revised to provide that if a person previously received an award from a court or settlement which is lower than the payment rates under the Payment Scheme they are entitled to a ‘top up’ payment to bring them in line with the Payment Scheme.

### Eligibility for health services without charge (Head 19)

Head 19 should be amended to provide that all relevant persons are eligible for health services without charge.

### Provision of health services without charge or health support payment (Head 20 and Head 21)

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.

### Provision of other forms of rehabilitation measures

The legislation should be amended to include wider forms of rehabilitation, as recognised under international human rights law. Any form of rehabilitative or transformative reparation should be holistic and accessible to all survivors.

## Waivers (Head 22(5))

**Head 22(5) should be deleted from the legislation.**

## Deceased relevant person (Head 24)

**Head 24 should be revised to remove the requirement that the deceased person must have died after 13 January 2021 in order for a family member to claim redress.**

**In line with international guidance that relatives or dependants of survivors or victims should be regarded as victims, the Government should amend An Action Plan for Survivors and Former Residents of Mother and Baby and County Home Institutions to extend the provision of specialist trauma-informed counselling to family members or dependents of survivors. This should include provision for individual and group counselling supports that meet their self-identified mental health needs for the remainder of their life.**

## Review and appeals process (Heads 25–27)

**Head 25 should be amended to provide that staff who undertake a review must not have been involved in the original decision-making process concerning the applicant.**

**Head 26 should be amended to provide a list of relevant qualifications and/or experience a person must have before being appointed as an appeals officer. Further, Head 26 should be amended to provide that survivors can be appointed as appeals officers.**

**The legislation should be amended to provide that all applicants will be provided with financial support to avail of legal advice and representation during the review and appeals processes.**

## Provision of independent legal advice (Head 29)

**Head 29 should be amended to provide that all applicants will be provided with financial support to avail of legal advice and representation when making a decision to apply, during the application process and at the point of accepting a redress payment and signing**

a waiver. Further, if necessary, applicants should be provided with advocacy support, including literacy and digital supports throughout the application process.

### Reporting on and reviewing the Scheme (Head 10 and Head 33)

Head 10 should be amended to set out a list of matters which should be included within the annual report.

Head 33 should be replaced with a new section establishing a dedicated independent mechanism to review the operation of the Payment Scheme. The membership of this mechanism should include survivors and individuals who have relevant expertise and experience.

If Head 33 is not replaced, Head 33 should be amended to provide that the independent reviews should be conducted by individuals with experience and expertise of redress and/or human rights and equality principles. Furthermore, Head 33 should be amended to require that the independent reviews should be publically disseminated.

Head 10 and Head 33 should be amended to require the collection and reporting of disaggregated data, including equality data, on the operation and effectiveness of the Payment Scheme.

### List of institutions (Schedule 1)

Reparations should not be limited to those resident in institutions which were investigated by the Commission of Investigation. The design of the Payment Scheme should include consultation with survivors on the list of institutions to be included under the Payment Scheme.

## Introduction

The Irish Human Rights and Equality Commission ('the Commission') 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 '2014 Act'). The Commission has a statutory mandate 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 examine any legislative proposal and report its views on any implications for human rights or, equality.<sup>1</sup>

The Commission welcomes the opportunity to provide its submission on the General Scheme of a Mother and Baby Institutions Payment Scheme Bill. The Commission recognises the diversity of women and children affected by their experiences within Mother and Baby Homes and related institutions including married women, unmarried women, Traveller women and children, disabled women and children, and women and children of other minority groups. The Commission also acknowledges the intersectionality between diverse identities.

The Commission notes that the structural and institutional arrangements, practices, policies and cultural norms associated with Mother and Baby institutions have had the effect of excluding and discriminating against mothers and children based on their identities.<sup>2</sup> The Commission recognises the diverse range of needs of survivors, and the need for the State response to take account of this diversity. The Commission notes the recent call by UN human rights experts for this legislation to provide redress for harm caused due to racial discrimination and systemic racism to which children of African and Irish descent were subjected.<sup>3</sup> The legal and policy responses to the legacy of Mother and Baby Institutions

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<sup>1</sup> Section 10(2)(c) of the [Irish Human Rights and Equality Commission Act 2014](#).

<sup>2</sup> See the Commission's Strategic Priority on 'Respect and Recognition' in IHREC, [Strategy Statement 2022–2024](#).

<sup>3</sup> The UN experts note that "according to information received, systemic racism in childcare institutions has resulted in the higher institutionalisation rate of children of African and Irish descent. ... We are seriously concerned over the severe and continuing effects that racial discrimination and systematic racism have had on the lives of the adults who are currently seeking redress." United Nations Officer of the High Commissioner for Human Rights, [Ireland: UN experts call for adequate redress for systemic racism and racial discrimination in childcare institutions](#) (press release, 23 September 2022).

must examine and address the institutional structures and cultural norms which contributed to the discrimination faced by diverse identities.

Over the past number of years, the Commission has engaged on the rights of survivors and victims of historical abuse and it has made a number of submissions to various national and international bodies in relation to Mother and Baby Homes and related institutions.<sup>4</sup> In April 2021, the Commission provided an advisory paper to the Government on the planned development of a redress scheme for survivors of Mother and Baby Homes and related institutions.<sup>5</sup> The Commission's submission was informed by a series of one-to-one listening sessions in March 2021 with survivors and key stakeholders to get their personal views on redress.<sup>6</sup> The Commission exercised its *amicus curiae* function in the Philomena Lee and Mary Harney High Court cases concerning the Final Report of the Commission of Investigation into Mother and Baby Homes.<sup>7</sup>

The Commission welcomes that several recommendations in its advisory paper have been addressed within the legislation and proposals for the operation of the Payment Scheme.<sup>8</sup>

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<sup>4</sup> See for example 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); 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) p. 45; IHREC, [Ireland and the Convention against Torture: Submission to the United Nations Committee against Torture on Ireland's second periodic report](#) (July 2017) pp. 53–54; IHREC, [Submission to the UN Committee against Torture on the List of Issues for the Third Examination of Ireland](#) (January 2020) pp. 28–29; 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) pp. 7–9; IHREC, [Submission to the United Nations Human Rights Committee on the List of Issues for the Fifth Periodic Examination of Ireland](#) (August 2020) pp. 19–20; IHREC, [Submission to the Joint Committee on Children, Disability, Equality and Integration on the General Scheme of a Certain Institutional Burials \(Authorised Interventions\) Bill](#) (February 2021); IHREC, [Ireland and the International Covenant on Civil and Political Rights Submission to the Human Rights Committee on Ireland's fifth periodic report](#) (June 2022) pp. 14–18.

<sup>5</sup> IHREC, [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'](#) (April 2021).

<sup>6</sup> A total of eight participants took part in the process – which included seven survivors and one representative of survivors. See IHREC, [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'](#) (April 2021) pp. 4–5.

<sup>7</sup> See *amicus curiae* submission in [Philomena Lee v The Minister for Children, Equality, Disability, Integration and Youth, the Government of Ireland, Ireland and the Attorney General](#); and [Mary Harney v The Minister for Children, Equality, Disability, Integration and Youth, the Government of Ireland, Ireland and the Attorney General](#).

<sup>8</sup> Including establishing a legislative basis for the Payment Scheme, the commitment to survivor-centred and non-adversarial approach to redress, the prioritisation of applicants based on age, provision of an enhanced medical card and alternative supports for survivors based overseas, and amending the eligibility criteria to

However, there are outstanding matters raised in the advisory paper which have not been addressed in the legislation, as well as additional issues which arise from an examination of the legislation. The Commission considers that significant changes are required to the legislation and the Payment Scheme to ensure compliance with human rights and equality standards.

The Commission details its recommendations below, but briefly, it is of the view that the Payment Scheme should provide for a two-track approach to the provision of redress, where survivors would have the option of applying to either track. Each track would include a payment for the historic wrong of being resident in a Mother and Baby Home, or another relevant institution, for any length of time, which impacted on the mother and child bond. Track One would also include a modified version of the Government's time-based approach to payment, while Track Two would alternatively include an individualised assessment of harm. The addition of a two-track model to the Payment Scheme does not diminish the State's obligation to provide an effective and appropriate remedy, which is proportional to the gravity of the violations and the harm suffered. The inclusion of these changes to the legislation and the Payment Scheme should protect the needs of survivors above the interests and budgetary constraints of the State.<sup>9</sup> To ensure a human rights and equality compliant redress scheme, the detailed design of the Payment Scheme should be done in conjunction with the involvement of survivors and with the multi-disciplinary expertise of practitioners in law, finance, psychology, social work and social security.

The Commission provides these observations without prejudice to its broader position that the proposed legislation should form part of a larger transitional justice response to the treatment of women and children in Mother and Baby Homes and other institutions.<sup>10</sup>

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provide that women and children resident after 1974 are eligible to the scheme. IHREC, [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'](#) (April 2021).

<sup>9</sup> 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) p. 70.

<sup>10</sup> The United Nations Human Rights Committee recently recommended the State "[e]nsure the full recognition of the violation of human rights of all victims in these institutions [including Mother and Baby Institutions], and establish a transitional justice mechanism to fight impunity and guarantee the right to truth for all victims"; see United Nations Human Rights Committee, [Concluding observations on the fifth periodic report of Ireland](#), CCPR/C/IRL/CO/5 (27 July 2022) para. 12(a).

Transitional justice is based on five pillars; the right to truth, justice, reparation, non-recurrence and memory processes.

The Commission remains available to assist if further scrutiny of the legislation is required and on any specific issue which may arise.

## A Human Rights and Equality Compliant Payment Scheme

The Commission welcomes the Government's commitment to a holistic and non-adversarial approach to the provision of payments and benefits.<sup>11</sup> Participants at the Commission's one-to-one 'listening sessions' with survivors and key stakeholders viewed an adversarial approach to redress as invasive, inappropriate and re-traumatising.<sup>12</sup> 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. The Commission considers that this survivor-centred approach should be explicitly reflected in the legislation through a list of guiding principles to inform the implementation of the legislation and the Payment Scheme. The inclusion of a list of guiding principles would illustrate to survivors and to those administering the Payment Scheme the importance of ensuring that the operation of the Scheme complies with human rights and equality standards.

These guiding principles should be drawn from relevant human rights and equality principles,<sup>13</sup> and should at a minimum include:

- the right to an adequate, effective and prompt remedy;<sup>14</sup>
- fair procedures and accountability;<sup>15</sup>

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<sup>11</sup> Department of Children, Equality, Disability, Integration and Youth, [Government approves proposals for Mother and Baby Institutions Payment Scheme and publishes An Action Plan for Survivors and Former Residents of Mother and Baby and County Home Institutions](#) (press release, 16 November 2021 – last updated 23 December 2021).

<sup>12</sup> IHREC, [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'](#) (April 2021) p. 4.

<sup>13</sup> For further discussion of the relevant human rights standards, see IHREC, [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'](#) (April 2021).

<sup>14</sup> See for example Article 2(3) of the International Covenant on Civil and Political Rights, Article 14 of the Convention against Torture, Article 13 of the European Convention on Human Rights ('ECHR') and Article 47 of the EU Charter of Fundamental Rights ('the Charter'). See also Principle 32 of the 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); and 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, para. 11(b); United Nations Committee against Torture, [General comment No. 3 \(2012\) on the implementation of article 14](#), CAT/C/GC/3 (13 December 2012) para. 6; Council of Europe, [Guide to good practice in respect of domestic remedies](#), adopted by the Committee of Ministers on 18 September 2013 (2015) p. 12.

<sup>15</sup> Principle 5 of the 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.



- access to records and information;<sup>16</sup>
- equality and non-discrimination;<sup>17</sup>
- proportionality;<sup>18</sup>
- gender dimensions;<sup>19</sup>
- accessibility and support;<sup>20</sup>
- participation;<sup>21</sup> and
- the 'do no harm' principle.<sup>22</sup>

**The Commission recommends that the legislation be amended to include a list of guiding principles drawing from relevant human rights and equality standards.**

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<sup>16</sup> The United Nations human rights experts have recognised that access to records and information is regarded as a vital component to accessing an effective remedy; see United Nations, [Communication from UN Special Procedures to Ireland, IRL 2/2021](#) (5 November 2021) p. 11.

<sup>17</sup> 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, para. 25; United Nations, [Communication from UN Special Procedures to Ireland, IRL 2/2021](#) (5 November 2021) p. 10.

<sup>18</sup> Reparation should, taking account of the individual circumstances, be appropriate and proportional to the gravity of the violations and the harm suffered; 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, paras. 15, 18.

<sup>19</sup> See United Nations General Assembly, [The gender perspective in transitional justice processes: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/75/174 (17 July 2020).

