Submission to the Joint Committee on Education and Skills Regarding the Retention of Records Bill 2019

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Executive Summary

I. **Access to archives plays in promoting and protection victim-survivors' right to truth. Under international and European Union (EU) law, survivors have a right of access to their personal information, especially where it relates to human rights violations.**

II. **The process matters as much as the outcome. Pro-active, systemic and meaningful consultations with victim-survivors affected by the 2019 Bill must be pursued.**

III. **Records containing personal information of survivors are the data of survivors to which they should be entitled under GDPR and the Data Protection Act 2018.**

IV. **I support the establishment of a National Archives Child Care-Related Records Advisory Board. Survivors are the experts on their own experience, preferences and the potential issues and concerns that affect the survivor community more generally.**

V. **The status quo is that they are obliged to dispose of these records, but have discretion as to how to do so. Disposal is not necessarily destruction. The word destruction is not found in either the legislation related to the Commission to Investigate Child Abuse, the Residential**

Institution Redress Board or the Residential Institution Statutory Fund (Caranua).

VI. **Survivors should be granted immediate access to their personal information. The remaining records should be subjected to the ordinary rules of the National Archives legislation.**

VII. **Processes of anonymization and a right of reply are sufficient to address concerns regarding uncontested allegations contained in records.**

VIII. **No costed figure has been mentioned to date regarding the records of relevant institutions. It seems incumbent on this Committee and the Oireachtas to satisfy itself that such an alternative would be prohibitively expensive given the issues of national importance concerned with these institutions.**

IX. **The proposed 75-year absolute ban on the release of records of relevant institutions is contrary to comparative and international best practice on transitional justice.**

I. Introduction

As a legal academic, my expertise is in transitional justice, which concerns how societies respond to legacies of widespread or systemic human rights abuses through truth telling, accountability, redress and guarantees of non-repetition. Transitional justice has typically concerned post-conflict or post-authoritarian societies, but has recently featured in peaceful democracies, most relevantly in how Canada responded to its legacy of physical and sexual abuse in residential schools. I have written previously that transitional justice should be understood to apply to how Ireland is addressing its past legacy of historical abuses such as residential schools, Magdalene Laundries and Mother and Baby Homes.[1]

The Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (2005) of the United Nations High Commission on Human Rights declares that victims of serious crimes under international law have a right to know the truth about the violations. The Principles emphasize the vital role that access to archives plays in learning the truth, holding persons accountable for human right violations, claiming compensation, and defending against charges of human rights violations. The Principles state that each person is entitled to know whether his or her name appears in State archives and, if it does, to challenge the validity of the information by submitting to the archival institution a statement that will be made available by the archivists whenever the file containing the name is requested for research use.

[1] James Gallen, 'Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice' (2016) 10 International Journal of Transitional Justice 332; James Gallen and Kate Gleeson, 'Unpaid Wages: The Experiences of Irish Magdalene Laundries and Indigenous Australians' (2018) 14 International Journal of Law in Context 43.

The Retention of Records Bill 2019 proposes that the records of three bodies (Commission to Inquire into Child Abuse, Residential Institutions Redress Board and Residential Institutions Statutory Fund Act 2012) (hereinafter the relevant bodies) will, on the dissolution of the bodies, become records of the Department of Education and Skills and be transferred to the National Archives. The records will then be withheld from public access for a period of at least 75 years and that provisions of the National Archive Act 1986 will be dis-applied. In Dail debate in 2015, it appears 75 years was selected to ensure that records would be released to the general public at a time where it was expected all relevant affected individuals would be dead.

In April 2019, Joe McHugh stated the following competing concerns regarding the Retention of Records Bill: “On the one hand, it requires weighing in the balance the original assurances of confidentiality, the associated provision for the destruction of the records and the sensitive and personal nature of the records. On the other hand, due consideration must be given to the wider public interest in ensuring that the history of child abuse in the residential institutions is preserved.”

