

# Redressing Gendered Mistreatment: Magdalen Laundries, Symphysiotomy and Mother and Babies Homes

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## **I. Introduction**

Historical abuse in Ireland is a product of claimed noble intentions of institutions and professions, ill designed and poorly resourced practices, and atrocious harms done to those individuals who the institutions claimed to serve. After the establishment of the Irish Free State in 1922, the State maintained “inherited networks of social control”, including Magdalene institutions, County Homes, Mother and Baby Homes, Industrial and Reformatory schools, psychiatric hospitals and prisons.<sup>1</sup> In addition, strong religious influence in politics and the medical profession shaped the nature of hospitals in turn influenced choice of medical procedure and the nature of care in the institutions.<sup>2</sup> Among these wide ranging forms of historical abuse, this chapter will examine the cases of the Magdalene laundries, the medical procedure of symphysiotomy and Mother and Baby Homes. These institutions and practices particularly demonstrate the gendered dimension and nature of historical abuse and the modern-day efforts at addressing a legacy of human rights violations arising from these contexts.

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<sup>1</sup> Eoin O’Sullivan and Ian O’Donnell, *Coercive Confinement in Post-Independence Ireland* (Manchester University Press 2012) 258

<sup>2</sup> Lindsey Earner-Byrne, “Moral Prescription: The Irish Medical Profession, the Roman Catholic Church and the Prohibition of Birth Control in Twentieth-century Ireland” in Catherine Cox and Maria Luddy (eds) *Cultures of Care in Irish Medical History, 1750–1970* (New York: Palgrave Macmillan 2010) 207-228

Part II will examine the gendered nature of historical abuse in Ireland, with particular emphasis on these institutions and practices, and argue that these institutions formed part of a broader nation building project in early 20th century Ireland, which had particular concern for the production of a narrow morality and role for women in Ireland as primarily mothers and the bearers of children. Part III will consider the nature and conditions under which these historical issues began to be investigated and redressed in modern Ireland. It will argue that while these institutions and gendered harms have been addressed as part of a broader examination of Ireland's historical abuse, similarly to other consolidated democracies, there has been a gendered dimension in the manner in which harm against women and girls has been prioritised in the sequencing of investigation and redress. Parts IV, V and VI will evaluate the investigations and redress schemes to date for Magdalene Laundries, Symphysiotomy and Mother and Baby Homes and argue that a piecemeal approach that seeks to minimise the extent of the legal recognition of wrongdoing is consistent across these areas. Part VII will conclude by arguing that several shared structural challenges face those seeking to effectively redress the gendered nature of the harm and failures of redress strategies to date.

## **II. Elements of Irish Historical Abuse against Women**

In Ireland, after the establishment of the Irish Free State in 1922, Church and State authorities engaged in a process of nation building: "at the core of the relationship between Church and State was the ideological and spiritual construct of an imagined nation, that is, a nation of Irish Catholic virtues without the unnatural sexual vices that were seen by Free State ideologues, lay and clerical, as corrupting the rest of the world."<sup>3</sup> This process of nation

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<sup>3</sup> Anthony Keating, "Church, State, and Sexual Crime against Children in Ireland after 1922" (2004 - 2006) 5(7) *Radharc* 155-180, 157-8

building enabled the continued use of institutions that predated the Free State and accelerated the influence of the Catholic church and Catholic morality. Mairead Enright writes: “in the post-colonial state, Catholicism became the defining characteristic of Irishness, understood in opposition to Englishness.”<sup>4</sup> Three manifestations of this nation building process were Magdalene laundries, Mother and Baby Homes and the symphysiotomy medical procedure.

First, the earliest Magdalene laundries were established in eighteenth century, throughout Europe, North America and Australia,<sup>5</sup> and operated in Ireland between 1795 and 1996. At an absolute minimum, approximately 14,607 women are known to have been detained in a Magdalen Laundry from the foundation of the Irish State in 1922 until the closure of the last Laundry in 1996, though victim-survivor groups suggest these figures are underestimated.<sup>6</sup> No new Magdalene laundries were established after the foundation of the Irish State in 1922, but reliance on church-run institutions was affirmed and fortified, continuing the “civilising” mission of the church begun under British rule of Ireland.<sup>7</sup>

Gender is a defining feature in the history of Magdalene Laundries and there are allegations of a variety of forms of gendered abuse.<sup>8</sup> The claimed purposes of the

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<sup>4</sup> Mairead Enright, ‘Involuntary Patriotism’: Judgment, Women and the National Identity on the Island of Ireland” in Mairead Enright, Julie McCandless and Aoife O’Donoghue (eds) *Northern/Irish Feminist Judgments: Judges’ Trouble and the Gendered Politics of Identity* (Oxford: Bloomsbury 2017) 27-49, 31

<sup>5</sup> Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries, Chapter 3: History of the Magdalene Laundries and institutions within the scope of the report para. 69; James Franklin, “Convent slave laundries? Magdalen asylums in Australia”, (2013) 34 *Journal of the Australian Catholic Historical Society* 70-90

<sup>6</sup> Justice for Magdalenes, State involvement in the Magdalene Laundries: JFM’s principal submissions to the Inter-departmental Committee to establish the facts of State involvement with the Magdalene Laundries (February 2013), available at [http://www.magdalenelaundries.com/State\\_Involvement\\_in\\_the\\_Magdalone\\_Laundries\\_public.pdf](http://www.magdalenelaundries.com/State_Involvement_in_the_Magdalone_Laundries_public.pdf) (Last visited 8-11-2016)

<sup>7</sup> Tom Inglis, *Moral Monopoly: The Rise and Fall of the Catholic Church in Modern Ireland* (1998 UCD Press), 140, 147-8

<sup>8</sup> Justice for Magdalenes, Submission to the United Nations Committee Against Torture, 46th Session May 2011, available at [http://www.magdalenelaundries.com/jfm\\_comm\\_on\\_torture\\_210411.pdf](http://www.magdalenelaundries.com/jfm_comm_on_torture_210411.pdf) (last visited 03-11-16)

Laundries was to house and reform “fallen women”: those involved in prostitution, or (alleged to be) involved in extra-marital sexual activity, including unmarried mothers. James Smith suggests that the Magdalene system facilitated the creation of the post-colonial Irish state with a separate, Catholic identity, untainted by ideas of prostitution, single motherhood or sexual violence.<sup>9</sup>

Secondly, symphysiotomy is a surgical procedure designed to enlarge a woman’s pelvis during childbirth by partially cutting the fibres which join the pubic bones at the front of the pelvis. While symphysiotomy was introduced in the late 18<sup>th</sup> century, interest in the procedure revived in some Irish hospitals in the early twentieth century until the 1960s and 1970s as an alternative to Caesarian section, which was viewed as dangerous and restricting the possibility of continued pregnancies.<sup>10</sup> The State commissioned Walsh report concludes that approximately 1500 symphysiotomies were carried out between the late 1940s and early 1960s.<sup>11</sup> The revived use of symphysiotomy arises from a confluence of legal and religious gendered restrictions on women’s bodily autonomy, with contraception illegal during this period, the Walsh report concluded that “the lack of options to control fertility was one of the key reasons for the return to symphysiotomy in mid-20th century Ireland.”<sup>12</sup>