<sup>20</sup> See 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; United Nations Committee against Torture, [General comment No. 3 \(2012\) on the implementation of article 14](#), CAT/C/GC/3 (13 December 2012) paras. 29, 32; Committee on the Rights of Persons with Disabilities, [General Comment No. 6 \(2018\) on equality and non-discrimination](#), CRPD/C/GC/6 (26 April 2018) paras. 73(h), 73(n).

<sup>21</sup> Article 25 of the International Covenant on Civil and Political Rights ('ICCPR'), Article 5 (c) of the Convention on the Elimination of Racial Discrimination ('CERD'), Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'), Articles 12 and 23 (1) of the Convention on the Rights of the Child ('CRC'), and Article 4 (3) and Article 33 (3) of the Convention on the Rights of Persons with Disabilities ('CRPD'). See also United Nations Office of the High Commissioner for Human Rights, [Guidelines for States on the effective implementation of the right to participate in public affairs](#) (2018).

<sup>22</sup> 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, para. 10; United Nations Committee against Torture, [General comment No. 3 \(2012\) on the implementation of article 14](#), CAT/C/GC/3 (13 December 2012) para. 21.

## Observations on the Bill

### Ex gratia nature of the Payment Scheme

The Government has announced that the Payment Scheme will be established on an ex gratia basis. This follows the practice of previous redress schemes established by the State which were set up on an ex gratia basis where no liability was accepted by the State or other relevant private actors.<sup>23</sup> The Commission notes the United Nations Human Rights Committee have recently recommended that the State remove all barriers to accessing a full and effective remedy for victims of Mother and Baby Institutions, including the ex-gratia nature of the Scheme.<sup>24</sup>

The United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence ('the Special Rapporteur') has emphasised that reparation programmes which fail to acknowledge responsibility for wrongdoing do not provide full and effective reparations.<sup>25</sup> Reparations are not simply an exchange mechanism, where reparation is provided after the violation of rights.<sup>26</sup> Rather reparation has to be explicitly accompanied by an acknowledgement of responsibility and be linked to the pillars of truth, justice, memorialisation and guarantees of non-repetition. If there is a failure to acknowledge responsibility, the provision of redress on an ex gratia basis may imply that:

“[A] payment is charitable, rather than based on any legal obligation, identifiable responsible actor or entitlement for such victims to a remedy”.<sup>27</sup>

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<sup>23</sup> For example the Magdalen Restorative Justice Scheme, the Symphysiotomy Payment Scheme, the Residential Institutions Redress Scheme and the Louise O’Keeffe Scheme were all set up on an ex gratia basis with no admissions of wrongdoing.

<sup>24</sup> United Nations Human Rights Committee, [Concluding observations on the fifth periodic report of Ireland](#), CCPR/C/IRL/CO/5 (27 July 2022) para. 12(c).

<sup>25</sup> 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. 63; 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. 30.

<sup>26</sup> 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.

<sup>27</sup> See Luke Moffet, A pension for injured victims of the Troubles: reparations or reifying victim hierarchy? (2016) 66(4) Northern Ireland Legal Quarterly 297, p. 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) p. 49.

The provision of redress in this manner could lead to the re-traumatisation and secondary victimisation of survivors.<sup>28</sup> Monetary compensation alone without an acknowledgement can be offensive and inadequate, and it can be perceived as ‘blood money’ to buy a survivor’s silence.<sup>29</sup> While the Commission acknowledges the Taoiseach’s public apology to survivors on 13 January 2021, the Commission notes that the State apology is in the context of the Commission of Investigation’s final report, in respect of which survivors have expressed concern on its findings.<sup>30</sup> A number of participants in the consultation for the report of the Interdepartmental Group (‘the IDG’) on proposals for a redress scheme, felt that the apology was inadequate and that more needed to be done.<sup>31</sup> To be a meaningful measure of transitional justice, an apology must be considered as meaningful by survivors.<sup>32</sup> Participants at the Commission’s listening session highlighted the importance of sincere and meaningful apologies as a means of recognising that what they suffered was wrong and helping to alleviate the shame and stigma that many survivors have internalised for

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<sup>28</sup> 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) p. 38.

<sup>29</sup> 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, p. 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) p. 211.

<sup>30</sup> IHREC, [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’](#) (April 2021) p. 5. See also Joint Committee on Children, Equality, Disability, Integration and Youth, [Report on pre-legislative scrutiny of the General Scheme of a Mother and Baby Institutions Payment Scheme Bill 2022](#) (July 2022) pp. 13–14.

<sup>31</sup> In relation to apologies the consultation report noted “The consultation took place in the context of the Taoiseach’s apology to survivors delivered on 13th January 2021. However, almost one in five respondents, (18%) felt that more needed to be done. Some stated that the Taoiseach’s apology addressed only those within the remit of the Commission and was therefore exclusionary in nature and resulted in artificial stratification of the issue. The Taoiseach’s apology also made reference to responsibility being more societal and family based rather than acknowledging the primary role played by the state and the religious. It is felt that this relationship between church and state was what built the architecture within which society responded rather than the reverse, and that Church and State bear primary responsibility for the impact on survivors. Some respondents called for letters of apology to be issued to all survivors or their families and a number felt this should also issue from the religious orders and county councils.” See OAK, [Report of the findings of the consultation with survivors of mother and baby homes and county homes: March-April 2021](#) (May 2021, submitted to the Interdepartmental Group) pp. 33–34.

<sup>32</sup> Queen’s University Belfast, [Apologies and Institutional Child Abuse](#) (2018) p. 1.

decades.<sup>33</sup> A number of UN human rights experts have recommended to the State that the redress scheme should ensure a State apology which fully recognises the gravity and range of human rights violations which occurred.<sup>34</sup>

The 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’) recognise that a measure of satisfaction which may be considered as reparation for human rights violations is a:

“public apology, including acknowledgement of the facts and acceptance of responsibility.”<sup>35</sup>

Public apologies have been placed on statutory footing in other jurisdictions.<sup>36</sup> The motivations for public apologies are:

“Generally both backward- and forward-looking, acknowledging past harms but also signalling a better future. The backward-looking elements include the taking of responsibility for past human rights violations, the honest acknowledgement of what occurred and naming the wrongness of those harms. The forward-looking components address the image of a “redeemed individual or nation”, the beginning of a new era and a break from past cultures of violence, but also signal the social and political transformation required to ensure that such atrocities will never be repeated.”<sup>37</sup>

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<sup>33</sup> IHREC, [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’](#) (April 2021) p. 13.

<sup>34</sup> In November 2021, eight UN experts communicated with the Irish Government on the international human rights obligations the State should comply with in designing and implementing a redress scheme; see United Nations, [Communication from UN Special Procedures to Ireland, IRL 2/2021](#) (5 November 2021) p. 4.

<sup>35</sup> 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, para. 22(e). See also United Nations General Assembly, [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).

<sup>36</sup> United Nations General Assembly, [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) para. 8.

<sup>37</sup> United Nations General Assembly, [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) para. 17.

The Commission is of the view that the Payment Scheme should be designed in a manner which 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 agreement.<sup>38</sup>

**The Commission recommends that the establishment of the Payment Scheme should not be on an ‘ex gratia’ basis and that provisions seeking to deny or limit liability by the State or other private entities should not find expression in the legislation or Payment Scheme.**

**The Commission recommends that the Payment Scheme should be designed to facilitate apologies from officials representing the State and relevant private entities to survivors.**

### Duration of the Scheme (Head 5)

Head 5 provides that the Payment Scheme will operate for no more than five years. The Commission is concerned that the deadline of five years may not be adequate for all survivors due to the practical and emotional barriers to making an application.<sup>39</sup> The opening of the Payment Scheme will require survivors to become visible, some of whom have never told family and friends that they were resident in an institution, which places them at risk of re-traumatisation and means that they will need time to decide whether to apply to the Scheme. The majority of those who took part in the IDG consultation were of the view that there should be no cut-off date or the Scheme should be opened for a long unspecified period.<sup>40</sup>

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<sup>38</sup> 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).

<sup>39</sup> See discussion in Scottish Human Rights Commission, [Response to Pre-legislative Public Consultation on Financial Redress for Historical Child Abuse in Care](#) (November 2019) p. 29.

<sup>40</sup> OAK, [Report of the findings of the consultation with survivors of mother and baby homes and county homes: March-April 2021](#) (May 2021, submitted to the Interdepartmental Group) p. 12. ‘The consultation process was undertaken by OAK from 10th March 2021 to the 2nd April 2021. A ‘Call for Submissions’ was issued by the Department of Children, Equality, Disability, Integration and Youth which resulted in 444 written submissions. In addition, 17 online consultation meetings were held by OAK, with 186 participants including survivors, their families, survivor advocates/representatives, representatives of organisations/survivor services and other related parties. Consultations by telephone were facilitated for 12 individuals who were not in a position to attend the online group meetings nor make a written submission’; OAK, [Report of the findings of the consultation with survivors of mother and baby homes and county homes: March-April 2021](#) (May 2021, submitted to the Interdepartmental Group) p. 8.

The Commission considers that there is no justification for closing the Payment Scheme at all. The decision to close the Residential Institutions Redress Board ('RIRB') to new applications after 17 September 2011 caused grave injustice to victims of abuse in industrial schools living abroad who were unaware of the Scheme until after it had closed. The Commission notes that the scheme to address the needs of the women who were admitted to and worked in the Magdalen institutions which was established in 2013 remains open to new applications.<sup>41</sup>

**The Commission recommends that Head 5 be deleted.**

### Office of the Chief Deciding Officer of the Mother and Baby Institutions Payment Scheme (Heads 6–9)

The legislation provides for the establishment of the Office of the Chief Deciding Officer, which will be set up within the Department of Children, Equality, Disability, Integration and Youth, and will be responsible for the administration of the Payment Scheme. Heads 6, 7, 8 and 9 provide for the appointment of the Chief Deciding Officer, their deputy and staff, and the functions of the Chief Deciding Officer.

It is a welcome approach to establish a responsible body to administer the Payment Scheme as the Special Rapporteur has recognised the importance of an entity being responsible for the implementation of the reparation programme.<sup>42</sup> However, the Commission is concerned that the Office of the Chief Deciding Officer is not a sufficiently independent body. The Commission notes that in Scotland, Redress Scotland, which was established to assess applications for redress is an independent body which is not part of any Government department.<sup>43</sup> The Commission is of the view that the Payment Scheme should be administered by an independent body which is not part of any Government Department.

However, if the Government proceeds with the approach outlined in the legislation, the Commission considers that membership of the body administering the Payment Scheme, and those hearing appeals of first instance decisions, should include individuals with

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<sup>41</sup> <https://www.gov.ie/en/service/8fe41a-the-magdalen-restorative-justice-ex-gratia-scheme/>.

<sup>42</sup> 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. 79.

<sup>43</sup> See <https://www.redress.scot/about-redress-scotland/>.

relevant expertise and experience of areas such as redress, transitional justice, alternative dispute resolution, and human rights and equality. Survivors who took part in the consultation process for the IDG Report recommended that an independent panel/board should be established to decide claims and membership of the panel should include representatives of survivors and their families, experts in human rights law, social policy, academics, and trauma counsellors.<sup>44</sup> A diversity of actors within a redress programme is essential in creating a holistic approach to assessing compensation.<sup>45</sup> Such a body should include the participation of survivors in the administration of the scheme and determination of awards. The principle of participation requires individuals to be involved in the implementation of administrative decisions that concern them.<sup>46</sup> The Special Rapporteur notes that, at a minimum, a reparation programme should include the participation of survivors in the implementation of the programme.<sup>47</sup> The Special Rapporteur has noted the positive impact that effective and meaningful consultation with, and the participation of, survivors can have on redress schemes, including that:

“Victim 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. Moreover, active and engaged participation may offer some relief in the light of the dismal record in the implementation of reparations.”<sup>48</sup>

However, if it is decided to establish the Office of the Chief Deciding Officer as intended under the legislation, the Commission is of the view that the requirements for these positions should be strengthened within the legislation. The Commission is concerned that

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<sup>44</sup> OAK, [Report of the findings of the consultation with survivors of mother and baby homes and county homes: March-April 2021](#) (May 2021, submitted to the Interdepartmental Group) p. 49.

<sup>45</sup> 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) p. 66.

<sup>46</sup> United Nations Office of the High Commissioner for Human Rights, [Guidelines for States on the effective implementation of the right to participate in public affairs](#) (2018).

<sup>47</sup> 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).

