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Education and Skills Committee
c/o Jane Davidson, Committee Assistant
The Scottish Parliament
Edinburgh EH99 1SP

By email to Jane.Davidson@parliament.scot

1 October 2020

Dear Committee members,

Thank you for inviting me to present evidence to you yesterday on Ireland's experience of 'historical' institutional / child abuse redress schemes and what lessons might apply to the plans to establish Redress Scotland and other matters set out in the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill.

Below is an outline of the key areas where, I believe, the Bill could and should be amended to ensure greater respect for survivors' human rights. Scotland has already demonstrated excellent practice in some of the ways that it has responded to 'historical' institutional / care-related child abuse, and it has the opportunity to be world-leading in its provision of redress measures. While several of the Bill's aspects improve greatly on problems that have beset Irish redress schemes (for example, the Bill proposes a non-adversarial approach, provision of legal and other assistance throughout a survivor's engagement with the scheme, freedom of expression for survivors, access to information, and a prohibition on the review body reducing the payment proposed at first instance), there are nonetheless several crucial areas which require further consideration.

The waiver

1. Scotland has the opportunity to use this redress scheme to support survivors who wish to pursue litigation (against the State and/or other entities), by contributing to these individuals' psychological and financial security in the short term. Instead of providing for a waiver of rights as a condition of receiving a limited payment from Redress Scotland, the Bill could direct the courts to reduce any future damages award by the amount already paid by the relevant Defendant under the Scheme. This approach would recognise the absolute and inalienable human right of survivors of torture and other cruel, inhuman or degrading treatment to accountability for such abuse, and to compensation commensurate with the gravity of the harm suffered.

Such recognition and any ensuing litigation would strengthen current and future protections against torture and ill-treatment while redressing past failings.

2. In January 2020, the United Nations Committee Against Torture found the waivers imposed upon a participant in Ireland's Residential Institutions Redress Board (RIRB) and Magdalene 'ex gratia restorative justice' scheme to be unenforceable. The Committee's admissibility judgment in the ongoing individual case under article 22 of the Convention Against Torture of *Elizabeth Coppin v Ireland* is available [here](#). You will see at para 4.5 of the judgment that the Irish Government argued that Mrs Coppin's prior waivers under the Residential Institutions Redress Act 2002 and the non-statutory Magdalene 'ex gratia restorative justice' scheme should preclude her from bringing subsequent legal action against the State arising from the abuse concerned. At para 6.4, the Committee affirmed that articles 12, 13 and 14 of the Convention Against Torture require the state to investigate every individual case where there is reasonable ground to believe that torture or ill-treatment occurred and that article 14 requires the state to allow civil proceedings related to allegations of acts of torture or ill-treatment. At para 6.7, the Committee dismissed the legal waivers as having no effect on Mrs Coppin's absolute rights under the Convention; the Committee stated that 'collective reparation and administrative reparation programmes may not render ineffective the individual right to a remedy and to obtain redress (general comment No. 3, para 20), including an enforceable right to fair and adequate compensation, and that judicial remedies must always be available to victims, irrespective of what other remedies may be available (general comment No. 3, para. 30)'.
3. A scheme involving a waiver adds another avenue to the legal landscape facing survivors; however, the assertion that it provides 'choice' must be queried given survivors' unequal bargaining power. Survivors of childhood institutional / care-related abuse (and/or their family members) generally need the limited financial support that is on offer under a non-adversarial scheme. Objectively speaking, and notwithstanding the good intentions expressed regarding it, a waiver takes advantage of a survivor's situation (which has arisen from the abuse and through no fault of their own). Some may argue that the waiver is the fair price that survivors, collectively, have to pay in return for a scheme that offers financial settlements for claims that might not succeed at trial. However, against this contention are the following arguments: (1) the proposed payments are minimal; (2) if a claim is not suitable for litigation, no interest is served by a waiver; (3) the reasons behind 'historical' abuse cases no longer being fit for trial frequently relate to the wrongdoers' failures and treatment of survivors, meaning that survivors do not owe something in return for a limited payment; (4) there is an absolute right under international human rights law – as mentioned above – for survivors of torture and ill-treatment to obtain individualised accountability and redress; and (5) if we assume that in any given instance a survivor would have succeeded in litigation but was forced by circumstance to accept the scheme payment, the waiver has rewarded the wrongdoer for conditions the wrongdoer created.
4. Many survivors will not pursue litigation following an application to the scheme. As acknowledged already in the briefing materials concerning the Bill, there are many obstacles to litigating 'historical' abuse and survivors' personal preferences will vary. Arguably, however, the presence of a waiver disproportionately harms every

applicant to the scheme, and the general public, in addition to harming most obviously those who may have wished to litigate but felt obliged to take the scheme payment. To illustrate:

- a. In forcing survivors to choose between a guaranteed financial payment and accountability, the waiver arguably emits a message to survivors themselves and to the general public about survivors that they are interested in money above all else. This is simply untrue and degrading to survivors.
- b. If barriers to litigation are removed, individual cases may establish precedents that are of benefit to many, in terms of truth-telling and legal interpretations and standard-setting regarding the nature of and responsibility to protect from child abuse. There is every reason to believe that the waiver will prevent cases that could have enhanced legal protections from child abuse from being taken.
- c. The absence of cases due to the waiver may also lead to revisionism by some institutions or individuals who contributed to the scheme and benefitted from the waiver's protection against suit. In this regard, it is worth noting the response by the Catholic order of priests, the Rosminians (Institute of Charity), to the Irish Department of Education's proposal to retain, but 'seal' for at least 75 years, all records gathered by the RIRB (see **Enclosure**). The Rosminians opposed any retention of the records, rejecting the veracity of survivors' accounts of abuse generally and ignoring the fact that the RIRB made awards following an adversarial process:

Those who were involved in the Redress Scheme know well that it was purposely designed with a very low burden of proof to facilitate the State. The motivation was as much to do with politics as with justice. ... Future generations will naively take as truth the submissions to the Redress Board and lead to the eternal besmirching of the names of good people. Injustice heaped upon injustice.

- d. It is also worth noting that the legal waiver under the Magdalene 'ex gratia restorative justice' scheme has led to a situation where Irish Government officials have made repeated statements to United Nations human rights treaty bodies to the effect that the State knows of 'no factual evidence to support allegations of systematic torture or ill treatment of a criminal nature'¹ and that:

¹ Ireland, Second Periodic Report to the Committee Against Torture, UN Doc CAT/C/IRL/2, 20 January 2016, para 241, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2f2&Lang=en Ireland, Information on follow-up to the concluding observations of the Committee against Torture on the second periodic report of Ireland, UN Doc CAT/C/IRL/CO/2/Add.1 (28 August 2018), para 15. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fIRL%2fCO%2f2%2fAdd.1&Lang=en Human Rights Committee, Replies of Ireland to the list of issues, UN Doc CCPR/C/IRL/Q/4/Add.1 (received 27 February 2014, published 5 May 2014) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIRL%2fQ%2f4%2fAdd.1&Lang=en Ireland, Information on follow-up to the concluding observations of the Human Rights Committee on the fourth periodic report of Ireland, UN Doc CCPR/C/IRL/CO/4/Add.1, 15 August 2017, para 5 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIRL%2fCO%2f4%2fAdd.1&Lang=en (third round) Ireland, Follow-Up Material to the Concluding Observations of the UN Human Rights Committee on the Fourth Periodic Review of Ireland under the International Covenant on

‘No Government Department was involved in the running of a Magdalen Laundry. These were private institutions under the sole ownership and control of the religious congregations concerned and had no special statutory recognition or status.’² These contentions have been disproved not only by extensive survivor testimony but also by the contents of the Government’s Inter-departmental Committee to establish the facts of State involvement with the Magdalene Laundries, a substantial report of the Irish Human Rights Commission and the report of Mr Justice John Quirke on his proposals for the Magdalene ‘*ex gratia* restorative justice’ scheme.³ The absence of litigation on the matter, however, continues to influence the State’s official position—and, as a result, the national historical record and other structures.