Thirdly, in Ireland, unmarried mothers and their children were also considered as an explicitly gendered social problem from the 1920s.<sup>13</sup> Maria Luddy articulates the perceived challenge posed by unmarried mothers and their children: “Representing possible

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<sup>9</sup> James Smith *Ireland’s Magdalen Laundries and the Nation’s Architecture of Containment*, (2007 University of Notre Dame Press)

<sup>10</sup> Marie O’Connor, *Bodily Harm: Symphysiotomy and Pubiotomy in Ireland, 1944-92* (Dublin: Everttype, 2001), 3; *Farrell v Ryan*, [2015] IEHC 275 para. 7.3

<sup>11</sup> Oonagh Walsh, *Report on Symphysiotomy 1944-1984* (Dublin: Department of Health 2012), 4

<sup>12</sup> *ibid*, 21

<sup>13</sup> Paul Garrett, “Unmarried Mothers in the Republic of Ireland” (2016) 16(6) *Journal of Social Work* 708-725

immorality, a drain on public finances and someone in need not only of rescue, but also of institutionalisation, the unmarried mother had become, by the foundation of the Irish Free State in 1922, a symbol of unacceptable sexual activity and a problem that had the potential to blight the reputation not only of the family but of the nation.”<sup>14</sup> O’Sullivan and Raftery have also noted that ‘the language of criminality was deliberately invoked’ in discussions of unmarried mothers ‘highlighting the perception of such women as “criminal”’.<sup>15</sup> Diarmaid Ferriter describes the institutional solution to this perceived problem:

“The solution to the problem of illegitimate births was believed to lie in the establishment of antenatal homes for expectant unmarried mothers and institutions where the mother and children ‘might be maintained together for at least the first year of the child’s life’ (the idea being that the child could then be fostered). It was also believed that such homes were necessary ‘where by appropriate training and example, self-respect is restored’, preventing the women from staying in county homes at the expense of the ratepayers, or ‘drifting into a life of degradation’. In the summer of 1922, proposals that unmarried mothers go to institutions other than workhouses (now referred to as county homes) were raised by the religious orders, the main concern being, it seems, that at that time such women were ‘not segregated’ from more ‘hardened sinners’. The state’s acceptance of such proposals laid the foundation for the infrastructure of religious order-run mother and baby homes that operated from 1922 until the 1970s.”<sup>16</sup>

Approximately 23,000 children were born into nine mother and baby homes between 1904 and 1996.<sup>17</sup> Similar institutions, county homes, operated until the 1960s and were funded and managed by the State, with some additional assistance from female religious congregations.<sup>18</sup> In 1966 there were 47 such homes.<sup>19</sup> Finally, there were around 300 private

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<sup>14</sup> Maria Luddy, *Unmarried Mothers in Ireland, 1880–1973*, (2011) *Women’s History Review*, 20:1, 109-126 , 110; Maria Luddy, “Moral Rescue and Unmarried Mothers in Ireland in the 1920s” (2001) 30 *Women’s Studies* 797-817

<sup>15</sup> Mary Raftery and Eoin O’Sullivan, *Suffer the Little Children: The Inside Story of Ireland’s Industrial Schools* (Dublin, 1999), 73.

<sup>16</sup> Diarmaid Ferriter, *Occasions of Sin: Sex & Society in Modern Ireland*, (London: Profile Books 2009) 155

<sup>17</sup> Report of the Inter-Departmental Group on Mother and Baby Homes (2014), available at <https://www.dcyh.gov.ie/documents/publications/20140716InterdepartReportMothBabyHomes.pdf>, 14

<sup>18</sup> *ibid*

<sup>19</sup> Response to Parliamentary Question: Dáil Éireann - Volume 220 - 17 February, 1966

maternity homes in total registered under the 1934 Registration of Maternity Homes Act. Women in these homes were strongly encouraged to give up their children based on “the firm conviction that unmarried mothers were fundamentally unfit to have custody of their own children.”<sup>20</sup> Mother and Baby Homes functioned as a ‘form of internal exile’ for many women.<sup>21</sup>

These institutions and practices contribute to a dominant interest of church and State authorities with the management of perceived immorality and vice, especially for women, and the construction of a normative Irishwoman as a wife capable of bearing and rearing a large family of children in the context of marriage. The operation of these institutions and practices began to cease in the 1970s, though the last Magdalene laundry closed in 1996. In this period, the tireless and lengthy work of activists changed Ireland, through the use of litigation and political activism, opening new if limited opportunities for women to control their bodies and choices beyond narrow nationalistic constructions of womanhood and vice, such as the eventual decriminalisation of contraception.<sup>22</sup> However, it is not until recent decades that Ireland has begun to investigate and redress its historical marginalisation, discrimination and harm against women.

### **III. From Crises to Process: The Dynamics of Investigating Historical Abuse**

In recent decades, Ireland has begun to reckon with its past legacy of wrongdoing since the foundation of the State. Anne-Marie McAlinden identified three distinct periods of inquiries, some contemporary to events and some investigating historical abuses.<sup>23</sup> From the 1930s

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<sup>20</sup> Moira Maguire, “Foreign Adoptions and the Evolution of Irish Adoption Policy 1945-52” (2002) *Journal of Social History* 387-404, 389

<sup>21</sup> Fintan O’Toole, Dark elements of our past are also forces in our present. *The Irish Times*, 10 June 2014

<sup>22</sup> Mairead Enright, ‘Involuntary Patriotism’: Judgment, Women and the National Identity on the Island of Ireland” in Mairead Enright, Julie McCandless and Aoife O’Donoghue (eds) *Northern/Irish Feminist Judgments: Judges’ Trouble and the Gendered Politics of Identity* (Oxford: Bloomsbury 2017) 27-49

<sup>23</sup> Anne-Marie McAlinden ‘An Inconvenient Truth: Barriers to Truth Recovery in the Aftermath of Institutional Child Abuse in Ireland’ (2012) 33 *Legal Studies* 5

to the 1970s the focus was on the lack of basic care within institutional environments;<sup>24</sup> from the 1970s to the 1990s attention turned to abuse within the family and the failure of child protection services;<sup>25</sup> and from the late 1990s, four commissions of inquiry have examined child sexual abuse in diocesan and residential settings and the response of church and state authorities,<sup>26</sup> with further investigations into State involvement in the Magdalene Laundries, the practice of symphysiotomy and an ongoing Commission of Inquiry into the practices of Mother and Baby Homes and a representative sample of county homes.

