

**Submission to Joint Committee on Children, Disability, Equality and Integration  
on the General Scheme of a Certain Institutional Burials (Authorised  
Interventions) Bill 2019**

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## 1. Introduction

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We are honoured to have been given the opportunity to make a submission to the joint Committee on Children, Disability, Equality and Integration on the General Scheme of a Certain Institutional Burials (Authorised Interventions) Bill 2019<sup>1</sup>.

The scandal of Mother and Baby Homes came to worldwide attention when it was discovered following Catherine Corless's research in 2014. It was uncovered that the remains of 796 children were located in a mass grave in Tuam County Galway, placed in structures designed to accommodate and treat sewage.

The Commission of Investigation, appointed in February 2015, subsequently called for test excavation. In 2017, it was established that the remains of the children found dated from the era of the home. The 5<sup>th</sup> Interim report of the Commission must be read in conjunction with the proposed legislation, as it specifies via appendices issues surrounding the 'inappropriate burials', which are specific to sites such as Tuam and Bessborough. Under the previous administration, Minister Katherine Zappone in December 2019 approved the publication of the General Scheme of Certain Institutional Burials (Authorised Interventions) Bill. She did so in an effort to provide a statutory framework, which will involve the appointment of an agency to oversee works required to restore dignity of the remains, where it is discovered that manifestly inappropriate burials have taken place.

It is imperative that the Burial Bill forms part of a larger transitional justice response to the treatment of women and children in Mother and Baby Homes and other institutions. There is a strong commitment and responsibility to observe, respect and adhere to international obligations. We have seen as recently as last October the confusion created around the legislation to seal records for 30 years, and the ignorance of the State in relation to GDPR provisions. Minister Zappone lead a transitional justice model and spoke regularly about the need to give survivors a central place in the process, so much that the mantra "nothing about us without us" was often cited. Conscious of the recovery of remains for families who have never truly been accommodated or informed, per direction from among others Dr. Geoffrey Shannon, the State must now show due respect and consideration to those seeking repatriation of their loved one, even decades after their death. Moreover, knowing the

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<sup>1</sup> General Scheme of a Certain Institutional Burials (Authorised Interventions) Bill (10 December 2019) <https://www.gov.ie/en/publication/51a535-general-scheme-of-a-certain-institutional-burials-authorised-interve/>.

truth about how they died provides an opportunity for closure and restore their dignity. Truth is also a crucial for education and practice that can be achieved through memorialisation and an archival repository, which are necessary guarantees of non-recurrence of such violations.

Relating to the issue of inappropriate burials in Mother and Baby Homes, the Irish State is expected to respect and protect various fundamental human rights: notably the right to dignity, the right to life, the right privacy and family life, the freedom from torture and ill-treatment, the right to truth, the right to be buried in dignity, the right to an effective remedy.

We have to keep in mind that some limitations exist regarding the conduct of forensic investigations, notably with regards to the integrity and dignity of the deceased. However, in the case of the Tuam mass grave, the burials are so evidently inadequate, atrocious shameful : the exhumation, identification and proper re-interment of the each remain are essential to restore the integrity and dignity of the deceased. Regarding the Tuam mass grave, Dr Shannon, in his Twelfth Report on Child Protection, mentioned that “there appears to be an inferred duty on the Irish State to collect, as far as reasonably possible, the remains of those interred at Tuam.”<sup>2</sup>

### **1.1. The need for a transitional justice approach to the exhumation, identification and re-interment process**

The *United Nations* have defined transitional justice as a “the full range of processes and mechanisms associated with a society’s attempt to come to terms with the legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”<sup>3</sup>

The *International Center for Transitional Justice (ICTJ)* considers that transitional justice “is rooted in accountability and redress for victims. It recognizes their dignity as citizens and as human beings.” One of the main goals of transitional justice must always be “the recognition of dignity of individuals, the redress and acknowledgment or violations, and the aim to prevent them from happening again.”<sup>4</sup>

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<sup>2</sup> Dr Geoffrey Shannon, ‘Twelfth Report of the Special Rapporteur on Child Protection’ (2019) 353 <https://www.gov.ie/en/collection/51fc67-special-rapporteur-on-child-protection-reports/>.

<sup>3</sup> UN, Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice, March 2010 [https://www.un.org/ruleoflaw/files/TJ\\_Guidance\\_Note\\_March\\_2010FINAL.pdf](https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf).

