

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

Irish Human Rights and Equality

Commission

*February 2021*



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

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## Contents

Introduction .....	2
Background to the General Scheme .....	2
Relevant human rights and equality framework.....	4
General observations .....	7
Transitional justice processes and gender perspectives .....	7
Mass grave investigations: obligation of means not results .....	8
Observations on the General Scheme.....	9
Scope of the General Scheme (Head 3) .....	9
Human rights and equality approach to mass graves (Heads 3, 5 and 6) .	11
Restrictions (Head 6) .....	12
Role of the Coroner (Head 7) .....	16
Part 4 and 5 - Role and functions of the Agency.....	18
Independence, impartiality and transparency.....	18
Participation and access to information.....	18
Return of human remains to family members (Head 33) .....	20
The obligation to preserve and protect.....	21
Part 6: The identification process .....	22
Multidisciplinary approach to the identification process.....	22
'Pilot programme' (Head 47) .....	24
DNA (Historic Remains) Database System (Heads 48 and 49).....	25
Participation in the programme (Head 53) .....	27
Review (Head 62).....	28

## 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'). In accordance with its founding legislation, the Commission is mandated 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 the Joint Committee on Children, Disability, Equality and Integration with its submission on the *General Scheme of a Certain Institutional Burials (Authorised Interventions) Bill* (the 'General Scheme'). The Commission has previously raised concerns about the human rights and equality issues arising in connection to this piece of legislation.<sup>2</sup>

The discovery of the mass grave site at the former Mother and Baby Home at Tuam in 2017 and the findings of the *Mother and Baby Homes Commission of Investigation Final Report* (2020) that many of the Mother and Baby Homes did not properly record the burials of children who died in these institutions engage serious human rights and equality issues both for the deceased and their family members.<sup>3</sup> In particular, for family members (some of whom are also survivors of these institutions) there is a need to know the fate and whereabouts of these children and to receive their mortal remains for burials or, a dignified commemoration. Therefore, effective legislation that will as far as practicable protect, and preserve mass graves, such as Tuam, and provide for the identification and return of mortal remains to family members plays an important part in providing truth and justice to these individuals.

## Background to the General Scheme

The Commission of Investigation into Mother and Baby Homes was established by the Irish Government in February 2015. The terms of reference for the Commission of

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

<sup>2</sup> IHREC (Designate) [Proposed Commission of Investigation to Inquire into Mother and Baby Homes](#), June 2014

<sup>3</sup> Mother and Baby Homes Commission of Investigation – Final Report, 30 October 2020.

Investigation included a commitment to an investigation of post-mortem practices and procedures in respect of children or mothers who died while resident in these institutions.<sup>4</sup>

On 9 March 2017, a significant number of human remains were discovered buried at the site of a former Mother and Baby Home in Tuam. In December 2018, a government-commissioned expert technical group published a report on how to respond. Following on from the publication of this report, Galway County Council conducted a public consultation in response to the expert group's findings and proposed options.<sup>5</sup> The consultation reported that although local residents largely wished for memorialisation and non-disturbance of remains, former residents of Tuam Mother and Baby Home and relatives of former residents of the home "overwhelmingly wished for full forensic excavation of the site along with DNA analysis".<sup>6</sup> The consultation concluded that "[p]articipants expressed the need for justice, truth and accountability and [that] this was consistent throughout dialogues".<sup>7</sup>

In 2018, the Minister announced plans for the site to be excavated forensically.<sup>8</sup> The *Fifth Interim report of the Commission of Investigation*, published 15 March 2019, highlighted that the major issues with regards to burials "arise in the cases of Bessborough and Tuam." On 10 December 2019, Cabinet approved the publication of the *General Scheme of the Certain Institutional Burials (Authorised Interventions) Bill*. The Bill provides the statutory basis and framework for the creation of an agency, which can then oversee the excavation, exhumation, identification and re-burial of any remains found at certain sites where "manifestly inappropriate burials have taken place".

*The Final Report of the Commission of Investigation* was published on 12 January 2021. The Final Report found that most of the Mother and Baby Homes did not hold burials registers. In particular, neither Tuam nor Bessborough kept a register of burials. While the Commission of Investigation believes it is likely that the children who died in Tuam

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<sup>4</sup> Statutory Instrument No.57 of 2015.

<sup>5</sup> B Walshe and C O'Connell, Consultation on the Options and Appropriate Courses of Action available to Government in relation to the site of the former Mother & Baby Home, Tuam, Co. Galway, 16 April 2018.

<sup>6</sup> Ibid, page 3.

<sup>7</sup> Ibid, page 18.

<sup>8</sup> Department of Children, Equality, Disability, Integration and Youth [Government approves programme of action to respect the memory and dignity of children who died in Tuam Mother and Baby Home](#), October 2018

are buried inappropriately in the grounds of the institution, it has not been able to establish where the majority of the Bessborough children are buried.<sup>9</sup>

## Relevant human rights and equality framework

The proposed legislation gives rise to a number of human rights and equality issues which are closely intertwined with the right to life, the right to family life, the prohibition against inhuman and degrading treatment, the right to an effective remedy, and women's and children's rights. These rights find expression in the Constitution of Ireland, the European Convention on Human Rights (the 'ECHR') and international human rights law.

Case law confirms the importance of dignity under the Constitution and, in particular, the importance attached to the circumstances associated with a person's death.<sup>10</sup> At common law, there has also been recognition of the right to a decent burial, and of a range of rights and duties concerning dead bodies.<sup>11</sup> Articles 2 and 3 of the ECHR place positive procedural obligation upon states to effectively investigate either a killing or, suspicious death within their territory or an allegation of inhuman or degrading treatment, respectively.<sup>12</sup> However, this is an obligation of means only, and not results.<sup>13</sup>

Article 8 of the ECHR has been broadly interpreted as providing family members of deceased persons with a number of rights, including the right to have their loved one's body returned to them and the right to know the fate of their family members, including information surrounding the death and/or burial of their loved ones.<sup>14</sup> The European Court of Human Rights (the 'ECtHR') has also held that the way in which a relatives

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<sup>9</sup> Mother and Baby Homes Commission of Investigation – Final Report, 30 October 2020, at page 29.

<sup>10</sup> See for example *PP v. HSE* [2014] IEHC, 633, *Re a Ward of Court*, [1996] 2 IR 79 and *Fleming v. Ireland* [2013] IESC 19.

<sup>11</sup> See *Dr Geoffrey Shannon, Human Rights Issues at the Former Site of the Mother and Baby Home, Tuam, Co Galway*, 12 April 2018: pp. 94-101.