The starting point for investigating or redressing historical abuse in Ireland has tended to be denial of responsibility for wrongdoing from both State and private actors, including church authorities.<sup>27</sup> The Irish government's original position was that the State had no responsibility for nor played any historical role in the Magdalene laundries.<sup>28</sup> In the context of Mother and Baby homes, there were several attempts in the national media to deny the veracity of the historical records gathered by Catherine Coreless regarding the extent and circumstances of deaths in the Mother and Baby Home in Tuam, Co. Galway.<sup>29</sup> In the context of symphysiotomy, the Irish state has rejected the recommendations of the United Nations

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<sup>24</sup> Report of the Commission of Inquiry into the Reformatory and Industrial School System, 1934–1936 (London: The Stationery Office, 1936) ('The Cussen Report'); *Reformatory and Industrial Schools System Report* (London: The Stationery Office, 1970) ('The Kennedy Report').

<sup>25</sup> The Report of the Kilkenny Incest Investigation (London: The Stationery Office, 1993); North Western Health Board Report of the Inquiry into the West of Ireland Farmer Case (Manorhamilton: North Western Health Board, 1998).

<sup>26</sup> *Ferns Report* (Dublin: Government Publications 2005) Dublin; *Report by Commission of Investigation into the handling by Church and State authorities of allegations and suspicions of child abuse against clerics of the Catholic Archdiocese of Dublin* (Dublin: Department of Justice, Equality and Law Reform 2009) (*Murphy Report*); *The Commission to Inquire into Child Abuse Report* (Dublin: Government Publications 2009) (*Ryan Report*); Commission of Investigation, *Report into the Catholic Diocese of Cloyne* (Dublin: Department of Justice and Law Reform, 2011) (*Cloyne Report*).

<sup>27</sup> Stanley Cohen 'State crimes of previous regimes: knowledge, accountability and the policing of the past' (1995) 20 *Law and Social Inquiry* 7, 12-22

<sup>28</sup> O'Keeffe criticised for referring to Magdalen women as 'employees' Irish Times 19th September 2009; Irish Human Rights Commission, Assessment of the Human Rights Issues Arising in relation to the "Magdalen Laundries" November 2010, para 8.

<sup>29</sup> Rush to moralise over Tuam has run ahead of the facts The Irish Times 9 March 2017; John Waters attacks media 'hoax' over Tuam scandal The Irish Times 12 November 2017; Diarmuid Ferriter: "This erroneous assertion that 800 bodies were dumped in a septic tank. That is not true", <https://www.youtube.com/watch?v=fpMLB1icn0w>

Human Rights Committee, concluding that obstetricians at the time were not perpetrators who should now be punished and noted that Irish and international studies indicate that symphysiotomy is not a banned procedure but continues to have a place in obstetrics in certain limited circumstances.<sup>30</sup>

In Ireland, high profile media reports, literature and memoir and legal cases of child sexual abuse across the Irish church initially brought the broader issue of historical abuse into Irish public and political consciousness.<sup>31</sup> Subsequent inquiries into both residential institutions and diocesan child sexual abuse created the possibility to investigate Ireland's historical abuse comprehensively. However, such early investigations had gendered consequences. While child sexual abuse in residential schools affected both men and women, several forms of institutional abuse and practice were specific to women and girls. As a result of investigations into historical institutional and child sexual abuse by religious actors especially, the dominant narrative largely concerned boys abused by priests and other religious figures in institutional settings and initially minimised the extent to which (a) familial sexual abuse of both boys and girls and (b) historical non-sexual abuse of women, such as forced labour, detention or medical procedures, was addressed by State inquiries. Subsequent and separate efforts were required from victim-survivors and civil society to prompt the State to provide further forms of inquiry and redress for Magdalene laundries, Mother and Baby Homes and the surgical procedure symphysiotomy - all of which primarily affected women and girls. These dynamics suggest that emergent social forces and the diffusion of norms regarding disclosure of abuse can create new forms of exclusion or minimisation of harm that must be consciously counter-acted.

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<sup>30</sup> United Nations Human Rights Committee, Concluding observations on the fourth periodic report of Ireland Addendum: Information received from Ireland on follow - up to the concluding observations, CCPR /C/IRL/CO/4/Add.1, para. 23

<sup>31</sup> "How the Story of Abuse Emerged" *The Irish Times* 26 November 2009; Mannix Flynn's *Nothing to Say: A Novel*; *The God Squad*, Paddy Doyle; *States of Fear* (1999) and *Prime Time: Cardinal Secrets* (2002); *Suing the Pope* (2002)



This fragmentation of investigating and redressing historical abuse is not cost-neutral from a victim-survivor perspective. It is now 19 years since the initial efforts of the State to investigate institutional child sex abuse in the Commission to Inquire into Child Abuse began, representing a significant period of time for those who have been affected by institutions not initially investigated and redressed or those who suffered harm through multiple forms of institutionalisation, such as in an industrial school and a mother and baby home. Relatedly, each subsequent inquiry and redress mechanism has also been cheaper than the last, suggesting the State's incentive towards the minimisation of redress of historical abuse over time. The Commission of Investigation into Child Abuse cost approximately €86 million. The Residential Institutions Redress Board has cost the State in excess of €1 billion, while church institutions have paid a minority of the bill for compensation to victims of abuse in residential schools, with recent figures suggesting a payment of a mere 13% of the total bill.<sup>32</sup> In the context of symphysiotomy, part of the mandate given to Judge Yvonne Murphy for her 2014 report, was to “assess the merits and costs to the State of proceeding with an *ex-gratia* scheme relative to allowing the court process to proceed.”<sup>33</sup> The current Commission of Investigation into Mother and Baby Homes is estimated to cost at least €21.5m.<sup>34</sup> The Magdalene Restorative Justice scheme has cost approximately €25.7 million.<sup>35</sup> In 2011, the Public Accounts Committee reviewed the experience of Tribunals of Inquiry and endorsed the recommendation for the terms of reference of inquiries to be tightly drawn and that new lines of inquiry should be limited.<sup>36</sup> In light of significant resources and

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<sup>32</sup> *Comptroller and Auditor General, Special Report 96 - Cost of Child Abuse Inquiry and Redress* (2017)

<sup>33</sup> Yvonne Murphy, *Independent Review of Issues relating to Symphysiotomy* (Dublin: Department of Health 2014), 1

<sup>34</sup> <http://www.mbhcoi.ie/MBH.nsf/page/Terms%20of%20Reference-en>

<sup>35</sup> Office of the Ombudsman, *Opportunity Lost: An Investigation by the Ombudsman into the administration of the Magdalene Restorative Justice Scheme* (Dublin: Office of the Ombudsman 2017), 66

<sup>36</sup> Public Accounts Committee, *Third Interim Report on the Procurement of Legal Services by Public Bodies*, (Dublin: Dail Eireann, 2011) 25

time spent investigating and redressing historical abuse, the State's incentives towards a narrowly defined and restrictive approach are clear.