This submission argues that if records are to be preserved in any capacity, then the view of survivors as to the nature and extent of how those records are maintained and accessed should be the paramount consideration.

II. Consultation and Consent – What Victim-Survivors Want

Transitional justice is designed to prevent and guarantee the non-recurrence of human rights abuse and violence. The first element in ensuring this guarantee is meaningful is to enable victim-survivor ownership of the process, particularly through consultation with affected groups at every stage. Victim-survivors should be empowered to influence decisions and policy, and not be the object of charity, paternalism or

instrumentalisation. To effectively address the past, process matters. A transitional justice approach is distinctive as a process centred on and owned by the persons most affected by human rights abuse: victim-survivors and their families.[2] The goals of the process are not made subservient to the agenda of victims, but "an awareness of the centrality of victims/survivors and their needs to the whole process drives it."[3] As a result, consistent consultation with victim-survivors in the design, operation and implementation of transitional justice mechanisms is essential to the legitimacy and effectiveness of the enterprise.[4] A failure to involve victim-survivors meaningfully creates significant risks of a new form of paternalism and damages the legitimacy and effectiveness of any transitional justice initiative. How these archives and records are treated is of profound significance and forms part of the lasting legacy of the relevant bodies.

The Department of Education should be commended for its recent small scale, pilot consultation with survivors concerning a range of issues including archives.[5] However, it is essential that more pro-active, systemic and meaningful consultations with those affected by the 2019 Bill are pursued. Industrial and reformatory schools formed parts of Ireland's architecture of coercive confinement, that addressed poverty and marginalization in a paternalistic fashion that told families that Church and State knew best how to "manage" their lives. A present day process of law making regarding the

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[2] Kieran McEvoy and Lorna McGregor, 'Transitional Justice from Below: An Agenda for Research, Policy and Praxis,' in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* , ed. Kevin McEvoy and Lorna McGregor (Oxford: Hart Publishing, 2008).
[3] Simon Robins, "Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal" (2011) 5 (1) Int J Transit Justice 75-98
[4] United Nations Office of the High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States: National Consultations on Transitional Justice HR/PUB/09/2
[5] Consultations with Survivors of Institutional Abuse on Themes and Issues to be addressed by a Survivor Led Consultation Group, available at 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 (last visited 11th November 2019)

voices and archives of those resident in these institutions without meaningful consultation and ownership risk perpetuating this paternalistic approach and causing new forms of harm and distress. It is highly possible that survivors exist across all sectors of society and have had a range of life experiences. It is unreasonable to rely solely on their initiative to ascertain their views and preferences.

Consent

In April 2019 at the Second Stage reading of the Bill, Deputy McHugh emphasised the personal and sensitive nature of some of the records contained in relevant institutions. It is precisely the personal and sensitive of this information that makes these personal records the right and entitlement of survivors. Records containing personal information of survivors are the data of survivors to which they are entitled under GDPR and the Data Protection Act 2018. Article 4(1) GDPR defines "Personal data" as:

> any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

In 2017, the Court of Justice of the European Union (CJEU) held that personal information may be linked to more than one individual and this does not affect an individual's right of access: 'The same information may relate to a number of individuals and may constitute for each of them, provided that those persons are identified or identifiable, personal data'.[6] Survivors personal data in the context of the 2019 Bill may include transcripts of their own testimony, accounts of their own redress

[6] Nowak v Data Protection Commissioner of Ireland (Case C-434/16, 20 December 2017), para. 45

application or personal files which may include information they have not been able to access elsewhere, such as:

- Records created by the schools or religious bodies
- Records created by the State
- Witness statements or other documents produced by people involved in running the schools, which mention or concern individual survivors

Such access to personal information for relatives of children who died while incarcerated to enable them to ascertain the truth regarding their family members, whose preferences can no longer be ascertained. An approach that prioritises survivor choice regarding what happens to their personal data offers the opportunity for survivors to allow their testimony to be made publicly available (anonymised to the extent that may be deemed necessary to comply with legal obligations of third parties) or for it to remain confidential. Legislation providing survivors with unqualified access to their own personal information and choice as to its use would be compatible with EU law as long as it did not generally constitute a disproportionate interference with the fundamental rights of others. This approach aligns with international best practice. Trudy Peterson concludes:

“Two principles form the basis for handling the records of victims of human rights violations:

1. The victim has the right to know what information is in the file on his or her case (habeas data).

2. The victim has the right to determine whether the file on his or her case can be consulted by third parties.

In all cases, “victims” should be understood to include “heirs and assigns.” Often the file is on a person who is deceased, and the privacy interest in it is now that of the living heirs.”[7]

Peterson goes on to note the potential role for the archive as an opportunity for survivors and those affected by such arms to exercise agency: “The victim and those named may submit further information. Both victims and those named in the files may want to make corrections or declarations about the information in the files. The original case files, as they existed at the close of the commission, should not be altered by additions or deletions. The archival custodian should accept the submissions, create a new file in which the submissions are placed, and place a cross-reference in the original file indicating that a parallel file exists. This cross-reference must be incorporated in both the paper and electronic files. The archives will ensure that the parallel file is always given to researchers who request the original file.”[8]

Ongoing Consultation

I support the establishment of a National Archives Child Care-Related Records Advisory Board. Survivors are the experts on their own experience, preferences and the potential issues and concerns that affect the survivor community more generally. Such a body could be established to advise the Government and the Director of the National Archives regarding the treatment of these records, following an open competition through the public appointments process. The records related to other historical abuse inquiries such as clerical abuse inquires, the Inter-Departmental

[7] Trudy Huskamp Peterson, *Final Acts: A Guide to Preserving the Records of Truth Commissions* (Woodrow Wilson Center Press ; Johns Hopkins University Press 2005) 94.
[8] ibid 96.

Committee to establish the facts of State involvement with the Magdalen Laundries (McAleese Committee) and the ongoing Mother and Baby Homes Commission of Inquiry, may, in the future form part of a comprehensive archival picture of Ireland's attempts to address its legacy of historical abuses and past wrongs. A standing consultative body of survivors would greatly assist this process.

If as a country we want meaningfully to prevent the horrors documented in the Ryan report from being forgotten or worse repeated, then it is absolutely critical that the views of survivors regarding the treatment of these records is accorded paramount importance. The Retention of Records Bill 2019 completely ignores the wishes of living survivors to have full control over their own personal stories, testimonies and personal records.

III. Choice under the CICA and RIRB Legislation

Second, discussions to date that the relevant bodies are currently compelled by law to destroy the records is not accurate. In April 2019, Deputy McHugh suggested that the National Archives system does not give "sufficiently robust assurances regarding the treatment of the records. This is especially the case when account is taken of the fact that their retention represents a substantial change of approach relative to the process of destruction that is provided for in the existing legislation governing the bodies."

The status quo is that they are obliged to dispose of these records, but have discretion as to how to do so. Disposal is not necessarily destruction. The word destruction is not found in either the legislation related to the Commission to Investigate Child Abuse, the Residential Institution Redress Board or the Residential Institution Statutory Fund

(Caranua). Section 7(6) of the Commission to Investigate Child Abuse Act 2000 provides

> (6) The Commission shall make such arrangements as it considers appropriate for the making of as complete a record as is practicable of the proceedings of the Commission and the Committees and, in relation to the custody, and the *disposal* (otherwise than in a manner that would contravene the National Archives Act, 1986), after the dissolution of those bodies, of the documents of the Commission or a Committee and of copies of any documents given in evidence to the Commission or a Committee. *(emphasis added)*

The CICA Act does not refer to destruction, only to disposal. This is confirmed in the Third Interim Report of the CICA at page 240:

> In relation to what will happen when the Commission has finished its work, in general under the Act the Commission *has a discretion as to the custody and disposal of its records*, subject to compliance with the National Archives Act, 198621.The records of the Confidential Committee will not be subject to the provisions of the Act of 198622 and, accordingly, *the Commission will have an absolute discretion as to their custody and disposal*. No final decision can be made at this juncture in relation to these matters. The Commission gives an assurance to persons concerned that the guarantee of confidentiality in relation to information given to the Confidential Committee will be honoured. Persons who will give information in confidence and persons, individuals and bodies, whom the information may suggest were implicated in wrongdoing or in conduct of which society disapproves who have not had an opportunity to refute the information, can be assured that steps will be taken to retain the records in a secure facility but only for such period as is reasonably necessary. Thereafter the records will be destroyed.

Section 28 (7-8) of the Residential Institutions Redress Board Act 2002 also refer to disposal:

> (7) The Board shall, prior to the making of an order under section 3 (3), determine the disposal of the documents concerning applications made to it.

(8) The Review Committee shall, prior to the making of an order under section 14 (3), determine the *disposal* of the documents concerning applications made to it.

Legal definitions and uses of "disposal" typically have two meanings: (i) to transfer ownership or control of a property to another or (ii) to deal with or address conclusively. Neither meaning in its plain language nor purposive interpretation conclusively refers to destruction. Section 7(5) of the National Archives Act 1986 provides for *disposal by way of destruction* explicitly: "Departmental records, the disposal of which is authorised by an authorisation under this section, shall be disposed of by being destroyed in a manner which ensures that their confidentiality is not affected and that their contents are not ascertainable." The fact that disposal does not equal destruction is evident in section 2(4) of the current Retention of Records Bill 2019, which provides:

(4) Records which are the subject of an authorisation under subsection (1) shall be *disposed* of—

(a) in accordance with conditions, if any, specified in the authorisation, and

(b) *by being destroyed* in a manner which ensures that their confidentiality is not affected and that their contents are not ascertainable.

The reference to disposal in the 2000 and 2002 Act *without more* cannot be equated with destruction. The status quo is that the relevant bodies have discretion as to how to deal with these records and are not presently compelled under law to destroy them. Trudy Peterson notes that saving inquiry archives is a critical component of transitional justice:

> "Saving the records ensures that amnesia does not prevail. Another reason to save the commission's records is to demonstrate to future citizens how the commission operated, how it handled its charge, and what it did and did not know—in short, its legitimacy. The records document the operation of the commission with unparalleled immediacy and integrity."[9]

[9] ibid 2.

IV. The National Archives Act 1986 is sufficient

As a result, and in line with the motion on the Ryan report adopted by Dáil Éireann on 12 June 2009, the Oireachtas has a choice as to how to effect "the desirability that, in so far as possible, all of the documentation received by and in the possession of the Commission to Inquire into Child Abuse is preserved for posterity and not destroyed."

It is my submission that the National Archives Act remains the appropriate and sufficient system for retaining the records of relevant institutions. It is important emphasise that the records of the relevant institutions should be categorised, as each category warrants different treatment. Commissions create three types of records: (1) administrative files, such as those on personnel, payroll, and fiscal matters; (2) program records, which document the substantive work of the commission; and (3) investigative records, which are related to particular individuals or incident.[10]

Concerns regarding confidentiality apply only to personal information given by those who cooperated with the relevant bodies. There is no good reason in principle why other records, such as program records, documenting the work of the relevant bodies, should be subjected to an absolute blanket ban of 75 years.

This submission has addressed the treatment of survivors' access to personal data within investigative or program records above. Survivors should be granted immediate access to their personal information. The remaining information should be subjected to the ordinary rules of the National Archives legislation. The National Archives are equipped to engage with the survivor community. Many archivists deal with survivors of abuse, allowing them to access relevant records. Many Archivists seek additional training to better assist survivors of clerical/institutional abuse. Where necessary,

[10] ibid 4.

archives should seek additional support services and/or expertise in dialogue with survivors.

