

**Proposed Commission of Investigation to Inquire
into Mother and Baby Homes
Submission on behalf of the Irish Human Rights
and Equality Commission (Designate)**

June 2014

Introduction

1. The Irish Human Rights Commission (“**IHRC**”) is Ireland’s National Human Rights Institution and was established pursuant to the Human Rights Commission Acts 2000 and 2001. Its functions include reviewing the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and making recommendations to Government thereon. The Irish Human Rights and Equality Commission Bill 2014 envisages the merger of the Equality Authority and the IHRC into a single enhanced body whose functions will include the review of law and practice in the State relating to the protection of human rights and equality and making recommendations to Government thereon.

2. The operation and oversight of Mother and Baby Homes in the State, and related issues in respect of the Magdalen Laundries, have been of concern to the Commission for some time. In this regard, we refer you to the Commission’s *Assessment of the Human Rights Issues Arising in Relation to the “Magdalen Laundries”* of November 2010 (“**the 2010 Assessment**”), to the *Follow-Up Report on State Involvement with Magdalen Laundries* of June 2013 (“**the 2013 Report**”), and to the relevant sections of the *Submission to the UN Human Rights Committee on the Examination of Ireland’s Fourth Periodic Report under the International Covenant on Civil and Political Rights* of June 2014 (“**the 2014 Submission**”), copies of which we enclose.

3. In light of these concerns, the Commission welcomes the Government’s decision to establish a Commission of Investigation to address these matters. The Commission considers that it is critically important that any such investigation should take place within a human rights and equality framework and, in particular, that it fully conforms with the State’s human rights obligations under the Constitution and under international human rights law.

The Operation and Oversight of Mother and Baby Homes

4. On the basis of the information already in the public domain, it is clear that both the operation and oversight of Mother and Baby Homes raise matters of significant public concern which require an independent and effective investigation. Some of the specific concerns already identified include the following:

- i. The Mother and Baby Homes were characterised by extremely high infant mortality rates, as illustrated by the high profile cases of the Bon Secours Home in Tuam and Bethany Home in Dublin. In many cases, the children's deaths appear to be associated with malnutrition, inadequate medical treatment, and neglect.
- ii. The infant mortality rates raise broader concerns about the conditions in the Mother and Baby Homes and the treatment of residents, babies and young children more generally.
- iii. Similar concerns arise in respect of children who were sent by the Mother and Baby Homes to live with families whether in the form of nursing, boarding out, fostering or adoptive arrangements. Some children were also sent to industrial schools (2010 Assessment, paragraph 25).
- iv. In certain cases, children were sent abroad for "adoption", either directly from Ireland or indirectly through other jurisdictions. Although it appears that the State permitted the Mother and Baby Homes to operate as adoption agencies (2010 Assessment, paragraphs 79-80), many adoptions – including those to foreign jurisdictions such as the United States – may have taken place outside any official or legal framework.
- v. Many of the infants who died in the Mother and Baby Homes were not properly buried and, in many cases, were interred in unmarked graves or on unmarked burial grounds. The Commission has explored analogous issues in the context of the Magdalen Laundries in its 2013 Report (paragraphs 243-246).
- vi. A significant number of children resident in the Mother and Baby Homes participated in vaccine trials (2010 Assessment, paragraph 106).

- vii. There is very little information on the nature, duration and conditions of women's residence or in some cases, detention in the Mother and Baby Homes.
- viii. In some cases, women were referred from Mother and Baby Homes to the Magdalen Laundries (2010 Assessment, paragraph 25). In its 2013 Report, the Commission noted (at paragraph 159) that "a striking feature of the sample records provided is that some of the women referred from Mother and Baby Homes remained in Magdalen Laundries for a long time" and commented that there may be cases where such referrals infringed the right to liberty.

5. In some cases, Mother and Baby Homes appear to have operated under the control of local health boards (2013 Report, paragraph 153). Even in cases where the Homes were not run directly under the auspices of the State, there is evidence of a significant degree of State involvement in their operation and oversight. First, there was an obligation on Mother and Baby Homes to register under the Registration of Maternity Homes Act 1934 and registered homes were subject to inspection by the State. Secondly, many of the Homes were in receipt of public funding, both from local authorities and central Government. Thirdly, some of the Homes were recognised as places of detention by the Department of Justice and certain residents were sent to the Homes through the criminal justice system. In light of the issues identified in the preceding paragraph, broader questions arise as to whether the State failed in its duty to supervise and properly regulate the care of women and children in the Homes, both generally and in respect of the specific issues such as registration of deaths and burials, adoption, and participation in clinical trials.