In this context, the efforts of victim-survivors and advocacy organisations to pursue investigations accountability and redress for historical abuse must be understood as involving all available mechanisms including legal, political, cultural and moral means. Symphysiotomy entered national prominence in 2010 with a television documentary,<sup>37</sup> but advocacy efforts were greatly enhanced by successful national litigation. In 2012 in *Kearney v McQuillan*, the Irish High Court and Supreme Court agreed that symphysiotomy was not a generally approved obstetric practice in 1969 and awarded Olivia Kearney €325,000 for being subjected to a post Caesarean-section symphysiotomy.<sup>38</sup> An inquiry into Mother and Baby Homes resulted from investigative journalism and dedicated historical research by local individuals, which led to the worldwide media coverage of revelations of the discovery of a significant amount of human remains of children and infants at the site of the Mother and Baby Home in Tuam, Co. Galway.<sup>39</sup> In addition to these national level approaches, it has been necessary to invoke international law and international human rights mechanisms to disrupt the attitude and process of the State to historical abuse and to shame a State into more effectively addressing a legacy of historical abuse. Magdalene Laundries were originally excluded from State-led national inquiries into child sexual abuse commenced in the late 20<sup>th</sup> century. In 2011, the United Nations Committee against Torture criticised Ireland's failure to address the Magdalene Laundries, in which girls and women were detained arbitrary and forced to engage in unpaid labour.<sup>40</sup> Similar efforts have been

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<sup>37</sup> Symphysiotomy - A Brutal Practice, broadcast 18th February 2010, available at <https://www.rte.ie/news/player/2010/0218/2704182-brutal-procedure-the-symphysiotomy-scandal/>

<sup>38</sup> *Kearney v McQuillan* [2012] IESC 43

<sup>39</sup> Dan Barry "The Lost Children of Tuam" 28 October 2017 New York Times

<sup>40</sup> United Nations Committee Against Torture, Concluding Observations CAT /C/IRL/CO/1

pursued in the symphysiotomy context,<sup>41</sup> while the issue of Mother and Baby Homes has also been referenced in several United Nations human rights treaty body mechanisms.<sup>42</sup>

This role for international law and international human rights mirrors the use and potential for shaming and scrutinising Ireland's record on ensuring and enhancing the equality and empowerment of women in its laws and policies. The national investigations and redress mechanisms for each of these instances of historical abuse - Magdalene Laundries, symphysiotomy and Mother and Baby Homes will now be considered.

#### **IV. Magdalene Laundries**

In 2011, prompted by a submission by the advocacy group Justice for Magdalenes, the United Nations Committee against Torture expressed grave concern at Ireland's failure to protect girls and women who were involuntarily confined between 1922 and 1996 in the Laundries, by failing to regulate and inspect their operations, where it was alleged that physical, emotional abuses and other ill-treatment were committed, amounting to breaches of the Convention.<sup>43</sup> The Committee also recommended that Ireland institute investigations into all allegations of torture and other cruel, inhuman or degrading treatment or punishment; prosecute and punish the perpetrators, and ensure that all victims obtain redress and have

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<sup>41</sup> United Nations Human Rights Committee, Concluding observations on the fourth periodic report of Ireland CCPR/C/IRL/CO/4; United Nations Committee Against Torture, Concluding Observations CAT /C/IRL/CO/2, paras. 27-8; United Nations Committee on the Elimination of Discrimination against Women, Concluding observations on the combined sixth and seventh periodic reports of Ireland CEDAW/C/IRL/CO/6-7, paras. 14-5

<sup>42</sup> United Nations Human Rights Committee, Concluding observations on the fourth periodic report of Ireland Addendum: Information received from Ireland on follow - up to the concluding observations, CCPR /C/IRL/CO/4/Add.1, paras. 1-3;

<sup>43</sup> United Nations Committee Against Torture, Concluding Observations CAT /C/IRL/CO/1, para. 21

an enforceable right to compensation, including the means for as full rehabilitation as possible.<sup>44</sup>

In response, Ireland appointed an Inter-Departmental Committee (IDC) to establish the facts of State involvement with the Magdalene Laundries. The McAleese report of the IDC included that approximately 14,607 women were detained in a Magdalen Laundry from the foundation of the Irish State in 1922 until the closure of the last Laundry in 1996, though victim-survivor groups suggest these figures are underestimated.<sup>45</sup> The report concluded that of the cases in which routes of entry to Magdalene Laundries are known, only 26.5 percent were referrals made or facilitated by the State.<sup>46</sup> Based on these findings, *An Taoiseach* Enda Kenny offered an apology in parliament to the women who resided in the Magdalene Laundries. The Taoiseach described the Magdalene laundries as "the nation's shame" and accepted the State's direct involvement:

"Therefore, I, as Taoiseach, on behalf of the State, the government and our citizens deeply regret and apologise unreservedly to all those women for the hurt that was done to them, and for any stigma they suffered, as a result of the time they spent in a Magdalene Laundry."<sup>47</sup>

This apology, while welcomed by some victims-survivors, eschewed framing the harm experienced as a question of legal rights and responsibilities. The McAleese report presented the testimony of victim-survivors about their experiences in the laundries as

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<sup>44</sup> *ibid.*

<sup>45</sup> Justice for Magdalenes, State involvement in the Magdalene Laundries: JFM's principal submissions to the Inter-departmental Committee to establish the facts of State involvement with the Magdalene Laundries (February 2013), available at [http://www.magdalenelaundries.com/State\\_Involvement\\_in\\_the\\_Magdalen\\_Laundries\\_public.pdf](http://www.magdalenelaundries.com/State_Involvement_in_the_Magdalen_Laundries_public.pdf) (Last visited 8-11-2016)

<sup>46</sup> Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries (Dublin: Department of Justice 2013) Introduction, para. 2

<sup>47</sup> <http://www.thejournal.ie/full-text-enda-kenny-magdalen-apology-801132-Feb2013/>

“stories”, rather than as evidence, and, claiming limitations arising due to its mandate, did not issue recommendations regarding accountability, responsibility or criminality.<sup>48</sup> The report minimised the representation of harm in the Laundries, drawing favourable comparisons to harm experienced in Residential and industrial schools and in diocesan settings.<sup>49</sup> Mairead Enright critiques the report’s findings, suggesting it “consists of disjointed quotations from anonymised women, selected apparently at random. The women are allowed scant quotations in which to share their stories. This is in contrast to, for instance, the long passages of quotation from identified benign male authority figures later in the chapter”.<sup>50</sup> The existence of two oral history projects counters the minimisation of harm and lived experience of survivors in the presentation of the McAleese report.<sup>51</sup>

