



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Briefing Paper: The Right to Information in
Relation to Mother and Baby Homes, Magdalene
Laundries and Workhouses in NI**

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1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the NIHRC), pursuant to section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). The NIHRC is also required, under section 78A(1) of the Northern Ireland Act 1998, to monitor the implementation of Article 2 of the Windsor Framework, to ensure there is no diminution of rights protected in the “Rights, Safeguards and Equality of Opportunity” chapter of the Belfast (Good Friday) Agreement 1998 as a result of the UK’s withdrawal from the EU.¹ In accordance with these functions, the following advice is submitted to the Committee for the Executive Office regarding access to information in the context of Mother and Baby Institutions, Magdalene Laundries and Workhouses, and their pathways and practices in NI.

2.0 Human Rights Based Approach

- 2.1 The Executive Office’s consultation on a proposed public inquiry and financial redress relating to the activities for mother and baby homes, Magdalene Laundries and other institutions in NI acknowledges the Truth Recovery Expert Panel recommendation that a key function of the Independent Panel should be to “gather, preserve, catalogue, and digitise relevant records and archives” relating to these institutions.² However, the Executive Office does not, but should, specify how the information will be accessed and preserved. The Executive Office views this as an issue outside of the remit of the public inquiry.³ But the NIHRC disagrees, particularly considering issues which have arisen with similar inquiries in Ireland.⁴ The human rights basis for this conclusion is set out below.

¹ The Windsor Framework was formerly known as the Protocol on Ireland/Northern Ireland to the UK-EU Withdrawal Agreement and all references to the Protocol in this document have been updated to reflect this change. (see Decision No 1/2023 of the Joint Committee established by the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community of 24 March 2023 laying down arrangements relating to the Windsor Framework).

² Deirdre Mahon et al, ‘Mother and Baby Institutions, Magdalene Laundries and Workhouses in NI: Truth, Acknowledgment and Accountability’ (TEO, 2021), at 13; The Executive Office, ‘Truth Recovery - Mother and Baby Institutions, Magdalene Laundries and Workhouses, and Their Pathways and Practices’ (TEO, 2024), at 37.

³ The Executive Office, ‘Truth Recovery - Mother and Baby Institutions, Magdalene Laundries and Workhouses, and Their Pathways and Practices’ (TEO, 2024), at 37.

⁴ Jennifer O’Connell, ‘State accused of ‘stonewalling’ and ‘hiding evidence’ over Magdalene Laundries’, *Irish Times*, 4 March 2023; *Stolen* (2023); JP McDowell and Hannah Unger, ‘Press Release: Fair Procedures – High Court declares that rights of Mother and Baby Home survivors were breached’, *FieldFisher*, 22 December 2021.

Right to Truth

- 2.2 There has been a persistent veil of secrecy and deception surrounding Mother and Baby Institutions, Magdalene Laundries and Workhouses in NI, consequently the right to truth is a key aspect to the framework and operation of the proposed public inquiry. It is also a key consideration regarding what steps to take to preserve the findings of the public inquiry and to ensure any uncovered violations do not happen again.
- 2.3 The right to truth is a recognised right in the context of gross human rights violations, which includes violations of the right to life and freedom from torture or ill-treatment, such as those alleged in this context.⁵ The UN Office of the High Commissioner for Human Rights recognises that “access to information and, in particular, to official archives, is crucial to the exercise of the right to truth”.⁶ Furthermore, Principle 2 of the UN Orentlicher Principles affirms the “inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes”.⁷ These principles apply to any situation of impunity, including such as that which arose in the context of Mother and Baby Institutions, Magdalene Laundries and Workhouses in NI.
- 2.4 The UN General Assembly has stressed the importance for States to “provide appropriate and effective mechanisms for society as a whole and, in particular, for relatives of the victims, to know the truth regarding gross violations of human rights”.⁸ The UN General Assembly has further recognised the importance of preserving historic memory in relation to gross violations of human rights through “the conversation of archives and other documents related to those violations”.⁹ The UN General Assembly has affirmed that States should “preserve archives and other evidence concerning gross violations of human rights... to facilitate knowledge of

⁵ *El-Masri v The Former Yugoslav Republic of Macedonia* (2012), Application No 39630/09, Judgment of 13 December 2012, at para 191; *Janowiec and Others v Russia* (2013) ECHR 1003, at para 9 of the Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller; *Varnava and Others v Turkey* (2009) ECHR 1313, at paras 200-202; CAT/C/GC/3, ‘UN CAT Committee General Comment No 3: Implementation of Article 14’, 13 December 2012, at paras 6 and 16.

⁶ E/CN.4/2006/91, ‘Study on the Right to the Truth: Report of the Office of the United Nations High Commissioner for Human Rights’, 8 February 2006, para 52.

⁷ E/CN.4/2005/102/Add.1, ‘UN Economic and Social Council Report of the Independent Expert to Update the Set of Principles to Combat Impunity’, 8 February 2005, at Principle 2.

⁸ A/HRC/RES/12/12, ‘UN General Assembly Resolution on the Right to Truth’, 12 October 2009.