6. In addition to noting the 'direct' State involvement, the State's obligations of due diligence in relation to the protection of human rights, should be noted. The context of pervasive societal discrimination against women and girls who became pregnant outside of marriage, and the stigmatisation and discrimination against 'illegitimate' children must also be noted here, in the framing of the key human rights violations.

The State's Human Rights Obligations

7. The operation and oversight of institutions such as the Mother and Baby Homes and Magdalen Laundries raise very serious questions about the extent to which the State has complied with its human rights obligations under the Constitution of Ireland 1937 ("**the Constitution**") and under international human rights law, including the European Convention on Human Rights ("**ECHR**"), which has been binding on Ireland since 3rd September 1953, the Council of Europe's European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("**CPT**"), which Ireland ratified on 11 May 2002, the International Covenant on Civil and Political Rights ("**ICCPR**"), which Ireland ratified on 8 December 1989, and the United Nations against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("**UNCAT**"), which Ireland ratified on 11 April 2002.¹

8. Provisions may also apply from the International Covenant on Economic, Social and Cultural Rights ("**ICESCR**"), which Ireland ratified on 8 December 1989; from the Convention on the Elimination of All forms of Discrimination Against Women ("**CEDAW**"), which Ireland ratified on 23 December 1985 and the Convention on the Rights of the Child ("**CRC**"), which Ireland ratified on 28 September 1992. Article 2 CRC provides against discrimination of any kind and Article 7 CRC provides that 'The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.' Articles 20 and 21 CRC provide for special protection in the case of adoption.

9. Specific prohibition of discrimination stems from many core international treaties to which Ireland is a party, such as CEDAW, which provides at Article 2 that States parties, *inter alia*, 'condemn discrimination against women in all its forms,

¹ Some of these instruments have been partly incorporated into Irish law: see the Criminal Justice (United Nations Convention Against Torture) Act 2000 and the European Convention of Human Rights Act 2003.

agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women' and the CRC, which provides at Article 2 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.' These, and several other provisions, are of significance when considering the pervasive societal discrimination against women and girls who became pregnant outside of marriage and the stigmatisation and discrimination experienced by 'illegitimate' children.

10. In particular, serious issues arise in respect of the right to life (as protected by Article 40.3 of the Constitution, Article 2 ECHR and Article 6 ICCPR), the right to liberty (as protected by Article 40.4 of the Constitution, Article 5 ECHR and Articles 9 and 10 ICCPR), the right of children to protection by the State in Article 42.5, the right to bodily integrity, privacy and the right to the person under the Constitution and the right to private and family life under Article 8 ECHR, and the freedom against torture and inhuman or degrading treatment (Article 3 ECHR, Article 7 ICCPR and UNCAT). In the context of the vaccine trials specifically, it should be noted that Article 7 ICCPR provides that, "in particular, no one shall be subjected without his free consent to medical or scientific experimentation". In addition, if residents were forced to work in the Homes, as they were in the Magdalen Laundries, the obligations under the International Labour Organisation (ILO) Forced Labour Convention, which Ireland ratified on 2nd March 1931, would also apply.²

11. In establishing the Commission of Investigation, it is important that the Government has due regard to the obligations of the State in respect of the investigation and redress of alleged historic human rights violations and that the terms of reference and the process of investigation are informed by, and fully compliant with, these obligations. Under the ECHR, Articles 2 and 3 impose

² See also Article 24 of the ICCPR.

procedural obligations on States to investigate suspicious deaths and claims of torture or ill-treatment. Such investigations must be independent and impartial, adequate and effective, and undertaken with reasonable expedition. The Convention also confers on victims the right to an effective remedy for violations of its provisions.

12. At the UN level, Article 12 UNCAT, read with Article 16 UNCAT, imposes a duty on each State Party to “ensure that its competent authorities proceed to a prompt and impartial investigation”, wherever there is reasonable ground to believe that an act of torture or of cruel, inhuman or degrading treatment or punishment, has been committed in any territory under its jurisdiction. Such an investigation must be effective, transparent and provide for participation by victims. Article 14 UNCAT requires States to ensure that, in their legal systems, a victim of an act of torture (or, in the case of death, his dependants) “obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible”. Redress in this context must be adequate, effective and comprehensive.