The Laundries can be considered to be a regime that operated in a discriminatory and gendered system of detention entirely for women and girls who shared economic dependence, poverty and social exclusion. The Laundries enabled Irish society, not merely State institutions, to enforce compliance with a restrictive and religious social morality - and to isolate or deny those who failed to comply with its strictures. In the view of the Irish Human Rights and Equality Commission, the McAleese report indicates that the Laundries fulfilled a function that was otherwise the obligation of the State, as a significantly cheaper alternative to State care.<sup>52</sup> In addition, the conduct and findings of the McAleese committee risk exacerbating the discriminatory and gendered forms of harm experienced of victim-

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<sup>48</sup> Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries (Dublin: Department of Justice 2013) Chapter 19: Living and working conditions

<sup>49</sup> Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries (Dublin: Department of Justice 2013), Introduction, 18

<sup>50</sup> Mairead Enright, Critiquing the McAleese report, <http://humanrights.ie/economic-rights/critiquing-the-mcaleese-report/> last visited 10-01-18

<sup>51</sup> Katherine O'Donnell, Sinead Pembroke and Claire McGettrick. (2013) Magdalene Institutions: Recording an Oral and Archival History. Government of Ireland Collaborative Research Project, Irish Research Council; Waterford Memories, available at <https://www.waterfordmemories.com/recordings>

<sup>52</sup> Irish Human Rights and Equality Commission, Follow Up Report on State Involvement with Magdalene Laundries, (IHREC 2013), para. 60

survivors of the Laundries. Claire McGettrick of Justice for Magdalenes describes the manner in which the Committee interviewed survivors of the Laundries:

“Initially, the committee didn’t even want to speak to women in person, but we fought for that. The women gave their testimony verbally and then we were given very little notice of a second meeting where we were to look at the format of the initial testimony. Instead, the women were brought in one by one for a meeting with the commission where they asked repeated questions. Their overall impression was that they were being checked to ensure that their memories were correct. The women came out of those meetings very quiet and subdued. None of them, none of us, had been expecting for them to be questioned like that.”<sup>53</sup>

Based on the McAleese Report, Mr. Justice Quirke recommended an *ex gratia* scheme for the benefit of the women concerned based on the length of their documented service in the laundries including access to the full range of State provided health services. His report concluded that the women were entitled to recognition, through monetary payment, that they worked “within (and, arguably to an extent for), the State for a period of time.”<sup>54</sup> The Report concluded that the Magdalene women should be paid a minimum sum of €10,000 up to a maximum of €100,000, to reflect “work undertaken”. Further recommendations included a memorial, payment equivalent to the State pension, and assistance to Magdalene women. In June 2013, the Irish Government accepted Judge Quirke’s recommendation for an *ex gratia* lump sum payment scheme for women affected. The Redress for Women Resident in Certain Institutions Act 2015 also provided the State shall make available health services to participants in the scheme without charge, including general medical practitioners, counseling services and physiotherapy.

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<sup>53</sup> Claire McGettrick, Interviews lacked transparency, available at <http://clericalwhispers.blogspot.ie/2013/02/interviews-lacked-transparency-say.html> last visited 10-01-2018

<sup>54</sup> *Report of Mr Justice Quirke on the establishment of an ex gratia Scheme and related matters for the benefit of those women who were admitted to and worked in the Magdalen Laundries* (Dublin: Department of Justice 2013), paras. 2.04-2.07; 2.11

The Quirke Scheme fundamentally fails to frame the question of State legal responsibility for the harm experienced, including acknowledgement for unpaid wages; nor does it address the broader question of the mistreatment of women while detained in the Laundries. In contrast to reformatory and industrial schools, the relevant religious institutes have refused to contribute to the compensation fund for victim-survivors, an estimated 600 of whom were still alive in March 2014.<sup>55</sup> The Scheme also failed to include all relevant institutions associated with Magdalene Laundries, in particular An Grianán Training Centre, High Park, which formed part of St. Mary's Refuge in High Park, Drumcondra, Dublin.<sup>56</sup> Regarding this and similar facilities, the Office of the Ombudsman concluded "the actions of the Department in this regard constitute maladministration being actions based on erroneous or incomplete information and an undesirable administrative practice."<sup>57</sup> In *MKL and DC v Minister for Justice and Equality*, two applicants sought and were granted judicial review of the decision to exclude their entry into the *ex gratia* scheme.<sup>58</sup> White J concluded that the Department of Justice and Equality did not apply fair procedures due to its failure to exchange any documentation that it was considering in dealing with the eligibility of the applicants for their consideration and comment.<sup>59</sup>

## V. Symphysiotomy

After years of pressure from victim-survivors and advocacy organisations related to symphysiotomy since 2001, the Irish government commissioned Professor Oonagh Walsh

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<sup>55</sup> <http://irishpost.co.uk/magdalene-compensation-snob-is-rejection-of-laundry-women/>

<sup>56</sup> Office of the Ombudsman, *Opportunity Lost: An Investigation by the Ombudsman into the administration of the Magdalene Restorative Justice Scheme* (Dublin: Office of the Ombudsman 2017), 24-5

<sup>57</sup> *ibid*, 31

<sup>58</sup> *MKL and DC v Minister for Justice and Equality* [2017] IEHC 389

<sup>59</sup> *ibid*, para. 38.

to report on symphysiotomy rates against maternal mortality rates from 1940 to present, to critically appraise international reviews of symphysiotomy and associated rates in comparable countries and Ireland; review any guidelines and protocols that applied on symphysiotomy and provide an accurate picture regarding its use in Ireland.<sup>60</sup> In her 2012 report, Professor Walsh agreed with estimates that 1,500 women were subjected to symphysiotomy during childbirth between 1944 and 1984.<sup>61</sup> The report concluded that “Irish obstetrical practice was heavily influenced by and constrained within a widely accepted religious framework. This influence was not merely ideological but also shaped legislation in order to ensure conformity to certain religious principles.”<sup>62</sup> The report also noted its inappropriate use in a number of cases, where it was performed after delivery.<sup>63</sup> After the release of a draft report, Prof Walsh engaged in consultations with relevant affected individuals and groups.<sup>64</sup> This process sought to address concerns arising from the draft report and to dispel misperceptions and falsehoods that arose from inaccurate reporting regarding its contents. The consultation process also revealed discomfort of some victim-survivors/those affected with the “confrontational nature of the coverage” regarding the issue.<sup>65</sup> The final report recommended the continuation and extension of processes of apology and redress for those affected by symphysiotomy.