<sup>12</sup> See for example; *McCann and Others v. the United Kingdom*, Number 17/1994/464/545, 27 September 1995; *Osman v. the United Kingdom*, Number 87/1997/871/1083, 28 October 1998, *Aslakhanova v. Russia* Number 2944/06, 8300/07, 50184/07, 332/08, 42509/10, 18 December 2012, *El Masri v. Former Yugoslavia Republic of Macedonia* GC] no. 39630/09, 13 December 2012.

<sup>13</sup> App. No. 32457/04, judgment of 27 Feb. 2008, available at: [www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/](http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Hudoc/Hudoc+database/), para 66.

<sup>14</sup> See for example, *Pannullo and Forte v. France* Number 37794/97, ECHR 2001-X., *Girard v. France* Number 22590/04, 30 June 2011, *Hadri Vionet v. Switzerland* Number 55525/00, 14 February 2008, *MARic v. Croatia* Application no. 50132/12; *Zorica Jovanovic v. Serbia* Number 21794/08, ECHR 2013.

remains is treated and the right to attend the funeral of a family member falls within Article 8.<sup>15</sup> In particular, it has found a positive obligation on authorities who are aware of a person's death to act with "reasonable diligence" to ensure that family members are so informed.<sup>16</sup> Article 8 of the ECHR is not an absolute and a state can justify such an interference if it can demonstrate that the inaction is:

"in accordance with the law, is necessary in a democratic society, in the interests of national security, public safety or economic well-being, for the prevention of disorder or crime, for the protection of health or morals, of the for the protection of the rights and freedom of others".<sup>17</sup>

The ECtHR<sup>18</sup> has also recognised the right to know the truth in the context of investigations into complaints of torture, inhuman or degrading treatment, holding that:

"...the Court also wishes to address another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth regarding the relevant circumstances of the case. In this connection it underlines the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened.

...

...an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory..."<sup>19</sup>

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<sup>15</sup> *Solska and Rybicka v. Poland*, Applications 30491/17 and 31083/17, paras 104-108

<sup>16</sup> *Lozovyye v. Russia*, Application no 4587/09, para 46.

<sup>17</sup> See Article 8 (2) of the European Convention of Human Rights.

<sup>18</sup> European Court of Human Rights, *El Masri v. Former Yugoslav Republic of Macedonia* GC] no. 39630/09, 13 December 2012.

<sup>19</sup> *Ibid* para 191 and 192.

In 2018, pursuant to a request from then Minister for Children, Dr Katherine Zappone TD, the Special Rapporteur on Child Protection, Dr Geoffrey Shannon, published a report on the *Human Rights Issues at the Former Site of the Mother and Baby Home, Tuam, Co. Galway*. This report set out the relevant human rights standards in both domestic and international law. Dr Shannon noted that; “in international law, there are no unified mass-grave protection guidelines in place for States to follow when they are faced with the discovery of sites”. However, he also notes that in the absence of such guidelines, advocates have recommended that “the principles established in international humanitarian law in relation to armed conflict can serve as a guide with regard to the treatment of the dead in some peacetime situations”.<sup>20</sup>

In addition to guidance that can be drawn from international law<sup>21</sup>, three resources have developed in recent years that are instructive. First, the development of the *Bournemouth Protocol on Mass Grave Protection and Investigation (2020)* (the ‘Bournemouth Protocol’) which consolidates legal rules and best practice to support those protecting and investigating mass grave sites.<sup>22</sup> Second, the UN Special Rapporteur on extrajudicial, summary or arbitrary execution (hereafter ‘the UN Special Rapporteur’) published a report on mass graves (2020), which *inter alia* presents some of the complex normative and practical issues raised by the existence of mass graves and provides a set of human rights standards and possible steps towards the respectful and lawful handling of mass graves. Third, the Forensic Guide to the Investigation, Recovery and Analysis of Human Skeletal Remains (2020) which aims to promote accountability and access to effective remedies and reparations for victims and their families in the case of extrajudicial killings and enforced disappearances in Latin America.<sup>23</sup>

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20 Dr Geoffrey Shannon, *Human Rights Issues at the Former Site of the Mother and Baby Home, Tuam, Co Galway*, 12 April 2018: p. 5.

21 For instance, the Geneva Conventions and their Additional Protocols form the core of international humanitarian law, regulating the conduct of armed conflict and seeking to limit its effects. With regard to missing persons, the International Committee of the Red Cross (ICRC), “Guiding Principles/Model Law on the Missing” (2009) and the International Convention for the Protection of All Persons from Enforced Disappearance are of assistance (although it should be noted that Ireland has not yet ratified this Convention).

22 Bournemouth University [Bournemouth Protocol on mass grave protection and investigation](#), 2020.

23 Argentine Forensic Anthropology Team, *Forensic Guide to the Investigation, Recovery and Analysis of Human Skeletal Remains*, August 2020 <https://eaaf.org/wp-content/uploads/2020/11/EAAF-Forensic-Guide-for-the-investigation-recovery-and-analysis-of-human-skeletal-remains.pdf>

## General Observations

### Transitional justice processes and gender perspectives

Transitional justice is based on five pillars; the right to truth, justice, reparation, non-recurrence and memory process.<sup>24</sup> 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. To comply with international obligations, transitional justice mechanisms should seek to ensure that states safeguard the rights of victims to justice and reparations, the right of victims and societies to know the truth about violations, guarantees of non-recurrence of violations and memorialisation.<sup>25</sup>

Women and children's rights are clearly relevant given the background to the proposed legislation and accordingly should inform government's response and the Committee's scrutiny of the General Scheme. With specific regard to women as both survivors and as parents of the deceased transitional justice mechanisms, including this proposed legislation, should include special measures to ensure that women receive adequate redress, that they meaningfully participate in these processes and that their rights and perspectives are adequately addressed.<sup>26</sup> Transitional justice processes that incorporate a gender and women's human rights perspective can help ensure accountability for women's rights abuses and further ensure that such abuses against women, or other marginalised groups are not perpetuated into the future.<sup>27</sup>

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<sup>24</sup> UN Human Rights Council, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice](#). A/HRC/45/45, 9 July 2020: p. 18

<sup>25</sup> See UN, Guidance Notes of the Secretary-General, UN Approach to Transitional Justice, March 2020. Also see UN, The gender perspective in transitional justice processes, 17 July 2020.

<sup>26</sup> The Forensic Guide to the Investigation, Recovery and Analysis of Human Skeletal Remains states that participation with victims' families should not only be an integral part of the whole process - from investigation, identification to the return of any remains identified - but should also form part of the design process; "... there have been many different modes of participation, but in our opinion, the victims' families and their organizations should sit at the table where the political decision as to the type of mechanism to be used for search purposes is taken." Argentine Forensic Anthropology Team, Forensic Guide to the Investigation, Recovery and Analysis of Human Skeletal Remains, August 2020 <https://eaaf.org/wp-content/uploads/2020/11/EAAF-Forensic-Guide-for-the-investigation-recovery-and-analysis-of-human-skeletal-remains.pdf>, page 7.