5. Magdalene Laundries survivors have not, in fact, received all aspects of the promised scheme—and the waiver is key to this situation. Financial payments were administered by the Department of Justice first, before other elements of the scheme were provided, and the women had to sign a waiver to receive their payment. This meant that they were left with little recourse when the other elements failed to appear (particularly because the scheme is a non-statutory administrative scheme, making judicial review more difficult—aside from the ordinary barriers to taking legal action). Women have spoken about the joint failure of the Department of Justice and Department of Health to provide the promised healthcare in the Report of the ‘Dublin Honours Magdalenes’ Listening Exercise⁴ and several dentists, for example, have ‘urge[d] the Council of the Irish Dental Association to publicly disassociate itself from this act by the Government and to speak out publicly on behalf of its members who do not accept the injustice we are expected to support.’⁵

Procedural fairness

6. In establishing the Magdalene scheme in 2013, the Irish Government expressed a desire to avoid the re-traumatising adversarial procedures of the previous RIRB. Therefore, it was decided that a woman need only demonstrate her duration of detention in an institution in order to qualify for a payment. Payments were based on a scale of up to 10 years+ which correlated with lump sum payments of up to €50,000 and further weekly payments up to €50,000 in total, paid in actuarially calculated

Civil and Political Rights, 17 July 2015, p3,

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fAFR%2fIRL%2f21460&Lang=en Ireland, Combined sixth and seventh periodic reports to the United Nations Committee on the Elimination of All Forms of Discrimination Against Women, 30 September 2016, p 8; https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fIRL%2f6-7&Lang=en

² Ireland, Second periodic report to the Committee against Torture, UN Doc CAT/C/IRL/2 (20 January 2016) para 237.

³ See Maeve O’Rourke, ‘Justice for Magdalenes Research, ‘NGO Submission to the UN Committee Against Torture in respect of Ireland’ (JFMR, July 2017) pp 7-13, https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT_CAT_CSS_IRL_27974_E.pdf

⁴ Katherine O’Donnell and Claire McGettrick, *Dublin Honours Magdalenes Listening Exercise Report, Vol 1: Report on Key Findings* (Justice for Magdalenes Research, 2020), http://jfmresearch.com/wp-content/uploads/2020/04/DHM-Listening-Exercise-Report_Vol-1.pdf

⁵ Dr Padraig O’Reachtagain, Dr Maurice Quirke, Dr Desmond Kennedy, Letter to the editor, *Journal of the Irish Dental Association*, Aug/Sept 2015, Vol 61(4), p164, https://www.dentist.ie/fileupload/JIDA/pdfs%20of%20Journal/2015/2015%20No_%204%20-%20August%20September.pdf

instalments with any remainder reverting to the State if a woman dies earlier than predicted. (The scheme includes other material elements, automatically provided or promised upon a woman's qualification for a specific payment amount.)

7. An investigation by the Ombudsman⁶ and judicial review proceedings⁷ established, respectively, that the Magdalene scheme lacked fairness because: (1) the Department of Justice, which administered the Scheme, required the production of documentary evidence, i.e. records, and had no mechanism for receiving the women's own testimony or that of their family or friends in the event that records were not available or were disputed; and (2) the Department did not provide the women with a copy of all evidence which it had received (e.g. from the nuns), in order to allow comment. Legal fees were not provided to help women through the application process—rather, €500 + VAT was available only for a solicitor to advise each woman on the legal waiver once she had received an offer. Neither did the Government provide any independent advocacy services under the Scheme such that, by November 2017, the Ombudsman reported that women 'deemed' by the Department to lack sufficient decision-making capacity to apply to the scheme had been abandoned.
8. In light of the Irish experience:
 - a. The absolute requirement in the Bill for documentary evidence seems problematic. It is worth exploring the possibility of accepting sworn testimony (particularly since the Bill already envisages protections against fraud).
 - b. It is welcome that the Bill proposes provision of legal assistance and other services; it is perhaps worth considering how these services can be specified to a greater degree.
 - c. There is a need for greater clarity in the Bill regarding the procedures by which a decision will be reached on the amount to be awarded, in order to guarantee fairness.

Time limit

9. Many survivors of Irish residential schools did not have the opportunity to apply to the RIRB because they were unaware of its existence, or unaware of its relevance to their experiences, before the deadline for applications had passed. Their exclusion from the RIRB had a compounding effect because eligibility for the later material supports provided by 'Caranua' was premised on a prior award from the RIRB.⁸ In

⁶ Office of the Ombudsman, *Opportunity Lost*, November 2017,

<https://www.ombudsman.ie/publications/reports/opportunity-lost/>

⁷ *MKL and DC v Minister for Justice and Equality* [2017] IEHC 389,

<https://www.bailii.org/ie/cases/IEHC/2017/H389.html>

⁸ Barbara Walshe and Catherine O'Connell, 'Consultations with Survivors of Institutional Abuse on Themes and Issues to be addressed by a Survivor Led Consultation Group, (Department of Education, July 2019), 12, <https://www.education.ie/en/Publications/Education-Reports/consultations-with-survivors-of-institutional-abuse-on-themes-and-issues-to-be-addressed-by-a-survivor-led-consultation-group.pdf>

