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Maeve Doherty
Mother and Baby Homes Commission of Investigation
73 Lower Baggot Street
Dublin 2
By post and email to: mdoherty@mbhcoi.ie

Dear Ms Doherty

I write further to your letter dated 19 April 2016 in connection with submissions to the Commission that we would like to make on behalf of Adoption Rights Alliance (ARA) and/or JFM Research (JFMR). I am sorry that it wasn't possible for us to attend the hearing on 25 February but I am pleased to confirm that we are able to attend on 9 May 2016 at 11am. As suggested, we have set out in this letter the issues on which we would very much like to make submissions at the hearing.

In order to make this letter more digestible, we have set out our points in summary form. We would then hope to develop them further, with the assistance of Counsel, at the hearing.

Introduction

As the Commission is no doubt aware, ARA and JFMR are committed to assisting individuals affected by the operation of the Mother and Baby Homes and related institutions and agencies, including the Magdalene Laundries. These individuals include mothers who spent time in institutions, children who were adopted/fostered/boarded out from those institutions or through other avenues and those who wish to locate family members.

We would like to state at the outset that both ARA and JFMR welcome the establishment of the Mother and Baby Homes Commission of Investigation and we are committed to doing everything that we can to assist the Commission in its objective of producing a full and effective report into the matters under investigation.

That said, we have a number of comments on the Commission's terms of reference, its scope and processes. We also have comments on the impact of Irish Statute, European and International Human Rights, and Irish Constitutional Law both on the Commission and on those whose experiences the Commission is investigating.

We have set out our comments below.

Terms of Reference

We understand that the Terms of Reference were settled by order of the Government as set out in SI No 57 of 2015. We accept therefore that the Terms of Reference are not of the Commission's own making.

We note, however, that under clause 1(ix)(6) *"the Commission may include in its reports any recommendation that it considers appropriate, including recommendations in relation to relevant matters identified in the course of its investigation which it considers may warrant further investigation in the public interest."* This clause specifically envisages the Commission making recommendations about the scope of the necessary investigation.

Furthermore, Section 6 of the Commissions of Investigation Act 2004, which governs the establishment of the Commission, expressly gives the Government power to amend the Commission's terms of reference *"at any time before the submission of the Commission's final report, ...with the consent or at the request of the Commission for the purpose of clarifying, limiting, or extending the scope of its investigation"*.

It is against the backdrop of these provisions, which allow the Commission to seek to amend the scope of its investigation, that we make the following points about the Terms of Reference.

In this regard, our first submission is that the list of institutions (limited as it is to just 14 Mother and Baby Homes and an as yet unidentified additional selection of County Homes) is far too restrictive and will not allow the Commission to make findings that reflect the operation of what we believe to have been at least 170 homes, institutions, agencies and individuals operating across the country. Indeed, our database is growing continuously as new homes, institutions, agencies and individuals are brought to our attention.

As the Commission will be aware, there were numerous formal and informal arrangements that implemented the Irish State's policy regarding the treatment of children born outside marriage, unmarried mothers and women and girls "at risk" of becoming unmarried mothers. These included, amongst others, State Maternity Hospitals; Private Hospitals; Private Nursing Homes; homes where children were held but where natural mothers were not present; GP assisted home births; PFIs (Pregnant from Ireland – women and girls who gave

birth in the UK and were brought back to Ireland); County Homes; statutory and non-statutory Adoption Agencies; Children's Homes and Magdalene Laundries. To limit the scope of the investigation to just 14 Mother and Baby homes and a number of County Homes will mean that the experiences of up to 70% of all unmarried girls and women whose children were adopted (including illegal adoptions) and those adopted children born to such unmarried girls and women will be excluded from the scope of the Commission.

This will have numerous negative consequences, namely that the true number of forced adoptions will not be investigated, the true number of illegal adoptions will not be investigated, the role of the Adoption Board will not be fully investigated and the role of the State will not be fully investigated, for example, by its operation of State-funded maternity hospitals (the Dublin hospitals including Holles Street, Rotunda, Coombe, James, Cork's Erinville Hospital) and its role in facilitating forced and illegal adoptions. The role of State-appointed/regulated adoption agencies will not be fully investigated in that the role of all bar a handful of adoption agencies (the majority of which were church-run) which facilitated forced and illegal adoptions will not be investigated.