<sup>27</sup> UN, Guidance Notes of the Secretary-General, UN Approach to Transitional Justice, March 2020, p. 5. Also see UN, The gender perspective in transitional justice processes, 17 July 2020.

**The Commission recommends examination of the General Scheme as part of a larger transitional justice response for the survivors of the Mother and Baby Homes and families of those who died within these institutions.**

**The Commission further recommends that a women’s human rights perspective inform scrutiny of the General Scheme, with particular focus on the need for affected women to meaningfully participate in the drafting and operation of proposed legislation.**

### Mass grave investigations: obligation of means not results

Mass grave investigations are an “obligation of means and not results”.<sup>28</sup> Mass grave investigations can be highly complex, lengthy and resource intensive. Depending on the grave and the evidence available, it may not always be possible to retrieve, identify and return remains to family members. Indeed, available research shows that identification of remains is low.<sup>29</sup> However, this does not diminish the obligation on the State to make best efforts to respect these rights. Rather it affirms that meaningful engagement must underpin the design and implementation of legislation of this nature, and further, that it be complemented by a transparent communication strategy. The UN Special Rapporteur acknowledging this specific challenge has stated:

“There exists concern that the prevailing emphasis on identification fails the vast majority of families and may even intensify their pain, “creating almost a secondary trauma” should their hopes be unrealized. More thought should be given up front to methods of cooperation with families to minimise this possibility.”<sup>30</sup>

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<sup>28</sup> Bournemouth University [Bournemouth Protocol on mass grave protection and investigation](#), 2020, pp. 6-7.

<sup>29</sup> United Nations General Assembly (2020) [Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Mass graves, highlighting the multitude of sites of mass killings and unlawful deaths across history and the world](#), UN Doc A/75/384, pp. 8- 9.

<sup>30</sup> United Nations General Assembly (2020) [Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Mass graves, highlighting the multitude of sites of mass killings and unlawful deaths across history and the world](#), UN Doc A/75/384, p. 9.

**The Commission recommends that any legislation of this kind be underpinned by meaningful engagement with affected individuals and complemented by a transparent communications strategy.**

## Observations on the General Scheme

### Scope of the General Scheme (Head 3)

Head 3(1) provides that the State will only intervene where:

“manifestly inappropriate burials have taken place at a site, associated with an institution, of persons who died while ordinarily resident at that institution”.

“Institution” and “ordinarily resident” are not defined under the General Scheme. However, it is noted that the General Scheme states that its purpose is to authorise interventions where manifestly inappropriate burials have taken place that are:

“associated with institutions operated by or on behalf of the State or in respect of which the State had clear regulatory or supervisory responsibilities.”<sup>31</sup>

The State’s positive obligation to protect the right to life requires an effective official investigation when individuals have died in suspicious circumstances, irrespective of whether those responsible are agents of the State or, private persons.<sup>32</sup> Also, international best practice does not define “mass grave” sites by state involvement. Instead, “mass grave” sites are given a broad scope of application to include:

“burial site where the circumstances surrounding the death and/or the body-disposal method warrant an investigation as to their lawfulness”.<sup>33</sup>

Accordingly, the scope of the General Scheme will limit interventions to burials of people who were “ordinarily resident” within certain “institutions” run by or on behalf of

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<sup>31</sup> The General Scheme, at page 2.

<sup>32</sup> *Jorja v. Moldova*, no. 12219/05, 23 March 2010, para 26.

<sup>33</sup> United Nations General Assembly (2020) [Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Mass graves, highlighting the multitude of sites of mass killings and unlawful deaths across history and the world](#), UN Doc A/75/384, para 17(d). Also see Bournemouth Protocol.

the State. This restricted scope of application does not align with the States human rights obligations or, international best practice in this area.<sup>34</sup>

**The Commission recommends that the scope of the General Scheme be revised to align with the international definition of mass grave sites; to include any burial site where the “circumstances surrounding the death and/or body-disposal method warrant an investigation as to their lawfulness.”**

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<sup>34</sup> Ibid. Also see the Bournemouth Protocol.

## Human rights and equality approach to mass graves (Heads 3 and 5)

Head 3 of the General Scheme provides that the Minister shall bring a proposal to Government where the Minister “is satisfied, on reasonable grounds, that manifestly inappropriate burials have taken place at a site”.<sup>35</sup> If, on considering this proposal, Government forms the view that “it is necessary for the purpose of safeguarding important objectives of general public interest”, it may make an order to establish a statutory agency to excavate, exhume and manage the identification and reinternment of any human remains found at a particular site.<sup>36</sup> Head 3(8) provides that after determining that there is a public interest in carrying out an intervention in a particular site, Government shall consider the proportionality of any intervention with regard to a number of specified factors.<sup>37</sup> Head 5 sets out the criteria that Government must take into consideration when deciding whether or not to make an order to intervene in a particular site, including whether certain burials are “manifestly inappropriate”.<sup>38</sup> Head 6 sets out a wide range of circumstances that prevent the making of an order under Head 3.

It is noted with concern that the General Scheme, in particular, in relation to the making of an order to intervene (Head 3) and the criteria for intervention (Head 5) is silent on the relevant human rights and equality issues that, as set out above, are central to the objectives of legislation of this kind.<sup>39</sup>

**The Commission recommends that Heads 3 and 5 be revised to ensure that Government, and other persons, performing functions under the proposed legislation have due regard to the need to protect human rights and equality of both victims and family members.**

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<sup>35</sup> Head 3(1) of the General Scheme.

<sup>36</sup> Head 3(3) of the General Scheme.

<sup>37</sup> Head 3(8) of the General Scheme, provides for the following factors – “(a) public health, respect for the deceased, respect for the views of the relatives of the deceased, (d) the potential impacts on the site and surrounding area, including any potential impact on – (i) residents whose dwelling adjoins the site, and (ii) archaeological feature of the site, (e) the social interest to be served by carrying out an intervention, (f) the economic impact of an intervention, (g) avoidance of obstructions to any official or legal inquiry, investigation or, process, proceedings pending or due before court, tribunal of inquiry or commission of investigation, (h) possible alternative options available to accord dignity to persons buried there.”

<sup>38</sup> Head 5(2) of the General Scheme.

<sup>39</sup> Section 42 of the Irish Human Rights and Equality Commission Act 2014 may be instructive.

Heads 3, 5 and in particular the restrictions set out under Head 6, are currently framed in a manner that allows wide discretion to Government when determining whether or not to intervene in a particular site, even where there are “reasonable grounds that manifestly inappropriate burials have taken place”.<sup>40</sup>

The State is under a legal duty to investigate mass burials,<sup>41</sup> and to preserve and protect evidence at relevant sites.<sup>42</sup> Whilst an intervention may not be possible or appropriate in certain circumstances, such circumstances should be construed strictly and with due regard to the relevant human rights and equality of survivors and family members of the deceased.