2013, Mr Justice John Quirke recommended that the Magdalene scheme have no time limitation.⁹

10. The Bill's proposed five-year time limit seems problematic, bearing in mind the wide variety of circumstances and locations in which survivors live, the importance to their dignity and wellbeing of this scheme, and—as mentioned above—the absolute nature of the right of survivors of torture or ill-treatment to obtain redress including as full rehabilitation as possible.¹⁰

Exclusion of corporal punishment from the Scheme's scope

11. There was no exclusion of corporal punishment from the meaning of abuse in Ireland's Residential Institutions Redress Act 2002 similar to the one envisaged in the Bill. From a human rights perspective, the focus in the Bill on whether or not the abuse complained of was permitted by domestic legislation at the time it occurred is problematic because, among other reasons: (1) the answer to this question does not dictate whether or not such actions violated European or international human rights law guarantees, (2) as Redress Scotland is not a court of law it cannot conclusively determine the answer to the question in a given case, and (3) the European Court of Human Rights' approach to interpreting whether the threshold of severity for a finding of inhuman or degrading treatment is met is to consider 'all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.'¹¹ The Court has added the 'nature and context of the treatment' as further factors to consider,¹² and it has stated clearly that the vulnerability of children generally and as a result of how they are individually situated must be factored into assessing the nature and impact of their treatment.¹³ In numerous cases decided by the ECtHR, behaviour that might not in other circumstances breach the prohibition on torture or ill-treatment has been found to do so because of the particular situation of powerlessness of the person who suffered the harm.
12. The powerlessness of a child in care will be an extremely important factor for Redress Scotland to consider when assessing the severity of abuse, and to begin with a presumption that corporal punishment will not be deemed abusive seems to be an unnecessary and disproportionate interference with the process and not in keeping with the spirit of the Bill.
13. If this corporal punishment exclusion were removed from the Bill, it would not run the risk of retrospectively criminalising behaviour that was lawful, as argued by one of the Bill's drafters during yesterday's session. Redress Scotland will not have a basis in the proposed Bill to determine applications and make financial awards based

⁹ Ireland, *The Maagdalen Commission Report* (May 2013), 46, <http://www.justice.ie/en/JELR/2.%20THE%20MAGDALEN%20COMMISSION%20REPORT.pdf/Files/2.%20THE%20MAGDALEN%20COMMISSION%20REPORT.pdf>

¹⁰ See United Nations Committee Against Torture, General comment no. 3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of article 14 by States parties, 13 December 2012, <https://www.refworld.org/docid/5437cc274.html>

¹¹ For example *Pretty v United Kingdom* (2002) 35 EHRR 1 para 52.

¹² For example, *Kudla v Poland* (2002) 35 EHRR 11 para 91.

¹³ For example, *Z and Others v United Kingdom* (2002) 34 EHRR 3; *O'Keeffe v Ireland* (2014) 59 EHRR 15; *X and Y v The Netherlands* (1986) 8 EHRR 235; *A v United Kingdom* (1999) 27 EHRR 611.

on criminal law (although, bearing in mind the paucity of the Bill’s provisions on the procedures by which payment amounts will be determined, this is something that should be clarified).

14. A blanket rule that excludes from the scope of the Bill’s proposed redress scheme abusive behaviour that is deemed to have been permitted by domestic legislation at the time it occurred could set an unhelpful precedent internationally, as one can see by considering the Irish experience. The 2013 report of the Irish Government’s Inter-departmental Committee to establish the facts of State involvement with the Magdalene Laundries (IDC) explained, for example, that the Conditions of Employment Act 1936 expressly allowed the religious congregations to pay no wages to the girls and women incarcerated and working at commercial laundry in the Magdalene institutions. The IDC also contended—although the Irish Human Rights Commission disputes the IDC’s legal analysis—that the nuns were not required by domestic legislation to pay wages or social insurance contributions on behalf of the women working in their commercial laundries because they were not in ‘insurable employment’. The Irish Human Rights Commission, in reviewing the contents of the IDC’s report and applying human rights law standards (including the 1930 Forced Labour Convention and Article 4 of the ECHR) to those contents, concluded that:

*The State’s culpability in regard to forced or compulsory labour and/or servitude in the Laundries appears to be threefold. Firstly; at the administrative level, it failed to outlaw and police against such practices, including through criminal sanction. Secondly; the State or its agents placed girls and women in the Laundries knowing that such girls and women would be obliged to provide their labour in those institutions, and then thirdly, the State further supported these practices by benefitting from commercial contracts with the Laundries.*¹⁴

Non-financial redress

15. The Committee may be interested to review the following reports concerning the need for lifelong non-financial supports to survivors. These reports explain to an extent what many survivors and practitioners understand to constitute restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition (which are the five required elements of redress under the United Nations Convention Against Torture¹⁵ and according to the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law):

- a. Katherine O’Donnell and Claire McGettrick, *[Dublin Honours Magdalenes Listening Exercise Report, Vol 1: Report on Key Findings](#)* (Justice for Magdalenes Research, 2020).

¹⁴ Irish Human Rights Commission, *Follow-Up Report on State Involvement with Magdalen Laundries*, June 2013, 86-91, <https://www.ihrec.ie/app/uploads/download/pdf/20130618164449.pdf>

¹⁵ United Nations Committee Against Torture, General comment no. 3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of article 14 by States parties, 13 December 2012, <https://www.refworld.org/docid/5437cc274.html>

- b. Barbara Walshe and Catherine O’Connell, [Report on Consultations with Survivors of Institutional Abuse on Themes and Issues to be addressed by a Survivor Led Consultation Group](#), (Department of Education, July 2019).
- c. Collaborative Forum of Former Residents of Mother and Baby Homes, [Recommendations](#) (Department of Children and Youth Affairs, December 2018).
- d. Maeve O’Rourke, Claire McGettrick, Rod Baker, Raymond Hill et al., [CLANN: Ireland’s Unmarried Mothers and their Children: Gathering the Data: Principal Submission to the Commission of Investigation into Mother and Baby Homes](#) (Justice for Magdalenes Research, Adoption Rights Alliance, Hogan Lovells, 15 October 2018), Section 6.
- e. Katherine O’Donnell and Maeve O’Rourke, [JFM Restorative Justice & Reparations Scheme for Magdalene Laundry Survivors](#) (14 October 2011).

16. It is important to note that these five documents speak to the need to include survivors’ children and grandchildren in redress and reparation for institutional / care-related abuse. This is an area requiring further consideration in the Bill.

I hope that the above is helpful and I wish you the best with your further deliberations on the Bill. Please do not hesitate to contact me if you require clarification or any further information.

Yours sincerely,

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Enclosure: Letter from Fr Joseph O’Reilly, Provincial, Rosminians (Institute of Charity), to Jan O’Sullivan, TD, Minister for Education and Skills dated 26 March 2015



Jan O'Sullivan,
Minister for Education and Skills,
Marlborough St.
Dublin 1.

March 26, 2015.

Dear Minister,



I refer to your letter of March 10 re the General Scheme of the Retention of Records Bill, 2015. I am grateful for the opportunity to make a contribution on this matter.

Minister I am truly shocked that the Government are considering legislation to retain these records when it was clearly stated that they would not be retained.

In particular I make the following points:

1. It is being proposed that these records would be resealed for 75 years, but as this case clearly illustrates, a future Government may well change its mind, perhaps in its own interests.

2. Those who were involved in the Redress Scheme know well that it was purposely designed with a very low burden of proof to facilitate the State. The motivation was as much to do with politics as with justice.

3. There are two dangers here:

1. Whatever credibility the Redress Scheme now has in the public mind will be ridiculed in the future because of its intrinsic flaws.

And / or

2. Future generations will naively take as truth the submissions to the Redress Board and lead to the eternal besmirching of the names of good people. Injustice heaped upon injustice.

4. Fundamental to my objection is the damage that will also be done to the credibility of the establishment of such schemes in the future. In a future scenario when the Government of the day is trying to encourage people to participate in a confidential institution with promises that that 'everything will be destroyed at the end' or



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'everything is confidential' concerned persons or institutions will have ample evidence of broken promises.

Yours Sincerely,

Fr. Joseph O'Reilly
Provincial.

FR. JOSEPH O'REILLY
PROVINCIAL