13. As is clear from the UNCAT Committee’s General Comment No. 3 (2012), redress may require not only restitution and compensation but also rehabilitation, satisfaction (including the right to truth and a public apology), and guarantees of non-repetition. The Committee also notes that the failure to investigate, criminally prosecute or allow civil proceedings may constitute a *de facto* denial of redress. The UNCAT Committee has accepted that these obligations to investigate and provide redress may apply to violations of UNCAT which occurred prior to its entry into force for a State where the effects of the violations continue after that date. In the case of the Mother and Baby Homes, many former residents of the Homes are still alive and some of the allegations which have been made provide reasonable ground to believe that if not acts of torture, acts of cruel, inhuman or degrading treatment may have been committed in the Homes. In its Concluding Observations on Ireland’s report under the Convention dated 17 June 2011, the UNCAT Committee recommended

that the State carry out investigations, prosecute and punish perpetrators, and provide redress in the context of both the Ryan Report and the Magdalen Laundries.

14. Although the Government subsequently established an Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries, chaired by Senator Martin McAleese, which published its Report in February 2013, the UNCAT Committee's Rapporteur has since noted that the Inter-Departmental Committee "lacked many elements of a prompt, independent and thorough investigation as recommended by the committee" and sought further information on "the measures the State party is planning to take to ensure that there is a full inquiry into all complaints of abuse, in accordance with the Committee's original recommendation" (Letter dated 22nd May 2013 from Ms Felice Gaer, Rapporteur, to Mr Gerard Corr, Permanent Representative of Ireland to the United Nations, Geneva). This is a matter which the Commission has also raised in its 2013 Report and, most recently, in its 2014 Submission to the UN Human Rights Committee.

The Proposed Commission of Investigation

15. In light of these considerations, the Commission would make the following recommendations in respect of the Commission of Investigation with a view to ensuring that the process of investigation is informed by, and fully compliant with, Ireland's human rights obligations.

Appointment(s) to the Commission

16. The sole member, or each member, of the Commission, to be appointed under section 7 of the Commissions of Investigations Act 2004 ("**the 2004 Act**"), should be a person of the highest integrity with appropriate experience and expertise and whose independence is beyond doubt. Having regard to the serious human rights issues involved, it would be desirable for the member(s) of the Commission to have experience and expertise of investigation or adjudication of

alleged human rights violations. In this regard, consideration should be given to inviting an independent international human rights expert to chair the investigation.

Terms of Reference

17. The Commission of Investigation's Terms of Reference will play an important role in determining the effectiveness of its work. Section 4(3) of the 2004 Act allows the Minister or Government to "consult with any persons" before setting the terms of reference and, in light of its functions under section 8 (a) and (d) of the Irish Human Rights Commission Act 2000, the Commission would value an opportunity for consultation in this respect.

18. The Commission welcomes the statement of the Minister for Children, Charlie Flanagan, TD, in Dáil Éireann on 10th June 2014 to the effect that the Commission of Investigation should consider matters beyond infant mortality and burial in the Mother and Baby Homes and that it should also look at the nature of adoptions and the vaccine trials which took place in, under the auspices of, or following residence in the Homes.

19. The Commission recommends that the Terms of Reference for the Commission of Investigation be framed appropriately so as to allow the Commission of Investigation to examine in a comprehensive and effective way all relevant issues relating to infant mortality (including causes, circumstances and rates of infant mortality as well as the prevailing conditions for, and treatment of, residents), burial arrangements, adoptions (including the various forms of adoption and the role and involvement of other institutions and organisations), and vaccine trials.

20. The Commission also recommends that the Terms of Reference for the Commission of Investigation include all Mother and Baby Homes, including Bethany Home, and any analogous institutions which provided for the care of women and their children during the relevant period, to include the referral of girls and women

(some with psychiatric, intellectual disability or developmental conditions) to and from psychiatric hospitals by social services.³

21. The Commission further recommends that, in order to give full effect to its earlier recommendations and to the recommendations of the UNCAT Committee, the Government give serious consideration to including the Magdalen Laundries within the Terms of Reference of the Commission of Investigation. The operation and oversight of the Mother and Baby Homes and the Magdalen Laundries give rise to many similar, and in some cases interconnected, issues which would benefit from such an independent, effective and transparent process of investigation, particularly given that the work of the Inter-Departmental Committee chaired by Senator McAleese did not allow for the investigation of individual claims of ill-treatment and was prevented, by its Terms of Reference and lack of statutory power to compel evidence, from retaining records supplied by religious orders responsible for the operation of the Laundries.

22. Finally, the Commission recommends that the Terms of Reference make express provision for the matters set out in the following section. While the Commission may “conduct its investigation in the manner that it considers appropriate in the circumstances of the case” in accordance with section 10(1) of the 2004 Act, clear guidance on these matters in the Terms of Reference would assist in ensuring that the investigative process is fully compliant with the State’s human rights obligations.