**The Commission recommends further examination of the wide discretion given to the Government under Heads 3 and 5 and the extensive restrictions listed under Head 6, with a view to determining whether they pursue a legitimate aim, are necessary and proportionate.**

### Restrictions (Head 6)

As noted above, the restrictions under Head 6 are extensive and could have the effect of excluding many manifestly inappropriate burials, including potentially some burial sites identified in the Commission of Investigation Report. Although all exceptions warrant further examination, the following are of particular note:<sup>43</sup>The General Scheme states that certain sites are to be excluded from the Government order where “there is an ongoing Garda investigation into the circumstances surrounding the burials or the way the deaths took place”.

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<sup>40</sup> Head 3(1) of the General Scheme.

<sup>41</sup> For instance, States are under an obligation to take steps reasonably available to them to secure evidence. See for example - *Treskavica v Croatia*, Judgment, ECtHR Application No. 32036/13 (12 April 2016) para 60, noting that this includes forensic evidence. Also, under humanitarian law, Article 34(2)(b) of Additional Protocol I requires the protection of grave sites.

<sup>42</sup> Under the Constitution and the ECHR (obligation to protect life) the State is under a positive obligation to carry out effective investigations into deaths.

<sup>43</sup> Other examples include; Head 6(5) which states “Exhumation would be unreasonably difficult or unsafe”. It is submitted that this has been drafted in an overly broad, and vague manner. Also see Head 6(8) states “The land on which the burial site is located contains one or more dwellings”. Although, such a scenario would likely engage the private property rights of other individuals they must be balanced against the rights of victims’ families which are also engaged. Accordingly, property rights should not be in and of themselves grounds for a restriction.

The Minnesota Protocol states that “[u]pon completion of the necessary investigative procedures, human remains should be returned to family members”.<sup>44</sup> The ECtHR has held that families have a right for human remains to be returned to them if there is no investigatory purpose for holding onto the remains.<sup>45</sup>

A criminal investigation should not be a reason to exclude sites from proposed legislation.<sup>46</sup> It may be possible to put in place procedures and safeguards to ensure that the exhumation process preserves evidence that can assist in identification or in any criminal investigation.<sup>47</sup>

**The Commission recommends that an ongoing criminal investigation should not be used as a reason to exclude sites from Government orders.**

The General Scheme provides for an exception where there is evidence that “informed family consent was given for burials arranged by the institution”.

The Constitution and the ECHR place an obligation on the State to secure the right to effective respect for physical and psychological integrity, in particular in the context of health-related matters, when considering whether consent was free and informed.<sup>48</sup>

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<sup>44</sup> See [The Minnesota Protocol on the Investigation of Potentially Unlawful Death \(2016\)](#), 2017:p. 9. Also, the ICRC Model Law provides that after a post-mortem examination, remains should be returned to the families of the deceased at the earliest time possible. See ICRC, [Advisory Service on International Humanitarian Law, Guiding Principles/Model Law on the Missing, Principles for Legislating the Situation of Persons Missing as a Result of Armed Conflict or Internal Violence: Measures to prevent persons from going missing and to protect the rights and interests of the missing and their families](#), February 2009:p. 46.

<sup>45</sup> *Panullo and Forte v. France*, ECtHR Application no. 37794/97, 30 October 2001, para 35-40.

<sup>46</sup> United Nations General Assembly, [Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Mass graves, highlighting the multitude of sites of mass killings and unlawful deaths across history and the world](#), UN Doc A/75/384, 2020.

<sup>47</sup> The ICRC Model provides that “It is essential that all information be collected for the purpose of identification whenever exhumations are performed; regulations and procedures should be in conformity with the principles governing the protection of personal data and genetic information; it is important to preserve evidence conducive to the identification and that may be required for any criminal investigation, whether under national or international law.” Article 21. See ICRC, [Advisory Service on International Humanitarian Law, Guiding Principles/Model Law on the Missing, Principles for Legislating the Situation of Persons Missing as a Result of Armed Conflict or Internal Violence: Measures to prevent persons from going missing and to protect the rights and interests of the missing and their families](#), February 2009 , p. 46.

<sup>48</sup> Article 40.3 of the Constitution protects the right to bodily integrity. See for example (Re a Ward of Court (withholding medical treatment) (No 2), 1996 Also see the ECtHR judgments, *Sentges v. the Netherlands* (dec.) no. 27677/02, 8 July 2003; *Nitecki v. Poland* (dec.), no. 65653/01, 21 March 2002.

The General Scheme does not provide a definition of 'informed consent', so it is unclear how evidence of informed consent is to be established. Informed consent requires a person be provided with all available information before giving their consent.<sup>49</sup> This may be difficult to assess in respect of burials linked to the Mother and Baby Homes as they occurred decades ago. Moreover, the General Scheme does not indicate who is responsible for making the determination, nor does it address circumstances where families may wish to challenge a decision based on this restriction (or indeed other restrictions).

**The Commission recommends further examination of the exclusion on the basis of stated "informed family consent" and that this should include consultation with affected individuals, including survivors and family members.**

The General Scheme provides for an exception where "the lapse of time since the last known burial exceeds 70 years, in relation to the date on which the circumstances of the burials concerned became widely known".

The rationale for this particular cut-off date is unclear, and such a restriction could potentially exclude any burial sites prior to 1950. This is at odds with the Commission of Investigation into Mother and Baby Homes which examined the period of 1922 to 1998.

**The Commission recommends revising the 70-year time limit particularly in light of the fact that the Commission of Investigation into Mother and Baby Homes examined the period of 1922 to 1998.**

The General Scheme provides for an exception where "[g]overnment has formed the view that memorialisation of the site without further intervention is more appropriate". Memorialisation, the fifth pillar of transitional justice, is also recognised as an important

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<sup>49</sup> In the context of healthcare the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has said "[i]nformed consent requires that communication is cognizant of varying levels of comprehension and not be too technical, complex, hasty, or in a language, manner or context that the patient does not understand." See [the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Thematic study on the realization of the right to health of older persons](#), A/HRC/18/37, July 2011, para 5

feature in terms of addressing mass graves.<sup>50</sup> The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence states:

“Transitional justice systems require vigorous and active memory policies based on human rights approaches in order to adequately address past crimes committed by dictatorial or authoritarian regimes or crimes perpetrated in the context of an armed conflict. Without memory, the rights to trust and full reparation cannot be fully realised and there can be no guarantee of non-recurrence.”<sup>51</sup>

However, the Special Rapporteur further explains;

“Memory processes complement but do not replace mechanisms for truth, justice and guarantees of non-recurrence. Memory mechanisms should not serve as a pretext for granting de jure or de facto impunity to the perpetrators of gross violations of human rights or serious violations of international law.”<sup>52</sup>

The General Scheme currently presents memorialisation as a reason not to carry out an investigation or exhume remains from mass graves, which may in turn impact on the rights of families and survivors to identify remains of loved ones. While a memory process is extremely important in the context of commemoration, and may in certain circumstances be an appropriate option, it should not be grounds, in and of itself, to prevent the identification of remains for family members. Furthermore, the views of survivors and family members must play a central role in any decision to memorialise a manifestly inappropriate burial.<sup>53</sup>

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<sup>50</sup> United Nations General Assembly, [Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Mass graves, highlighting the multitude of sites of mass killings and unlawful deaths across history and the world](#), UN Doc A/75/384, 2020

<sup>51</sup> UN Human Rights Council, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice](#). A/HRC/45/45, 9 July 2020, p. 17.

