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**To:** The members of the Oireachtas Joint Committee on Education and Skills

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**RE: Submission on the provisions of the Retention of Records Bill 2019**

## **Submission to the Oireachtas Joint Committee on Education and Skills on the provisions of the Retention of Records Bill 2019**

13 November 2019

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### **1. Summary of Submission: List of Findings and Recommendations**

We welcome this consultation on the Retention of Records Bill 2019.<sup>1</sup> We are grateful for the opportunity to make a submission to the Oireachtas Joint Committee on Education and Skills and we hope that this consultation will lead to a larger effort to engage with survivors of residential schools and other institutional and gender-based abuses in order to ascertain their views on the Bill.

We cannot overstate the potential impact of this Bill's contents on our country's historical record, on survivors' and their families' personal lives, and on our State's ability to prevent abuse in the future. The Bill deserves the most careful and survivor-focused scrutiny possible. The 'Report on a Scoping Study on a consultation process with survivors of institutional abuse' commissioned by the Department of Education earlier this year stated that numerous survivors were worried about the Bill's effects on them.<sup>2</sup>

#### **Key findings:**

- The Bill is a 'blanket' proposal to prohibit all access to every document contained in the archives of the Ryan Commission, RIRB and Review Committee
- It is not clear to what extent records of Government Departments that should ordinarily be deposited in the National Archives under the NAA 1986 have been so deposited or will be so deposited in future

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<sup>1</sup> <https://data.oireachtas.ie/ie/oireachtas/bill/2019/16/eng/initiated/b1619d.pdf>

<sup>2</sup> See for example at page 10:

<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>

- Destruction of records was not previously guaranteed, or promised, under the CICA 2000 or RIRA 2002
- Confidentiality of records gathered and created by the Ryan Commission other than by its Confidential Committee does not appear to be required by the CICA 2000
- Survivors do not have full access to their personal data at present, including information about others' treatment of them and all other data relating to them
- International comparative practice demonstrates that it is not impossible nor impractical to provide survivors with access to their personal data and to provide public access to archival information including non-sensitive, administrative and appropriately anonymised or redacted records.

### **Key recommendations**

- Further consultation with survivors must take place, in relation to (1) their personal data access, (2) their access to the broader archives that will enable them to understand the operation of the residential schools system as a whole, and (3) public access to the information in the relevant archives, both personal and non-personal (i.e. administrative).
- Pending the re-drafting of the Retention of Records Bill, the Oireachtas should legislate to ensure immediate access to full, unredacted personal files for survivors from the existing archives
- The Oireachtas should amend section 28(6) RIRA 2002 to ensure respect for survivors' freedom of expression
- The Oireachtas must ensure that personal and public access to the three bodies' archives is consistent with the EU GDPR and the Irish Constitution, and should be guided by European and international human rights norms regarding the 'right to the truth' in particular
- The Oireachtas should consider comparative international practice while aiming to implement 'best' practice in accordance with Ireland's European and international human rights obligations

## **2. What does the Bill propose?**

In essence, this Bill proposes that all of the documents that were gathered and created by the Commission to Inquire into Child Abuse (Ryan Commission), Residential Institutions Redress Board (RIRB) and Residential Institutions Redress Review Committee (Review Committee) will be sent to the National Archives of Ireland, where they will be 'sealed' for at least the next 75 years.

In other words, the Bill proposes that, until at least the year 2094, none of the following records (amongst others) could be obtained directly from the archives of the Ryan Commission, RIRB or Review Committee:

- The administrative records showing how the residential school system and the individual schools were run by both State and Church bodies, such as:
  - Financial records
  - Inspection records
  - Records of how daily life in the schools was organised and how children were treated
  - School Board of Management records<sup>3</sup>
  - Bishops' records
  - Diocesan records
  - Department of Education records
  - Department of Health and Children records
  
- Survivors' personal records, such as:
  - Records created by the schools or religious bodies
  - Records created by State bodies
  - Survivors' applications to the RIRB, including medical and psychological reports and details of their abuse and its impact on their lives
  - The witness testimony that survivors gave to the Ryan Commission or the RIRB (i.e. their 'transcripts')
  - Witness statements or other documents produced by people involved in running the schools, which mention or concern individual survivors
  
- All other documents created or produced by State representatives, Church and Congregational representatives and any other witnesses such as:
  - Witness evidence
  - Statements or commentary on individual survivors' application for 'redress'
  
- All documents created by the Ryan Commission, RIRB and Review Committee, such as:
  - Correspondence with survivors, with State representatives and with Church representatives
  - Decisions regarding the giving of evidence or the determination of applications for 'redress'
  - General administration records concerning the bodies' functioning

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<sup>3</sup> The Third Report of the then-Laffoy Commission notes that discovery orders had been made in respect of: Complainants; Individuals named by Complainants as alleged perpetrators of abuse; Congregations which managed institutions in which abuse is alleged to have taken place; Boards of Management of National Schools in which abuse is alleged to have taken place; The Departments of State with regulatory responsibility for institutions in which abuse is alleged to have taken place, primarily, the Department and the Department of Health and Children; Bishops; Diocesan Archives; Hospitals and clinics which treated Complainants; Health Boards which had responsibility for Complainants while children; An Garda Síochána; The Director of Public Prosecutions; and A coroner.

The only exception appears to be that Government Departments may still hold original records which they copied and sent to the Ryan Commission, RIRB or Review Committee. These records may, to some extent, still be available under Freedom of Information legislation, or may be deposited in the National Archives as ordinarily required. The Minister for Education stated at Dáil Second Stage on 2 April 2019 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.’