The Process of Investigation

23. Whatever the precise terms of reference, the work of the Commission of Investigation will be considerable in its scope. Having regard to the long period of time which has passed since the events at issue, it is important that the investigative

³ See *Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries*, February 2013, Executive Summary, at para. 20 and Ch. 11, at para. 109, available at www.justice.ie/en/JELR/Pages/MagdalenRpt2013 See also *IHRC Follow-Up Report on State Involvement with Magdalen Laundries of June 2013*.

process proceed with all due expedition while also ensuring that it is conducted in a comprehensive and fully effective manner. In order to facilitate the investigation, it may be appropriate for the Commission of Investigation to make interim reports in accordance with section 33 of the 2004 Act.

24. In order for the Commission of Investigation to be able to carry out its investigation effectively, and to be truly independent in the performance of its functions in accordance with section 9 of the Act, it is vitally important that the Commission of Investigation be adequately resourced and funded. The Government should ensure that the approval of the Minister and the consent of the Minister for Finance to the appointment of persons - to advise and assist the Commission of Investigation under section 8 of the 2004 Act - is not unreasonably withheld and that the Commission of Investigation is provided with all appropriate and necessary resources to complete its work, including by effective use of its powers, including if necessary its powers of compellability and its powers of entry and inspection under Parts 3 and 4 of the 2004 Act respectively. In this regard, the State is under human rights obligations to ensure that its investigations into alleged human rights violations, once initiated, proceed swiftly. Where human rights violations are established, the investigation must lead to effective redress which is addressed below.

25. The Commission must also have access to all relevant information and documentation from both the State, at central government and local authority levels, and from non-State entities, including the churches, religious orders and other relevant persons. While the Commission notes the work of the interdepartmental group in undertaking an initial information-gathering function, it urges that the Government do all within its power to ensure that there is full, and preferably voluntary, cooperation by all public bodies with the Commission of Investigation once it is established and in the course of its investigation. In particular, in respect of the issue of vaccine trials, appropriate steps should be taken to make available to the Commission of Investigation the relevant reports and records of the Vaccine Trials Division of the Commission to Inquire into Child Abuse, which was

unable to complete its work as a result of a judgment of the High Court finding that this element of the Commission's inquiry was *ultra vires* the Commission to Inquire into Child Abuse Act 2000.

26. While, in accordance with section 11 of the 2004 Act, the Commission of Investigation will in general conduct its investigation in private, having regard to the nature of the investigation, appropriate arrangements should be made so as to allow public hearings of appropriate modules of the investigation and, in particular, to allow former residents of the Homes, at their request, to give evidence in public. It is vital that victims are consulted during the investigation and given a voice in the investigative process in this way.

27. It is noted that, under section 32 of the 2004 Act, on the conclusion of its investigation, a commission shall prepare a written report, based on the evidence received by it, "setting out the facts it established in relation to the matters referred to it for investigation". It is also noted that, under section 19 of the 2004 Act, evidence given to the Commission of Investigation is not admissible as evidence against a person in any criminal or other proceedings. Without prejudice to these provisions, it would be appropriate and desirable for the Commission to make recommendations in respect of follow-up steps which may flow from its findings of fact, particularly in relation to appropriate redress for potential victims of human rights abuses in the Mother and Baby Homes and other institutions coming within the scope of the investigation.

28. The Government should undertake at this stage to take all appropriate steps arising from the Report(s) or to put in place an effective mechanism to take such steps. In particular, these steps would include redress for potential victims of human rights abuses in the Mother and Baby Homes and other institutions coming within the scope of the investigation and the criminal prosecution of potential perpetrators of criminal conduct which might be subject of findings of fact within the Report.

29. In this regard, while the full and effective investigation of these matters is extremely important for the purpose of complying with the State's human rights obligations, it is equally important for the State is prepared to take the necessary steps on foot of such an investigation to provide timely and appropriate redress to victims, to punish and prosecute criminal activity, and to ensure that these matters do not occur in the future. In this regard, as noted, redress may require not only restitution and compensation but also rehabilitation, satisfaction (including the right to truth and a public apology), and guarantees of non-repetition.

Consequences of the Investigation

30. In this submission, the Commission has recommended that, in order to meet the State's human rights obligations, the proposed investigations into the Mother and Baby Homes must be independent and impartial, adequate and effective, and undertaken with reasonable expedition. We have also noted that the State's human rights obligations confer on victims the right to an effective remedy for human rights violations.