<sup>48</sup> 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. See also 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. 25–26.



there is no requirement for the Chief Deciding Officer, their deputy or their staff to have expertise or experience of redress schemes or human rights and equality. This is concerning as the functions of the Chief Deciding Officer will have significant implications for the rights of survivors who engage with the Office. At a minimum, any individual involved in the administration of the Payment Scheme should be required to undertake relevant training before undertaking their responsibilities under this legislation. Training is important to ensure the avoidance and minimisation of the re-traumatisation and secondary victimisation of individuals engaging with the Payment Scheme.<sup>49</sup> The Commission is also of the view that the requirements of independence for the Office should be further safeguarded by amending Head 6(4) to clarify the stated reasons for why the Minister may remove the Chief Deciding Officer from office.

**The Commission recommends that the legislation be amended to establish a sufficiently independent body to administer the Payment Scheme. This body should include survivors and individuals with relevant experience or expertise.**

**If the Office of the Chief Deciding Officer is not replaced, the Commission is of the view that Heads 6 and 8 should be amended to require that the Chief Deciding Officer and their deputy should have relevant expertise and knowledge of redress and/or human rights and equality standards before being appointed to their position. The Commission further recommends that Head 9 be amended to require that the staff of the Office of the Chief Deciding Officer should receive initial and ongoing training on relevant issues related to the operation of the Payment Scheme. Moreover, the Commission recommends that Head 6(4) be amended to clarify the stated reasons why the Minister may remove the Chief Deciding Officer from office.**

### **Advertisement and awareness of the Scheme (Head 7(1)(e))**

Head 7(1)(e) provides that one of the principle functions of the Chief Deciding Officer is:

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<sup>49</sup> United Nations Committee against Torture, [General comment No. 3 \(2012\) on the implementation of article 14](#), CAT/C/GC/3 (13 December 2012) para. 35.



“to make all reasonable efforts, through public advertisement in Ireland and abroad, and otherwise, to ensure that persons who were residents of an institution are made aware of the Scheme.”

This is a welcome approach as international guidance has recognised the importance of ensuring that information on the operation of a reparation programme is available and accessible to survivors.<sup>50</sup>

Principle 33 of the UN *‘Updated Set of principles for the protection and promotion of human rights through action to combat impunity’* provides that:

“Ad hoc procedures enabling victims to exercise their right to reparation should be given the widest possible publicity by private as well as public communication media. Such dissemination should take place both within and outside the country, including through consular services, particularly in countries to which large numbers of victims have been forced into exile.”<sup>51</sup>

The Commission is of the view that this provision should be strengthened by requiring the Chief Deciding Officer to ensure that information on the Payment Scheme and related matters such as applying for the Scheme is provided to survivors in accessible formats, in particular for older persons and disabled people, including people who may not be literate or digitally literate.<sup>52</sup> The Committee on the Elimination of Discrimination against Women provides that States should:

“Develop and disseminate accessible information, through diverse and accessible media and community dialogue, aimed at women, in particular those affected by intersecting forms of discrimination, such as those with disabilities, those who are illiterate or those who have no or limited knowledge of the official languages of a

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<sup>50</sup> 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, para. 24.

<sup>51</sup> 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).

<sup>52</sup> See IHREC, [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’](#) (April 2021) p. 29.

country, on the legal and social resources available to victims/survivors, including reparations.”<sup>53</sup>

**The Commission recommends that Head 7(1)(e) be amended to clarify that the information on the Scheme and its operation should be provided to survivors in accessible formats.**

### Payment Rates (Head 11)

Head 11 provides that the general and work-related payments will be made in accordance with the payment rates set out under Schedule 3, with the rate of pay for each payment increasing based on length of stay. The Commission is of the view that before setting out the rates of pay there should be meaningful consultation with survivors to ensure that the level of awards reflects the harms suffered by survivors. As noted above, consultation with survivors can:

“improve the fit between benefits and expectations”.<sup>54</sup>

The Commission notes the commitment of the Government to ensure that applicants will qualify for a payment solely based on proof of residency, without a need to bring forward any evidence of abuse nor any medical evidence.<sup>55</sup> This is a welcome approach as procedural and evidentiary rules can be barriers to participation in redress schemes.<sup>56</sup>

The Commission notes that the proposed legislation does not specify the purpose of the payments under the scheme nor the purpose of the scheme itself. It is not clear from the provisions whether the payments have a symbolic meaning or are a recognition of the specific harms and trauma experienced by survivors. The Explanatory Notes for Head 18 provide that the general payment:

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<sup>53</sup> United Nations Committee on the Elimination of Discrimination against Women, [General recommendation No. 35 on gender-based violence against women](#), CEDAW/C/GC/35 (26 July 2017) para. 31(d).

<sup>54</sup> 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.

<sup>55</sup> Department of Children, Equality, Disability, Integration and Youth, [Mother and Baby Institutions Payment Scheme: Government Proposals](#) (November 2021) p. 4.

<sup>56</sup> 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. 71.

“recognises time spent in a relevant institution, harsh conditions, emotional abuse and other forms of mistreatment, stigma and trauma experienced while resident in a Mother and Baby or County Home Institution.”

However, this purpose is not specified within the legislation. The Commission is of the view that it should be clear within the legislation what the purpose of the payments is and what the payment aims to achieve. Without clarity on what the purpose of a payment (or scheme) is or what it seeks to achieve in a symbolic sense, the legislation lacks moral force and meaning as redress for past wrongs and harms.

The provision of redress in the context of Mother and Baby Institutions is complex as there are two sets of victims and survivors: those who were resident as a child in an institution and those who were resident in an institution for reasons relating to pregnancy, birth or care of their child. These groups will have had different experiences in relation to these institutions and experienced different harms, which need to be considered in the provision of redress. Participants at the Commission’s listening session acknowledged the difficulties surrounding the provision of redress due to the diversity of experiences, needs and personal situations of survivors.<sup>57</sup>

While welcoming the Government’s commitment to provide redress, the Commission considers that significant work is required to redesign the Payment Scheme to ensure it adequately and appropriately reflects the needs and experiences of survivors. In recommending a new approach to the provision of redress under the Payment Scheme the Commission is proposing a two-tracked model.

While described in more detail below, briefly the two tracks would provide the following payments:

#### **Track One**

- A flat/equal payment for all survivors to acknowledge the historic wrong of having been resident in a relevant institution for any length of time, which impacted on the mother and child bond.

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<sup>57</sup> IHREC, [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’](#) (April 2021) p. 4.

- A time-based payment for all survivors who were resident in a relevant institution to acknowledge the harms experienced, which are distinct from the loss of the mother and child bond.
- A work-based payment for survivors who qualify, which increases based on length of stay.

## **Track Two**

- A flat/equal payment for all survivors to acknowledge the historic wrong of having been resident in a relevant institution for any length of time, which impacted on the mother and child bond.
- A payment determined by an individualised assessment of harm that identifies categories of specific harms experienced, which are distinct from the loss of the mother and child bond.

While advocating for the inclusion of an individualised assessment of harm as an option in the Payment Scheme, the Commission acknowledges that the IDG did consider in their report a tiered approach, which involved a general payment and also a payment for severe abuse and trauma, based on individual assessment and evidence.<sup>58</sup> The IDG chose not to recommend this approach due to concerns that survivors would have difficulty satisfying any evidence threshold, as medical evidence of injury rather than written testimony would be required. The IDG noted that this may contribute to payment under this tier being unattainable for survivors which may in turn lead to survivors being re-traumatised by the process of the application and the decision not to grant an award under the scheme.

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<sup>58</sup> Department of Children, Equality, Disability, Integration and Youth, [Report of the Interdepartmental Group \(IDG\) on the development of the Mother and Baby Institutions Payment Scheme](#) (November 2021) p. 34.

Research into the operation of previous redress schemes in Ireland<sup>59</sup> and other jurisdictions<sup>60</sup> shows that an individualised assessment of harm/abuse is by its nature adversarial and can be re-traumatising for survivors. An individualised assessment of harm may require the use of oral hearings and potentially involve the testing of evidence or similar.<sup>61</sup> The process of an individualised assessment of harm will take longer than a time-based payment as it will take time to develop the categories of harm to be included in the individualised assessment; for survivors to complete the application and access reports and documents concerning evidence of the harm they experienced; and for the determinations on payment to be made. The potential for the Payment Scheme to adopt an adversarial approach to individualised assessment which may lead to the re-traumatisation of survivors is the reason why the Commission is recommending that survivors have the option of applying for an award under Track One.

Notwithstanding the difficulties identified in the operation of redress schemes which include an individualised assessment of harm, the Commission is of the view that survivors should have the option to pursue an individualised payment based on their informed choice. The availability of an individualised assessment would address calls from some survivors for this option to be available.<sup>62</sup> A number of survivors, in the OAK consultation process, raised

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<sup>59</sup> 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' (2020) *Eire Ireland: An Interdisciplinary Journal of Irish Studies* 55:1-2. pp. 10–11.

<sup>60</sup> Professor Kathleen Daly has noted negative responses of survivors who applied to redress schemes for institutional child abuse in Canada and Australia including that they are disappointed with the process and outcome. Survivors feel that the payment did not reflect the abuse and suffering experienced, it devalued a survivor's worth, other people received more money than they survivor did and they objected to the use of categories of harm/abuse to define and rate their childhood experiences. The process of applying can create emotional difficulties for survivors as they may have to relive painful experiences. Survivors may also face burdensome administrative efforts in applying. See Kathleen Daly, *Redressing Institutional Abuse of Children* (Palgrave Macmillan, 2014) Chapter 7.

<sup>61</sup> However, it may be possible to mitigate the adversarial nature of the process – see further below.

<sup>62</sup> The Commission notes a number of submissions from survivors to the Joint Committee on Children, Equality, Disability, Integration and Youth on this Bill called for redress for specific harms they and others experienced.

the importance of financial payments, alongside a general payment, to recognise the different forms and levels of harm that survivors experienced.<sup>63</sup> There is precedence for an individualised approach to the provision of redress in Ireland, as the RIRB administers an individualised assessment of harm in awarding compensation.<sup>64</sup> The UN experts have recommended to the State that the redress scheme should provide compensation commensurate with the gravity of the offence.<sup>65</sup> The Special Rapporteur has emphasised that reparation programmes should acknowledge:

“[T]hat not all victims are in the same situation. They do not experience the same harm and do not face the same consequences.”<sup>66</sup>

The Committee against Torture has stated that:

“[I]n the determination of redress and reparative measures provided or awarded to a victim of torture or ill-treatment, the specificities and circumstances of each case must be taken into consideration and redress should be tailored to the particular needs of the victim and be proportionate to the gravity of the violations committed against them.”<sup>67</sup>

Other jurisdictions have used this combined model, where survivors can choose either of the payment tracks, to provide redress to survivors of historical violations.<sup>68</sup> The combined

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See links to the submissions on pp. 36–37 of the Joint Committee on Children, Equality, Disability, Integration and Youth, [Report on pre-legislative scrutiny of the General Scheme of a Mother and Baby Institutions Payment Scheme Bill 2022](#) (July 2022).

<sup>63</sup> Survivors identified criteria that should be applied in determining the amount of financial recognition: Forced family separation/disappearance; Psychological trauma and harm; Vaccine experiments; Lack of Supervision/Vetting of families; Physical harm and injury; Length of time in Institution; Racial, Ethnic, Discrimination/abuse; Work undertaken without payment; Intergenerational Harm; Sexual Abuse; Records of Registration; Unlawful denial of Information/disappearance of records; Illegal birth registration; Mother's Age; Other. See OAK, [Report of the findings of the consultation with survivors of mother and baby homes and county homes: March-April 2021](#) (May 2021, submitted to the Interdepartmental Group) pp. 11, 36–39.

<sup>64</sup> The RIRB assesses redress with reference to severity of (1) the abuse suffered, (2) physical and mental injuries, (3) the emotional and social effects of injuries, and (4) loss of employment and other opportunities. See <https://www.rirb.ie/default.asp>.

<sup>65</sup> United Nations, [Communication from UN Special Procedures to Ireland, IRL 2/2021](#) (5 November 2021) p. 4.

<sup>66</sup> 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. 108.

<sup>67</sup> United Nations Committee against Torture, [General comment No. 3 \(2012\) on the implementation of article 14](#), CAT/C/GC/3 (13 December 2012) para. 6.