Furthermore, no detail has been given as to how the 14 Mother and Baby Homes were selected. There is no indication that consideration has been given as to whether those 14 homes are representative of the homes in Ireland constituting as they do less than 10% of the institutions operating in the State during the relevant period (see up-to-date list from our database attached).

It is our submission that the Commission should seek an extension of the scope of its investigation to include a far wider selection of institutions so it can make effective recommendations in its final report while at the same time allowing a far greater number of affected individuals to provide their evidence to the Commission. At the very least, the Commission should be willing to accept evidence from people who spent time in the wider list of institutions so those individuals can be heard.

We further submit that the Commission should include in its investigation (and if necessary seek an extension of its scope in order to investigate) the following substantive issues: (1) the identities of the infants and mothers who died in institutional settings and were buried by the institutions; (2) the question of forced labour of mothers in institutional settings; and (3) discrimination on the grounds of gender, marital status and socio-economic status.

The Commission's Rules and Procedures

Again, we understand that the Rules and Procedures are largely derived from the Commissions of Investigation Act 2004. That said, the Act does give the Commission a good deal of leeway to adopt procedures designed to guarantee fairness to all.

Our first submission in connection with the Commission's rules and processes relates to the fact that the majority of hearings appear to be intended to be held in private and also whether individuals will be able to hear, and cross examine upon, evidence affecting or directly relevant to them.

Section 5 of the Rules and Procedures largely replicates Section 11 of the Act and gives the Commission significant discretion to hear evidence from witnesses in public.

From the correspondence exchanged between our solicitors and the Commission (copies attached) and the Commission's website, we understand that the Commission intends that the majority of its hearings will be held in private and that, in the event that anyone is "affected" by any evidence given, those witnesses might be given the opportunity to cross examine a witness on the witness being recalled by the Commission for that purpose.

The Commission has been unable fully to set out what it means by "affected" and it seems to us to be unsatisfactory for witnesses or people affected, for example, by the evidence of an individual running a particular Mother and Baby Home, only to be notified about that person's evidence after the event. In our submission, the most sensible way forward would be for individuals who spent time in relevant institutions and/or people who were adopted or otherwise affected by the various institutions to be able to give evidence as to their personal experiences in private but that what we might call representative witnesses, such as members of adoption agencies, individuals who ran Mother and Baby Homes, State officials or those giving evidence on behalf of the various religious orders, have their evidence given in public so that the great number of individuals affected by that evidence can hear it and that there be the potential for some kind of representative cross examination all at the same hearing. Unless this sort of procedure is adopted, it seems to us likely that there will be an opportunity granted to those responsible for running the Homes and the State's policy to comment on specific allegations by individuals but no effective opportunity for those actually resident in such institutions to hear and comment upon the evidence of those parties responsible for the institutions.

If this submission is not accepted, we believe that the Commission should try to set out detailed guidelines as to when individuals will be able to hear the evidence of people relevant to their situation and to contemplate the publication of when certain key individuals will be giving evidence. This at least would allow affected people to know who is giving evidence, and when, thus allowing them to understand the options open to them.

Our second submission relates to the issue of public hearings, raised above, but goes further: we are concerned that the Commission appears not to intend to make available to those affected by the Mother and Baby Homes and/or related matters during the course of its investigation any of the documentary evidence, or even a list of the documentary evidence,

furnished to the Commission either by State entities or by private institutions or individuals. We accept that the Commission has a duty to ensure the confidentiality of sensitive data and material which is not relevant to the Commission's work; however, we submit that the Commission should endeavour to make available to those affected by the Mother and Baby Homes and/or related matters the substance (at least) of the documentary evidence which is relevant to the Commission's work, taking appropriate measures to maintain confidentiality of sensitive data as legally required. Indeed, we note the duty on the Commission pursuant to section 12 of the Act to disclose to any person who gives evidence to the Commission the substance of any evidence in its possession that, in the Commission's opinion, the person should be aware of in order that the person may comment upon it.

The Commission is, no doubt, cognisant of the jurisprudence of the European Court of Human Rights (notably in *Edwards v United Kingdom* (2002) 35 EHRR 19) that for an investigation to comply with the State's procedural obligations under articles 2 and 3 ECHR, it must involve victims and their next-of-kin in the procedure "to the extent necessary to safeguard [their] legitimate interests". In *Edwards v United Kingdom*, the European Court of Human Rights found a violation of the positive obligation to effectively investigate as a result of "the private character of the proceedings from which the applicants were excluded save where they were giving evidence". The UN General Assembly-recommended Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment require that "[a]lleged victims of torture or ill-treatment and their legal representatives shall be informed of, and have access to, any hearing, as well as to information relevant to the investigation, and shall be entitled to present other evidence."