31. In order for the State to take the necessary steps on foot of an investigation to provide appropriate redress to victims, the legislation underpinning the Commission of Investigation must be capable of allowing the elements of redress to flow from the findings of the Investigation in three distinct areas.

32. First, a statutory investigation must allow any perpetrators of human rights violations to be prosecuted for criminal activity (individual justice and vindication of the rights of the victim) and ensure that the process of investigation and prosecution deters other would-be perpetrators from repetition to ensure that these matters do not occur in the future. In this regard we note that, by virtue of section 19 of the 2004 Act, there is a bar on the use of information or documentation in future criminal or other proceedings, including where such information has been provided to a Commission of Investigation under section 8 of the 2004 Act. This provision is similarly found in other comparable legislation.

33. Second, a statutory investigation must ensure that individual restitution, compensation, rehabilitation and satisfaction can be made available to victims of human rights violations. Victims should have a right to such redress based in legislation and, in light of the possible limitations of the 2004 Act, it may be that further legislation is required to ground such consequential provisions in statute. Such statutory redress would include but would not be limited to financial compensation and may require, *inter alia*, the provision of specialised health, social services and pension entitlements, as is required in relation to those women who spent time in the Magdalen Laundries.

34. Third, a statutory investigation must ensure that the public interest is served insofar as a right to truth be established on a statutory footing to include recognition of human rights violations where they may have occurred and a public apology on behalf of the State. This requirement centres on the guarantees of non-repetition required under human rights law.

35. Accordingly, the Commission recommends that consideration be given to amending the 2004 Act so as to allow the Commission to take place within a human rights and equality framework and in a manner which is fully compatible with the State's human rights obligations. In order to do so, the Commission of Investigation must be in a position not only to establish the facts and truth regarding allegations of human rights violations but also to provide redress where such allegations are upheld, including through prosecutions of perpetrators, guarantees of individual remedies to victims and guarantees of non-repetition as required under human rights law.

36. More generally, we also recommend that consideration be given to amending the Statute of Limitations Acts 1957-2000 to allow for individuals within discrete classes of persons to seek redress through the courts where a Commission of

Investigation may so recommend and where other forms of redress are not considered practicable.⁴

37. In conclusion, the following recommendations are made:
- i. **That a human rights and equality framework be applied to the proposed Commission of Investigation into Mother and Baby Homes;**
 - ii. **That the Terms of Reference for the Commission of Investigation include all Mother and Baby Homes, including Bethany Home, and any analogous institutions which provided for the care of women and their children during the relevant period. It should include examination of the Magdalen Laundries and all relevant issues relating to infant mortality (including causes, circumstances and rates of infant mortality as well as the prevailing conditions for, and treatment of, residents), burial arrangements, adoptions (including the various forms of adoption and the role and involvement of other institutions and organisations), and vaccine trials which took place in, under the auspices of or following residence in the Mother and Baby Homes. It should also include examination of any analogous institutions which provided for the care of women and their children during the relevant period, to include the referral of girls and women (some with psychiatric, intellectual disability or developmental conditions) to and from psychiatric hospitals by social services;**
 - iii. **That the Commission of Investigation be provided with all appropriate and necessary resources to complete its work within a comprehensive and timely manner;**
 - iv. **That consideration be given to inviting an independent international human rights expert to chair the Commission of Investigation;**

⁴ Consideration would also be required to identify the correct forum and respondent in amending legislation: whether an action would lie in the Circuit or High Court and whether against Ireland and the Minister of Public Expenditure and Reform and/ or private bodies and how a claim could be grounded – whether under an existing tort or statutory or constitutional duty. Where an existing tort is not recognised we would recommend that a statutory tort be introduced in amending legislation. This could be justified on the basis that a breach of a constitutional duty to vindicate personal rights is already located under the Constitution.

- v. That there be a clear continuum between the Commission of Investigation and an effective statutory redress mechanism for victims of human rights violations where redress refers to: a) criminal prosecutions where warranted; b) individual remedies for individuals whose human rights were violated; and c) a right to truth and apology to ensure guarantees of non-repetition.
- vi. That consideration be given to amending the 2004 Act to fully allow for redress where allegations of human rights abuses are upheld, including through prosecutions of perpetrators, guarantees of individual remedies to victims and of non-repetition as required under human rights law;
- vii. That consideration be given to amending the Statute of Limitations Acts where violations of human rights are found to have occurred by a statutory investigative mechanism.

27 June 2014