Anonymisation

Questions have also been raised as to whether the records might be released on an anonymised basis and consideration has been given to this approach. Three objections have been stated by Deputy McHugh in April 2019:

“First, it would rob the records of much of their historical significance.”

The logic that anonymising records would remove "historical significance" is not valid. The evidential value in the original records is not affected or changed. A digital surrogate can be created and changed (redacted/anonymised) without ever affecting the original record. "Historical significance" is a subjective term based on the interpretation of the evidential value of these records, where infinite variables can come into play affecting the perceived significance.

“Second, anonymising the records would not be without risk that personal information could be revealed, either through an administrative error or by inference from the remaining content.”

The risk of accidental disclosure of personal information is inherently possible, but no evidence adduced that such a risk is especially pronounced in this context. Regrettably, given existing practices regarding redaction for personal information evident in recent discussions regarding the Adoption Information and Tracing Bill and associated processes of personal access requests, the presumption based on existing practice points in the opposite direction, that it is foreseeable that victim-survivors would receive less personal information than they are entitled to. Effectively redacted

information cannot constitute an innuendo, an implied statement that could constitute defamation. Clear and precise redaction practices, that favour maximising survivor access have been pursued in comparative jurisdictions' inquiries and archival practices, discussed below.

"There is a legal onus, a legal interpretation and issues of confidentiality. Many of the witnesses' contributions were given in confidence. This is one of the competing imperatives for me. The records contain findings of fault against individuals. Due to the assurances of confidentiality, those allegations were not tested in the way they would have been in a court of law. This is why there are serious concerns about the right to privacy, the right to a good name and legitimate expectations of confidentiality. As a result, the legal advice is that early release of the records could be open to legal challenge from survivors and alleged perpetrators of abuse. That is one argument."

These views exaggerate the issue of confidentiality. The statements of survivors do not constitute "findings of fault". The Commission's report and contents cannot be used for litigation. The Redress Board is expressly ex gratia without admission of liability and contains a waiver for those survivors who applied for this scheme. There is very limited potential for further litigation to arise where waiver of the right of access to court exists. In addition, it could remain open for religious orders or other individuals or groups who wish to contest any aspect to provide written responses to allegations within the report from survivors or the Commission itself, as recommended by international policy in the area.

The internal program documents of the relevant bodies are not affected by assurances of confidentiality. The Investigation Committee of the Ryan Commission had powers to direct and compel testimony and cooperation.

"Lastly, the anonymisation of the records would represent a massive and costly undertaking, given that there are in excess of 2 million individual records involved. This, of itself, would not be reason enough to rule out this approach, but in light of the other drawbacks I have alluded to, it must also weigh on the considerations."

Anonymisation or redaction is a significant undertaking but it represents a critical component of Ireland's response to its legacy of historical abuses. It is the most effective way to ensure that survivor consent is meaningfully respected and that concerns about the access to this valuable historical resource are effectively balanced against competing concerns to respect personal data. No costed figure has been mentioned to date regarding the records of relevant institutions. It seems incumbent on this Committee and the Oireachtas to satisfy itself that such an alternative would be prohibitively expensive given the issues of national importance concerned with these institutions.

V. Comparative and International Practice Indicates Alternative, Less Restrictive Balances can be struck between Access and Privacy

The proposed 75-year absolute ban on the release of records of relevant institutions is contrary to comparative and international best practice on transitional justice.

In England and Wales, the Independent Inquiry into Child Abuse offers survivors the opportunity to access their file and to exercise ordinary and full data rights under the UK Data Protection Act. The detailed redaction protocol adopted by this Inquiry

demonstrates that a much more nuanced position can be adopted, governed by sub-statutory regulation.[11]

In Australia, while records of private sessions of the Royal Commission into Responses to Institutional Child Abuse recommended: "Individuals' existing rights to access, amend or annotate records about themselves should be recognised to the fullest extent."[12] While the Commission's own files will not be opened for 99 years to general public access, it has actively published transcripts, testimony and evidence and enabled survivors to access transcriptions and audio recordings of their own testimony.