The Confidential Committee

We welcome the opportunity for witnesses to come forward and give evidence in private in a less formal manner that is not subject to cross examination. We believe that this will assist many of those who spent time in the relevant institutions to tell their stories in a forum that is sympathetic to the emotional distress and trauma that many of them have suffered. We understand that the Confidential Committee has probably had to develop its way of working as it has gone along but believe that, now it has had an opportunity to hold a number of hearings, it would be very helpful if more information could be circulated as to how the hearings operate in practice. We believe that knowing more about what actually happens will encourage more people to attend to give evidence.

The Commissions of Investigation Act 2004

We understand that the Commission has to operate in accordance with statute. However we are concerned that the Commissions of Investigation Act 2004, sections 19, 39 and 40

restrict information and documentation that has been provided to the Commission from being used or accessed for other purposes.

It will come as no surprise to the Commission to learn that many of those individuals in contact with us have experienced great difficulty in accessing even the most basic information (birth certificates, names of parents and medical information) about themselves, in particular from the various religious orders running many of the institutions. At the appropriate time, we will be urging the Commission to make recommendations that will facilitate the timely provision of documentation to affected individuals about themselves and their personal histories without having to suffer the current level of delay and the consequences of disproportionate concerns about the privacy of their parents or siblings. Over the past two decades, the co-founders of ARA and JFMR have encountered countless people who have been delayed and prevented from obtaining basic information about their identity. We are aware of many instances of people wishing to reunite with their family member(s) when the delays and obstructions have resulted in cases where the person sought has died prior to the completion of the search. Therefore if the Commission is to receive a significant amount of documentation that would be of fundamental use and interest to affected persons we would submit that the Commission ought to do everything in its power to make that information available to those people that need it.

Redress and the Statute of Limitations Acts 1957 to 2000

These statutes effectively prevent individuals who were resident in the various Mother and Baby Homes and other institutions from bringing claims for redress in respect of their treatment. For many individuals, especially children born in the institutions, it was not possible to bring claims within the limitation period for want of information or a true understanding of the illegality of abuses that took place which included false imprisonment, illegal adoption and physical abuse to name but three.

In the absence of any redress scheme, which we would urge the Commission to consider recommending in any event, our submission is that the Commission recommends to the Government that there be an exception enacted to the Statute of Limitations to allow claims against the parties responsible to be made by individuals who suffered mistreatment and breaches of their rights in the various institutions.

Irish Constitutional, and European and International Human Rights, Law

We echo the Irish Human Rights and Equality Commission's submission to Government that the Commission's investigation must comply with the State's obligations under the Constitution and European Human Rights and International Human Rights Law. We note in support of this submission that clause (ix)(13) of the Terms of Reference gives the Commission discretion as to the scope and intensity of the investigation but also goes on to

highlight the need for the investigation to be... "*thorough in accordance with the State's obligations under International Human Rights Law.*" We also imagine that the Commission is conscious of the application to its work of section 3 of the European Convention on Human Rights Act 2003.

In this respect, we make three submissions.

First, we submit that the Commission must investigate all possible violations of the following rights: the right to life; the right to freedom from torture or ill-treatment; the right to freedom from enforced disappearance; the right to freedom from slavery, servitude or forced or compulsory labour; the right to liberty and security of the person; the right to receive an education; the right to respect for private and family life, home and correspondence; the right to freedom of expression; and the right to freedom from discrimination.

With respect to enforced disappearance, we draw the Commission's attention to the jurisprudence of the European Court of Human Rights (including *Kurt v Turkey* (1999) 27 EHRR 373 and *Bazorkina v Russia* (2008) 46 EHRR 15), finding the "disappearance" of a relative to amount to a violation of a family member's article 3 ECHR rights where it caused intense suffering. The United Nations Human Rights Committee (*Quinteros v Uruguay*, Communication No 107/81) and the Inter-American Court of Human Rights (*Blake v Guatemala*, Judgment of 24 January 1998; *Goiburú and Others v Paraguay*, 22 September 2006) have made similar findings, equating the effects of "enforced disappearance" to torture or ill-treatment. We submit that forcible taking of children from their mothers and the subsequent inability of mothers to discover the whereabouts of their children may meet the definition of "enforced disappearance" under article 2 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. The Commission will be aware that the widespread or systematic practice of enforced disappearance is considered a crime against humanity in international law.