<sup>4</sup> International Center for Transitional Justice, What is transitional justice? <https://www.ictj.org/about/transitional-justice>.

This approach of transitional justice has more recently started to be used in remedying historical abuses, regardless of whether conflict or authoritarian regimes (as typically understood) were involved. The International Conference at Boston College (November 2018) ‘*Towards Transitional Justice, Recognition, Truth-telling, and Institutional Abuse in Ireland*’<sup>5</sup> looked at the applicability of a transitional justice framework as a response to Ireland’s history of institutional abuse.

While transitional justice is traditionally referred to as a process of political transformation towards democracy, a newer approach applies its principles to gross human rights violations in general. The Conference discussed “the efficacy of a transitional justice approach to Ireland’s history of institutional abuse and consider the State’s response to this legacy.”<sup>6</sup> The key principles of transitional justice – justice, reparation, truth-telling, and guarantees of non-recurrence – must guide and inspire the process of exhumation and identification of the Mother and Baby Homes mass graves.

## **1.2. The main points of concerns regarding the Burial Bill 2019**

While analysing the proposed Bill, we have identified several areas which were unclear, insufficient or provided an unsatisfactory protection of the rights of the families:

- *Timelines and delays*: certain provisions in the Bill provide deadlines that are unreasonably long; certain provisions do not provide any timelines. Many relatives of the victims are aging and are entitled to know the truth and bury their loved ones in dignity.
- *Involvement of the families and information*: the Bill lacks precisions regarding the involvement of the families throughout the process. There is a need to involve families at every stage through consultation, and to provide them with information regarding every step that is being taken. Transparency is key to fulfil the rights of the families, and for truth telling.
- *Broader access to the DNA identification programme*: the Bill provides a very restricted access to the identification programme, which will in fact compromise the identification of many of remains.

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<sup>5</sup> International Conference at Boston College, *Towards Transitional Justice, Recognition, Truth-telling, and Institutional Abuse in Ireland*, 1-2 November 2018 [https://www.bc.edu/bc-web/academics/sites/ila/events/towards-transitional-justice.html#about\\_the\\_conference](https://www.bc.edu/bc-web/academics/sites/ila/events/towards-transitional-justice.html#about_the_conference) .

<sup>6</sup> International Conference at Boston College, *Towards Transitional Justice, Recognition, Truth-telling, and Institutional Abuse in Ireland*, 1-2 November 2018 [https://www.bc.edu/bc-web/academics/sites/ila/events/towards-transitional-justice.html#about\\_the\\_conference](https://www.bc.edu/bc-web/academics/sites/ila/events/towards-transitional-justice.html#about_the_conference) .

- *Dismissal of otherwise applicable domestic provisions*: What is the justification for the dismissal of domestic application that would otherwise provide a legal basis for the exhumation and identification of the remains (ie. Coroners Act 1962; Local Government (Sanitary Services) Act 1948; Forensic Evidence and DNA Database System Act 2014). It would be appropriate to somehow involve to the Coroner in the process.
- *Process for appointment of Agency*: these is a need for more details on how the Agency will be appointed, what expertise, qualifications, experience the appointed members will have, if and how the families will be consulted for the appointment of the members of the agency.
- *Members of the Agency*: it would be appropriate to have experts on archeology and DNA identification. It would also be appropriate to appoint an independent expert who will make sure the interests and the rights of the families are protected, and who will be the link between the families and the Agency.

## **2. The underpinning rights relating to the protection and exhumation of mass graves**

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### **2.1. The international protection or mass graves**

There is no general and explicit international framework pertaining to the protection of mass graves, nor an obligation to collect the bodies of the deceased. The only existing legally binding provisions on the matter are found under *international humanitarian law*<sup>7</sup> : it provides that the parties to a conflict shall find and retrieve the bodies of the dead and provide appropriate and decent burial.

Drawing from these provisions, and from certain rights laid down in international and European instruments, it can be understood that a duty to exhume and rebury in dignity lies on the Irish State. While no hard law, binding international instruments exist regarding the protection, investigation and

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<sup>7</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85, Article 15*: “At all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled.” ; *Protocol relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Protocol II), Article 8*: “...whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay... to search for the dead, prevent their being despoiled, and decently dispose of them.”

exhumation of mass graves, several guidelines have been published on this issue (notably by the UN and by academics).