<sup>52</sup> UN Human Rights Council, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice](#). A/HRC/45/45, 9 July 2020, p. 5.

<sup>53</sup> United Nations General Assembly, [Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Mass graves, highlighting the multitude of sites of mass killings and unlawful deaths across history and the world](#), UN Doc A/75/384, 2020: p. 10.

**The Commission recommends that this part be revised to ensure that memorialisation complements rather than replaces, the process for addressing mass graves.**

**The Commission recommends that any decisions concerning memorialisation include meaningful participation with survivors and family members.**

### Role of the Coroner (Head 7)

Head 7 provides that where the Government makes an order under Head 3 in relation to a site, the Coroner shall not have jurisdiction under the *Coroners Acts 1962 -2019* in respect of bodies exhumed from that site during the period of existence of the Agency. The purpose of this provision is to dis-apply section 47 of the *Coroners Acts 1962*,<sup>54</sup> which concerns the role of the Coroner in the exhumation process, and section 17,<sup>55</sup> which concerns the duty of the Coroner in circumstances where a death may have occurred in a violent or unnatural manner, unexpectedly and from unknown causes. The State's positive obligation to protect the right to life<sup>56</sup> requires "an effective official investigation when individuals have died in suspicious circumstances" ..<sup>57</sup> Arguably, the families of the deceased are also recognised as victims themselves of ongoing violations, and as such, have the right to an effective remedy,<sup>58</sup> which includes a thorough and effective investigation.<sup>59</sup> The ECtHR has recognised that states are under

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<sup>54</sup> Section 47 of *Coroners Act 1962*, as amended by the *Coroners (Amendment) Act 2019* provides: Where a coroner is informed by a member of the Garda Síochána not below the rank of inspector that, in his opinion, the death of any person whose body has been buried in the coroner's district may have occurred in a violent or unnatural manner, the coroner may request the Minister to order the exhumation of the body by the Garda Síochána.

(1a) Where there is a relevant Ombudsman Commission investigation and a coroner is informed by a designated officer of the Ombudsman Commission that, in his or her opinion, the death of the person concerned whose body has been buried in the coroner's district may have occurred in a violent or unnatural manner, the coroner may request the Minister to order the exhumation of the body by the Ombudsman Commission.

<sup>55</sup> Section 17 provides:

Subject to the provisions of this Act, where a coroner is informed that the body of a deceased person is lying within his district, it shall be the duty of the coroner to hold an inquest in relation to the death of that person if he is of opinion that the death may have occurred in a violent or unnatural manner, or unexpectedly and from unknown causes or in a place or in circumstances which, under provisions in that behalf contained in any other enactment, require that an inquest should be held.

<sup>56</sup> Under Article 2 of the European Convention on Human Rights.

<sup>57</sup> *Jorqa v. Moldova*, no. 12219/05, 23 March 2010, para 26.

<sup>58</sup> Article 13 of the European Convention on Human Rights; Article 2(3) of the International Covenant on Civil and Political Rights.

<sup>59</sup> The European Court of Human Rights have held that an effective remedy includes the "payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to

an obligation to take further investigative measures if evidence surrounding the circumstances and causes of a death becomes known at a later stage.<sup>60</sup> *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*<sup>61</sup> sets out that in cases of unlawful death, families of victims have a right “to information about the circumstances, location and condition of the remains and, insofar as it has been determined, the cause and manner of death.”<sup>62</sup>

In the absence of a coroner’s inquest to establish a cause of death, it is unclear how the State intends to ensure family members know the truth about the cause and circumstances of the death, and the manner of the burial of their relative.<sup>63</sup>

**The Commission recommends that Head 7 be amended to recognise that the jurisdiction of the Coroner applies to the burial sites. If Head 7 is retained, consideration should be given to amending proposed legislation to ensure that effective investigations are carried out to determine the truth about the cause and circumstances of the death, and manner of the burials of the deceased person.**

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the investigatory procedure” [Kaya v. Turkey](#), 19 February 1998, Reports of Judgments and Decisions 1998-I, para 10.

<sup>60</sup> Where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. See [Brecknell v. the United Kingdom](#), no. 32457/04, 27 November 2007, para 71.

<sup>61</sup> The Minnesota Protocol aims to protect the right to life and advance justice, accountability and the right to a remedy, by promoting the effective investigation of potentially unlawful death or suspected enforced disappearance. The Protocol sets a common standard of performance in investigating potentially unlawful death or suspected enforced disappearance and a shared set of principles and guidelines for States, as well as for institutions and individuals who play a role in the investigation. See [The Minnesota Protocol on the Investigation of Potentially Unlawful Death \(2016\)](#), 2017.

<sup>62</sup> [The Minnesota Protocol on the Investigation of Potentially Unlawful Death \(2016\)](#), 2017, p. 4.

<sup>63</sup> The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions stated that “[m]ass graves warrant investigations into the circumstances of unlawful death, the causes of death, as well as the manner of disposal of the bodies.” See United Nations General Assembly (2020) [Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Mass graves, highlighting the multitude of sites of mass killings and unlawful deaths across history and the world](#), UN Doc A/75/384, para 18.

## Part 4 and 5 - Role and functions of the Agency

### Independence, impartiality and transparency

Part 4 provides for the legal status of the Agency, stating that it “shall be independent in the performance of its functions”.

According to the Bournemouth Protocol, “in order for an investigation to be perceived as legitimate in the eyes of an affected community ... any investigative team must not only operate with independence and impartiality, they must be seen to do so”.<sup>64</sup> The Bournemouth Protocol also states that all stages of investigation, exhumation and return of remains should be as transparent as possible in order to support public scrutiny of the process.<sup>65</sup>

While Head 9(2) stipulates that the Agency shall be independent, other heads may compromise such independence. For example, in its description of how the performance of the Agency is to be monitored, Head 20 sets out a close reporting relationship between the sponsoring Minister and the Agency but it does not provide for such information to be made publicly available. In addition, Head 26 prohibits the disclosure of information relating to functions of the Agency. While this may be necessary in some circumstances, it is important that such a provision does not lead to the development of a working culture of secrecy and concealment.

