

30 July 2021

By email

Deputy Funchion
Chair
Committee on Children, Disability, Equality and Integration
Leinster House
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Our ref 10162979

Dear Deputy Funchion

MOTHER & BABY HOMES COMMISSION REPORT

As we believe you will be aware, this firm is acting on behalf of Adoption Rights Alliance (“ARA”) and JFM Research (“JFMR”) in connection with The Clann Project which was set up to assist anyone who wished to submit their evidence, in the form of witness statements, to the Mother & Baby Homes Commission of Investigation (“the Commission”).

In doing so, the Clann Project spoke to 164 witnesses and submitted 82 statements to the Commission of which 34 were supported by the sworn affidavit confirming their truth required by the Commission if they were to be taken into account as evidence. Based on these statements and the work of a large number of academics and lawyers, including more than 20 members of the Bar of Ireland, the Clann Project made a substantial submission to the Commission setting out its own findings as regards the treatment of mothers, children and adopted people in the institutions under investigation and the adoption system as a whole and also made a number of recommendations that it believed the Commission should make to the Irish Government in its report.

We understand that your Committee is interested in meeting with various groups to discuss the suggestion that the Commission’s Report be repudiated based on its content and findings together with concerns expressed about the Commission’s methodology as described in the Report but also in subsequent comments by one of the Commissioners at an online seminar hosted by Oxford University.

The Clann Project co-directors Claire McGettrick and Dr Maeve O’Rourke attended before you on 29 June 2021 in relation to the Birth Information and Tracing General Scheme of Bill and are also available to appear in relation to the Commission Report. We will leave them to make their detailed position clear if invited to appear. In the meantime, however, they have asked us to provide you with any comments that we have about the Commission’s approach and methodology arising out of our own interaction with the Commission over the course of its investigation.

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THE ESTABLISHMENT OF THE COMMISSION OF INVESTIGATION

ARA and JFMR were pleased when in 2014 the Government stated its intention to establish an investigation into Ireland's Mother & Baby Homes and related issues. Both organisations had long felt that there needed to be a comprehensive investigation into adoption, forced family separation and connected institutional abuses.

The Clann Project was established to help anyone who wanted to give evidence to the Commission by providing such assistance as they required. This started by providing practical information about how those who wanted to interact with the Commission could do so and moved on to the preparation of witness statements. As well as assisting those individuals who approached us, we also believed that the Clann Project would assist the Commission as it would receive professionally drafted statements that cross referred to relevant documentation. Indeed, at one point [Ref: MBHCOI letter to HL dated 21 July 2016](#) the Commission said that it was pleased we were providing this Pro Bono service to affected individuals.

Against this backdrop, it is fair to say that we were disappointed by the reaction we got from the Commission in response to our correspondence with them (which was principally directed to obtaining a greater understanding of the Commission's procedures and the extent to which Clann Project witnesses could give evidence and make submissions to the Commission in public hearings) which, at times, seemed to be unnecessarily defensive and unduly focussed on maintaining the secrecy of the investigation.

CORRESPONDENCE WITH, AND SUBMISSIONS MADE TO, THE COMMISSION

Procedure for giving evidence and responding to the evidence of others

At the very outset, we wrote to the Commission with a number of questions relating to the procedures by which individuals could give evidence to the Commission and how they could be involved in the cross examination of witnesses whose evidence affected them ([Ref: HL letter to MBHCOI dated 12 November 2015](#)).

The Commission's response ([Ref MBHCOI letter to HL dated 14 December 2015](#)) contained the following statements:

- *The Commission will disclose the evidence of a witness and ask that witness to attend in person... for the purposes of cross examination by the representative of an affected party in circumstances where the Commission considers that fair procedures require such an attendance. The decision will obviously be to a significant extent based on the nature of the evidence given but will also depend on the other evidence available to the Commission and the degree to which a person is considered to be affected by that evidence.*
- *Unless the Commission directs that evidence will be heard in public...[it] is not anticipated at this stage that other interested parties or their legal representatives will be invited to attend the private hearings of the Commission.*
- *The conduct of the investigation is a matter for the Commission and should it at any stage require commentary on relevant evidence from survivors, arrangements will be made in this regard.*

Making procedural submissions in public

On 11 February 2016, a request was made to the Commission that when the Clann Project made its procedural submissions to the Commission on 9 May 2016, that hearing be heard in public [[Ref: letter from CM to MBHCOI dated 11 February 2016](#)]. On 19 February 2016, the Commission asked why a public hearing would be appropriate. Reasons were subsequently provided [[Ref: letter from ARA/JFMR to MBHCOI dated 3 May 2016](#)] and again and in further detail at the hearing on 9 May