- ***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***

According to these *Basic Principles and Guidelines*, “victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.”<sup>8</sup>

- ***Bournemouth University Protocol on mass grave protection and investigation***

The Bournemouth Protocol on mass grave protection and investigation provides a lists of overarching operating principles in the protection and investigation of mass graves<sup>9</sup> :

- *Do no harm*: this principles notably implies to “avoid creating inequalities or perceptions of bias or favouritism [...]” and “ a clear respect for and, where possible, adherence to cultural sensitivities and norms, and the know religious beliefs of victims and/or their families [...] to the extent they do not adversely affect the achievement of an effective investigation.”
- *Physical and emotional safety*: according to this principle “the safety, dignity, privacy and wellbeing of victims and their families should remain a key concern for all actors without distinction.”
- *Independence and impartiality*: “In order for an investigation to be perceived as legitimate in the eyes of an affected community, and so enhance community engagement, support for the rule of law and public accountability, any investigative team must not only operate with independence and impartiality, they must be seen to do so.”
- *Confidentiality*: this entails the protection of data relating to the missing individuals, to their families, of to any other relevant details. Also, “any data sharing should be limited only to

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<sup>8</sup> UNGA resolution 60/147 (16 December 2005) UN Doc A/RES/60/147, 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.

<sup>9</sup> Bournemouth University, Bournemouth Protocol on mass grave protection and investigation, 2020 [https://issuu.com/bournemouthuniversity/docs/the\\_bournemouth\\_protocol\\_on\\_mass\\_grave\\_protection\\_fr=sMjc3OTI0MjAyNzM](https://issuu.com/bournemouthuniversity/docs/the_bournemouth_protocol_on_mass_grave_protection_fr=sMjc3OTI0MjAyNzM) .

those individuals and bodies necessary to ensure achievement of the objectives of the exhumation process, and to the extent agreed by the individuals concerned”.

- *Transparency*: The investigation, exhumation, identification and return of the human remains “should be as transparent as possible for all parties involved in the protection and investigation effort, the families of the mission and the public. Transparency will serve to support public scrutiny of the process.”
- *Communication*: Communication with the affected community, the media and the general public “is essential to the realisation of trust, goodwill and legitimacy for the operation, and will enable the delivery of other vital aspect, including reporting – both of grave sites and the missing – as well as engagement with the identification and investigative processes.”
- *Realistic expectations*: Accordingly “identification and the return of human remains may not always be possible, and expectations should be managed as much as possible to ensure continues engagement and support for the exhumation process.”

## 2.2. The duty to bury under common law

The duty to bury is a well-established principle under Common law. In a country where the Catholic faith is a central part of society, this principle ought to be of primary importance.

In the case *Buchanan v. Milton* before a UK Court, Justice Hale stated that “[t]here is no right of ownership in a dead body. However, there is a duty at common law to arrange for its proper disposal.<sup>10</sup>” In *Rex v. Stewart*<sup>11</sup>, the High Court of England and Wales recognised the right to a dignified Christian burial. Lord Denman CJ stated that “[e]very person dying in this country, and not within certain exclusions laid down by the ecclesiastical law, has a right to a Christian burial; and that implies the right to be carried from the place where his body lies to the parish cemetery.<sup>12</sup>” The Court held that it there was a public duty to bury deceased individuals; the High Court commented that “the common law casts on someone the duty of carrying to the grave, decently covered, the dead body of any person dying in such a state of indigence as to leave no funds for that purpose.<sup>13</sup>” The State is therefore responsible for exhumating unidentified mass graves located within its jurisdiction, in order to provide information on the deaths and provide proper burial.

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<sup>10</sup> *Buchanan v. Milton* (1999) 2 FLR 844, 845.

<sup>11</sup> *Rex v. Stewart* (1840) 113 ER, 1007.

<sup>12</sup> *Rex v. Stewart* (1840) 113 ER, 1009.

<sup>13</sup> *Rex v. Stewart* (1840) 113 ER, 1009.

### 2.3. The right to dignity under the Irish Constitution

The Preamble of the Constitution of the Republic of Ireland proclaims that “[w]e, the people of Éire [...] seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured [...]”