While these political processes were ongoing, attempts to litigate for medical negligence arising out of the symphysiotomy procedure continued. In *Kearney v McQuillan*, the plaintiff alleged that as result of a symphysiotomy conducted after the delivery of a child by caesarean section, she suffered serious and permanent personal injuries.<sup>66</sup> In the

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<sup>60</sup> Oonagh Walsh, *Report on Symphysiotomy 1944-1984* (Dublin: Department of Health 2012), 9

<sup>61</sup> *ibid*, 4

<sup>62</sup> *ibid*, 17

<sup>63</sup> *ibid*, 72-3

<sup>64</sup> *ibid*, 74

<sup>65</sup> *ibid*, 83

<sup>66</sup> *Kearney v McQuillan* [2006] IEHC 186



substantive High Court judgment, Ryan J concluded this was not a case of a doctor deviating from a well-settled practice, but rather a case of a doctor who pursues a policy that a minority adhere to but which enjoys a certain respectability because of the status of the people who share the opinion. Even if the practice had enjoyed more general approbation, the Court concluded, it was attended by obvious inherent defects, being wholly unnecessary and having significant morbidity and on any basis, the operation required an essential justifying circumstance of pelvic disproportion which was absent.<sup>67</sup> As a result, the symphysiotomy operation was wholly unjustified. The decision was upheld by the Supreme Court though damages were reduced from €450,000 to €325,000.<sup>68</sup> However, litigation for symphysiotomy was not always successful. In *Farrell v Ryan* the High Court concluded that the plaintiff had failed to establish that there was “no justification whatsoever in any circumstances for the performance of a symphysiotomy on the plaintiff at the time it was performed”, in circumstances where symphysiotomy was performed as an alternative to Caesarean section.<sup>69</sup>

In November 2013, Minister for Health James Reilly appointed Judge Yvonne Murphy to review all relevant literature on symphysiotomy, assess the priorities of survivors, and assess whether an *ex gratia* scheme would be cheaper for the State than allowing litigation to proceed. In 2014, Judge Murphy issued her report, detailing her meeting of 34 survivors, 16 family members, and insurers, lawyers and representatives of the Congregation of the Medical Missionaries of Mary and approximately 300 letters provided in correspondence. The report considers existing literature and discussions of symphysiotomy and noted that 154 High Court proceedings had been initiated regarding symphysiotomy. It also noted the preferences of victim-survivor representative organisation Survivors of Symphysiotomy to

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<sup>67</sup> *Kearney v McQuillan* [2012] IEHC 127, para. 53-4

<sup>68</sup> *Kearney v McQuillan* [2012] IESC 43

<sup>69</sup> *Farrell v Ryan* [2015] IEHC 275, para. 11.6

enable closure were for a public apology that symphysiotomy and pubiotomy were wrong, amounted to medical negligence and were done without consent; a payment of €250,000 to €450,000, according to an individualised assessment of the pain, suffering and disruption to normal life experienced.<sup>70</sup>

The report cautioned that assessing the level of damage attributed to and caused by symphysiotomy in litigation would be a difficult assessment, largely involving expert evidence. The report frames the desirability of the *ex gratia* scheme as a quid pro quo: “in considering of removing the burden of these issues [of proving liability, of the age and infirmity of the litigants] it reasonable to consider that the appropriate level of any sums awarded in the scheme be less than the sum that might be awarded to a successful litigant in a High Court.” It also recommends a bar to litigation for those who enter a scheme to benefit the State “in not having to litigate a large number of cases and bear the burden of costs associated with the defence of those actions.”<sup>71</sup> Judge Murphy calculated that redress through the courts would cost €95 million, whereas redress through an *ex gratia* scheme would cost €34 million. As a result the report recommended a reduced scale of payment from €50,000 to €150,000 and declined to recommend an apology from Government. Both the Medical Missionaries of Mary and the Institute of Obstetricians and Gynaecologists have issued apologies, but the State has not apologised for its role.

In November 2014, the “Surgical Symphysiotomy Ex Gratia Payment Scheme” was published, adopting Judge Murphy’s recommendations regarding payments and was to be administered “as expeditiously as possible” by Judge Maureen Harding Clark. Several features of the scheme differ widely from international best practice on addressing

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<sup>70</sup> Yvonne Murphy, *Independent Review of Issues relating to Symphysiotomy* (Dublin: Department of Health 2014)

<sup>71</sup> *ibid*, 51-3

allegations of historical harm. First, the scheme offered an incredibly short period of time for individuals to apply: 20 working days. This approach is in stark contrast to the application periods in other Irish *ex gratia* schemes, such those regarding Magdalene laundries or the Residential Institutions Redress Board.<sup>72</sup> Second, payment of any award under the scheme was conditional upon the applicant waiving their claim to litigate regarding symphysiotomy, without access to substantive appeal or oversight. Third, the redress scheme is *ex gratia* in nature, which means “by favour” and without admission of responsibility. This approach fails to adopt international law and best practice standards in the provision of reparation, which require the State to acknowledge its role in, or failure to prevent, the violation of individual rights.<sup>73</sup>

In 2016, the report of Judge Maureen Harding Clark on this scheme was published and indicated the Judge sought to pursue a “compassionate and generous” approach. The scheme awarded €29.8 million to 399 successful applicants. However, the report did not merely detail the scheme’s administration, but evaluated again the Irish practice of symphysiotomy and the women concerned. First, the report differed from other Irish investigations into historical harm by failing to document the testimony of women subjected to the procedure. Second, the report suggested that the scheme was primarily premised on the expectation that symphysiotomy caused serious and life long disability.<sup>74</sup> While over 35% of successful applicants suffered significant disability, the emphasis on life long disability neglected to adequately consider the harm and lack of patient consent involved in the use of symphysiotomy. The report also emphasised that “the vast majority of

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<sup>72</sup> Terms of the Surgical Symphysiotomy Ex Gratia Payment Scheme (Dublin: Department of Health 2014)

<sup>73</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005

<sup>74</sup> Judge Maureen Harding Clark, Report on the Surgical Symphysiotomy Ex Gratia Payment Scheme (Dublin: Department of Health 2016), 5

applicants became pregnant within a year of the symphysiotomy” and led healthy lives thereafter, calling into question the extent of the harm endured.<sup>75</sup> Recovery from harm by an individual over the course of their lifetime should in no way diminish the importance of the State acknowledging the initial wrongdoing.