<sup>68</sup> Scotland: <https://www.redress.scot/> and [https://archive2021.parliament.scot/S5\\_Education/General%20Documents/20201102DraftAssessmentFrameworkcontainspotentiallydistressingcontent.pdf](https://archive2021.parliament.scot/S5_Education/General%20Documents/20201102DraftAssessmentFrameworkcontainspotentiallydistressingcontent.pdf); Sweden: Johanna Sköld et al., ‘Historical justice through redress schemes? The practice of interpreting the law and physical child abuse in Sweden’ (2020) 45(2)

approach can be regarded as beneficial for survivors as it maximises the advantages of each approach.<sup>69</sup> However, it is important to ensure that survivors are supported in the application process, through access to legal representatives and advocacy groups,<sup>70</sup> and that before they apply for Track One or Track Two they are made fully aware of the process and the potential outcomes of this process so they can make an informed decision to opt for either Track One or Track Two.<sup>71</sup> Communication with survivors will be key in sensitively and effectively managing their expectations of the process and outcomes of the Payment Scheme. Ensuring that the members of the body administering the scheme have relevant training and experience will be essential in providing a holistic and supportive environment to survivors as they go through the various stages of the Payment Scheme.

Irrespective of whether survivors opt for an award under Track One or Track Two, the payment for the historic wrong and payments for the various types of harm experienced by survivors should focus on improving the quality of life of survivors.<sup>72</sup> It is important to remember that the aim of the payment is not to return the survivors to the situation they were in before the violations of their rights; rather the payment should subvert the pre-existing structural inequality which may have engendered the violence.<sup>73</sup>

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Scandinavian Journal of History 178–201; and Canada and Australia: Stephen Winter, ‘Two models of monetary redress: A structural analysis’ (2017) Victims and Offenders.

<sup>69</sup> A common experience payment is regarded as “faster, more certain, more attractive to applicants, less psychologically difficult, and more equitable” while an individualised assessment can offer “substantive justice and participant agency”; Stephen Winter, ‘Two models of monetary redress: A structural analysis’ (2017) Victims and Offenders.

<sup>70</sup> Kathleen Daly, Redressing Institutional Abuse of Children (Palgrave Macmillan, 2014) p. 185.

<sup>71</sup> Kathleen Daly, Redressing Institutional Abuse of Children (Palgrave Macmillan, 2014) p. 196.

<sup>72</sup> Pablo de Grieff, Handbook of Reparations (Oxford University Press) p. 466. See also IHREC, [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’](#) (April 2021) p. 15.

<sup>73</sup> The Committee on the Elimination of Discrimination against Women provides that: “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 United Nations 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 2013) para. 79. See also United Nations General Assembly, [The gender perspective in transitional justice processes: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/75/174 (17 July 2020) para. 37.

## Track One

Monetary payments under redress schemes can be categorised under two headings; payments which address historic wrongs and those which address abuse.<sup>74</sup> It would appear that the intention behind the time-based payment and the work-related payment is to address the harms experienced in the institutions rather than a recognition of the historic wrong.<sup>75</sup> The Commission considers that the legislation should be amended to include a payment to address the historic wrong of having been resident in a relevant institution for any length of time. This historic wrong has already been recognised by the Government. In the State apology delivered on 13 January 2021, the Taoiseach apologised:

“for the profound generational wrong visited upon Irish mothers and their children who ended up in a Mother and Baby Home or a county home. As the commission says plainly, “they should not have been there.” I apologise for the shame and stigma which they were subjected to and which, for some, remains a burden to this day.”<sup>76</sup>

In the *‘Action Plan for Survivors’* the Minister for Children, Equality, Disability, Integration and Youth stated:

“[t]hat any person was sent to one of these institutions at all was a profound wrong, for which the Irish State and religious congregations must bear responsibility.”<sup>77</sup>

The payment would be in recognition of the historic wrong of having been resident in one of these institutions for any length of time which impacted on the mother and child bond. It would also be a recognition of the stigmatisation and prejudice faced by pregnant and/or unmarried women and girls in Irish society.

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<sup>74</sup> For example, in Canada the Indian Residential School Settlement Agreement (IRSSA) provided a common experience payment (CEP) to recognise the common experience of residing in one of the Indian residential schools and its impacts. While the Independent Assessment Process (IAP) provided for payments for sexual abuse, serious physical abuse or other wrongful acts suffered while attending a residential school. Independent Assessment Process Oversight Committee, [Final Report](#) (2021) p. 22.

<sup>75</sup> The Explanatory Notes for Head 18 provide that the general payment “recognises time spent in a relevant institution, harsh conditions, emotional abuse and other forms of mistreatment, stigma and trauma experienced while resident in a Mother and Baby or County Home Institution.”

<sup>76</sup> See <https://www.oireachtas.ie/en/debates/debate/dail/2021-01-13/10/>.

<sup>77</sup> See Government of Ireland, [An Action Plan for Survivors and Former Residents of Mother and Baby and County Home Institutions](#) (2021) p. 4.



The Commission is of the view that this payment should be in the form of a fixed/flat payment, where each applicant receives the same amount,<sup>78</sup> and should be provided to both the mother and the child. The evidentiary threshold for this payment should remain low, as set out currently in the legislation, to ensure that the application and assessment process is survivor-centred.<sup>79</sup> The payment for the historic wrong should be paid immediately to survivors after their claim is assessed, ahead of additional claims they may have in progress with the body administering the Payment Scheme.

The Commission recommends that the general time-based payment and work-based payment already provided for in the legislation should be included within the Track One payments. Anyone who was resident in a relevant institution should be eligible for both payments, provided they satisfy the qualifying criteria. The general time-based payment should be a recognition of the harms experienced by mothers and children in these institutions. The legislation should clearly set out which harms are covered by the time-based payment so as to provide a recognition of the experiences of survivors.<sup>80</sup> The harms recognised under the time-based payment should be distinct from the loss of mother and child bond which is recognised in the payment for the historic wrong. The time-based payment for the harms experienced and the payment for the historic wrong of being resident in an institution which impacted on the mother and child bond have different aims; the time-based payment recognises the harms which have occurred and the payment for being resident in the institution is to acknowledge the historic wrong. The harms which occurred in these institutions were a direct consequence of the historic wrong of being resident in these institutions. Guidance on the list of harms which should be explicitly set

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<sup>78</sup> See discussion in Kathleen Daly, *Redressing Institutional Abuse of Children* (Palgrave Macmillan, 2014) p. 126.

<sup>79</sup> 'Flat payment or other equality-based approaches do not require probing of the claimants' experiences of abuse, and depending on the scheme, can be based on government records of placement histories or time spent in institutions'; see Kathleen Daly, *Redressing Institutional Abuse of Children* (Palgrave Macmillan, 2014) p. 126.

<sup>80</sup> The Commission note that Joint Committee on Children, Equality, Disability, Integration and Youth in their pre-legislative report on this Bill recommended that "The scheme must recognise all rights violations and all harms perpetrated in the institutional and family separation system, including but not limited to those identified by OAK. The OAK categories of harm should be expressly listed as an appendix or schedule to the Bill, in acknowledgement of the wider experience and understanding of harm. This should define harm as including the categories noted by OAK." Joint Committee on Children, Equality, Disability, Integration and Youth, [Report on pre-legislative scrutiny of the General Scheme of a Mother and Baby Institutions Payment Scheme Bill 2022](#) (July 2022) p. 4.

out in the legislation can be taken from the communication of the UN experts to the State, the views of participants in the OAK consultation and IHREC's advisory paper to the IDG.<sup>81</sup>

## Track Two

Under Track Two, the Commission is of the view that survivors should be able to apply for a payment for the historic wrong of being resident in a relevant institution for any length of time which impacted on the mother and child bond (as described under Track One).

Alongside the payment for the historic wrong, the Commission is of the view that the legislation should set out additional categories of harm for survivors to claim compensation for the harm caused to them in the institutions. While the legislation includes time-based and work-related payments, survivors involved in the consultation process on the design of the Payment Scheme identified seventeen harms and human rights violations experienced by them which require reparation.<sup>82</sup> The Commission notes that OAK, who undertook the consultation with survivors, have remarked that only five of the harms identified by survivors are provided or partially provided for in terms of the Bill.<sup>83</sup>

The inclusion of categories of harm in Track Two would provide recognition to survivors of the different types of harm and trauma experienced by survivors in the institutions. In applying to the Payment Scheme, survivors should be permitted to apply for awards under multiple categories to reflect all the different harms they experienced in these institutions. The Commission is of the view that it is important that the categories of harm eligible for

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<sup>81</sup> See list of harms identified on pp. 22–23 of IHREC, [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'](#) (April 2021).

<sup>82</sup> The harms identified are: Loss of Mother Child Relationship; Psychological Abuse; Lack of Proper Vetting; Withholding of personal Information; Work undertaken without payment; Physical/Sexual Abuse; Unspecified abusive treatment; Lack of Education; Arbitrary detention/coercive control; Stigma and discrimination; Loss of Father/Sibling/Extended Family Relationships; Violation of Human Rights; Racial Profiling/Suppression of Ethnic Identity; Health Issues related to Lack of Info; Neglect; Non-Consensual Participation in Vaccine Trials; Loss of Nationality and Heritage. See OAK, [Report of the findings of the consultation with survivors of mother and baby homes and county homes: March-April 2021](#) (May 2021, submitted to the Interdepartmental Group) p. 29

<sup>83</sup> Correspondence from OAK to IHREC noted that the harms provided for in the provision of financial reparations are: length of time in institution and work without payment; the harms partially provided for are: psychological trauma and harm, physical harm and injury, and discrimination including racial and ethnic abuse. See also OAK, [Opening Statement to the Joint Committee on Children, Equality, Disability, Integration and Youth on the provisions of the General Scheme of the Mother and Baby Institutions Payments Scheme Bill 2022](#): Delivered by Mary Lou O'Kennedy on 24th May 2022; OAK, [Submission to the Joint Committee on Children, Equality, Disability, Integration and Youth On The General Scheme of a Mother and Baby Institutions Payment Scheme Bill 2022](#) (May 2022).

payment reflect both pecuniary and non-pecuniary harm.<sup>84</sup> The Commission considers that ‘harm’, for the purposes of redress, should be defined inclusively and informed by relevant human rights and equality standards.<sup>85</sup> Guidance on the list of harms which would be eligible for an individualised assessment can be taken from the harms identified in the communication from the UN experts to the State, the views of participants in the OAK consultation report and IHREC’s advisory paper to the IDG.<sup>86</sup> The identification of the specific harms to be included in the additional categories should be done in consultation with survivors and their representative groups. Survivors should also be consulted on how harm should be assessed and a payment determined.

The categories of harm to be eligible for payment under the legislation should be clearly defined, be distinct and there should be no overlap between the different categories of harm so as to make it clear to survivors when applying to the Scheme which exact harm the payment is meant to redress. As mothers and children in these institutions experienced different harms, it should be made clear for each category of harm whether a survivor who was a mother or a child is eligible for an award under that category. As the Commission is recommending the inclusion of a flat payment for the historic wrong of being resident in one of these institutions which impacted on the mother and child bond, the Commission is of the view that the loss of the mother and child bond should not be included in the additional categories of harm. This recommendation would avoid an overlap in a payment between the categories of harm and the historic wrong, and more importantly avoid

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<sup>84</sup> The UN Principles recognise that compensation should be provided for both material harm and non-material harm; 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, para. 20. The ECtHR has the power under Article 41 of the ECHR to award ‘just satisfaction’ for pecuniary and non-pecuniary damage; see European Court of Human Rights, [Q&A on the European Court of Human Rights award of “just satisfaction”](#) (press release, 26 March 2019). The ECtHR have 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; see *Varnava and others v. Turkey*, 16064/90, 16065/90, 16066/90 et al. Judgment 18.9.2009 [GC], para. 224.

<sup>85</sup> IHREC, [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’](#) (April 2021) p. 23.

<sup>86</sup> See list of harms identified on pp. 22–23 of IHREC, [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’](#) (April 2021).

survivors potentially having to produce evidence of the loss of the mother and child bond which could serve as an additional evidential barrier for redress.

An individualised assessment of harm will require producing evidence of harm, which will be tested or scrutinised in some manner. While noting that the adversarial nature of an individualised assessment of harm has the potential to re-traumatise and perhaps generate a sense of not being believed amongst survivors, the Commission considers that how adversarial the process is depends on the standard of proof and type of evidence required. To support a survivor-centred approach to the provision of individualised awards, the Commission is of the view that the process for adjudicating the nature and extent of the harms should be non-adversarial in its approach as far as possible. The Commission considers that the redress scheme could, for example, provide for an option of a mediated settlement in the first instance.<sup>87</sup> In circumstances where settlement cannot be reached, procedures could be adopted which mitigate the adversarial nature when hearing and assessing the evidence such as if a victim chooses to give evidence in an oral hearing, the oral evidence should be taken in an inquisitorial fashion.<sup>88</sup> Whatever the approach, the process must ensure that fair procedures as protected under the Constitution and human rights law are carefully and expressly articulated within the Payment Scheme, in a manner that is both accessible and understood by all parties engaged in the process.<sup>89</sup>

It should be clear to individuals applying to a particular category, the evidence required for showing they experienced the harm and how the harm can be assessed against logical criteria. Redress schemes in Ireland and in other jurisdictions which have adopted an individualised approach to assessment have used a matrix system<sup>90</sup> or an assessment

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<sup>87</sup> Patricia Lundy, [Historical Institutional Abuse: What survivors want from redress](#) (Ulster University – commissioned by the Panel of Experts on Redress, March 2016) p. 35. See also IHREC, [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'](#) (April 2021) p. 27.