The Supreme Court has explicitly recognised human dignity as a core constitutional value. By extension, the dignity afforded to the living shall continue in death. This right to dignity in death was notably recognised by the High Court in *PP v. HSE*<sup>14</sup>. In this case, the Court stated that “[t]o maintain and continue the present somatic support for the mother would deprive her of dignity in death and subject her father, her partner and her young children to unimaginable distress.<sup>15</sup>”

In *Re a Ward of Court*, Judge Denham J. noted that “[a]n unspecified right under the Constitution to all persons as human persons is dignity—to be treated with dignity<sup>16</sup>”. She also stated that the individuals have a constitutional right to “dignity in life and death<sup>17</sup>”. In the *State (Quinn) v. Ryan*<sup>18</sup>, the Irish Supreme Court judged that the Irish Constitution provides a right to remedy for any breach of a constitutional right.

The Project CLANN in its report has stated that “[t]he right to dignity in death also appears to have been routinely violated by the manner in which many children and women who died in institutions were buried.<sup>19</sup>” While the rights of deceased individuals cannot be vindicated, the Irish State holds a duty under its Constitution to ensure that the right to dignity is protected or restored, even in death.

### 2.4. The State’s duty to investigate under Article 2 and 3 ECHR

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<sup>14</sup> *PP v HSE* (2014) IEHC, 622.

<sup>15</sup> *PP v HSE* (2014) IEHC, 622.

<sup>16</sup> *Re a Ward of Court* (1996) 2 IR 79, 163.

<sup>17</sup> *Re a Ward of Court* (1996) 2 IR 79, 169.

<sup>18</sup> *State (Quinn) v. Ryan* (1965) IR 70, 122.

<sup>19</sup> Maeve O'Rourke, Claire McGettrick, Rod Baker, Raymond Hill, ‘CLANN: Ireland's unmarried mothers and their children: Gathering the data: Principal submission to the Commission of Investigation into Mother and Baby Homes’ (2018) Justice For Magdalenes Research, Adoption Rights Alliance, Hogan Lovells, 110 [http://clannproject.org/wp-content/uploads/Clann-Submissions\\_Redacted-Public-Version-October-2018.pdf](http://clannproject.org/wp-content/uploads/Clann-Submissions_Redacted-Public-Version-October-2018.pdf).

Article 2 on the right to life and Article 3 on the prohibition of torture and ill-treatment of the ECHR put on the State a positive obligation to investigate corresponding violations.

- ***Article 2 – right to life***

The State has the duty to take the initiative to investigate once he has been made aware of the death (or the disappearance). For the investigation into the death of an individual to be effective, the ECtHR requires that certain standards are met: the investigation must be independent, adequate, prompt and with reasonable expedition, and transparent (involve public scrutiny and the participation of the next-of-kin).<sup>20</sup>

In the case *McCann And Others v. United Kingdom*<sup>21</sup>, the European Court established the obligation to effectively investigate a potential breach of Article 2 by a state agent using force.<sup>22</sup> This case set a precedent and this obligation has been applied in numerous cases, regardless of whether the death occurred as a result of the use of lethal force, or because of negligence. The Irish knew or ought to have known the abuse and neglect suffered in the institutions, and the resulting death within infants and children.

Regarding transparency, in *Edwards v. United Kingdom*<sup>23</sup>, the ECtHR found that the parents of the victims, who was killed while detained in prison, had not been “involved in the procedure to the extent necessary to safeguard their interests.”<sup>24</sup> Indeed, the inquiry and investigation had been conducted privately by the authorities. The Burial Bill must involve the relatives of the victims to an extent that is satisfactory for the protection of their own rights.

- ***Article 3 – prohibition of torture***

While the mothers and children in the Homes undeniably suffered atrocious physical and emotional abuse, the families of the deceased cannot vindicate the rights of the victims under Article 3. However, the rights of the relatives under Article 3 have continuously been briefed because of the failure of the State to properly investigate the deaths.<sup>25</sup>

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<sup>20</sup> European Court of Human rights, Guide on Article 2 of the European Convention on Human Rights (30 April 2020) 31-35 <[https://www.echr.coe.int/Documents/Guide\\_Art\\_2\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf)> (accessed 28 June 2020).

<sup>21</sup> *McCann v. UK* (1996) 21 EHRR, 97.

<sup>22</sup> *McCann v. UK* (1996) 21 EHRR,61.

<sup>23</sup> *Edwards v. The United Kingdom* (2002) 35 EHRR, 487

<sup>24</sup> *Edwards v. The United Kingdom* (2002) 35 EHRR, 84.