**The Commission recommends that such monitoring reports should be laid before the Houses of the Oireachtas to increase transparency and accountability around the work of the Agency.**

### Participation and access to information

The role and functions of the Agency does not adequately address the importance of survivor and family participation. For example, Head 27 requires the notification of landowners with respect to the conduct of works but there is no requirement to inform survivors or families members. Also, and linked to the issue of transparency, it is noted

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<sup>64</sup> Bournemouth University, [Bournemouth Protocol on Mass Grave Protection and Investigation](#), 2020: , p. 9.

<sup>65</sup> Bournemouth University, [Bournemouth Protocol on Mass Grave Protection and Investigation](#), 2020: , p. 9.

that Head 44 and Head 45 will have the effect of sealing documents and records obtained by the Agency during the course of an intervention for a period of 30 years.<sup>66</sup>

The *United Nations Principles For The Protection And Promotion Of Human Rights Through Action To Combat Impunity*, states that the right to truth “includes an “inalienable right” to know the truth about past events, a duty to preserve memory, and a victim’s right to know”.<sup>67</sup>

The Minnesota Protocol also provides that:

“States must enable the participation of families in investigations into unlawful deaths, and ensure they obtain available information on the circumstances, events and causes of death, and the location and condition of the remains insofar as these have been determined”.<sup>68</sup>

According to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, consultations with affected individuals should guide management and custodianship of both the site/s and their human remains, and that key principles such as “respect for the deceased; personalization for their loved ones, specifically when individuation is not possible; and memorialization” should form the basis of this engagement.<sup>69</sup>

Ability to obtain information, in particular archives, is also important in the context of transitional justice processes. Access to archives is essential for societies to learn and to know the truth about history. Although protecting archives is important, it is equally important to make archives publically available.<sup>70</sup>

**The Commission recommends that the General Scheme, in particular the role and functions of the Agency, be revised to ensure ongoing and effective consultation and participation which includes survivors and families of the deceased.**

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<sup>66</sup> Section 10 of the National Archives Act 1986

<sup>67</sup> UN Doc E/CN.4/2005/102, Principles 2-4.

<sup>68</sup> Minnesota Protocol, 2016.

<sup>69</sup> United Nations General Assembly (2020) [Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions: Mass graves, highlighting the multitude of sites of mass killings and unlawful deaths across history and the world](#), UN Doc A/75/384, para 77.

<sup>70</sup> UN Human Rights Council, [Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice](#). A/HRC/45/45, 9 July 2020, p. 19.

**The Commission recommends further examination of the need to ensure that affected individuals and the public have access to information, including access to relevant archives.**

### Return of human remains to family members (Head 33)

Head 33 states that where remains have been exhumed, the Agency shall, in consultation with the Sponsoring Minister, make such final arrangements for the remains as it deems appropriate, including but not limited to arranging re-internment at a place and in a manner chosen by the Agency, or where “feasible to do so, releasing remains to family members of the deceased”.

When determining the most appropriate manner of re-internment the Agency shall have regard to:

- (a) the dignity of the deceased;
- (b) the stated wishes of family members;
- (c) the extent, if any, to which it may be feasible to return remains to family members;
- (d) the religious practices of the deceased, if any; and
- (e) the conditions of the remains.

Head 33(2) states that arrangement to reintern or return human remains shall occur no later than 5 years from the date that exhumation works were carried out.

The ECtHR has found breaches of the right to respect for family and private life where there was an unjustified delay in returning bodies to family members to bury the deceased.<sup>71</sup> The ECtHR has also held that the non-return of human remains and burial in unspecific locations could constitute a violation of the right to private and family life. Also, international law makes clear that States are under an obligation to return any remains to the family, as well as any personal effects, or to provide the families with access to the burial site.<sup>72</sup>

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<sup>71</sup> See for example *Pannullo and Forte v. France*, Number 37794/97, ECHR 2001-X and *Gerard v. France*, Number 22590/04 *Sabanchiyeva and others v Russia*, Judgment, ECtHR Application No 38450/05 (6 June 2013) paras 117-134.

<sup>72</sup> See for further guidance: International Committee of the Red Cross, Rule 114. Also see Principle (2) 4 of the Guiding Principles that specified that “the return [of human remains] should also involve the means and procedures need to ensure a dignified burial consistent with the wishes of and cultural customs of

**The Commission recommends that this Head be revised to place a statutory duty on the State to return, on request and without delay, the identified human remains and personal artefacts to families once the intervention and identification has been completed.**

**The Commission further recommends that where human remains cannot be returned that that proposed legislation should specify that the State shall bury the remains in a specified location and in a manner that respects the religious or cultural belief of the deceased, and where relevant, that this occurs in close consultation with family members.**

### The obligation to preserve and protect

The General Scheme is silent on the steps the State should take to preserve and protect human remains that have been identified but not claimed, or that have not been identified.<sup>73</sup> The Bournemouth Protocol advises that in relation to human remains that are identified but not claimed or, where identification is not possible:

“[a] record should be kept active in order to allow future identification and subsequent notification to relatives and interested parties, including state authorities. Preservations and longer-term storage measures are needed to safeguard the prospect of future identification. Where preservation and storage measures are unavailable or inappropriate, unidentified human remains may be buried in marked graves according to the likely cultural or appropriate religious customs of the deceased. In order to ensure the possibility of identification in the future. [C]remation should, wherever possible, be avoided”.<sup>74</sup>

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the families and their communities”. Furthermore, Article 21(4) of the ICRC Model Law on Missing Persons states that “human remains and personal effects shall be returned to families”. Also, although Ireland has not ratified the CED, it states that states the obligation on States to return the human remains of disappeared to family members. Of note jurisprudence from the Inter-American Court of Human Rights has states that “When the mortal remains are found and identified, the State must return them to their next of kin as soon as possible, as having proved the relationship genetically, so that they can be honoured according to their respective creeds.” - *Pueblo Bello Massacre Colombia*, Judgment on Merits, Reparations and Costs, Inter-American Court of Human Rights Series C No 140 (31 January 2006) para 273.

<sup>73</sup> See a Minnesota Protocol, section E on Identification of Dead Bodies, p. 24.