2016. Those reasons included the fact that the submissions were on the scope of the investigation, no personal evidence was being given, that the Clann Project was acting in a quasi-representative capacity and it was in the interest of fairness and transparency that the hearing be in public. The request was declined so we asked for the reasons why [[Ref: letter from HL to MBHCOI dated 27 May 2016](#)]. The Commission responded by referring us to S11(1) of the Commission of Investigations Act 2004 and by saying that it “*was not satisfied that it was desirable in the interests of both the investigation and fair procedures to hear all or part of your clients’ evidence in public*” [[Ref: letter from MBHCOI to HL dated 1 June 2016](#)]. We responded [[Ref: letter from HL to MBHCOI dated 1 July 2016](#)] pointing out that S11(1)(a) allows the Commission to hold a hearing in public if it is requested by a witness and, in these circumstances, it was incumbent on the Commission to give reasons for its decision to refuse such a request.

Giving evidence to the Investigation Committee

On 9 August 2016, we wrote to the Commission [[Ref: letter from HL to MBHCOI dated 9 August 2016](#)] noting that the Commission website gave the impression that the only way individuals could give evidence was via the Confidential Committee and that there was no indication of how witnesses could give evidence to the Commission itself. The Commission responded [[Ref: letter from MBHCOI to HL dated 23 August 2016](#)] stating that the Investigation Committee will invite witnesses to give evidence which “*will add to its body of knowledge of the issues under investigation. Not everyone who expresses an interest in giving evidence to the Investigation Committee will be invited for hearing*”.

On 23 February 2017, we wrote to the Commission [[Ref: letter from HL to MBHCOI dated 23 February 2017](#)] passing on a request from Philomena Lee that she be able to give her evidence to the Investigation Committee and that her hearing be held in public. The Commission said that it would consider the request [[Ref: letter from MBHCOI to HL dated 21 March 2017](#)]. We repeated the request on 1 March 2017 [[Ref: letter from HL to MBHCOI dated 1 March 2017](#)].

REACTION OF SURVIVORS, ADOPTED PEOPLE AND MOTHERS TO THE COMMISSION OF INVESTIGATION’S FINAL REPORT

As your Committee will be well aware, the Commission’s Final Report has been criticised by survivors, adopted people, mothers and other relatives.

The criticisms range from inaccuracies in the reporting of individual cases including in the main report of the Commission, to the making of various findings—for example that there is very little evidence that children were forcibly taken from their mothers, that there is no evidence that women were forced to enter mother and baby homes by the Church or State authorities, that women were not incarcerated in the institutions, that the women’s unpaid labour was generally work which they would have had to do if they were living at home, and that non-consensual vaccine trials disclosed no evidence of injury—and the extent to which the evidence of witnesses given to the Confidential Committee was considered by the Commission and included in its Report.

STATEMENTS BY THE COMMISSIONERS

The criticism as to the extent to which the evidence of survivors, adopted people and mothers was considered by the Commission was fuelled recently by the statements made by Professor Daly at an Oxford University seminar on 2 June 2021 in relation to the testimony reflected in the Confidential Committee Report [[Ref: http://clannproject.org/commission-report/oxfordtranscript](http://clannproject.org/commission-report/oxfordtranscript)]. During that seminar, Professor Daly said:

“Anything in the main report had to meet robust legal standards of evidence”.

“If we wrote something that was adverse, critical about an individual or an entity, an institution, we had to write a draft report where we made these critical observations and

supply them with the accompanying documentation.... And they had a chance to read that and they had a chance to come back.... They came back with a vengeance.”

“I have spoken to my colleagues about how we could have integrated the Confidential inquiry into the Report? Well, first of all, it would have taken us... it would have taken a lot of time, additional time...”

“I think basically we’ve done a job and I think let it stand and nobody ever suggested this was going to be the last word on it. We never knew it could be or should be the last word and my view is, by all means, let others go and work with this topic and with taking statements from people, particularly people who spoke to the Confidential inquiry, from anyone who has got evidence. So my view is we’ve done a job and basically, you know, let others go and take it further.”

Following a request that the Commissioners appear before your Committee to answer questions about their Report and its methodology, Judge Murphy wrote a letter dated 11 June 2021 [Ref: [Letter from Judge Murphy to Joint Committee on Children, Disability, Equality, Integration and Youth dated 11 June 2021](#)] In that letter, Judge Murphy said:

“The Commission... was required to work within the 2004 Act and its Terms of Reference.”

“During the Investigation, the Commission investigated critical witnesses on oath, testing the evidence where appropriate and always on the express understanding that those affected by it would be given the opportunity to cross examine.”