<sup>88</sup> 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) p. 15.

<sup>89</sup> IHREC, [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'](#) (April 2021) pp. 27–28.

<sup>90</sup> See <https://www.rirb.ie/default.asp>. See also Stephen Winter, 'Two models of monetary redress: A structural analysis' (2017) *Victims and Offenders* pp. 4–6. In Canada, they used a hierarchical points structure. 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) p. 50.

framework<sup>91</sup> to make an individualised payment. Individualised payments are based on abuse and severity, or on abuse, severity and the resulting impact.<sup>92</sup> The standard of evidence in redress schemes in other jurisdictions has been more commonly set at ‘reasonable likelihood’, which is lower standard than the civil standard of ‘balance of probabilities’ which has also been used in some redress schemes.<sup>93</sup>

The Scottish Human Rights Commission (the ‘SHRC’) has contended that for the award of non-pecuniary damage there should be some evidence of the harm caused but not at a level of detail which risks re-traumatisation of applicants.<sup>94</sup> In awarding pecuniary and non-pecuniary damage, the ECtHR has stated that a clear causal link must be demonstrated between the violation/s and its impact on the individual’s life.<sup>95</sup> As non-pecuniary harm is difficult to quantify, the ECtHR makes its assessment of damages on an equitable basis, with regard to standards which emerge from case law.<sup>96</sup> The ECtHR has observed that equity:

“[A]bove all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred.”<sup>97</sup>

The Commission is of the view that the process for applying for an award under the Payment Scheme should be trauma-informed and person-centred with low eligibility thresholds. The Special Rapporteur has stated the object of registration for a reparation programme is not to challenge the veracity of the claims of the victims or the evidence they have provided, rather it is to assume in good faith that what they have said is a statement of truth.<sup>98</sup> The Special Rapporteur has welcomed reparation programmes which place the burden on the State in proving the damage or where there is a lower evidentiary

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<sup>91</sup> See guidance from Scotland: <https://www.gov.scot/publications/redress-survivors-historical-child-abuse-care-scotland-act-2021-statutory-guidance-assessment-framework/> and Canada: <http://www.iap-pei.ca/media/information/publication/pdf/pub/iap-guide-v4-20190508-eng.pdf>.

<sup>92</sup> Kathleen Daly, *Redressing Institutional Abuse of Children* (Palgrave Macmillan, 2014) pp. 126, 133.

<sup>93</sup> Kathleen Daly, *Redressing Institutional Abuse of Children* (Palgrave Macmillan, 2014) p. 133.

<sup>94</sup> Scottish Human Rights Commission, [Response to Pre-legislative Public Consultation on Financial Redress for Historical Child Abuse in Care](#) (November 2019) p. 21.

<sup>95</sup> European Court of Human Rights, [Q&A on the European Court of Human Rights award of “just satisfaction”](#) (press release, 26 March 2019).

<sup>96</sup> European Court of Human Rights, [Q&A on the European Court of Human Rights award of “just satisfaction”](#) (press release, 26 March 2019).

<sup>97</sup> *Al Jedd v United Kingdom*, Judgement of the European Court of Human Rights, 7 July 2011, para. 114.

<sup>98</sup> 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. 57.

threshold.<sup>99</sup> Low-evidentiary thresholds are recognised as beneficial in that they are sensitive to the needs of victims by avoiding secondary victimisation and removing complicated and lengthy procedures.<sup>100</sup> Low evidentiary thresholds also contribute to completeness of a reparation programme.<sup>101</sup> The Special Rapporteur has said that the evidentiary standard should not create exclusion or resemble a court case.<sup>102</sup> Provision should be made for survivors to have a choice of submitting a short written statement or providing a short oral statement.<sup>103</sup> Therefore, the Commission is of the view that evidentiary thresholds for the Payment Scheme should be survivor-centred, and that appropriate weight should be given to the testimony of survivors in order to apply for an individualised award.

**The Commission recommends that survivors be consulted with before setting out the payment rates under Schedule 3.**

**The Commission recommends that the legislation should specify the purpose of the payments under the scheme and of the scheme itself.**

**The Commission recommends that the legislation be amended to provide for a two track model for determining a payment under the Payment Scheme. Survivors would have the choice of opting for either track:**

**Track One**

- **A flat/equal payment for all survivors to acknowledge the historic wrong of having been resident in a relevant institution for any length of time, which impacted on the mother and child bond.**

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<sup>99</sup> 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. 57.

<sup>100</sup> United Nations Office of the High Commissioner for Human Rights, [Rule of Law Tools for Post-Conflict States: Reparations programmes](#) (2008) p. 18.

<sup>101</sup> United Nations Office of the High Commissioner for Human Rights, [Rule of Law Tools for Post-Conflict States: Reparations programmes](#) (2008) p. 18.

<sup>102</sup> United Nations General Assembly, [The gender perspective in transitional justice processes: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/75/174 (17 July 2020) para. 42.

<sup>103</sup> Scottish Human Rights Commission, [Response to Pre-legislative Public Consultation on Financial Redress for Historical Child Abuse in Care](#) (November 2019) p. 19.

- A time-based payment for all survivors who were resident in a relevant institution to acknowledge the harms experienced, which are distinct from the loss of the mother and child bond.
- A work-based payment for survivors who qualify, which increases based on length of stay.

#### **Track Two**

- A flat/equal payment for all survivors to acknowledge the historic wrong of having been resident in a relevant institution for any length of time, which impacted on the mother and child bond.
- A payment determined by an individualised assessment of harm that identifies categories of specific harms experienced, which are distinct from the loss of the mother and child bond.

**The Commission recommends that the inclusion of additional categories of harm in the individualised assessment under the Payment Scheme, should be done in consultation with survivors and their representative groups, and in line with human rights and equality standards.**

**The Commission recommends that the evidentiary thresholds for the Payment Scheme should be survivor-centred, and appropriate weight should be given to the testimony of survivors. The Commission further recommends that fair procedures must be clearly and expressly articulated within the Payment Scheme, and legal advice and assistance should be provided to survivors throughout this process.**

#### **Form of payment (Head 11)**

The legislation does not clarify whether the payment/s will be paid in a lump sum, smaller periodic payments or in the form of a pension. While it is presumed that it is in the form of lump sum, the Commission is of the view that further consideration should be given to the form of payment. Research from Northern Ireland has indicated concerns that smaller periodic payments or a pension may be more beneficial to certain survivors as they may not have the necessary life skills to make sound financial decisions which may mean the lump

sum is spent quickly.<sup>104</sup> A pension can be regarded as a contribution to improving the quality of life of survivors and victims.<sup>105</sup> The provision of a pension may be more beneficial for survivors living in poverty. It has been contended that international experience of reparation programmes illustrates that it is better to distribute compensation awards in the form of a pension rather than as a lump sum.<sup>106</sup> Survivors who participated in the consultation for the IDG's report expressed a preference that survivors should be able to avail of a combination of a lump sum, periodic payments and/or damages through the courts.<sup>107</sup> To support individuals in deciding on the form of payment and managing the money awarded under the Payment Scheme, the Commission considers that survivors should, if they require it, be provided with free financial advice.<sup>108</sup>

**The Commission is of the view that the legislation should be amended to provide that individuals may choose to receive their payment/s in the form of a pension or as a lump sum and should be provided with free financial advice to assist them in making this choice and in managing any payment/s received.**

### Accessibility of the application process (Head 14 and Head 15)

Head 14 sets out the process for the application to the Scheme and Head 15 sets out the assessment process. The Commission welcomes the commitment to ensuring that the Scheme is accessible and that appropriate measures will be put in place for applicants who may lack capacity.<sup>109</sup> The provision of reparation requires an individual to become visible,

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<sup>104</sup> Patricia Lundy, [Historical Institutional Abuse: What survivors want from redress](#) (Ulster University – commissioned by the Panel of Experts on Redress, March 2016) p. 18.

<sup>105</sup> United Nations Office of the High Commissioner for Human Rights, [Rule of Law Tools for Post-Conflict States: Reparations programmes](#) (2008) p. 31.

<sup>106</sup> United Nations Office of the High Commissioner for Human Rights, [Rule of Law Tools for Post-Conflict States: Reparations programmes](#) (2008) p. 31.

<sup>107</sup> OAK, [Report of the findings of the consultation with survivors of mother and baby homes and county homes: March-April 2021](#) (May 2021, submitted to the Interdepartmental Group) p. 36.

<sup>108</sup> See Patricia Lundy, [Historical Institutional Abuse: What survivors want from redress](#) (Ulster University – commissioned by the Panel of Experts on Redress, March 2016) p. 18; 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) p. 51.

<sup>109</sup> Department of Children, Equality, Disability, Integration and Youth, [Mother and Baby Institutions Payment Scheme: Government Proposals](#) (November 2021) p. 7.



which may place them at risk of secondary-victimisation.<sup>110</sup> Therefore, it is critical that the Payment Scheme is user-friendly and avoids further traumatising for survivors.<sup>111</sup>

The Special Rapporteur has identified several barriers to women's effective access to reparation programmes including:

- a higher rate of illiteracy and difficulties in directly accessing information;
- a higher poverty rate;
- a lack of legal and economic autonomy;
- exclusion from public and political life;
- pejorative attitudes towards women and practices that affect them in the public and private spheres;
- the mistrust of State institutions or lack of knowledge and understanding about the institutional structure of the State; and
- the fear and inhibitions from which women suffer in making their claims.<sup>112</sup>

These barriers have to be taken into account when designing and implementing reparation programmes to ensure the scheme is appropriate, accessible and understandable to victims and survivors.<sup>113</sup> The Payment Scheme should be accessible, effective and expeditious for all survivors, and appropriately adapted to the special vulnerability of groups of people.<sup>114</sup>

Special measures for application should be adopted to ensure groups who are in situations of vulnerability come forward to register.<sup>115</sup> Confidentiality and the provision of a safe

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<sup>110</sup> United Nations General Assembly, [The gender perspective in transitional justice processes: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/75/174 (17 July 2020) para. 35.

<sup>111</sup> 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, para. 10.

<sup>112</sup> United Nations General Assembly, [The gender perspective in transitional justice processes: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/75/174 (17 July 2020) para. 46.

<sup>113</sup> United Nations General Assembly, [The gender perspective in transitional justice processes: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/75/174 (17 July 2020) para. 46.

<sup>114</sup> 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; 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.

<sup>115</sup> 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. 54.

environment in the application process will assist in minimising the possibility of re-victimisation and stigma.<sup>116</sup> The Payment Scheme should avoid short time frames for applications.<sup>117</sup>

Short timeframes for applying for the scheme can have a particular impact on women and minority groups as they:

“[F]requently require more time to overcome their reluctance to approach justice initiatives as well as official institutions, because they have traditionally been excluded, marginalized or outright abused.”<sup>118</sup>

**The Commission recommends that reasonable and procedural accommodations are built into the design and operation of the Payment Scheme to ensure that older people, disabled people, and those with limited literacy and/or digital skills, can meaningfully access the Payment Scheme.**

### Prioritisation of applicants (Head 15(2)(f))

Head 15(2)(f) provides that determinations of applications shall be made as soon as practicable with regard to the age and health of the applicants. This is a welcome approach as the Commission previously called for the prioritisation of certain categories of survivors due to age, health or disability and the adoption of special measures to ensure persons receive the remedy they are entitled to under international law in a timely and age and health-respectful manner.<sup>119</sup> The Special Rapporteur has stated that reparation programmes

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<sup>116</sup> 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. 71; United Nations General Assembly, [The gender perspective in transitional justice processes: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/75/174 (17 July 2020) para. 44.

<sup>117</sup> The United Nations Human Rights Committee recently recommended that the State remove all barriers to accessing a full and effective remedy for victims of Mother and Baby Institutions, including short timeframes to apply to the redress scheme; see United Nations Human Rights Committee, [Concluding observations on the fifth periodic report of Ireland](#), CCPR/C/IRL/CO/5 (27 July 2022) para. 12(c). See also United Nations Office of the High Commissioner for Human Rights, [Rule of Law Tools for Post-Conflict States: Reparations programmes](#) (2008) p. 17.

<sup>118</sup> United Nations Office of the High Commissioner for Human Rights, [Rule of Law Tools for Post-Conflict States: Reparations programmes](#) (2008) p. 17.