However, several questions arise in respect of this limited assurance:

- If records of Government departments concerning the residential schools are in principle to remain subject to the National Archives Act 1986 (NAA 1986), then why does this Bill not ensure that all such records gathered over a decade or more into the archives of the Ryan Commission, RIRB and Review Committee – and which are more than 20 or 30 years old – are made available to the public as ordinarily envisaged under the NAA 1986 (along with provision of the necessary financial resources)?
- No index to the Ryan Commission, RIRB or Review Committee’s archives has been produced. Therefore, how are survivors or the public to know what Departmental records exist, perhaps still in their original form, outside of the three archives that are subject to this Bill?
- Almost all Government department records regarding industrial and reformatory schools must now be more than 30 years old and therefore should - in theory - already be in the National Archives. It is well known that the National Archives are under-resourced and that many transfers that should have taken place over the past decades and years have not been possible. Therefore, survivors and the public cannot rely upon the reassurance that Departmental records will be available as normal.
- The definition of ‘record’ in the Retention of Records Bill 2019 includes ‘copies of any such records’; therefore, it is not clear whether any material that is available in the archives of the three bodies will in fact still be available elsewhere.
- ‘Departmental records’ under the National Archives Act 1986 is not a broad enough category to capture all state records concerning the residential schools – unless of course the archives of the Ryan Commission (as is currently the case under the NA 1986) and the RIRB and Review Committee are brought within the remit of the National Archives.

The key provisions of the Bill are as follows:

### **Section 1**

According to the definition of ‘record’ in section 1 of the Bill, the Bill’s provisions cover every document in the archives of the three bodies and all copies of such records:

*“record” means a document in any form (including any electronic form) made or received, by a relevant body, in the performance of its functions, and includes copies of any such records.*

### **Section 2**

This section provides that the Director of the National Archives may work with the three relevant bodies to designate certain records in the archives for destruction.

### **Section 3**

This section sets up the ‘sealing’ period of at least 75 years. It states that only on the expiry of 75 years from the date of the transfer of the records to the National Archives may any Regulations be made (under section 6) to allow access to them.

### **Section 4**

This section ensures that the records of the three bodies that are transferred to the National Archives under this Bill will not be considered ‘Departmental’ records under the National Archives Act 1986.

### **Section 5**

This section **disapplies the following sections of the National Archives Act 1986 (NAA 1986)** in relation to the records of the three bodies for at least the next 75 years or for all time (see the Bill for the distinctions):

- Section 2(3) NAA 1986: This section ordinarily allows Departments of State to retain a copy of any record transferred to the National Archives.
- Section 7 NAA 1986: This section ordinarily requires Departments of State to retain all of their records until and unless the National Archives Director authorises destruction of certain records (or until and unless Ministerial Regulations made after consultation with the National Archives Director allow disposal of certain records).
- Section 8 NAA 1986: This section ordinarily requires transfer to the National Archives of Departmental records that are more than 30 years old (and, since the National Archives (Amendment) Act 2018 came into force, records ‘of significant historical or public interest’

or those whose release ‘will facilitate the balanced and fair reporting of matters of common interest to the State and other jurisdictions’ may be designated by the Government for transfer after 20 years).

- Section 9 NAA 1986: This section ordinarily allows the National Archives Director to dispose of records in the National Archives’ custody in accordance with certain conditions.
- Section 10 NAA 1986: This section sets out the requirements on the National Archives ordinarily to make its records available for public inspection.
- Section 11 NAA 1986: This section ordinarily gives the Taoiseach the power to direct transfer of certain records to the National Archives if not already transferred or to direct that certain records be made available for public inspection by the National Archives.
- Section 12 NAA 1986: This section provides that, ordinarily, records or archives deposited in the National Archives ‘shall be of the same force and effect in any court proceedings in the same manner as if they had not been so removed’.
- Section 15 NAA 1986: This section states that ‘Nothing in this Act shall affect any rights of a person claiming to be the owner of a document to recover the document.’
- Section 16 NAA 1986: This section provides that, when stamped with the seal of the National Archives, copies of records from the National Archives ‘shall be received in evidence in any court of law and by any duly constituted tribunal and by either House of the Oireachtas (or committee of either such House) and shall be deemed to be a duly authenticated copy of the original unless the contrary is shown’.
- Section 19(1)(c) NAA 1986: This section ordinarily allows the Taoiseach after consultation with the Director to make regulations allowing the disposal of certain archives and Departmental records.
- Section 19(1)(f) NAA 1986: This section ordinarily allows the Taoiseach after consultation with the Director to make regulations in relation to ‘the authentication of copies and extracts from the archives’.

## **Section 6**

This section allows the Minister for Education and Skills in not less than 75 years’ time to make regulations, following consultation with the National Archives Director, to permit certain access to records in the archives of the three bodies. The Minister must ‘have regard to the effects on the well-being and emotional state of persons alive at the date of the making of the regulations that, in

the Minister's opinion, are reasonably possible as a consequence of a relevant disclosure occurring.'

### **Section 7**

This section deletes several sections of the Commission to Inquire into Child Abuse Act 2000 (CICAA 2000).

In particular, it deletes the provision of the CICAA 2000 that addresses the disposal of the Ryan Commission's archive.

Section 7(6) of the CICAA 2000 states at present:

*(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.*

The key element of this provision in the CICAA 2000 is that the Ryan Commission is at present required to comply with the National Archives Act 1986 regarding the custody and any disposal of its records. Under section 2(2) of the NAA 1986, 'Departmental records' includes all material 'made or received, and held in the course of its business, by a Department of State...**or any body which is a committee, commission or tribunal of enquiry** appointed from time to time by the Government, a member of the Government or the Attorney General, and includes copies of any such records duly made'.

### **Section 8**

This section amends section 28(6) of the Residential Institutions Redress Act 2002 (RIRA 2002): what is colloquially termed the 'gagging' clause. At present, section 28(6) of the RIRA 2002 prohibits any person from publishing 'any information concerning an application or an award made under this Act that refers to any other person (including an applicant), relevant person or institution by name or which could reasonably lead to the identification of any other person (including an applicant), a relevant person or an institution referred to in an application made under this Act.' The Bill proposes to amend this section to provide for publication, in accordance with the Bill, in not more than 75 years' time.