Third, the report is inconsistent in its evaluation of medical expertise. On the one hand, the report acknowledges the difficulty for its own medical team in establishing the existence of scars or other markers consistent with symphysiotomy, especially after several decades.<sup>76</sup> On the other hand, the report is critical of evidence provided by applicants’ doctors for not detailing an applicant’s medical history through the years as a result of symphysiotomy, even though GPs would have less awareness or exposure to this rare procedure.<sup>77</sup>

Fourth the report concluded that 185 claims (1 out of 3 applicants) were ineligible. The report was critical of “intense” publicity and activism leading to the establishment of the scheme. Remarkably, the report speculated broadly as to the reasons why applicants made their claims. It concluded that that “suggestible women” were influenced by the possibility of financial payment into the “self-serving adoption and embracing of the experiences described by others.”<sup>78</sup> It criticised the “lurid accounts” of applicants, suggested their belief in conspiracy theories, and bemoaned the similarity of applicants’ submissions - without having regard to the influence of the short application time period. Criticism of unsuccessful applicants and guesswork as to their reasons for applying are remarkable and highly inappropriate conclusions. Mairead Enright argues: “The report’s approach undermines human rights campaigners, group organising, and social justice

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<sup>75</sup> *ibid*, 33

<sup>76</sup> *ibid*, 45

<sup>77</sup> *ibid*, 55

<sup>78</sup> *ibid*, 97

lawyering in one fell swoop, perhaps forgetting that without the work of these organisations the redress scheme – however flawed – would not have been set up at all, and many women would not have been able to access it.”<sup>79</sup>

## **VI. Mother and Baby Homes**

In 2014, the Irish government established an Inter Departmental Group was set up in response to revelations and public controversy regarding conditions in Mother and Baby Homes, centring on the high rate of deaths at the Mother and Baby Home in Tuam, Co. Galway. Catherine Corless sourced details from public records of 796 child deaths in this home from 1925 to 1961.<sup>80</sup> The group was tasked with informing the government on any decisions on the scope, format and terms of reference of a commission of investigation. In its report, the group noted: “Any consideration of the treatment of unmarried mothers over the period is likely to identify gender discrimination as being to the fore, while also acknowledging the role played by social class with different settings and patterns of treatment for those in different economic circumstances.”<sup>81</sup> As a result of this inter-departmental group, in 2015, a Commission of Investigation was established regarding mother and baby homes and a representative sample of county homes.<sup>82</sup> The Commission has a mandate to establish the circumstances and arrangements for the entry and exit of single women and children to and from these institutions, including practices of adoption of children; to establish the living conditions and care arrangements experienced by

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<sup>79</sup> Mairead Enright, Notes on Judge Harding Clark’s Report on the Symphysiotomy Payment Scheme, available at <http://humanrights.ie/law-culture-and-religion/notes-on-judge-harding-clarks-report-on-the-symphysiotomy-payment-scheme/> last visited 10-01-18

<sup>80</sup> Report of the Inter-Departmental Group on Mother and Baby Homes July (Dublin: Department of Children and Youth Affairs 2014)

<sup>81</sup> Report of the Inter-Departmental Group on Mother and Baby Homes July (Dublin: Department of Children and Youth Affairs 2014), 8

<sup>82</sup> Commission of Investigation (Mother and Baby Homes and Certain Related Matters) Order 2015 S.I. No. 57 of 2015

residents; to examine mortality among mothers and children residing in these institutions and post-mortem practices and compliance with relevant contemporary regulatory and ethical standards of systemic vaccine trials found by the Commission to have been conducted on children resident in one or more of these institutions.<sup>83</sup>

The Commission of Investigation has the power to hold public hearings, but at the time of writing has declined to do so. Instead its work is in private and operates via an Investigation Committee and a Confidential Committee. The Confidential Committee is intended to provide a forum for persons who were formerly resident in the homes listed, or who worked in these institutions, during the relevant period to provide accounts of their experience in these institutions in writing or orally as informally as is possible in the circumstances.<sup>84</sup> In contrast, evidence given before the main Investigation Committee can be subject to cross-examination and refutation where the in the view of the Commission require such a process.<sup>85</sup> The Commission states it is “‘obliged to furnish a summary of relevant evidence to those persons or bodies who may in turn seek an opportunity to cross examine you on the matters raised’.”<sup>86</sup>

The most significant action of the Commission to date was its announcement regarding the Mother and Baby Home in Tuam, Co. Galway. Technical examinations of the site began in 2015, with test excavations in 2016 and 2017, which revealed a long structure divided into twenty chambers. Significant quantities of human remains have been discovered in at least 17 of the 20 underground chambers which were examined. A small number of remains were recovered for the purpose of analysis and indicated individuals with age-at-death ranges from approximately 35 foetal weeks to 2-3 years dating from 1925 to

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<sup>83</sup> *ibid*, Section 1

<sup>84</sup> *ibid*, Section 7(3)

<sup>85</sup> Commission of Investigation Act 2004, Section 12

<sup>86</sup> Clann Project, FAQs on Commission of Investigation, available at <http://clannproject.org/faqs/faqs-on-the-commission-of-investigation/> last visited 10-01-2018

1961. The Commission has asked that the relevant State authorities, including the coroner, take responsibility for the appropriate treatment of the remains.<sup>87</sup> A decision on how to proceed with the remains at Tuam is expected in 2018 on foot of an expert technical group report and consultation with relevant stakeholders.

On 10 March 2017, the Minister for Children and Youth Affairs Katherine Zappone announced that she hoped to initiate a ‘transitional justice’ approach to meet the needs of survivors of Mother and Baby Homes, with a view to ‘find out and record the truth, ensure accountability, make reparation, undertake institutional reform, and achieve reconciliation’.<sup>88</sup> At the time of writing, the transitional justice approach undertaken by the Department has resulted in national consultations with those affected by the issue of Mother and Baby Homes, monthly updates from the Department of Children and Youth Affairs as to developments on the issue, as well as the agreement from the Irish government to invite the United Nations Special Rapporteur on the Promotion of truth, truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, to engage in a country visit and examination of Ireland.

To date the Commission of Investigation has issued three interim reports. In July 2016, following receipt of the Commission’s 1st Interim Report, the Government agreed to the Commission’s request to extend the timeframe for its confidential committee and social history reports.<sup>89</sup> In December 2017, on foot of receipt of its third interim report, the

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<sup>87</sup> Notice 3rd March 2017 <http://www.mbhcoi.ie/MBH.nsf/page/Latest%20News-en> last visited 10-01-2018

<sup>88</sup> Elaine Loughlin, ‘Katherine Zappone: “We Will Find the Truth and Achieve Reconciliation”’ Irish Examiner (Cork, 10 March 2017).

<sup>89</sup> Mother and Baby Homes Commission of Investigation, 1st and 2nd Interim Reports, available at [http://www.mbhcoi.ie/MBH.nsf/page/LPRN-ALCFND1238712-en/\\$File/MBHCOI%202nd%20Interim%20Report.pdf](http://www.mbhcoi.ie/MBH.nsf/page/LPRN-ALCFND1238712-en/$File/MBHCOI%202nd%20Interim%20Report.pdf) (last visited 10-01-2018)

Commission of Investigation and Department of Children confirmed the extension of the Commission's mandate for a further year with its final report due in February 2019.<sup>90</sup>

The second interim report addresses three substantive issues: the exclusion of some children's homes from the Residential Institutions Redress Board Scheme, the exclusion of some mother and baby homes from the Commission's remit and the false registration of births. The report notes that children resident in mother and baby homes without their mothers were in the same position as children who were resident in the industrial schools and orphanages which were covered by the RIRB and should logically be eligible to apply for redress in the same way and under the same conditions.<sup>91</sup> In April 2017, Government rejected the extension of the RIRB to former residents of mother and baby homes, in the absence of findings from the Commission regarding abuse and neglect.<sup>92</sup> It is possible such findings may form part of the final report of the Commission. It remains to be seen what findings the Commission will reach and what recommendations it makes. It hopes that increased engagement with civil society and victim-survivors will result in a more inclusive and legitimate process and outcome.