<sup>119</sup> IHREC, [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’](#) (April 2021) p. 30.

should identify which groups of victims will be prioritised according to their situations of vulnerability, including vulnerability due to victimisation.<sup>120</sup>

The Commission notes that the Special Rapporteur has said that reparation schemes could also facilitate reparation for survivors in urgent need of attention; the Special Rapporteur has recommended that States should:

“Adopt emergency reparation programmes or services, while domestic reparation programmes are being designed, to address the urgent needs of victims and avoid exposing them to further harm.”<sup>121</sup>

Therefore, due to the advancing age of many survivors, consideration should be given to providing immediate payments to priority survivors separate to the design and implementation of this legislation.

**The Commission recommends that consideration be given to establishing an emergency Payment Scheme, separate to the one under this legislation, to provide immediate redress to victims.**

In regards to identifying individuals who may need to be prioritised for redress, the Special Rapporteur has emphasised the importance of the creation of victims’ registries to ensure that reparation could be provided to those in urgent need before the reparation programme is established.<sup>122</sup> Victims’ registries also assist in identifying the number of victims, assessing the expected costs of redress and the allocation of resources.<sup>123</sup> However, it should be acknowledged underrepresentation in victims’ registries is an issue which needs to be addressed by ensuring the registration process is accessible and that survivors are informed of the process.<sup>124</sup>

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<sup>120</sup> United Nations General Assembly, [The gender perspective in transitional justice processes: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/75/174 (17 July 2020) para. 48.

<sup>121</sup> See also 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. 129(k).

<sup>122</sup> 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. 47.

<sup>123</sup> 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. 47, 121, 129(e).

<sup>124</sup> 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. 47.

**The Commission recommends that consideration be given to establishing a victims' registry.**

### Eligibility criteria for a child (Head 18(1))

Head 18(1) provides that a person who was, or has reasonable grounds for suspecting they were resident as a child under the age of 18 years of age in a relevant institution for a minimum of six months will be entitled to a general payment. The Commission notes that the consultation process for the development of the Payment Scheme highlighted survivors' sense of anger, hurt and non-acceptance of the recommendations of the Commission of Investigation in relation to eligibility for redress.<sup>125</sup> Survivors criticised the eligibility criteria for being arbitrary, inappropriate and lacking an acknowledgement of the realities and conditions within the institutions.<sup>126</sup> Survivors called for a universal, inclusive scheme where every mother and child who spent time in an institution should be eligible for redress regardless of duration or the year they entered.<sup>127</sup> The decisions in relation to the inclusion or exclusion of survivors are not:

“[M]erely 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.”<sup>128</sup>

The Commission is of the firm view that the Payment Scheme cannot be bound by the significant limitations of the Commission of Investigation's findings and recommendations.<sup>129</sup> The Special Rapporteur has stated that:

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<sup>125</sup> OAK, [Report of the findings of the consultation with survivors of mother and baby homes and county homes: March-April 2021](#) (May 2021, submitted to the Interdepartmental Group) p. 9.

<sup>126</sup> OAK, [Report of the findings of the consultation with survivors of mother and baby homes and county homes: March-April 2021](#) (May 2021, submitted to the Interdepartmental Group) p. 9.

<sup>127</sup> OAK, [Report of the findings of the consultation with survivors of mother and baby homes and county homes: March-April 2021](#) (May 2021, submitted to the Interdepartmental Group) p. 9.

<sup>128</sup> United Nations General Assembly, [The gender perspective in transitional justice processes: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/75/174 (17 July 2020) para. 28.

<sup>129</sup> Participants at the Commission's one-to-one 'listening sessions' with survivors and key stakeholders all expressed concern about the findings of the Commission of Investigation. See IHREC, [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'](#) (April 2021).

“a truly human rights-based approach to reparations would take as the only relevant criterion for providing access to benefits the violation of rights.”<sup>130</sup>

The UN Principles define victims as:

“[P]ersons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.”<sup>131</sup>

The Commission notes that the IDG did not develop specific proposals in respect of children who were boarded out.<sup>132</sup> This is contrary to the IDG report acknowledging that the Commission of Investigation found that in some cases children who were boarded out experienced some of the worst abuses. One of the grounds advanced by the IDG for excluding children who were boarded out is that it would require an individualised approach to assessing abuse. As the Commission is proposing the option of an individualised assessment of harm, this justification for excluding children who were boarded out can be addressed within the terms of a revised Payment Scheme. The Commission notes that the Joint Committee on Children, Equality, Disability, Integration and Youth have recommended that children who were boarded out should be included in the Payment Scheme and be entitled to redress.<sup>133</sup>

The Commission notes the Government have said the key priority for those who were adopted is the need to access their records and identity information.<sup>134</sup> However, the Special Rapporteur on the sale and sexual exploitation of children expressed concern that the limited scope of the Commission of Investigation’s work would mean that its

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<sup>130</sup> 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. 67.

<sup>131</sup> 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, para. 8.

<sup>132</sup> Department of Children, Equality, Disability, Integration and Youth, [Report of the Interdepartmental Group \(IDG\) on the development of the Mother and Baby Institutions Payment Scheme](#) (November 2021) pp. 22–23.

<sup>133</sup> Joint Committee on Children, Equality, Disability, Integration and Youth, [Report on pre-legislative scrutiny of the General Scheme of a Mother and Baby Institutions Payment Scheme Bill 2022](#) (July 2022) p. 21.

<sup>134</sup> Department of Children, Equality, Disability, Integration and Youth, [Mother and Baby Institutions Payment Scheme: Government Proposals](#) (November 2021) p. 4.

investigation would not be broad enough to uncover the full scale of illegal adoption.<sup>135</sup> The Special Rapporteur on the sale and sexual exploitation of children observed that:

“[N]ot enough has been done to ensure information, accountability and redress for those who suffered abuse in the past in institutions and for those who were adopted in a manner that would amount to the sale of children under international law.”<sup>136</sup>

A failure to provide information, redress and justice perpetuates the harm suffered by victims and survivors of forced and illegal adoption.<sup>137</sup> The Commission of Investigation stated that mothers did not have much choice in whether their child was taken from them, however, it determined that this could not be labelled ‘forced adoption’.<sup>138</sup> The Commission of Investigation stated that there was, with the exception of a small number of legal cases, no evidence that the consent of the women was not full, free and informed.<sup>139</sup> However, the Special Rapporteur on the sale and sexual exploitation of children has said that:

“consent was improperly induced or forcibly detained and documents, including illegal birth registrations, were falsified on a large scale.”<sup>140</sup>

The Commissioner for Human Rights of the Council of Europe has stated that even if women consented to practices within institutions, this consent could not be regarded in most circumstances as free and informed and, therefore, the responsibility for human rights violations is not diminished.<sup>141</sup> The UN experts have said that as illegal adoption may come within the legal definition of trafficking in persons, it is critical that the redress scheme:

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<sup>135</sup> United Nations General Assembly, [Visit to Ireland: Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), A/HRC/40/51/Add.2 (15 November 2019) para. 14.

<sup>136</sup> United Nations General Assembly, [Visit to Ireland: Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), A/HRC/40/51/Add.2 (15 November 2019) para. 9.

<sup>137</sup> United Nations General Assembly, [Visit to Ireland: Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material](#), A/HRC/40/51/Add.2 (15 November 2019) para. 15.

<sup>138</sup> Department of Children, Equality, Disability, Integration and Youth, [Final Report of the Commission of Investigation into Mother and Baby Homes](#) (2021) Recommendations, para. 34.

<sup>139</sup> Department of Children, Equality, Disability, Integration and Youth, [Final Report of the Commission of Investigation into Mother and Baby Homes](#) (2021) Executive Summary, para. 254.

<sup>140</sup> United Nations Human Rights Council, [Report of the Special Rapporteur on the sale of children, child prostitution and child pornography](#), A/HRC/34/55 (22 December 2016) para. 36.

<sup>141</sup> Council of Europe, [Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, Following His Visit to Ireland, 22-25 November 2016](#) (29 March 2017) para. 176.

“establishes a process for effective investigations and ensures access to effective remedies to all victims, without exception.”<sup>142</sup>

Victims of adoption should be meaningfully involved in the design and implementation of measures of redress.<sup>143</sup>

The Scheme must ensure that access to an adequate and effective remedy is provided to all survivors without discrimination. In this regard, the Commission notes that Head 18(2) provides that there is no minimum length of stay requirement for a person who was resident in a relevant institution for reasons relating to pregnancy, birth or care of their child to be eligible for a general payment. The Commission does not see a rational reason for this distinction between children who were resident in the institutions and mothers who were resident in the institutions. The six-month period is not an indicator of whether a child suffered harm such as from the forced separation of mother and child.<sup>144</sup> Moreover, as the Commission of Investigation did not take a human rights based approach,<sup>145</sup> its findings and recommendations do not reflect Ireland’s human rights and equality obligations and therefore is not an adequate mechanism for identifying the full universe of survivors.<sup>146</sup>

**The Commission recommends that Head 18(1) be amended to remove the requirement of a six-month stay to ensure that all children who were resident in a relevant institution and/or who were adopted are eligible to apply to the Scheme.**

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<sup>142</sup> United Nations, [Communication from UN Special Procedures to Ireland, IRL 2/2021](#) (5 November 2021) p. 5.

<sup>143</sup> United Nations Human Rights Council, [Report of the Special Rapporteur on the sale of children, child prostitution and child pornography](#), A/HRC/34/55 (22 December 2016) para. 95(k).

<sup>144</sup> IHREC, [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’](#) (April 2021) p. 21.

<sup>145</sup> The UN Human Rights Committee recently expressed concern of the alleged failure of the Commission of Investigation “to thoroughly and effectively investigate all allegations of abuse, mistreatment or neglect, taking into account the experience of all survivors”; United Nations Human Rights Committee, [Concluding observations on the fifth periodic report of Ireland](#), CCPR/C/IRL/CO/5 (27 July 2022) para. 11.

<sup>146</sup> See IHREC, [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’](#) (April 2021) p. 2. 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.’ See Department of Children, Equality, Disability, Integration and Youth, [Final Report of the Commission of Investigation into Mother and Baby Homes](#) (2021) Chapter 36: Human Rights, para. 36.2.

## Eligibility criteria for work payment (Head 18(3)–(4))

Head 18(3) provides that a person who was resident in a relevant institution for reasons relating to pregnancy, birth or care of their child for a minimum of three months and undertook commercial work without pay shall be entitled to a work related payment. Head 2 defines commercial work without pay as work undertaken in Tuam, in a County Home or outside of a relevant institution in which a person was resident. The recommendations for which groups are eligible for redress for commercial work arose from a recommendation of the Commission of Investigation which determined that only certain groups of residents engaged in commercial work.<sup>147</sup>

The Commission of Investigation declined to recommend work-related payment for work that residents were required to do which was considered general work that they would have been doing at home. The Commission commented that while most women in Mother and Baby Homes were expected to carry out this type of work, they were not required to do commercial work.<sup>148</sup> This is an unfair comparison as they could not derive the benefit from the work they did in the Mother and Baby Homes. This approach also appears to reinforce gender discrimination. As already noted the Commission of Investigation did not take a human rights and equality based approach which means its findings do not fully reflect the State's human rights and equality obligations. International law recognises that no-one shall be held be in slavery or servitude, or required to perform forced or compulsory labour.<sup>149</sup> The Commission is of the view that the nature of the Mother and Baby Homes and related institutions means that the work undertaken by women has to be regarded as compulsory. The UN experts have emphasised the importance of including forced labour and servitude within the scope of the redress scheme as these conditions pushed:

“women into the realm of human trafficking, contemporary forms of slavery”.<sup>150</sup>

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<sup>147</sup> Department of Children, Equality, Disability, Integration and Youth, [Final Report of the Commission of Investigation into Mother and Baby Homes](#) (2021) Recommendations, paras. 31–32.

<sup>148</sup> Department of Children, Equality, Disability, Integration and Youth, [Final Report of the Commission of Investigation into Mother and Baby Homes](#) (2021) Recommendations, para. 30.

<sup>149</sup> Article 5 of the Charter, Article 4 of the ECHR and Article 8 of the ICCPR.

<sup>150</sup> United Nations, [Communication from UN Special Procedures to Ireland, IRL 2/2021](#) (5 November 2021) pp. 5–7.