This section also deletes sections 28(7) and 28(8) of the RIRA 2002, which at present state that the RIRB and the Review Committee shall 'determine the disposal of the documents concerning applications made to it'.



## **Section 9**

This section disapplies the Freedom of Information Act 2014 entirely in respect of all records transferred to the National Archives under the Bill.

### **3. How does this Bill interact with existing laws?**

#### ***CICAA 2000 and RIRA 2002***

##### **Regarding destruction of records:**

It has been suggested that (1) legislation mandated, and (2) survivors were informed, that all records of the Ryan Commission, RIRB and Review Committee would be destroyed. The Minister for Education stated at Dáil Report Stage on 2 April 2019 that ‘The ultimate protection provided for in the Acts was for the disposal and destruction of the records of the bodies once they had completed their work and prior to their dissolution, which is also provided for in the legislation enacted by the Oireachtas.’

In fact, as noted above, section 7 of the Commission to Inquire into Child Abuse Act 2000 (CICAA 2000) envisaged the Commission’s records being kept in custody or disposed of in accordance with the National Archives Act 1986 (NAA 1986), and - we understand – the CICAA 2000 did not change the provision in section 2(2) of the NAA 1986 that includes all material made or received by Commissions of Inquiry within the definition of ‘Departmental records’.

Sections 33 and 34 CICAA 2000 explicitly refer to the transfer of data provided to the Confidential Committee upon the dissolution of the Commission (and nowhere to its destruction).

Section 28 of the Residential Institutions Redress Act 2002 (RIRA 2002), on the other hand, explicitly states that documents provided to or prepared for the RIRB or Review Committee are excluded from the definition of ‘Departmental records’ under the NAA 1986. Sections 28(7) and 28(8) of the RIRA 2002 state that each of the two bodies shall ‘determine the disposal of the documents concerning applications made to it’.

It is our understanding that ‘disposal’ does not necessarily mean ‘destruction’. The words ‘destruction’ or ‘destroy’ are not contained in the CICAA 2000 or RIRA 2002. Section 9 of the NAA 1986 offers guidance as to the meaning of ‘disposal’. It provides that the Director of the National Archives ‘may dispose of archives in his custody’, which means, according to section 9(2):

*(2) Archives the disposal of which is authorised under subsection (1) shall either --*

*(a) be destroyed in such a manner as to ensure that their confidentiality is not affected and that their contents are not ascertainable, or*

*(b) be transferred, with the consent of the Council and the appropriate member of the Government or other body or person responsible for their transfer to or deposit with the National Archives, to another archival institution or other appropriate body, to be preserved there in accordance with such conditions as may be specified in writing by the Director.*

### **Regarding confidentiality of records:**

The CICA 2000, section 27, prohibits disclosure of information provided to the Commission's Confidential Committee subject to certain exceptions: (1) disclosure for the purpose of performing the Commission's functions, (2) disclosure to legal representatives, (3) disclosure to An Garda Síochána in relation to a continuing serious offence, (4) disclosure according to child protection law, and (5) disclosure to a court in connection with judicial review of a decision of the Confidential Committee. Section 34 CICA 2000, similarly, prohibits disclosure under Freedom of Information of any information provided to the Confidential Committee.

We cannot discern in the CICA 2000 a similar prohibition on disclosure of information provided to the Commission's Investigative Committee or otherwise to the Commission outside of the confines of the Confidential Committee.

Section 28 CICA 2000 states that disclosure of information provided to the Confidential or Investigative Committee is not *required*, except to An Garda Síochána in relation to a continuing or future serious offence or for child protection purposes.

Section 34 CICA 2000 envisages the functioning of Freedom of Information in relation to information held by the Commission other than by the Confidential Committee. However, the definition of 'public body' under section 6 of the Freedom of Information Act 2014 excludes the Commission to Inquire into Child Abuse in the performance of its functions under the CICA 2000, 'other than insofar as it relates to records concerning the general administration of those functions'.<sup>4</sup>

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<sup>4</sup> See Freedom of Information Bill 2013: Report Stage (Resumed) and Final Stage (16 July 2014), Deputy Brendan Howlin, Minister for Public Expenditure and Reform:

'I should have also referred to amendments Nos. 84 and 93 because they are in this group. The purpose of those amendments is to provide for an exemption from FOI for the records of child abuse bodies other than in regard to their administrative records. The bodies in question are the Commission to Inquire into Child Abuse, the Residential Institutions Redress Board and the Residential Institutions Redress Review Committee.'

While section 33 CICA 2000 originally dis-applied the right of personal data access under section 4 of the Data Protection Act 1988 to the information held by the Commission, this was replaced by a new section 33 CICA 2000 (as amended) through section 188 of the Data Protection Act 2018, based upon the EU General Data Protection Regulation (GDPR). The new section 33 CICA 2000 provides that the right of personal data access under Article 15 GDPR is now only restricted ‘to the extent necessary and proportionate to safeguard the effective performance by the Commission of its functions or a Committee of its functions’.

Regarding the confidentiality of RIRB and Review Committee records, section 28 RIRA 2002 is well known to survivors as its content is reproduced on all correspondence received from the bodies and it was also contained in the waiver form that survivors were required to sign prior to receiving financial settlements.

Section 28(1) RIRA 2002 states that the RIRB and Review Committee personnel shall not disclose information obtained in the course of performing their functions under the Act, except (1) to provide basic details of awards to the Minister for the purposes of a referral to the Review Committee, or to parties to legal proceedings where an applicant to the RIRB brings civil proceedings; (2) to An Garda Síochána in relation to a continuing or future serious offence; and (3) as required by child protection laws.