In Canada, the records of the Truth and Reconciliation Commission, which concern the abuse of indigenous children at residential schools will be preserved at the National Center for Truth and Reconciliation. An individual has the right, on request and without charge, to examine and receive a copy of a Centre record or information contained in a record if he or she provided the record or information to the Truth Commission. Family members are entitled to access the same information if the individual consents or the individual is deceased and the director believes that disclosing the record or information to the family member would not unreasonably invade the privacy of the deceased individual or another individual referred to in the record.

International policy also strongly supports the right of survivors to access their personal information and for redacted access by academics and researchers. The absolute position proposed by the 2019 Bill is out of line with this practice and

[11] https://www.iicsa.org.uk/key-documents/322/view/2018-07-25-inquiry-protocol-redaction-documents-version-3.pdf

[12] Royal Commission Final Report – Volume 8 Recordkeeping and Information Sharing, pp. 108-9

disproportionate. The 1996 Joinet Principles on impunity for human rights violations provide that: “The right to know implies that archives should be preserved”; “Access to archives shall be facilitated in order to enable victims and persons related to claim their rights. Access should also be facilitated, as necessary, for persons implicated, who request it for their defence. When access is requested in the interest of historical research, authorization formalities shall normally be intended only to monitor access and may not be used for purposes of censorship.”[13] The Principles continue that: “All persons shall be entitled to know whether their name appears in the archives and, if it does, by virtue of their right of access, to challenge the validity of the information concerning them by exercising a right of reply. The document containing their own version shall be attached to the document challenged.” [14] In 2015 the United Nations developed a set of general recommendations for archives regarding human rights investigations as a standard for international best practice.[15] 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 “

[13] Question of the impunity of perpetrators of human rights violations (civil and political) E/CN.4/Sub.2/1997/20/Rev. 1
[14] Question of the impunity of perpetrators of human rights violations (civil and political) E/CN.4/Sub.2/1997/20/Rev. 1
[15] Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non recurrence, Pablo De Greiff A/HRC/30/42, Set of general recommendations for truth commissions and archives

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 defence 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”.

VI. Invidious Discrimination between Victim-Survivors of Industrial Schools

On 2nd April 2019, Deputy Joe McHugh stated:

> I should at this point make it clear to the House that the records which are already extant in my Department in respect of industrial schools and reformatories do not come within the ambit of this Bill. They will be treated under the general provisions of the National Archives Act as they apply to departmental records. In addition, certain personal records of persons who were committed to industrial schools are held by my Department and are accessible under freedom of information. That position remains unchanged under the Bill.

As a result, the effect of this Bill is to create two classes of former residents, victim-survivors of industrial and reformatory schools: (i) those who engaged with CICA RIRB and Caranua and (ii) those who did not. This seems likely to create confusion, distress and warrants close scrutiny. The same standard of treatment, prioritising access of victim-survivors to their own personal information, seems far preferable.

VII. Conclusion

What was done to children in closed institutions forms part of the worst events in this country since the foundation of the State. In prior debates on this Bill there was a consensus that Ireland has a duty to remember the abusive elements of its past. It is insufficient to suggest that by virtue of the publication of the Ryan Report and provision of redress, the country will inevitably remember the past, honour those who have suffered, and commit itself afresh to the prevention of such harms being visited on children again. Instead it is incumbent on government and the Oireachtas today and with every succeeding generation, to remember who we have the capacity to be to one another in Ireland. The experiences and harms done to survivors should form part of our national narrative, our national sense of identity – that in Ireland people are capable of great goodness and kindness, but sadly, also great wrongdoing and great indifference. Sealing the archives until those affected are deceased, as proposed by this Bill, does not take that commitment to remember seriously. It does not honour the views of victim-survivors meaningfully, and does not commit us to exploring more fully and effectively Ireland can prevent such abuses from being repeated. There are amply examples in comparative practice and best practice that should guide a more survivor-centred approach.