The Committee on the Elimination of Discrimination against Women provides that in the provision of remedies, States should:

“Take full account of the unremunerated domestic and caregiving activities of women in assessments of damages for the purposes of determining appropriate compensation for harm in all civil, criminal, administrative or other proceedings”.<sup>151</sup>

The Commission has previously recommended, in relation to Magdalen Laundries that by way of restitution, lost wages and any pension or social protection benefits arising from engaging in compulsory work on an unpaid and unacknowledged basis should be identified and provided to the women concerned.<sup>152</sup>

**The Commission recommends that Head 18(3) be amended to provide that all relevant persons should be eligible for a work-related payment regardless of the institution they were resident in, the nature of the work, or length of stay.**

### Eligibility if person received a prior award from a court or settlement (Head 18(6))

Head 18(6) provides that a person shall not qualify for a general and/or work-related payment if they have received an award from a court or settlement in relation to the same set of circumstances. While the intention may be to avoid people receiving double compensation, the Commission considers that it is an arbitrary and unnecessary barrier to prevent such persons from applying to the Payment Scheme,<sup>153</sup> particularly as persons may have received a lower award from a court or settlement than the payment offered under the Payment Scheme. Appropriate measures could be put in place to address concerns around double compensation such as ensuring that if a person previously received an award they would receive a ‘top up’ payment to bring them in line with other survivors.

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<sup>151</sup> United Nations Committee on the Elimination of Discrimination against Women, [General recommendation No. 33 on women’s access to justice](#), CEDAW/C/GC/33 (3 August 2015) para. 19(c).

<sup>152</sup> IHREC (designate), [Submission of the Irish Human Rights Commission to the UN Human Rights Committee on the Examination of Ireland’s Fourth Periodic Report under the International Covenant on Civil and Political Rights](#) (June 2014) p. 27.

<sup>153</sup> See discussion 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) p. 57; Scottish Human Rights Commission, [Response to Pre-legislative Public Consultation on Financial Redress for Historical Child Abuse in Care](#) (November 2019) p. 27.

**The Commission recommends that Head 18(6) be removed from the legislation. The Commission further recommends that Head 18 should be revised to provide that if a person previously received an award from a court or settlement which is lower than the payment rates under the Payment Scheme they are entitled to a ‘top up’ payment to bring them in line with the Payment Scheme.**

### **Eligibility for health services without charge (Head 19)**

Head 19 provides that a relevant person must have been resident in a relevant institution for a minimum of six months to be eligible for the provision of health services without charge. As noted above, the Commission sees no rational connection between the potential harm suffered and the length of stay requirement.

**The Commission recommends that Head 19 be amended to provide that all relevant persons are eligible for health services without charge.**

### **Provision of health services without charge or health support payment (Head 20 and Head 21)**

Head 20 provides for the provision of a form of an enhanced medical card to persons who meet the eligibility criteria. The Commission notes that the Government has stated that:

“awards and benefits will be discounted for the purposes of determining entitlement to social welfare payment and/or income tax liability.”<sup>154</sup>

The Commission is of the view that any health benefit provided to survivors should be excluded from the means of determining eligibility for all social welfare payments.

Head 21 provides that a person not resident in Ireland can choose either an enhanced medical card or a health support payment. Head 12 provides for the payment of €3,000 to applicants living abroad in lieu of a form of enhanced medical card. While it is welcome to provide health services to survivors, the Commission has called for direct engagement with survivors on the framing and scope of such reparations.<sup>155</sup> Engagement with survivors will

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<sup>154</sup> Department of Children, Equality, Disability, Integration and Youth, [Mother and Baby Institutions Payment Scheme: Government Proposals](#) (November 2021) p. 7.

<sup>155</sup> IHREC, [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’](#) (April 2021) p. 15.

ensure that these rehabilitative measures are both adequate and effective to address the needs of survivors. As survivors have vastly different needs, different experiences and live in different jurisdictions, a multi-faceted approach to reparations is needed.

The provision of rehabilitation for health issues is important as there may be high levels of trauma amongst survivors.<sup>156</sup> Therefore, the provision of mental healthcare can be essential in improving the quality of life of survivors.<sup>157</sup> However, it should be recognised that survivors of serious human rights violations often need specialised services which may not be readily available.<sup>158</sup>

The Commission notes that 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”.<sup>159</sup>

The failure to provide effective rehabilitation measures for vulnerable victims and survivors constitutes inhuman treatment and can cause secondary victimisation.<sup>160</sup>

**The Commission 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.**

### Provision of other forms of rehabilitation measures

The Commission is concerned that the legislation does not recognise the wider forms of rehabilitation provided for under international law. Rehabilitation is wider than the provision of physical and mental health services.<sup>161</sup> Rehabilitation may take different forms

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<sup>156</sup> United Nations Office of the High Commissioner for Human Rights, [Rule of Law Tools for Post-Conflict States: Reparations programmes](#) (2008) p. 24.

<sup>157</sup> United Nations Office of the High Commissioner for Human Rights, [Rule of Law Tools for Post-Conflict States: Reparations programmes](#) (2008) p. 24.

<sup>158</sup> 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. 36.

<sup>159</sup> Justice for Magdalen Research, [Listening Exercise Vol 1: Report on Key Findings](#) (2020).

<sup>160</sup> 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.

<sup>161</sup> The UN Principles provide that rehabilitation should include “medical and psychological care as well as legal and social services”; 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](#)

and be delivered through a variety of interventions, such as; housing; social supports, including personal assistants or home help services; pensions; health and welfare; education; employment; and assistance to deal with the psychological effects of time spent in the Mother and Baby Homes and related institutions.<sup>162</sup> These measures should be age and context appropriate, and should aim to address inequality including, for example, on the grounds of gender, race, disability and socio-economic status.<sup>163</sup>

**The Commission recommends that the legislation be amended to include wider forms of rehabilitation, as recognised under international human rights law. The Commission further recommends that any form of rehabilitative or transformative reparation be holistic and accessible to all survivors.**

### Waivers (Head 22(5))

Head 22(5) provides that when a person accepts an offer of a general payment or work-related payment, the person should agree in writing to waive any right of action which they may otherwise have had against a body or discontinue any proceedings against a public body, which arise out of the circumstances of the application before the Chief Deciding Officer. The Commission notes that the signing of the legal waiver is not linked to the provision of an enhanced medical or a health support payment.

Programmes which:

“stipulate that accepting their benefits forecloses other avenues of civil redress can be called final.”<sup>164</sup>

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[International Humanitarian Law](#), adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, para. 21. The Special Rapporteur has emphasised that rehabilitation goes beyond physical and medical care, and includes other social services such as education; see 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. 98, 124.

<sup>162</sup> IHREC (designate), [Submission of the Irish Human Rights Commission to the UN Human Rights Committee on the Examination of Ireland's Fourth Periodic Report under the International Covenant on Civil and Political Rights](#) (June 2014) p. 27; IHREC, [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'](#) (April 2021) pp. 15–16.

<sup>163</sup> IHREC, [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'](#) (April 2021) p. 17.

<sup>164</sup> United Nations Office of the High Commissioner for Human Rights, [Rule of Law Tools for Post-Conflict States: Reparations programmes](#) (2008) p. 35.

The Commission acknowledges that there is not a settled position in international law on whether reparation programmes should be final.<sup>165</sup> The Office of the High Commissioner for Human Rights has stated that while finality may mean that judicial proceedings are made inaccessible to survivors, an element of finality in a reparation programme is beneficial,

“...once a Government has made a good-faith effort to create an administrative system that facilitates access to benefits”.<sup>166</sup>

The Special Rapporteur has said reparation programmes should:

“aim at finality, addressing the question of the potential coexistence of judicial reparation and domestic reparation programmes”.<sup>167</sup>

The UN Principles provide that a victim should have an equal access to an effective judicial remedy, and to facilitate this, the State should provide proper assistance to victims seeking access to justice.<sup>168</sup> The Committee on the Elimination of Discrimination against Women recommends States:

“should implement administrative reparation schemes without prejudice to the rights of victims/survivors to seek judicial remedies.”<sup>169</sup>

The Committee against Torture provides that collective reparation and administrative reparation programmes should not render ineffective the right of an individual to a remedy and to obtain redress.<sup>170</sup>

The Committee against Torture states that:

“Judicial remedies must always be available to victims, irrespective of what other remedies may be available, and should enable victim participation. States parties

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<sup>165</sup> United Nations Office of the High Commissioner for Human Rights, [Rule of Law Tools for Post-Conflict States: Reparations programmes](#) (2008) p. 35.

<sup>166</sup> United Nations Office of the High Commissioner for Human Rights, [Rule of Law Tools for Post-Conflict States: Reparations programmes](#) (2008) pp. 35–36.

<sup>167</sup> 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.

<sup>168</sup> 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, para. 12.

<sup>169</sup> United Nations Committee on the Elimination of Discrimination against Women, [General recommendation No. 35 on gender-based violence against women](#), CEDAW/C/GC/35 (26 July 2017) para. 33(b).

<sup>170</sup> United Nations Committee against Torture, [General comment No. 3 \(2012\) on the implementation of article 14](#), CAT/C/GC/3 (13 December 2012) para. 20.

should provide adequate legal aid to those victims of torture or ill-treatment lacking the necessary resources to bring complaints and to make claims for redress.”<sup>171</sup>

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.<sup>172</sup> The UN Human Rights Committee recently expressed concern with the State for failing to provide full and effective remedies to victims of Mother and Baby Institutions, including through:

“the obligation of victims, in order to receive compensation, to sign a waiver against further legal recourse against state and non-state actors through judicial process”.<sup>173</sup>

The Human Rights Committee recommended the State remove this requirement as it serves as a barrier to accessing a full and effective remedy.<sup>174</sup> 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.<sup>175</sup> The SHRC has advocated for a more reciprocal approach such as requiring courts, when awarding damages, to take into account any previous receipt of redress under the scheme.<sup>176</sup>

The Commission is of the view that survivors should not have to choose between accepting an award of redress or access to the courts. It is important to acknowledge that unrelated to compensation access to the courts is important to survivors in terms of airing matters in a public forum and findings of liability by a court.<sup>177</sup> Requiring survivors to choose between receiving redress through a scheme or retaining their right to access court places survivors

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<sup>171</sup> United Nations Committee against Torture, [General comment No. 3 \(2012\) on the implementation of article 14](#), CAT/C/GC/3 (13 December 2012) para. 30.

<sup>172</sup> 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.

<sup>173</sup> United Nations Human Rights Committee, [Concluding observations on the fifth periodic report of Ireland](#), CCPR/C/IRL/CO/5 (27 July 2022) para. 11.

<sup>174</sup> United Nations Human Rights Committee, [Concluding observations on the fifth periodic report of Ireland](#), CCPR/C/IRL/CO/5 (27 July 2022) para. 12(c).

<sup>175</sup> Scottish Human Rights Commission, [Response to Pre-legislative Public Consultation on Financial Redress for Historical Child Abuse in Care](#) (November 2019) p. 28.

<sup>176</sup> Scottish Human Rights Commission, [Response to Pre-legislative Public Consultation on Financial Redress for Historical Child Abuse in Care](#) (November 2019) pp. 28–29.

<sup>177</sup> Scottish Human Rights Commission, [Response to Pre-legislative Public Consultation on Financial Redress for Historical Child Abuse in Care](#) (November 2019) p. 28.

in a difficult position which may lead to re-traumatisation and re-victimisation.<sup>178</sup> The Commission considers that redress schemes which 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 Commission recommends that Head 22(5) be deleted from the legislation.**

### Deceased relevant person (Head 24)

Head 24 provides that the children, spouse or civil partner of a deceased relevant person may make an application on their behalf. The person must have died after 13 January 2021, which is the date the Taoiseach apologised on behalf of the Irish Government to those who spent time in a Mother and Baby Home or a County Home.<sup>179</sup> The Commission is concerned about this distinction between relatives of victims who died before and after the date of the State apology. It presents an arbitrary barrier for redress as due to the nature of the Scheme addressing historical abuse, a significant number of residents of the institutions are already deceased. The provision of payment to family members would acknowledge the violation of the rights of victims and the harm done to them, and the impact that this would have on the lives of relatives.<sup>180</sup>

To address the intergenerational trauma experienced by relatives of survivors, the Commission calls for the provision of specialist trauma-informed counselling supports to the family members of victims.<sup>181</sup> International guidance provides that relatives or dependants of survivors or victims can be regarded as victims themselves.<sup>182</sup> Responses to the IDG

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<sup>178</sup> 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) p. 38.

<sup>179</sup> See Explanatory Notes for Head 24.

<sup>180</sup> Scottish Human Rights Commission, [Response to Pre-legislative Public Consultation on Financial Redress for Historical Child Abuse in Care](#) (November 2019) pp. 32–33.