## **VII. Conclusion**

Investigating and redressing historical abuse across Magdalene Laundries, symphysiotomy and Mother and Baby Homes share several challenges. None of these approaches prioritise a victim-survivor centred perspective, with limited public engagement with the views and preferences of those who experienced these institutions and practices. There was limited consultation in the design and practice of investigations. The adoption of

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<sup>90</sup> Mother and Baby Homes Commission of Investigation, 3rd Interim Report, available at [http://www.mbhcoi.ie/MBH.nsf/page/LPRN-ATSF5N1111226-en/\\$File/MBHThirdInterimReport.pdf](http://www.mbhcoi.ie/MBH.nsf/page/LPRN-ATSF5N1111226-en/$File/MBHThirdInterimReport.pdf) last visited 10-01-2018

<sup>91</sup> Mother and Baby Homes Commission of Investigation, 2nd interim report, para. 4.4.

<sup>92</sup> Govt rejects immediate redress for mother and baby home children available at <https://www.rte.ie/news/ireland/2017/0411/866974-mother-and-baby-homes-report/>



an explicitly transitional justice approach to the Mother and Baby inquiry prompted subsequent consultations during the operation of the commission, but could usefully be augmented by recognising the need for an overall coherent approach to historical abuse in Ireland from government across all institutions and contexts.

The need for a coherent approach is acknowledged in international human rights treaty bodies. In 2017, the United Nations Committee for the Elimination of Discrimination Against Women concluded that the historical abuses in relation to the Madgalene Laundries, the Mother and Baby Homes and the medical practice of symphysiotomy give rise to serious violations that have a continuing effect on the rights of victims/survivors of those violations.<sup>93</sup> The Committee urged Ireland to conduct prompt, independent and thorough investigations, in line with international human rights standards, into all allegations of abuse in Magdalen Laundries, children's institutions and Mother and Baby Homes, and allegations of symphysiotomy in order to prosecute and punish the perpetrators of those involved in violations of women's rights, and ensure that all victims/ survivors of such abuse obtain an effective remedy, including appropriate compensation, official apologies, restitution, satisfaction and rehabilitative services.<sup>94</sup>

However, those seeking a more victim-survivor centered approach to investigating historical abuse face several challenges in employing legal challenges to do so. First, the statute of limitations regime in Ireland is highly restrictive when compared to other common law jurisdictions, with the result that relevant individuals may not be able to pursue any litigation strategy.<sup>95</sup> The limitation regime in Ireland enables only a limited subset of victims and survivors of historical abuse to recover, where unconscionable conduct on the part of the

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<sup>93</sup> CEDAW/C/IRL/CO/6-7, para. 15

<sup>94</sup> *ibid*

<sup>95</sup> James Gallen, *Historical Abuse and the Statute of Limitations*, (2018) *Statute Law Review* (forthcoming)

defendant can be shown under the 1957 Statute of Limitations, where there was no reasonable prospect of discovering the injury arising from the historical abuse under the Statute of Limitations (Amendment) Act 1991, or where victims suffer a recognised psychiatric disability, which prevents them from initiating litigation where they suffer from sexual abuse, but not other forms of historical abuse, under the Statute of Limitations (Amendment) Act 2000.

Second, considerable risks of costs attach to those attempt to challenge Ireland's approach to historical abuse through the courts. Ireland does not have an effective mechanism for multi-party litigation, despite recommendations in 2005 from the Law Reform Commission to introduce a new procedure for multi-party action.<sup>96</sup> Multi-party action could enable a range of litigants, including victim-survivors, to overcome barriers with funding and standing that they may face taking actions individually.<sup>97</sup> Irish policy makers may be relying on unquantified assertions that litigation floodgates would open. However in the case of historical abuse, these arguments seem especially spurious. Existing reports and investigations identify, albeit imperfectly the number of individuals concerned and even if interpreted liberally or with a foreseeable increase, would not cause disproportionate or catastrophic damage to the exchequer.

Third, what may be unique to Ireland is the limited nature and impact of the national conversation and debate that followed historical abuse inquiries.<sup>98</sup> Part of this may be explained by the limited public and academic access to the archives of investigations into historical abuse. In Ireland, the records of investigation into the Magdalene laundries have

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<sup>96</sup> Law Reform Commission, Report on Multi-Party Litigation (Dublin, Law Reform Commission, 2005)

<sup>97</sup> Joanne Blennerhasset, *A Comparative Examination of Multi-Party Actions: The Case of Environmental Mass Harm* (Hart 2016) 256; Order 6, rule 10 Circuit Court Rules 2001

<sup>98</sup> Amnesty International, *In Plain Sight: Responding to the Ferns, Ryan, Murphy and Cloyne Reports*, (Dublin, Amnesty International Ireland 2011) 20

not been made public. Archives are vital to the successful operation and outcome of all transitional justice processes. They are crucial to the exercise of individual rights, such as the right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, about the victims' fate.<sup>99</sup> In 2015 the United Nations developed a set of general recommendations for truth commissions and archives as a standard for international best practice.<sup>100</sup> In particular, the recommendations state:

“the access policy of truth commission archives should maximize public accessibility, while respecting applicable privacy concerns, including in particular assurances of confidentiality provided to victims and other witnesses as a precondition of their testimony. Access to truth commission archives may not be denied on grounds of national security or other grounds unless the restriction is in full compliance with international human rights law “<sup>101</sup>

The recommendations suggest the creation of general access rules, “such as what was previously public should remain public; victims, families, investigative and prosecutorial authorities, as well as legal defense teams, should have unhindered access to information on their specific case; there should be a presumption of public access to all State information with only limited exceptions; a procedure to make effective the right of access should be established; whatever access rules are determined for various categories of potential users (for example, victims, legal representatives, journalists, academics, and members of the general public) should apply to all members of the given category without discrimination”.<sup>102</sup>

The risk is that in responding to historical abuse, Irish redress mechanisms treat victim-survivors paternalistically - as vulnerable objects to whom the non-vulnerable are granting

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<sup>99</sup> Updated Set of principles for the protection and promotion of human rights through action to combat impunity” (E/CN.4/2005/102/Add.1), principles 3–4.

<sup>100</sup> A/HRC/30/42

<sup>101</sup> *ibid*

<sup>102</sup> *ibid*

a remedy from our benevolence - only as far as suits us - not as a matter of legal right or remedy. It remains to be seen whether the gendered mistreatment of women and girls will ever be effectively investigated and redressed.