<sup>74</sup> Bournemouth University, *Bournemouth Protocol on Mass Grave Protection and Investigation*, 2020: p. 13. Also, It is noted that burial of unclaimed and unidentified remains is deemed appropriate by the Mytilini Declaration concerned with the dignified treatment of missing and deceased persons and their

The Bournemouth Protocol also identifies specific methods to ensure traceability, including:

- Documentation and mapping of the site, including mapping of the location of individual bodies within the site;
- Numbering and tagging of each body and bag/coffin with reference to DNA sample number and storage;
- The use of signs to mark the site; and
- The safe storage of information to ensure its security.<sup>75</sup>

**The Commission recommends that proposed legislation address the need to preserve, protect and ensure the traceability of unclaimed or unidentified human remains to allow for possible future identification. In this regard, proposed legislation should expressly prohibit cremation as a final arrangement for unclaimed or unidentified remains.**

The General Scheme is equally silent on the steps that should be taken to preserve and protect sites that relate to ‘manifestly inappropriate burial’, but where an intervention was not ordered under Head 3, or excluded under Head 6. A legal framework that, as far as practicable, protects and preserves all ‘manifestly inappropriate burials’ will ensure the integrity of evidence should a possibility to investigate arise in the future.<sup>76</sup>

**The Commission recommends that proposed legislation should, as far as practicable, protect and preserve sites, even where intervention has been deemed inappropriate in order to allow for investigation in the future.**

## Part 6: The identification process

### Multidisciplinary approach to the identification process

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families as a consequence of migrant journeys (The Mytilini Declaration for the Dignified Treatment of all Missing and Deceased Persons and their Families as a Consequence of Migrant Journeys (2018) at A.16). The ICRC Model Law on the Missing in its commentary to Article 22 (Burial and exhumation) states ‘[c]remation should be avoided, except where necessary (e.g. for reasons of public health) and a record of the reason for it kept, as well as the ashes’ (p. 48).

<sup>75</sup> Ibid.

<sup>76</sup> Bournemouth University, *Bournemouth Protocol on Mass Grave Protection and Investigation*, 2020: p. 16.

The General Scheme focuses on DNA as the sole technique for the identification process.

However, international guidance suggests a more comprehensive approach which examines all the relevant and available information, such as for example, sex, age, ancestry, stature, distinguishing traits in the body, personal effects, historical context information, circumstances of disappearance/death, burial type, relationship with other persons in the same grave.<sup>77</sup> The *Forensic Guide to the Investigation, Recovery and Analysis of Human Skeletal Remains*, states that although genetic analysis is extremely important, it nevertheless has its limitations.<sup>78</sup> Therefore it states that it is necessary that a “multidisciplinary and comprehensive analysis of all the information should be undertaken”. In this regard, it recommends the creation of an identification commission where forensic experts and laboratory teams can discuss all the characteristics of this case to provide an integrated forensic report that sets out a “unique and unequivocal position on the identification achieved”.<sup>79</sup>

**The Commission recommends that Part 6 of the General Scheme be revised to facilitate a comprehensive and multidisciplinary approach to the identification process.**

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<sup>77</sup> See the Bournemouth Protocol. Also see *Forensic Guide to the Investigation, Recovery and Analysis of Human Skeletal Remains*, August 2020 <https://www.eaaf.org/wp-content/uploads/2020/11/EAFF-Forensic-Guide-for-the-investigation-recovery-and-analysis-of-human-skeletal-remains.pdf>

<sup>78</sup> The Guide states that “[i]t should be borne in mind that, despite the extraordinary discriminatory power

of genetic testing and its possibility of expressing its results in statistical terms, as a percentage of likelihood, there are also some limitations, namely:

- Degraded DNA in bone/tooth.
- Contaminated DNA.
- PCR inhibition.
- False positives and negatives.
- Incomplete reference samples: absence of close biological relatives of the missing person.
- Closed, endogamous groups in the community affected.
- Lack of knowledge of the context of death/disappearance.
- Lack of a priori and a posteriori information.
- Difficulties in the follow-up of genetic matches by making a comparison
  - with all the non-genetic data available.
  - Lack of an identification statistical value.

All these potential limitations make it necessary that the genetic results be considered in the general context of the case; for this purpose, a multidisciplinary and comprehensive analysis of all the information should be undertaken.” Argentine Forensic Anthropology Team, *Forensic Guide to the Investigation, Recovery and Analysis of Human Skeletal Remains*, August 2020 <https://www.eaaf.org/wp-content/uploads/2020/11/EAFF-Forensic-Guide-for-the-investigation-recovery-and-analysis-of-human-skeletal-remains.pdf>, at page 24=25.

<sup>79</sup> Ibid.

## 'Pilot programme' (Head 47)

Head 47 allows for the Agency to direct a 'pilot programme' of analysis to be carried out on a sample number of bodies exhumed from the site and, based on the sample results, the Director of the Agency will determine whether to proceed to a full identification programme. In making this determination, the Director shall have particular regard to the "proportion of samples tested from which DNA profiles were derived of sufficient standard to enable analysis". The Director shall not proceed to full identification programme unless she or he has "reason to believe that there is a reasonable prospect that bodies exhumed from a site may be identified through such a programme."

States are under an obligation to make best efforts to identify the human remains found in mass graves. Identification is arguably linked to the positive obligation to investigate an individual's death or disappearance. Also, it is a precondition for the return of human remains to families to facilitate burial and also for families to receive death certificates. Indeed, customary international humanitarian law provides that once the fate of a missing person has been determined to be death, all available means must be undertaken to ensure recovery of the body and any personal affects.<sup>80</sup>

"The obligation to identify the dead is an obligation of means, and parties have to use their best efforts and all means at their disposal in this respect.

According to the practice collected, the measures envisaged here include collecting one half of the double identity disk, autopsies, the recording of autopsies, the establishment of death certificates, the recording of the disposal of the dead, burial in individual graves, prohibition of collective graves without prior identification, and the proper marking of graves. Practice also suggests that exhumation combined with the application of forensic methods, including DNA testing, may be an appropriate method of identifying the dead after burial."<sup>81</sup>

It is unclear how the proposed pilot programme will work in practice. Implementation of a pilot project based on limited sample analysis may have the effect of preventing

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<sup>80</sup> ICRC, Customary International Humanitarian Law, Rule 116

<sup>81</sup> Ibid, see interpretation at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule116](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule116)

individual identification which may in turn fall short of the State's human rights obligations to ensure the proper investigation into missing persons determined to be dead. Also, it is noted that potential family members have no recourse to appeal a determination of this kind which may have significant implications on their private and family life. In cases that engage fundamental rights, the Irish Courts have recognised the need for procedural safeguards such as an independent review mechanism.<sup>82</sup>

**The Commission recommends further examination of the proposed pilot programme to ensure that it aligns with the State's obligations to carry out an effective investigation and that it reflects the State's 'best efforts' to identify and return remains to family members.**

**Should a pilot programme proceed, the Commission recommends revising this Head to ensure that necessary safeguards are in place to protect the rights of potential family members, including a mechanism to independently review decisions under this Head.**