<sup>25</sup> Dr Geoffrey Shannon, ‘Twelfth Report of the Special Rapporteur on Child Protection’ (2019), 347

In the case *Cyprus v. Turkey*<sup>26</sup>, the Court found that the Turkish authorities had failed to investigate the disappearance of Greek-Cypriot individuals. In this case, the Turkish authorities did participate to the investigation, but it was insufficient to be considered an effective investigation. Here, the ECtHR noted the consequences of the disappearances on the relatives, taking into account their suffering: the lack of action on the part of the Turkish authorities was considered as inhuman treatment towards the families<sup>27</sup>. This failure of the State to investigate in the light of the suffering of the families reached a significant level of severity due to the mental distress it added.

Furthermore, the Court importantly pointed out that : “the essence of such a violation does not so much lie in the fact of the “disappearance” of the family member but rather in the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct.”<sup>28</sup>

In the case *El-Masri v. Former Yugoslav Republic of Macedonia*<sup>29</sup>, the ECtHR found a breach of Article 3 where the applicant had been subjected to inhuman and degrading treatment, and the State had failed to conduct an effective investigation on the matter. In this case the Court noted the importance of an effective investigation for the applicants, and for the general public and other victims of ill-treatment: the Courts seems to believe that there is a general right to know the truth about such events.<sup>30</sup>

## **2.5 . The relatives’ right to family life under Article 8 ECHR**

The respect of the dignity of the dead can be considered a universal principle. While the right to dignity of a deceased individual can hardly be vindicated, the relatives of the individual can vindicate their right to family life regarding the handling of the remains and access to information on the matter.

The European Court of Human Rights has clearly interpreted Article 8 of the ECHR as giving rise to know the fate/ circumstances of the death of a relative<sup>31</sup>, to the right to have the remains of

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<https://www.gov.ie/en/collection/51fc67-special-rapporteur-on-child-protection-reports/>.

<sup>26</sup> *Cyprus v. Turkey* (2002) 35 EHRR, 30.

<sup>27</sup> *Cyprus v. Turkey* (2002) 35 EHRR, 155.

<sup>28</sup> *Cyprus v. Turkey* (2002) 35 EHRR, 156.

<sup>29</sup> *El-Masri v. Macedonia* (2013) 57 EHRR, 25.

<sup>30</sup> Dr Geoffrey Shannon, ‘Twelfth Report of the Special Rapporteur on Child Protection’ (2019), 337

<https://www.gov.ie/en/collection/51fc67-special-rapporteur-on-child-protection-reports/>.

<sup>31</sup> *Zorica Jovanović v. Serbia* (2015) 61 EHRR 3; *Marić v. Croatia* (2015) EHRR 2.

loved ones returned<sup>32</sup>, to the right to know one's identity and family history<sup>33</sup>, and to the necessity of the

Regarding the excavation and identification of the individuals buried in unidentified mass graves, Article 8 is central in order to protect the rights of victims' family members. The failure of the State to ensure proper burial and registration, and to mark the burial places of those the children who died in the Home has prevented the families from knowing the truth and from mourning them. This violation of Article 8 has been continuous.

Article 8 of the ECHR has clearly been interpreted by the Court as giving rise to know the fate/circumstances of the death of a relative<sup>34</sup>, to the right to have the remains of loved ones returned<sup>35</sup>, to the right to know one's identity and family history<sup>36</sup>, and to the necessity of the consent of relatives regarding the treatment of a body<sup>37</sup>.

#### **4. Recommendations on the 2019 Bill**

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<sup>32</sup> *Pannullo and Forte v. France*, App No 37794/97 (ECtHR 30 October 2001).

<sup>33</sup> *SH v. Austria* (2011) 52 HER, 6.

<sup>34</sup> *Zorica Jovanović v. Serbia* (2015) 61 EHRR 3; *Marić v. Croatia* (2015) EHRR 2.

<sup>35</sup> *Pannullo and Forte v. France*, App No 37794/97 (ECtHR 30 October 2001).

<sup>36</sup> *SH v. Austria* (2011) 52 HER, 6.

<sup>37</sup> *Elberte v. Latvia*, App No 61243/08 (ECtHR 2015).

### **Head 3 – Government Order**

(4) The Agency referred to in subhead (3) will stand established on and from the date appointed by the sponsoring Minister, which shall be no later than 6 months after the making of the Government order.

⇒ We suggest the Agency be established no later than 3 months after Government Order. Time is of the essence, and relatives have already waited six years.

(6) The Government may, in the Government order referred to in subhead (3), confer responsibility for any or all of the following functions on the Agency-

⇒ We do not agree with conferring responsibility to an Agency (ie. sub-contracting). The government is accountable and needs to take ownership of its actions, notably to ensure transparency and clarity.