Section 28(6) is a broad prohibition on publication of information relating to applications to the RIRB and Review Committee, which applies to survivors and others alike:

*(6) A person shall not publish any information concerning an application or an award made under this Act that refers to any other person (including an applicant), relevant person or institution by name or which could reasonably lead to the identification of any other person (including an applicant), a relevant person or an institution referred to in an application made under this Act.*

In our view, section 28(6) RIRA 2002 is to be criticised - and should be given thorough attention by the Oireachtas with a view to amending it - on the basis that it interferes with survivors’ freedom of expression and seems to do so unnecessarily and disproportionately given the other legal protections available to alleged wrongdoers (e.g. defamation law and the protection from civil suit

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In view of the sensitivity of the records held by these bodies and the fact that, even if their records were subject to FOI in full, it is likely they would be exempt from release under the FOI exemptions contained in this legislation relating to personal information and information obtained in confidence, I considered, having received a request, that these bodies be exempted from FOI. I decided, however, that it would be difficult to justify providing them with an exemption in respect of the administrative records that they hold. Legal advice received from the Attorney General raised no legal difficulties in making these bodies subject to FOI in terms of their administrative records. The exemption proposed for these bodies will be similar to that applying to the Office of the Attorney General and the Director of Public Prosecutions, for example.’

that the RIRA 2002 provides once a survivor has accepted a settlement). Members of the Oireachtas may wish to consider the report of the voluntary organisation, *Reclaiming Self*, to the United Nations Committee Against Torture in June 2017, which recorded a survivor stating that ‘Loads of people think they can’t report their abusers cause of what they signed’<sup>5</sup> and further contended:

The confidentiality agreement signed upon receipt of the Redress award was in itself an extension of the silence and secrecy experienced by victims for decades. Some victims report that they feel the ‘Acceptance and Waiver Following Award Form’ is a breach of their human rights that prohibits them from discussing their negative experience of an adversarial system, a system that in essence was not ‘victim centred’. Victims report that being ‘gagged’ in disclosing their experiences of the scheme is ‘unjust’ and a further example of the State’s protection of both itself and the Church. Moreover, a precursor to receiving the award was the signing of the waiver. Under the 2002 Act, victims were not only prohibited it from discussing their experiences of the Redress scheme, but also threatened with prosecution and fines if they discussed the Redress Board.<sup>6</sup>

### ***Other relevant law***

Members of the Oireachtas will need to consider the application of the EU General Data Protection Regulation, which takes precedence over Irish law in relation to personal data protection and establishes a strong right of access to personal data under Article 15 GDPR (which includes access to ‘mixed’ personal data where the data of another person relates to oneself).<sup>7</sup>

It is also essential for the Oireachtas to take account of the Irish Constitution, considering carefully how to ensure that survivors of abuse in residential schools (which included systematic torture) are enabled to the maximum extent to exercise their constitutional rights, while balancing the rights of others. Some of the most relevant constitutional rights of survivors and their family members are the right to freedom of expression, the right to privacy, the right to protection of family life, and the right to a remedy for violations of Constitutional rights (including, arguably although not yet defined by the Irish courts, the right to know the truth, particularly in relation to torture or other ill-treatment, arbitrary detention, unexplained or unregistered death in state custody and other major rights violations). The rights of others are also involved and relevant to the Oireachtas’ balancing task, including the right to privacy of those identified in records, the right to ‘good name’ and the right to freedom of expression (e.g. for historians and journalists).

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<sup>5</sup> *Reclaiming Self*, Report to the United Nations Committee Against Torture, June 2017, [https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT\\_CAT\\_CSS\\_IRL\\_27959\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT_CAT_CSS_IRL_27959_E.pdf) p17.

<sup>6</sup> *Reclaiming Self*, Report to the United Nations Committee Against Torture, June 2017, [https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT\\_CAT\\_CSS\\_IRL\\_27959\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRL/INT_CAT_CSS_IRL_27959_E.pdf) pp 23-24 (footnotes omitted).

<sup>7</sup> *Nowak v Data Protection Commissioner of Ireland* (Case C-434/16, 20 December 2017).

Below in the submission we discuss further these rights and other, related European and international human rights obligations on the State in relation to the contents of the archives of the Ryan Commission, RIRB and Review Committee.

#### **4. Survivors' Personal Data Access**

##### *Recommendations*

We recommend, first and foremost, proper consultation with survivors about their experience to date of accessing their personal data both from the three archives relevant to this Bill and from elsewhere, including medical and other personal records, information about other individuals' and institutions' treatment of them, and their personal testimonies. Survivors should be consulted about the following proposals:

Our recommendation from a legal and human rights perspective is that survivors should have full, immediate and indefinite access to their complete, unredacted Ryan Commission, RIRB and Review Committee files – including all data that involves other individuals' or institutions' treatment of them, whether State or non-State.

We further recommend that provision should be made for the family members of children who died while in State care or otherwise resident in the residential schools to have access to their relative's personal data to the same extent as survivors who are alive. The Oireachtas should further consider whether and if so how to ensure access for family members to some personal data concerning those who died following release from the residential schools, bearing in mind that the residential schools system separated families forcibly with the effect that many siblings and families more broadly lost contact with each other.

We recommend that, pending the introduction of a vastly revised Retention of Records Bill, the CICA 2000 and RIRB 2002 should be amended to explicitly provide for full personal data access for survivors and for relatives of children who died while in a residential school. Adequate supports should be provided for survivors who would otherwise struggle to exercise this right.

##### *Current situation*

As far as we are aware, survivors who have requested their files and transcripts from the Ryan Commission have generally been refused access. More recently the Ryan Commission has cited section 188 of the Data Protection Act 2018, which amended section 33 of the Commission to Inquire into Child Abuse Act 2000 such that section 33 CICA 2000 now states:

*33. (1) Article 15 (Right of Access) of the Data Protection Regulation is restricted, to the extent necessary and proportionate to safeguard the effective performance by the Commission of its functions or a Committee of its functions, in so far as it relates to personal data (within the meaning of that Regulation) provided to the Commission or a Committee while the data is in the custody of the Commission or a Committee, or in the case of such data provided to the Confidential Committee, of a body to which it is transferred by the Commission upon the dissolution of the Commission.*

In other words, the Commission maintains that releasing this personal data would inhibit the performance of its public functions. It is important to understand, therefore, that if this Bill passes, survivors will not have had an adequate prior opportunity to retrieve their Commission files.