### **DNA (Historic Remains) Database System (Heads 48 and 49)**

Head 48 provides that the DNA (Historic Remains) Database – either as a standalone database or using the DNA Database System established under the *Criminal Justice (Forensic Evidence and DNA Database System) Act 2014*<sup>83</sup> – will be utilised by Forensic Science Ireland to confidentially store DNA profiles created in accordance with this General Scheme. Head 49 provides that “the purpose of the DNA (Historic Remains) Database is to facilitate the analysis of DNA profiles in order to achieve a familial match with a person or persons who believe they may be related to persons exhumed from a specified site.” Head 48(8) provides that it will be an offence to use DNA samples or other personal or biological data for any other purpose. Heads 60 and 61 provide for the destruction of biological samples and DNA profiles within a specified time-frame. Legislation providing for the taking of bodily samples, the creation of DNA profiles, the use of DNA profiles, and the retention and storage of DNA profiles engages important questions of human rights, particularly in relation to the fundamental constitutional

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<sup>82</sup> See most recently for example [Damache v. Minister for Justice](#) [2020] IESC 63.

<sup>83</sup> This Act provided for the establishment of a DNA Database System for use by An Garda Síochána as an intelligence source for criminal investigations.

rights of bodily integrity<sup>84</sup> and privacy.<sup>85</sup> The ECtHR has held that the collection and retention of DNA profiles constitutes an interference with the right to respect for private life.<sup>86</sup> An interference with this right can be justified if it is in accordance with the law, pursues a legitimate aim,<sup>87</sup> and is necessary in a democratic society.<sup>88</sup> The ECtHR has emphasised the importance of having clear and detailed rules that govern the scope and application of measures that allow for the taking of bodily samples and the creation of DNA profiles, as well as minimum safeguards concerning duration, storage, usage, access to third parties, procedures for preserving the integrity and confidentiality of data and procedures for its destruction.<sup>89</sup>

The Bournemouth Protocol states that; “data must be collected in a sensitive manner that protects the rights of survivors and the deceased” and that: “practices relating to personal data, genetic information and storage of such information must conform with domestic data provisions and be cognisant of international standards”.<sup>90</sup>

The International Committee of the Red Cross (the ‘ICRC’) Model Rules states that it is important to ensure that a DNA analysis performed for the purpose of identification of a missing person be separated from any other use, for example, in criminal proceedings, otherwise it may inhibit recourse to this form of information gathering on the part of relatives and interested parties. It further warns:

“these measures of protection must not in any way serve as an obstacle to locating or identifying the missing person. It is imperative therefore that within

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<sup>84</sup> Ryan v Attorney General [1965] IR 294.

<sup>85</sup> Article 40.3.1 of the Irish Constitution guarantees the unenumerated right to respect for private life as one of the fundamental personal rights of the citizen. See McGee v AG [1974] IR 284; Norris v AG [1984] IR 36 See also IHRC, [Safeguards in DNA Database Scheme of Bill ‘Inadequate’](#), Press release, 08 August 2007; IHRC, [Observations on the Criminal Justice \(Forensic Evidence and DNA Database System\) Bill 2010](#), March 2010; IHRC, [Observations on the Criminal Justice \(Forensic Evidence DNA Database System\) Bill 2013](#), March 2014.

<sup>86</sup> See S. and Marper v. the United Kingdom, [GC], Nos. 30562/04 and 30566/04, 4 December 2008, paras 75–77.

<sup>87</sup> In the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>88</sup> Article 8(2) of the ECHR. The ECtHR has recognised this last factor, “necessary in a democratic society”, involves a proportionality test in which the Court asks whether the interference is proportionate to the legitimate aim being pursued.

<sup>89</sup> S. and Marper v. the United Kingdom, [GC], Nos. 30562/04 and 30566/04, 4 December 2008, para 99.

<sup>90</sup> Bournemouth University, [The Bournemouth Protocol on Mass Grave Protection and Investigation](#), 2020, p. 12.

organizations that collect, process or store personal data, clear procedures are put in place to ensure respect of privacy together with a system of accountability and control”.<sup>91</sup>

**The Commission recommends that legislation of this kind should be underpinned by rigorous safeguards governing the taking, retention, storage, sharing and destruction of bodily samples and DNA profiles, and the operation of the DNA (Historic Remains) Database System.**

### Participation in the programme (Head 53)

Head 53 provides that the Agency may invite people who believe “on reasonable grounds” that they 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 the identification programme.

There is no international guidance on the definition of family in the context of mass burials. The *Red Cross Guidelines for the use of forensic genetics in investigations into human rights and international humanitarian law violations* recommend that:

“[s]amples should be collected from as many relatives of the missing person as necessary, preferably first-degree relatives (parents, siblings and offspring)”.<sup>92</sup>

The Guidelines also state that if it is not possible to collect reference samples from the victim’s first-degree relatives, samples should be collected from second-degree relatives. In this case, a greater number of relatives are required. It further states that when there are not enough informative relatives, a request can be made to exhume the bodies of relatives in order to take bone samples and obtain valuable genetic information.<sup>93</sup>

Whilst there may be strong scientific grounds to prioritise the sampling of first-degree relatives, access to the programme need not be drafted in a manner that automatically

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<sup>91</sup> ICRC, Advisory Service on International Humanitarian Law, Guiding Principles/Model Law on the Missing, Principles for Legislating the Situation of Persons Missing as a Result of Armed Conflict or Internal Violence: Measures to prevent persons from going missing and to protect the rights and interests of the missing and their families, p. 40.

<sup>92</sup> ICRC, [Guidelines for the Use of Forensic Genetics in Investigations into Human Rights and International Humanitarian Law Violations](#), 2019, pp. 56-57.

<sup>93</sup> Ibid.

excludes other relatives, including for example, grand-parents or nieces and nephews of the deceased. This may be of particular relevance in the context of identification where it is not possible to collect DNA from first-degree relatives.

**The Commission recommends further examination of the categories of persons deemed eligible to participate in the programme.**

### Review (Head 62)

Head 62 provides that the Minister of Justice may, at his/her own initiative or on request by the Sponsoring Minister, review the operation of this Part insofar as it relates to the operation of the DNA (Historic Remains) Database System.

There is a lack of clarity over how, or when, such a review would be carried out (i.e. would there be a public consultation with relevant individuals, and would a report be published and presented before the Houses of the Oireachtas).

**The Commission recommends that Head 62 be amended to clarify the purpose, structure, and scope of the review into the operation of Part 6. This should include an explicit requirement to review the operation after a set period of time. Any such review should include the meaningful participation of families, groups representing survivors and/or families, persons with human rights and/or data protection expertise, and other relevant persons or groups.**



**16 – 22 Sráid na Faiche,  
Baile Átha Cliath, D07 CR20**  
16 – 22 Green Street,  
Dublin, D07 CR20

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