<sup>181</sup> The Government's Action Plan for Survivors and Former Residents of Mother and Baby and County Home Institutions notes that counselling services have been available to survivors of Mother and Baby and County Home Institutions since before the publication of the Commission of Investigation's Final Report through the HSE National Counselling Service. Government of Ireland, [An Action Plan for Survivors and Former Residents of Mother and Baby and County Home Institutions](#) (2021) p. 26.

<sup>182</sup> The UN Principles provide that: "Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization." See United Nations, [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of](#)

consultation on the Payment Scheme note how the impact of the trauma of the institutions went beyond the people in the homes and affected the rest of their families; and that there is an intergenerational sense of loss.<sup>183</sup> Survivors have called for recognition of the impact of the trauma on the next generation; how people now interact with their children and how this has shaped society.<sup>184</sup> Survivors explicitly called for counselling to be made available for family members who have been affected.<sup>185</sup> The Commission is of the view that, with regard to the provision of counselling, ‘family’ should be understood as including a wide range of family relationships and include situations where family members do not live in the same home.<sup>186</sup>

**The Commission recommends that Head 24 be revised to remove the requirement that the deceased person must have died after 13 January 2021 in order for a family member to claim redress.**

**The Commission recommends in line with international guidance that relatives or dependants of survivors or victims should be regarded as victims, the Government should amend *An Action Plan for Survivors and Former Residents of Mother and Baby and County***

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[International Human Rights Law and Serious Violations of International Humanitarian Law](#), adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, para. 8. The Special Rapporteur has stated that reparation programmes usually classify relatives of surviving and deceased victims as victims and are provided with full reparation as successor and direct victims; United Nations General Assembly, [The gender perspective in transitional justice processes: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/75/174 (17 July 2020) para. 29(b)–(c).

<sup>183</sup> See OAK, [Report of the findings of the consultation with survivors of mother and baby homes and county homes: March-April 2021](#) (May 2021, submitted to the Interdepartmental Group) p. 67. Furthermore, research from Northern Ireland has shown the intergenerational impact that a survivor’s trauma can have on their family. In a consultation on what survivors want from redress, one survivor of historical institutional abuse commented that “[w]e need a holistic look at supporting the family.” See Patricia Lundy, [Historical Institutional Abuse: What survivors want from redress](#) (Ulster University – commissioned by the Panel of Experts on Redress, March 2016) p. 29. See also 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) pp. 28–29.

<sup>184</sup> OAK, [Report of the findings of the consultation with survivors of mother and baby homes and county homes: March-April 2021](#) (May 2021, submitted to the Interdepartmental Group) p. 67.

<sup>185</sup> OAK, [Report of the findings of the consultation with survivors of mother and baby homes and county homes: March-April 2021](#) (May 2021, submitted to the Interdepartmental Group) pp. 78, 83.

<sup>186</sup> Regard must be had to the wide range of family relationships that have been recognised in the context of international human rights law, as well as in Irish law, policy and society in recent times; IHREC, [Submission to the Citizens’ Assembly on Gender Equality](#) (2020) pp. 7–8. The Special Rapporteur has also set out that reparation programmes usually use a definition of family which is not restricted to rigid or legalistic concept, and instead includes individuals who are emotionally attached to or in a dependent relationship with the primary victim; United Nations General Assembly, [The gender perspective in transitional justice processes: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence](#), A/75/174 (17 July 2020) para. 29(d).



***Home Institutions* to extend the provision of specialist trauma-informed counselling to family members or dependents of survivors. This should include provision for individual and group counselling supports that meet their self-identified mental health needs for the remainder of their life.**

### Review and appeals process (Heads 25–27)

The Commission notes its recommendation in relation to Heads 6–9 above that the legislation be amended to establish a sufficiently independent body to administer the Payment Scheme instead of the Office of the Chief Deciding Officer. The Commission also recommends that Head 25 be amended to provide that reviews and appeals of first instance decisions should be conducted by an independent oversight mechanism. Survivors and individuals with expertise in human rights and equality, transitional justice and alternative dispute resolution should be represented on the oversight mechanism.

However, if it is decided to establish the Office of the Chief Deciding Officer as intended under the legislation, the Commission makes the following observations in respect of these Heads.

Head 25 provides for the Chief Deciding Officer to arrange a review to be carried out after a request by an applicant, a person acting on behalf of an applicant or a person acting on behalf of a deceased applicant. The Explanatory Notes for Head 25 provide that the Chief Deciding Officer has the authority to delegate those powers to their staff and administrative provisions will be made to allow for staff other than those involved in the original decision-making process concerning an applicant to undertake a review. While it is welcome that the intention is that the review will be undertaken by staff who were not involved in the original determination, the Commission is of the view that this should be explicitly provided for under Head 25 rather than left to be addressed in regulations. A legislative provision would confirm the importance of ensuring the review is independent to the original determination.

**The Commission recommends that Head 25 be amended to provide that staff who undertake a review must not have been involved in the original decision-making process concerning the applicant.**

Head 26 sets out that the Chief Deciding Officer, with the consent of the Minister, shall appoint a panel of suitable persons to consider appeals. The Explanatory Notes for Head 26

provide that the appeals officer should have qualifications and/or previous experience which would deem them suitable for undertaking this role. However, Head 26 and the Explanatory Notes do not specify what would be relevant qualifications or previous experience. The Commission is of the view that Head 26 should include a non-exhaustive list of areas in which an appeals officer has relevant expertise and experience of, including human rights and equality, transitional justice and alternative dispute resolution. Provision should also be made for survivors to be appointed as appeals officers due to the personal experience of redress. An independent oversight mechanism, including survivors and individuals with expertise and knowledge, to review decisions of awards is an important measure in ensuring accountability and transparency in the operation of the Payment Scheme.

**The Commission recommends that Head 26 be amended to provide a list of relevant qualifications and/or experience a person must have before being appointed as an appeals officer. The Commission further recommends that Head 26 be amended to provide that survivors can be appointed as appeals officers.**

Head 27 provides for a relevant person to make an appeal to the appeals officer. It also provides that the relevant person and the Chief Deciding Officer may appeal to the High Court.<sup>187</sup> The review and appeal processes are likely to be complex processes. Noting the advanced age of many survivors, the Commission is of the view that it is essential that survivors be supported in the review and appeal processes. This support should extend to the provision of financial support to assist a survivor to avail of independent legal advice and representation during the review and appeals processes.

**The Commission recommends that the legislation be amended to provide that all applicants will be provided with financial support to avail of legal advice and representation during the review and appeals processes.**

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<sup>187</sup> Head 27(5) of the legislation.

## Provision of independent legal advice (Head 29)

Head 29 provides that individuals will be financially supported to avail of independent legal advice at the point of accepting a payment.<sup>188</sup> The Commission notes that participants at the IDG consultation identified “free legal aid or payment for private legal services” as a necessary support for survivors making applications.<sup>189</sup> The Commission also notes that the Joint Committee on Children, Equality, Disability, Integration and Youth have recommended that survivors should be:

“entitled to legal aid to enable them to seek independent legal advice at all stages and those costs should be met by the scheme in full.”<sup>190</sup>

Due to the complex nature of navigating redress schemes and the potential for the initial engagement to lead to re-traumatisation, the Commission is of the view that appropriate legal protection should be provided to survivors throughout the application process rather than only at the end of the process.<sup>191</sup>

The UN Human Rights Committee have stated that:

“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.”<sup>192</sup>

The provision of legal advice and representation is important as survivors may be placed in a vulnerable position in engaging in a redress process. Without legal assistance they face difficulty in providing evidence for their claim which could lead to re-traumatisation and secondary victimisation.

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<sup>188</sup> Department of Children, Equality, Disability, Integration and Youth, [Mother and Baby Institutions Payment Scheme: Government Proposals](#) (November 2021) p. 6.

<sup>189</sup> Participants states that legal fees could be capped to avoid the misuse of scheme funds; see OAK, [Report of the findings of the consultation with survivors of mother and baby homes and county homes: March-April 2021](#) (May 2021, submitted to the Interdepartmental Group) p. 12.

<sup>190</sup> Joint Committee on Children, Equality, Disability, Integration and Youth, [Report on pre-legislative scrutiny of the General Scheme of a Mother and Baby Institutions Payment Scheme Bill 2022](#) (July 2022) p. 5.

<sup>191</sup> IHREC, [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’](#) (April 2021) p. 32.

<sup>192</sup> 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.

**The Commission recommends that Head 29 be amended to provide that all applicants will be provided with financial support to avail of legal advice and representation when making a decision to apply, during the application process and at the point of accepting a redress payment and signing a waiver. The Commission further recommends that, if necessary, applicants be provided with advocacy support, including literacy and digital supports throughout the application process.**

### **Reporting on and reviewing the Scheme (Head 10 and Head 33)**

Head 10 provides that the Chief Deciding Officer must prepare an annual report on the operation of the legislation, which the Minister shall lay before the Houses of the Oireachtas. It is unclear what information will be included in the annual report as Head 10(2) provides that the Minister shall specify the content and form of the report. The Commission notes that Head 33 sets out a number of matters which should be considered in the independent reviews of the Payment Scheme. The Commission is of the view that a similar list of matters should be included within the annual report. These matters, under Head 33, include the views of key stakeholders on the process, and the levels of applications and awards of payment. This information can be critical for members of the Oireachtas examining whether the Payment Scheme is operating as intended and in line with human rights and equality standards.

**The Commission recommends that Head 10 be amended to set out a list of matters which should be included within the annual report.**

Head 33 provides for independent reviews of the operation of the scheme after its first anniversary and after it has ceased. Head 33 does not specify who should conduct their independent review, or if they have any experience or expertise of similar redress schemes, and/or relevant human rights and equality standards. There is also no requirement for the independent reviews to be made publically available and/or laid before the Houses of the Oireachtas. Independent reviews can be critical for examining the compliance of the scheme with human rights and equality principles so it is important that they be publically disseminated to ensure the public can monitor compliance. Publically available information will contribute to accountability, transparency and increase survivors' and the public's confidence that the scheme is operating in line with human rights and equality standards.

While the inclusion of a provision for independent reviews is a welcome approach, the Commission is of the view that there should be a dedicated mechanism for overseeing the operation of the Payment Scheme. The Committee against Torture recommends that:

“States parties shall establish a system to oversee, monitor, evaluate, and report on their provision of redress measures and necessary rehabilitation services to victims of torture or ill-treatment.”<sup>193</sup>

Any oversight mechanism should include the participation of survivors. The UN Special Rapporteur has set out minimum requirements that a domestic reparation programme should fulfil, including that the programme be:

“[M]onitored through processes that include consultation with and the participation of victims”.<sup>194</sup>

The Commission is also of the view that membership of an oversight mechanism should include individuals with relevant expertise and experience of areas such as redress, transitional justice, alternative dispute resolution, and human rights and equality. The creation of independent oversight mechanism will contribute to effective oversight of the operation of the scheme and ensure that it is providing effective reparation to the survivors of abuse.

**The Commission recommends that Head 33 be replaced with a new section establishing a dedicated independent mechanism to review the operation of the Payment Scheme. The membership of this mechanism should include survivors and individuals who have relevant expertise and experience.**

**If Head 33 is not replaced, the Commission recommends that Head 33 be amended to provide that the independent reviews should be conducted by individuals with experience and expertise of redress and/or human rights and equality principles. Furthermore, Head 33 should be amended to require that the independent reviews should be publically disseminated.**

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<sup>193</sup> United Nations Committee against Torture, [General comment No. 3 \(2012\) on the implementation of article 14](#), CAT/C/GC/3 (13 December 2012) para. 45.

<sup>194</sup> 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).

Central to the preparation of any annual report or carrying out of an independent review 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 adequate and regular assessment of the extent to which the scheme was complying with the right to provide an effective remedy to all survivors.

**The Commission recommends that Head 10 and Head 33 be amended to require the collection and reporting of disaggregated data, including equality data, on the operation and effectiveness of the Payment Scheme.**

### List of institutions (Schedule 1)

Schedule 1 includes a list of the Mother and Baby Homes and the County Homes. This list is based on the list of institutions investigated by the Commission of Investigation. The Commission of Investigation's report was limited in terms of the institutions which were investigated.<sup>195</sup> Relying on the findings of the Commission of Investigation in terms of which institutions are within the scope of redress will create a barrier to redress for those who were resident in institutions or places excluded from the Payment Scheme. 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."<sup>196</sup>

**The Commission recommends that reparations should not be limited to those resident in institutions which were investigated by the Commission of Investigation. The Commission**

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<sup>195</sup> IHREC, [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'](#) (April 2021) p. 2.

<sup>196</sup> 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) p. 53.

**further recommends that the design of the Payment Scheme should include consultation with survivors on the list of institutions to be included under the Payment Scheme.**







Coimisiún na hÉireann um Chearta  
an Duine agus Comhlionannas  
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