We understand that, by contrast with the Ryan Commission's response to personal data access requests, survivors who participated in the RIRB process have generally been facilitated to access their files and transcripts of their participation under Freedom of Information legislation. This entitlement is noted on the RIRB website and some survivors have been able to access their records accordingly, though not without difficulty in many cases. If this Bill takes effect, that entitlement will be lost. We have no data on how many survivors have exercised their right of access to their records so far. As far as we are aware, the Government has not undertaken any accessible public information campaign to ensure that survivors can access their records before the proposed legislation comes into effect. As such, the proposed legislation will discriminate sharply between survivors who have been able to take advantage of the Freedom of Information process, and those who have not. In practice, this will mean that the proposed legislation will have a disproportionate effect on survivors who are less able to engage with state processes because of educational disadvantage, poor mental health or lack of family or professional support. No effort has been made to address these issues. Given that survivor disadvantage is directly related to the abuses that they have suffered, failure to ensure access to personal records is a continuation of those abuses.

We recall the position of victims of abuse who did not give evidence to the Investigation Committee, but who were abused by offenders identified in the Ryan Commission's records. They also have a right of access to those and other records of abuse to the extent that the records relate to them. We note that the right to truth (under European and international human rights law, as explained below) is not conditional on their participation in any state process.

We have no substantial information regarding what survivors who participated in the Ryan Commission and applied to the RIRB understood would happen to their personal data in future. We do know that survivors were strongly and repeatedly warned of the prohibition on disclosing their own information, according to the section 28 RIRA 2002 'gagging order'. Although many survivors understand the agreement as prohibiting them from recounting their lived experience of abuse, the strict legal effect was to prohibit them from disclosing the amount awarded, the names of their abusers and the name(s) of the institution(s) where they were abused. The effect of the Bill

will be more expansive, because it will seal entire records of personal experience. This Bill, arguably, significantly alters the conditions of survivors' participation in Ireland's processes of reckoning with the past. That change requires fresh consent and wide consultation.

#### *EU General Data Protection Regulation (GDPR)*

Article 15 GDPR contains a strong right of access to one's personal data, which is defined in Article 4(1) GDPR as follows:

'personal data' means 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.

It is crucial to note that, according to the Court of Justice of the European Union (CJEU) in *Nowak v Data Protection Commissioner of Ireland* (Case C-434/16, 20 December 2017), information may be linked to more than one individual and this does not affect the right of access. As the CJEU stated in that case: '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' (para 45).

This means, for example, that survivors have a *prima facie* right of access under Article 15 GDPR to data that relates to them even if it also mentions or concerns other individuals. In *Nowak* the CJEU held that an examiner's comments on an exam script were the personal data of the exam candidate notwithstanding that they were also the examiner's personal data. A recent judgment of the Court of Appeal of England and Wales, in *Doctor B v General Medical Council* [2018] EWCA Civ 1497, took a similar approach (albeit under data protection law preceding the GDPR) finding that a doctor was not entitled to have his personal data, which was also the personal data of his patient and contained in a fitness to practice investigation report, withheld from the patient when it was clear that the patient was considering taking a legal claim against him.

It is our understanding that the Oireachtas could legislate to ensure access for survivors to their full unredacted files from the three relevant bodies' archives under Article 6.1(c) GDPR, which states that data processing will be lawful where it is 'necessary for compliance with a legal obligation to which the controller is subject'. In order to be compatible with the EU Charter of Fundamental Rights, the provision of unredacted files (which would include identifying details of others involved in the treatment of survivors) would need to be deemed necessary and proportionate by the Oireachtas.

Equally, the GDPR allows Member States to restrict data subjects' rights through legislation that satisfies the public interest criteria set out in article 23 GDPR – but only to the extent that such legislation does not deny 'the essence of the fundamental rights and freedoms' and 'is a necessary and proportionate measure in a democratic society'.

### *Irish Constitution*

Survivors enjoy rights to privacy and to an effective remedy for constitutional rights violations (including, arguably, a right to know all available information about their treatment by others while in the residential schools). In our submission, these rights require survivors to have access to their full, unredacted files from all three archives concerned.

Regarding the right to good name, which has been raised in relation to this Bill by those who were in positions of responsibility over survivors in residential schools: it is not clear that the constitutional right to good name is engaged merely because records of an inquiry or redress process are made available to those whom they relate to once that process has been completed. No judicial or equivalent finding necessarily results from access to a Ryan Commission or RIRB file (indeed access to the civil courts for those who accepted a settlement under the RIRA 2002 is prohibited by the Act). In any event, the question of good name and access to archives must be set in its proper context. Both the Commission and the RIRB adopted significant safeguards to protect the good name of named perpetrators and their orders at the time. The Investigative Committee located and obtained responses from individual men named by victims as abusers.<sup>8</sup> It is not clear how many of those men gave oral testimony to the Committee. When a survivor named individuals or institutions as responsible for the abuse they suffered, the RIRB was obliged to contact them, and ask them to provide the RIRB with evidence appropriate to the survivor's application. However, it is our understanding that - at the same time - the Ryan Commission also made a general policy decision to focus on understanding the system facilitating abuse of children rather than focusing on individual findings of culpability for specific instances of abuse. This appears to have been aimed at further protecting the constitutional rights of alleged abusers to fair procedures. While the Commission and RIRB did not apply the criminal standard of proof in making findings of fact, survivors' accounts were contested by a large number of lawyers for the Commission and the Board.