“It must be noted that the number of mothers who spoke to the Confidential Committee is a tiny proportion of the total number of mothers in the institutions under investigation. 304 mothers gave testimony to the Confidential Committee... in the period 1960-1998 inclusive, there were 24,207 mothers in the institutions investigated – the experiences of 1 per cent of those are reflected in the Confidential Committee Report.”

“In the absence of evidence that would withstand scrutiny and cross examination, the Commission was unable to reach factual conclusions that many people wished that it had reached”.

REFLECTIONS ON THE COMMISSION’S METHODOLOGY AND APPROACH

We can readily understand that the Irish government wished to avoid the time and expense of undertaking a public inquiry with all the expense of large legal teams and hence set up the Commission in the way that it did. That said, the approach taken by the Commission, which was to hold every hearing in private and apparently feel unable to make even general factual findings based on the testimony given to the Confidential Committee has left many of those most acutely affected lacking confidence in the Report.

This lack of confidence is, at least in part, based on the following elements of the Commission’s approach to its investigation:

- Article 6 of the Commission’s Terms of Reference contained the express option for the Commission to revert to the relevant Minister to request a variation. Indeed, in July 2016 Minister Zappone expressly confirmed that she was willing to entertain any such request [referred to in the Commission’s second interim report at <https://assets.gov.ie/26424/d934467e5b0e46a5b4217e4a997afd48.pdf>]. Thus, had the Commission felt as constrained by its Terms of reference as is now suggested it had the option to seek a variation.
- The Commission of Investigation Act 2004 does not require that every hearing be held in private. S11(3) of the Act expressly allows evidence to be heard in public at the request of

a witness. The Commission's refusal to hold any hearings in public, or give any reasons for its position, gives an unnecessary impression of secrecy.

- Neither the Terms of Reference nor the Commission of Investigation Act 2004 require that anything in the main report has to meet robust legal standards of evidence. There was nothing to stop the Commission drawing conclusions from a preponderance of evidence available to it, including evidence given to the Confidential Committee (see Article 4 of its Terms of Reference), while stating any caveats as to the nature of that evidence.
- Judge Murphy has stated that the testimony of the 550 witnesses who gave evidence to the Confidential Committee is only a tiny fraction of those who passed through the Homes. This, of course, is true but, in that case, why were witnesses encouraged to attend the Confidential Committee by virtue of the Commission not including on its website details of the other route to give formal evidence? Why did the Investigation Committee only call 64 of those witnesses to give evidence? Why did the Commission not call any of the Clann Project witnesses (even those who had submitted sworn affidavits) to give evidence? Why did the Commission not even reply to the request of Philomena Lee that she be able to give her evidence to the Commission?
- Notwithstanding the various statements made about, and statutory provisions (not least Section 12 of the Commissions of Investigations Act 2004 and Articles 2 and 3 of the European Convention of Human Rights), relating to individuals being affected by other persons' evidence, the Clann Project is unaware of any affected person being shown any evidence from any of the relevant institutions or being called for cross examination or being invited to cross examine another witness.
- It is clear from the comments of Professor Daly that various institutions have been given the opportunity to comment on draft findings and to make submissions on them. The Commission Report (Chapter 18) also indicates that individual nuns have had the opportunity to comment on draft findings. The Clann Project is unaware of any affected person being offered the same opportunity.

All of the above have contributed to the feeling amongst many adopted people, survivors and mothers that the Commission's Report has been prepared about them but with insufficient involvement of them.

HOW SHOULD THE REPORT BE TREATED?

We do not for one second criticise the integrity or hard work of the Commissioners. Indeed, much excellent work has been done to accumulate and pull together all the various sources of oral and written evidence.

Unfortunately, the manner in which the Commission has operated has resulted in conclusions being drawn that simply do not reflect the actual experiences of the very people most affected by the Commission's report. As a result, it would be disappointing if this report were accepted by the Irish Government as the definitive word on the operation of the Mother & Baby Homes. We would refer to the statement of Professor Daly that the Report should not be regarded as the last word on this subject and nor was it intended to be.

We note the suggestion by ARA and JFMR that the Government should affix to the Report's cover a notice to the effect that the Government has concerns about the Commission's methodology and as a result has not accepted the Commission's findings in full. Given our own misgivings about the Commission's procedures, as discussed in this letter, we see this proposal as a sensible one. In these circumstances, your Committee might therefore consider recommending to the Government the attachment of such a note to the Report.

Yours sincerely

A handwritten signature in black ink that reads "Yasmin Waljee". The signature is written in a cursive, flowing style.

Pp Yasmin Waljee OBE

Faye Jarvis
Partner

CC All members of the Committee on Children, Disability, Equality, Integration and Youth