The transfer of Mother and Baby Homes records to Tusla has already been highly criticized by survivors and academics: it has been synonymous with a lack of transparency and access to information. We do not want to same scenario to happen with the Burial Bill.

(8) Where, having determined that there may be a public interest in carrying out an intervention at a specific site, Government shall consider the proportionality of any intervention with regard to factors including the following–

(d) the potential impacts on the site and the surrounding area, including any potential impact on–

(i) residents whose dwelling adjoins the site,

⇒ We believe this provision is not relevant in the Burial Bill. CPO (Compulsory purchase order) are made to allow a public infrastructure project to go ahead for the common good.

It is important to balance collective interest and individual interest. While the principle of private property and all relevant individual rights should be observed, the excavation and exhumation of the remains located in an unidentified and improper mass grave shall be understood as an endeavour for the good of the community/country.

### **Head 5 – Criteria for intervention**

(2) With respect to Head 3(1), in determining whether certain burials are manifestly inappropriate, Government shall consider the presence of two or more of the following factors as particularly significant:

(a) the human remains are uncoffined;

(b) the burials would not reasonably be considered to provide a dignified interment;

(c) the human remains were not buried at the appropriate depth specified in the Rules and Regulations for the Regulation of Burial Grounds 1888 and amendments to those regulations;

(d) the human remains are buried collectively and in a manner or in a location that is repugnant to common decency and would reasonably have been so considered at the time the burials took place.

⇒ We believe that, to determine whether a burial is inappropriate, only one of these factors should be necessary. Each and every single factor provided under Head 5 is sufficient to characterize an improper burial, which violates the principle of dignity.

### **Head 6 – Restrictions**

(4) The burial site-

(c) could not be excavated without disturbing appropriately buried human remains that are not to be exhumed.

⇒ This consideration is irrelevant in the case of the Tuam mass graves, because there are no proper and identified burial located on the site. None of the burials are identified or recorded, and majority of the remains seems to be uncoffined.

(6) Evidence is available that-

(b) the lapse of time since the last known burial exceeds 70 years in relations to the date on which the circumstances of the burials concerned became widely known.

⇒ This provisions will block the excavation of mass graves where the last burial happened prior to 1950.

This provision is problematic in the sense that this legislation is supposed be extended to other mother and baby homes where unidentified mass graves potentially exist. Therefore this provision sets an unnecessary and inadequate temporal limitation, which will block the excavation of mass graves in certain mother and baby homes.

This provision will have broader consequences if the legislation is extended to other mass graves: it will cause legal limbo for relatives of individuals improperly buried before 1950; it will lead to inequality before the law.

⇒ *What exactly justified that burials predating 1950 shall not be covered by this legislation?*

(7) Evidence is insufficient to determine-

(b) the location of the alleged burials.

⇒ We believe it is necessary for the authorities to commission a wide array of specialists in the relevant fields to ensure best results in the exhumation and identification process.

The 2017 findings of the Expert Technical Group doubted the feasibility of the excavation and DNA identification of the remains. Experts in genomics and DNA databanks from UCD and TCD concluded that the conclusion published by the Technical Group were “viewed through the prism of a technology that is at least 20 years old.<sup>38</sup>” While it may not be possible to identify every single skeleton, they asserted that the difficulties mentioned in the Technical Group’s Report could easily be overcome considering the remains are located in concrete chambers and seem to have been preserved.

(10) Government has formed the view that memorialisation of the site without further intervention is more appropriate.

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<sup>38</sup> Kevin O’Sullivan, ‘What DNA analysis can achieve in identifying Tuam remains’ *The Irish Times* (11 September 2019)

<https://www.irishtimes.com/news/environment/what-dna-analysis-can-achieve-in-identifying-tuam-remains-1.4015172>.

- ⇒ We believe the government does not have the authority to instruct in such a manner where there are suggestions of criminality resulting in the deaths of its citizens and unorthodox burial practices.

Indeed, in July 2018, the Department of Children and Youth Affairs published a Consultation Report on the options proposed by the Expert Technical Group.<sup>39</sup> Former resident of the Mother and Baby Home and relatives of former residents voted in majority for the forensic excavation of the total available area (respectively 63% and 89%).