Therefore, it is not clear why the decision to seal records of the Commission and the RIRB for 75 years is considered a proportionate infringement of survivors' rights, given that the archive of the Commission and the RIRB taken as a whole are *already* shaped by the procedural guarantees taken to protect the right to good name while those bodies were operating. Governance of access to records must be understood against that backdrop. A properly resourced National Archive could ensure that persons accessing individual files are informed as to their wider context. Limited

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<sup>8</sup> Ryan Ch5, Vol 1



measures may also be taken on a case-by-case basis to protect the rights of identified individuals as necessary, without the need to seal records for 75 years.

### *European and international human rights obligations*

The State evidently recognises that survivors of abuse in residential schools have some rights of access to records of their childhood experiences, in that the Department of Education currently makes certain records available to survivors. It is important to understand, however, that in ‘transitional justice’ terms no meaningful distinction can be drawn between childhood records and records of engagement with subsequent state investigative and redress processes. The records with which the Bill deals have two important functions: (1) they bear witness to past historical abuses, including through testimony provided by survivors with direct experience of those abuses; and (2) they bear witness to how the contemporary Irish state has treated survivors of those abuses. Survivors of historical abuse have a right to access and consult records and information relating to that abuse, and its aftermath.

The right to truth<sup>9</sup> is a binding norm of international law. It is an inalienable, non-derogable and imprescriptible right; it is held independently of any trial or investigative process and cannot be extinguished by domestic statute or by the passage of time. It encompasses, not only a right to seek and obtain information relating to the facts of one’s own experiences of abuse including the identity of perpetrators,<sup>10</sup> but a right to access records of state investigations into and responses to the abuse (as referenced below in the discussion of public access to the relevant archives, particularly to the administrative files relating to the residential schools system). This right can be understood as a dimension of the right to reparations,<sup>11</sup> including the guarantee of non-repetition.<sup>12</sup> The European Court of Human Rights has acknowledged that access to information can facilitate rehabilitation.<sup>13</sup> By contrast, denial of access may be re-traumatizing and a continuation of the original abuse, particularly where, as in the case of Ireland’s residential schools, inappropriate use of bureaucratic power was a dimension of the original harm.

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<sup>9</sup> On critiques of the idea of legally produced “truth” see <https://academic.oup.com/jhrp/article/8/1/81/1751614>

<sup>10</sup> Commission on Human Rights, 2006, 15

<sup>11</sup> Van Boven-Bassiouni 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; *Bámaca Velásquez*, (IACtHR 2001), para. 76; *Contreras et al. v. El Salvador*, 31 August 2011 (Merits, Reparations and Costs), C No. 232, §§ 173 and 26; *Familia Barrios v. Venezuela*, 24 November 2011 (Merits, Reparations and Costs), C No. 237, in Spanish, § 291; *Gelman v. Uruguay*, 24 February 2011 (Merits and Reparations), C No. 221, § 243. *Radilla-Pacheco v Mexico*, C No. 209, 23 November 2009, §§ 180, 212, 313 and 334; *Fleury y otros v. Haiti*, 23 November 2011 (Merits and Reparations), C No. 236, in Spanish; *Gelman v. Uruguay*, op cit, § 256; *Gomes Lund y otros (Guerrilha do Araguaia) v. Brasil*, 24 November 2010, C No. 219, § 257; *Caracazo v. Venezuela*, 29 August 2002, C No. 95, §§ 117, 118; Committee of Ministers in its Guidelines on Eradicating impunity for serious human rights violations, approved on 30 March 2011 Article XVI

<sup>12</sup> Inter-American Commission on Human Rights, Report No. 136/99, Case 10.488, El Salvador, December 22, 1999, paragraph 228.

<sup>13</sup> *El Masri v Macedonia*, 13 December 2012

The Minister has acknowledged the role that these records may play in helping the families of survivors to understand their histories, and the legacies of intergenerational trauma that have shaped their own identities. The right to truth is held by both direct and indirect victims of abuse. Family members of survivors, and of deceased victims, have been central to the elaboration of the right to truth, especially the right to know the fate of loved ones who have been disappeared.<sup>14</sup> The right to identity<sup>15</sup> may also encompass a right to know the fate of one's next-of-kin,<sup>16</sup> particularly where this is necessary to guarantee the right to mourn and to preserve family memory.<sup>17</sup> In certain circumstances, the prolonged anguish, powerlessness and uncertainty<sup>18</sup> flowing from denial of access to official records establishing the fate of a loved one may constitute inhuman and degrading treatment.<sup>19</sup> Some survivors would make the same argument about the necessity of being able to access a relative's story of institutional abuse, held by the Commission and RIRB. Terms of access for family members should be determined in consultation with living survivors.

### *Comparative practice*

In jurisdictions which propose to seal the records of historical abuse inquiries for significant periods, substantive efforts have been made to ensure that survivors can access their own files prior to sealing. For example, in Scotland, the ongoing Child Abuse Inquiry permits survivors to make witness statements in private session. Survivors then have the option to request that their signed statement be sent to them. In Australia the controversial proposal to seal the records of private sessions of the Royal Commission into Institutional Responses to Child Sex Abuse (the equivalent of the Ryan Confidential Committee) for 99 years is somewhat mitigated by the steps it took to ensure that survivors have been able to access transcripts and audio files of their own testimony. The Australian Commission also recommended that survivors' rights to access, amend, or annotate records held about them be recognised to the fullest extent possible.<sup>20</sup>

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<sup>14</sup> Articles 32 and 33 of the 1977 Additional Protocol I to the Geneva Conventions (ICJ, 2001); Inter-American Court of Human Rights, Case of Gómez-Palomino v. Peru, Judgment of November 22, 2005, paragraph 78.92. Inter-American Court of Human Rights, Case of Barrios Altos v. Peru, Judgment of March 14, 2001, paragraph 48.