With regard to the above-mentioned rights, the Commission should investigate and make findings in relation to violations by (a) the State and (b) non-State actors. The jurisprudence of the European Court of Human Rights provides that the procedural obligation under articles 2 and 3 to effectively investigate requires an effective investigation into rights violations by private and even unknown perpetrators, as well as those for whom the State bears responsibility.

Our second submission relates to the issue of State responsibility. The Commission must include in its understanding of what amounts to State responsibility for rights violations the *failure to provide effective protection from violations of which it was or ought to have been aware*. This means that questions of effective regulation, monitoring, intervention, criminalisation and the surrounding legal and policy frameworks in relation to practices

carried on in the Mother and Baby Homes and related institutions and agencies should be of concern to the Commission when investigating and determining State responsibility for rights violations. The European Court of Human Rights' jurisprudence is clear on the issue of due diligence, or, positive obligations to protect, particularly regarding the rights to life; freedom from torture or ill-treatment; freedom from slavery, servitude or forced or compulsory labour; freedom from arbitrary detention; and respect for private and family life (see, for example, *O'Keeffe v Ireland* (2014) 59 EHRR 15; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1; *Storck v Germany* (2005) 43 EHRR 96; *Z and Others v United Kingdom* (2001) 34 EHRR 97; and *X v Netherlands* (1986) 8 EHRR 235, among many others).

Finally, we draw the Commission's attention to the right to a remedy, or, reparation, for rights violations (which is guaranteed by Irish Constitutional, and European and International Human Rights, Law) and we request that the Commission consider making recommendations to Government which would further this right. We submit that the Commission should consider the impact of the legislative and procedural issues identified throughout this letter on the right to a remedy and should make recommendations to Government for legislative reform, and amend its own procedures, where necessary.

We request that the Commission give detailed consideration to the elements of the right to a remedy and reparation for gross violations of international human rights law (set out in the UN General Assembly-recommended Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law) and make recommendations to Government both at an interim stage and at the conclusion of its work in respect of (1) restitution, (2) compensation, (3) rehabilitation, (4) satisfaction and (5) guarantees of non-repetition. These elements include measures such as access to information; identification of the whereabouts of remains; a public apology; judicial and administrative sanctions against persons liable for the violations; redress including compensation and rehabilitation; and education and institutional reform to guarantee non-repetition.

Hearing on 9 May 2016

We note that you have suggested that the hearing on 9 May be held in private. As our submissions are not based on any individual case and focus on the scope of the Commission, its procedures and various legal issues, we would ask that the hearing be conducted in public. In making this request, we are conscious that we make our submissions in a *quasi*-representative capacity and we believe it would be of benefit for interested parties to be able to attend if they so wish. We would be interested to learn why the Commission considers that the hearing should be held in private but at the moment we cannot see any reason why it needs to be.

Further Submissions

As we believe the Commission is aware, together with our solicitors, Hogan Lovells, ARA and JFMR are offering assistance to individuals in contact with us in preparing statements telling of their experiences for submission to the Commission. We hope that this exercise will enable us to build a database of information that will allow us to make submissions at a later date as to the findings and recommendations the Commission should make in its final report. We would be grateful therefore if you would note our request that we be able to make further submissions later in the investigation.

Please feel free to request any further information about these submissions failing which we will look forward to developing them at the hearing on 9 May 2016.

Our delegation at the hearing will be five in number. Susan Lohan and I will attend the hearing as representatives of ARA and JFMR. Colin Smith BL will appear as Counsel, attended by a representative of KOD Lyons, solicitors. Maeve O'Rourke will also attend (although not as Counsel for the hearing); Ms O'Rourke is a barrister at 33 Bedford Row, London, and has been working with Hogan Lovells, ARA and JFMR for some time in relation to the matters at hand. I hope that this will be acceptable to the Commission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Claire McGettrick', with a large, stylized flourish at the end.

Claire McGettrick

For and on behalf of Adoption Rights Alliance and JFM Research