While all stakeholders didn't agree on one unique solution, they all agreed on the necessity to take action urgently: "Participants expressed the need for justice, truth and accountability and this was consistent throughout the dialogues. Whatever decision is taken regarding the Tuam Site, effective timely communication and liaison between all the relevant parties is crucial to create the conditions for a more restorative and less contentious outcome."<sup>40</sup>

### **Head 7 – Temporarily disapplying other legislation which gives power to exhume**

- ⇒ We believe the decision to dismiss the applicability of existing statutory instruments is very dubious, as many relatives along with Dr Shannon have stated the importance to act promptly considering the health and age profile of the remaining family members.

While the Bill may seem necessary to exhume and identify the remains, Irish law provides a sufficient legal basis to start the process as soon as possible (ie. Coroners Act 1962; Local Government (Sanitary Services) Act 1948; Forensic Evidence and DNA Database System Act 2014).

Dr. Geoffrey Shannon, in his 2019 Report on the collection of Tuam survivors' DNA, clearly stated that it was legally possible to start DNA collection process, and to set an interim administrative scheme before an actual Bill is passed.

### **Head 16 – Staff of Agency**

*Provide along the following lines:*

(1) An Agency may appoint such and so many persons to be staff of the Agency, subject to the approval of the sponsoring Minister given with the consent of the Minister for Public Expenditure and Reform [...].

- ⇒ We believe the Bill should provide more details regarding the appointing process of the members of the Agency: how will the members be appointed? what expertise, qualification and experience will be required from potential members?

It would be appropriate to appoint independent experts in the fields of archeology, mass graves and DNA identification.

It would be necessary to appoint an independent expert (with some type of human rights expertise) who would act as a link between the relatives and the Agency, to represent their interests, voice their concerns/expectations and put their rights at the forefront in the process.

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<sup>39</sup> Barbara Walshe, Catherine O'Connell, 'Consultation on the Options and Appropriate Courses of Action available to Government in relation to the site of the former Mother and Baby Home, Tuam, Co. Galway' (6 July 2018).

<sup>40</sup> Barbara Walshe, Catherine O'Connell, 'Consultation on the Options and Appropriate Courses of Action available to Government in relation to the site of the former Mother and Baby Home, Tuam, Co. Galway' (6 July 2018), 18.

### **Head 23 – Accountability of Director to Public Accounts Committee**

Provide along the following lines:

(1) The Director of an Agency, whenever required in writing to do so by the Committee of Dáil Éireann established under the Standing Orders of Dáil Éireann to examine and report to Dáil Éireann on the appropriation accounts and reports of the Comptroller and Auditor General, shall give evidence to that Committee on —

(a) the regularity and propriety of the transactions recorded or required to be recorded in any book or other record of account subject to audit by the Comptroller and Auditor General that the Agency is required by this General Scheme to prepare,

(b) the economy and efficiency of the Agency in the use of its resources,

(c) the systems, procedures and practices employed by the Agency for the purpose of evaluating the effectiveness of its operations, and

(d) any matter affecting the Agency referred to—

(i) in any special report of the Comptroller and Auditor General under section 11(2) of the Comptroller and Auditor General (Amendment) Act 1993, or

(ii) in any other report of the Comptroller and Auditor General (insofar as it relates to a matter specified in paragraph (a), (b) or (c)) that is laid before Dáil Éireann.

⇒ We believe it is essential to appoint an independent expert (potentially with international expertise on the matter of mass graves) to control the work of the Agency, and make sure the exhumation is conducted adequately with regards to the circumstances, and the interests and rights of the families are not disregarded.

Another way of ensuring transparency and accountability is to allow relatives of the deceased to be involved with the Agency in so ways.

Potential expert : Professor Dame Sue Black who is a forensic anthropologist, anatomist and academic and Director of the Centre for International forensic Assistance. She is widely regarded in the area of recovery of remains located in war torn regions where mass graves have been identified and has worked with the UN and British Forensic Teams in Kosovo, Sierra Leone, Grenada and Iraq.

### **Head 26 – Prohibition on disclosure of information relating to functions of Agency**

Provide along the following lines:

(1) Except as explicitly provided for under this General Scheme, a person shall not, without the consent of the Director of the Agency (which may be given to the person, subject to or without conditions, as regards any information, any particular information or any information of a particular class or description), disclose —

(a) any information obtained by him or her while serving —

(i) as a member of the staff of the Agency,

(ii) as a consultant or adviser or contractor whose services are availed of by the Agency by virtue of Head 18,  
or

(b) any information so obtained relative to the business of the Agency or to the performance of its functions.