<sup>15</sup> *Urteaga* case Argentina

<sup>16</sup> *Del Carmen Almeida de Quinteros et al. v. Uruguay* (HRC, 1990) para. 14; Velasquez Rodríguez (IACtHR, 1988), para 181; Godínez Cruz, (IACtHR, 1989), para 191

<sup>17</sup> The right to family memory is a phrase from the preamble to the Spanish Law of Historical Memory.

<sup>18</sup> Inter-American Commission on Human Rights, Report No. 101/01, Case 10.247, Peru, October 11, 2001, paragraph 178.

<sup>19</sup> Human Rights Committee, María del Carmen Almeida de Quinteros et al. v. Uruguay, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990); Inter-American Court of Human Rights, Case of Goiburú et al v. Paraguay, Judgment of September 22, 2006, paragraph 100; Inter-American Court of Human Rights, *Moiwana Village V. Suriname*, Judgment of June 15, 2005, paragraph 100; Inter-American Court of Human Rights, Case of Myrna Mack Chang v. Guatemala, Judgment of November 25, 2003, paragraph 232.

<sup>20</sup> Final Report, Volume 17, p. 63. Available at:

[https://www.childabuseroyalcommission.gov.au/sites/default/files/final\\_report\\_-\\_volume\\_17\\_beyond\\_the\\_royal\\_commission.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_17_beyond_the_royal_commission.pdf)

## **5. Public Access to information from the relevant archives**

The Minister has acknowledged the vital importance of the records contained in the three archives to future historical research. This section of our submission addresses (1) administrative records or other records which do not contain personal data, and (2) records containing personal data, which could be anonymised or disclosed in accordance with law.

One major stumbling block in our ability – and the ability of the Oireachtas – to properly consider the Bill’s impact is the lack of public disclosure of the index to each of the three archives (appropriately redacted to comply with data protection obligations).

From the Ryan Commission’s reporting, we can see that much administrative information must exist in the three bodies’ archives, alongside personal data. For example, Volume 1, Chapter 5, paragraph 522 of the Commission’s report states that the Commission received ‘useful background materials without which it would have been difficult for the Investigative Committee to assemble the history of the Institution and relevant administrative details.’<sup>21</sup> Volume IV reveals that the financial records of four religious orders or congregations were provided to a private accountancy firm for analysis. Volume 1, Chapter 7 of the Commission’s report refers to discovery of administrative records of the Christian Brothers, including contemporaneous letters between representatives of the order regarding the use of violence, and correspondence regarding how cases of sexual abuse were dealt with. Photographs and maps were also provided. Files were obtained from the Christian Brothers’ headquarters in Rome, including ‘visitation reports’. The Department of Education also provided administrative material, along with the Department of Health and Children, and the Archbishop of Dublin.

### *Right to the truth – an individual and collective right*

Survivors’ right to the truth, discussed above, applies equally to information about how the entire system of residential schools was operated, how the ‘endemic’ abuse of children (as described by the Ryan Commission) was permitted to happen and persist, and how the State and non-State authorities have responded to survivors’ experiences since they initially occurred. Therefore, survivors have a right of access not just to their personal data but also to the administrative and other records that demonstrate how the system operated as a whole.

The right to public disclosure of truth is recognised as a collective, as well as an individual right.<sup>22</sup> It is a corollary of the State’s duty to prevent repetition of past abuses, and a dimension of the

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<sup>22</sup> Joint Principles E/CN.4/Sub.2/1997/20, 1997 [17]; *Al Nashiri v Poland*, App No 28761/11, ¶ 495 (E.C.H.R. 24 July 2014)

general democratic right of access to public information<sup>23</sup> which is essential to open and transparent government.<sup>24</sup> Finally, it can be understood as a dimension of the right to cultural heritage.<sup>25</sup> The records of the Ryan Commission and the RIRB can contribute to the formation of a shared national history. Investing in an appropriately public archive of historical abuse records is in itself an act of recognition which may help to address survivors' continuing sense that their stories are not credible or not worth preserving.

### *Survivor consent*

Survivor consent, based on survivors' right to privacy, i.e. to determine how their personal data is treated, should be the central organising principle in determining when and how survivors' personal records are made available to researchers.

Regarding the records of the RIRB and Review Committee and the Confidential Committee of the Ryan Commission, in particular, this principle is illustrated by the recent judgment of the Canadian Supreme Court in *AG v. Fontaine*, in 2017.<sup>26</sup> In Canada, the archives of the Truth and Reconciliation Commission investigating abuses of indigenous children in residential schools will be preserved at a National Center for Truth and Reconciliation. Access to the records will be governed in consultation with a Governing Circle including survivor representatives. In *Fontaine*, the Supreme Court of Canada considered whether records of the Independent Assessment Process (equivalent to the RIRB) should be transferred to the Truth and Reconciliation Commission archives, or whether they should be destroyed. Survivors had participated in the redress process on the basis of a guarantee of absolute confidentiality and had been informed that records would be destroyed on completion of the redress process. The Court held that the records could not be transferred without their consent. It held that the records should be preserved for 15 years, so that the opportunity to archive personal redress records could be publicised to affected survivors.