⇒ While information held by the Agency is understandably sensitive, there is no provision included in the Bill regarding disclosure of information and updates to the relatives of deceased.

With regards to their rights to family life, and the State's duty to investigate the death of an individual, the authorities must keep the relatives of the victims involved in the exhumation process as much as possible. This will allow transparency, and therefore more trust in the process on the part of the relatives.

### **Head 28 – Access to land**

(4) An Agency shall not seek access to land by court order where the land in question is in residential use and the access requested encroaches further than 2 metres past the boundary of the property or encroaches on part of a dwelling.

- ⇒ We believe each property should be looked at individually, and decisions should be made accordingly in order to best serve the interest of the community which is to excavate the entirety of the remains.

#### **Head 29 – Power to excavate and exhume**

(4) Where access to land has been obtained by an Agency under a High Court Order (or an order of the Court of Appeal on appeal from the High Court), exhumation works shall not commence before 29 days after the issuing of that Court Order.

- ⇒ We believe the timeframe proposed here is too lengthy, and that it should be reduced to 15 days.

#### **Head 31 – Duty to inform coroner and An Garda Síochána of certain matters**

Provide along the following lines:

Where, during the performance of the functions assigned to an Agency, there emerges in respect of any remains located during the course of works carried out under Head 29 evidence that the remains concerned do not appear to be in the scope of the exhumation being carried out under this General Scheme, then the Agency shall immediately inform the coroner within whose district the remains were exhumed and An Garda Síochána.

- ⇒ We believe the local, divisional and national Gardai should be informed and included on each step of the process. The families should also be informed of the outcome of any Gardai and Coroner investigation.

#### **Head 32 – Suspension of certain functions and information to be available to assist criminal investigations**

- ⇒ We believe family members should be made aware of such decision that may occur during the process.

#### **Head 33 – Obligation to make arrangements for re-interment**

(2) The Agency shall make arrangements under subhead (1) no later than five years from the date on which the exhumation works carried out under Head 29 are completed.

- ⇒ We believe the Agency shall make arrangements for re-interment no later than 3 years from the date of exhumation. Again, taking into consideration the age profile of most of the family members of the deceased, the length of time they have already been waiting for the State to take action, it is necessary to set shorter timelines.

#### **Head 52 – Functions of the Agency in relation to the Identification Programme**

Provide along the following lines:

(1) The objective of the identification programme is, where possible, to enable identification of a body exhumed from a specific site based on analysis and familial matching so that family members of the unknown deceased person can be informed of the circumstances of the person's interment and, if practicable, have the remains returned to them for re-interment.

- ⇒ The goal of the identification programme according to this provision is to allow immediate family members of a deceased individual to be informed of the identification of the body, and to then make a decision regarding interment.

Here, the focus is on the right of immediate family to have a loved one properly buried, and not on the “right” of a deceased individual to be buried with dignity : in the present case this would mean have his identity restored, and be given a proper Christian burial.

We believe the Bill should provide details on what will occur of remains for which there no matching family DNA, or remains for which it is impossible to establish a DNA profile.

### **Head 53 – Who may participate in Identification Programme**

(1) Subject to this Head, the Agency may invite people who believe, on reasonable grounds, that may be the parent, child, sibling or half-sibling of a person believed to be deceased and to have been interred at a specified site to participate in an identification programme if they wish to do so.

⇒ Access to the identification programme is extremely restrictive because only immediate family members are allowed to participate (parents, child, sibling, half-sibling); all other relatives are completely excluded from providing their DNA for identification.

The individuals buried at the Tuam site being children, allowing for potential descendants to participate in the identification programme is irrelevant/inadequate. The children at the Tuam site were buried roughly between 1925 and 1961, therefore it is mostly unlikely any parents will be able to come forward for the identification process. The only category of individuals most likely to participate in the identification programme are siblings and half siblings, which is extremely restricted and dramatically narrows the chances to identify the remains.

Standard forensic tests usually allow to identify individuals who are closely related (ascendants, descendants, siblings). However, genetic genealogy tests allow the identification of much more distant relatives (like cousins). Genetic genealogy could be used in cases where the familial match is uncertain (moderate or weak likelihood of familial link). It would be more adequate to allow for more distant family members to participate, for examples nephews, nieces, cousins.

While DNA identification poses numerous ethical problems, the DNA database will be established with the DNA of individuals who have given full consent to their DNA being harvested, stored and used for the purpose of the identification of human remains.