### *Constitutional rights*

The right to 'good name' and reputation is not the primary relevant right of most survivors in this instance. Survivors have a right to privacy, which enables them to control the terms on which

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<sup>23</sup> Article 19 ICCPR, Article 10 ECPHRRF, Article 10, ECHR; G.A. Res. 68/165; H.R.C. Res. 21/7; G.A. Res. 59 (I), U.N. GAOR, 1st Sess., U.N. Doc. A/RES/59(I) (Dec. 14, 1946); Inter-American Commission on Human Rights, The Right of Access to Information, Report of the Special Rapporteur for Freedom of Expression, Annual Report of the Inter-American Commission on Human Rights, Washington D.C. 2009, paragraph 2. Pablo de Greiff, U.N. Human Rights Council, Report of the Special Rapporteur on the Promotion of the Truth, Justice, Reparation and the Guarantee of Non-Recurrence, A/HRC/24/42 C.H.R. Res. 2005/66

<sup>24</sup> *Isayev and Others v. Russia*, no. 43368/04, 21 June 2011, § 140; *Al-Skeini and Others v. UK*, [GC], no. 55721/07, 7 July 2011; *McKerr v. UK*, no. 28883/95, 4 May 2001, § 115; *Khamzayev and Others v. Russia*, no. 1503/02, 3 May 2011, §196 ; *El Masri v Macedonia*, 13 December 2012

<sup>25</sup> Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, Principle 3

<sup>26</sup> 2017 SCC 47

access to their records are shared with others, along with other rights already discussed. Legislators should not assume that survivors will feel that their ‘good name’ or reputation is inherently at stake, given that they participated in the Ryan Commission and/or the RIRB as victims and not perpetrators.

Alleged or confirmed wrongdoers identified in the Ryan Commission and RIRB records may be able to invoke the constitutional right to ‘good name’. Members of the same order may claim an associative right to good name (and it may be that the religious orders or congregations, as institutions themselves, claim a further associative right to good name). It is not clear that these arguments should apply to the release and non-judicial use of Ryan Commission and RIRB records in the future in the same way as they applied to the proceedings by which those records were collated and produced. In addition, the right to good name is not absolute, and the exigencies of the common good - in particular the protection of the right to truth - may justify a nuanced approach to release of records, graduated according to the interests of those seeking access.

Regarding property rights, which may be asserted by the non-State entities that contributed material to the Ryan Commission, RIRB and Review Committee, it should be noted that legislation has already provided for the compelled production of records and section 30 CICA 2000 prohibits anyone from destroying records or information of relevance to the Commission until the Commission is dissolved – demonstrating that the public interest may permit such interference with constitutional property rights.

#### *Anonymity, Redaction and Reply*

The rights of survivors and other individuals who do not wish to be identifiable from archival records, including the right to good name, can be safeguarded without imposing a 75-year ‘blanket ban’ on release of records to third parties. Ireland has already used anonymisation - for example in the Ryan Report itself - as a means to protect the rights of those identified as abusers in Commission proceedings. Redaction is a practicable alternative, especially for records which are already held electronically; software e.g. Summation Document Management is available which can increase the accuracy and speed of redaction.

Other jurisdictions have used anonymisation and redaction in approaching equally sensitive records. For example, Finland’s National Child Abuse Inquiry will make its anonymised archives available for historical research. In Germany, under the Stasi Records Act, citizens can access their own secret police file or the file of a deceased relative. These files may contain sensitive information on recent personal and family history. Information relating only to third parties is redacted in order to protect those third parties’ identities. Journalists and researchers can access appropriately redacted files.<sup>27</sup> The thousands of anonymised narratives constructed from testimony

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<sup>27</sup> See further <https://www.bstu.de/>

to the private sessions are published on the Australian Royal Commission's website, and are an example of the kind of public release of testimony that is possible without the need for decades of delay.<sup>28</sup> The Scottish Child Abuse Inquiry is adopting a similar practice; survivors can waive their right to anonymity prior to publication of their transcript if they choose.<sup>29</sup>

Anonymisation or redaction would not have to deprive these records of their historical import. First, anonymisation/redaction at the point of release would not require permanent alterations to be made to the records. Second, non-identifying information may have significant historical value, especially if coupled with information which individual survivors consent to provide to researchers. In deciding whether identifying information should be redacted, regard could be had, amongst other factors, to (1) whether the person identified is alive or dead (2) if they are survivor, whether they consented to release of their name to researchers, and (3) whether, if they are a perpetrator, they have been convicted of a relevant crime, or the accusations against them are already notorious.<sup>30</sup>

Prevailing concerns about the perceived incompleteness or partiality of these records have been over-stated, and do not justify a blanket 75 year ban on access. No archive administered by the State can stand as a complete historical record of abuses on this scale.

The State could learn from practice in other countries in facilitating the collection of oral histories and documentary testimony to supplement the Ryan Commission and RIRB archives. In Argentina, for example, the oral history archives of the civil society organization, *Memoria Abierta*, act as a supplement to archives of the National Commission on the Disappearance of Persons. Ireland could also consider international best practice in facilitating a 'right of reply'<sup>31</sup> to archived records.<sup>32</sup> In practice, this would mean permitting people named in archived records, or their family members, to make a submission for filing alongside the relevant records, correcting or addressing their content for the benefit of future readers. The right to correct personal data is also protected by the GDPR.

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<sup>28</sup> See further

[https://www.childabuseroyalcommission.gov.au/narratives?category=All&field\\_private\\_session\\_gender\\_value=All&field\\_state\\_value=All&field\\_decade\\_value=All&field\\_government\\_value=All&field\\_atSI\\_value=All&next=1](https://www.childabuseroyalcommission.gov.au/narratives?category=All&field_private_session_gender_value=All&field_state_value=All&field_decade_value=All&field_government_value=All&field_atSI_value=All&next=1)

<sup>29</sup> See guidance document for survivors <https://www.childabuseinquiry.scot/media/2165/guidance-factsheet-for-people-who-tell-us-they-were-abused-190723.pdf>

<sup>30</sup> See e.g. IICSA (UK) Protocols <https://www.iicsa.org.uk/key-documents/322/view/2018-07-25-inquiry-protocol-redaction-documents-version-3.pdf>

<sup>31</sup> This is Principle 15 of the Joint Principles.

<sup>32</sup> Luker, Trish. "Decolonising Archives: Indigenous Challenges to Record Keeping in 'Reconciling' Settler Colonial States" *Australian Feminist Studies*, vol, 32, no. 91-92, 2017, 108-125