⁹ *Ibid.*

such violations, to investigate allegations and to provide victims with access to an effective remedy in accordance with international law".¹⁰

2.5 The UN Office of the High Commissioner for Human Rights summarises the right to truth as the entitlement to seek and obtain information on:

the causes leading to the person's victimisation; the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law; the progress and results of the investigation; the circumstances and reasons for the perpetration of crimes under international law and gross human rights violations; the circumstances in which violations took place; in the event of death, missing or enforced disappearance, the fate and whereabouts of the victims; and the identity of perpetrators.¹¹

2.6 The right to truth is acknowledged as closely linked to other rights, which are set out below.¹² The Office of the High Commissioner has observed that the right to seek information is instrumental in realising the right to truth, but both are separate as the right to information can be restricted, whereas the right to truth is inalienable.¹³ A large number of regional and national courts have ruled that a State's failure to inform the relatives of victim's about the fate or whereabouts of a victim amounts to torture or ill-treatment, which is itself a non-derogable right.¹⁴

2.7 Furthermore, it is important to consider a gender-sensitive approach, as identified by the former UN Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo.¹⁵ The former UN Special Rapporteur stated that the participation of women and girls in redress processes is "important for women and society in general to draw the links between past and present forms of violence and seize the opportunity provided by reparations discussions to press for more structural reforms".¹⁶

¹⁰ Ibid.

¹¹ E/CN.4/2006/91, 'Office of the UN High Commissioner of Human Rights Study on the Right to Truth', 8 February 2006, at para 38.

¹² Ibid, at para 42.

¹³ Ibid, at para 43.

¹⁴ Ibid, at para 60.

¹⁵ A/HRC/14-22, 'Report of the UN Special Rapporteur on Violence Against Women, Its Causes and Consequences, Rashida Manjoo', 23 April 2010, at para 29.

¹⁶ Ibid.

- 2.8 The NIHRC recommends that the Executive Office ensures that the right to truth is carefully considered at every stage of the proposed inquiry into Mother and Baby Institutions, Magdalene Laundries and Workhouses in NI. This is for the purposes of establishing the perpetrators, understanding the circumstances or reasons that led to the alleged abuses and human rights violations, and providing access to an effective remedy. This extends to victims, survivors, relatives and, as appropriate, broader society. It requires a gender-sensitive, victim-centred, trauma-informed approach.**
- 2.9 The NIHRC recommends that the Executive Office ensures that the right to truth is carefully considered in terms of what happens to the information gathered and findings made after the public inquiry is concluded, particularly in the context of ensuring that any violations that occurred do not happen again.**

Right to Information

- 2.10 Right to information, or the barriers to exercising this right, are at the heart of a need for a public inquiry. It has been highlighted to the NIHRC that barriers to gaining access to information is one thing, but victims and survivors are also concerned by the lack of transparency regarding what information is or is not held concerning Mother and Baby Institutions, Magdalene Laundries and Workhouses in NI, their pathways and practices.¹⁷ It has been explained to the NIHRC that there are occasions where being aware of what information is not available and why not, can be as telling as having access to information.¹⁸ It has also been raised with the NIHRC that it is common for information related to the institutions to be redacted based on it including third party or mixed information.¹⁹ However, there are concerns that this reasoning is being overused and that there is a lack of transparency as to what constitutes redactable information and what does not.²⁰ There are also concerns that there is no robust monitoring or complaints mechanisms to oversee restrictions on access to information.²¹

¹⁷ Meeting between NI Human Rights Commission and representative of victims and survivors of Mother and Baby Institutions, Magdalene Laundries and Workhouses, 23 September 2024.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

2.11 Article 10(1) of the ECHR protects the right to freedom of expression, including to receive and impart information “without interference by public authority”. Article 10(2) of the ECHR places restrictions of the right to freedom of expression, as prescribed by law and which are necessary in a democratic society, in:

the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

2.12 Regarding the application of Article 10 of the ECHR, the European Court of Human Rights (ECtHR) has noted that the freedom to receive information “prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him”.²² The ECtHR further identified that this freedom “cannot be construed as imposing on a State... positive obligations to ... disseminate information of its own motion”.²³ The ECtHR considers that the right to access information under Article 10 of the ECHR “does not confer on the individual a right of access to information held by a public authority nor oblige the Government to impart such information to the individual”.²⁴ However, the ECtHR has observed that such a right or obligation to confer information may arise under two conditions – where the disclosure of information has been imposed by a judicial order, or “in circumstances where access to the information is instrumental for the individual’s exercise of his or her right to freedom of expression, in particular the freedom to receive and impart information and where its denial constitutes an interference with that right”.²⁵ Further, the ECtHR has identified that a breach of the right to access information may occur where information provided by a public authority is “insincere, inaccurate or insufficient”, as this is akin to a refusal to inform.²⁶

²² *Roche v UK* (2005) ECHR 956, at para 172.

²³ *Ibid.*

²⁴ *Magyar Helsinki Bizottsag v Hungary* (2016) ECHR 975, at para 156.

²⁵ *Ibid.*

²⁶ *Association Burestop 55 and Others v France* (2021) ECHR 592, at para 85.

- 2.13 The ECtHR has identified threshold criteria for the right of access to State-held information, which concerns the purpose of the information request, the nature of the information sought, the role of the applicant and the availability of the information.²⁷
- 2.14 In relation to the purpose of the information request from a public authority, the ECtHR has observed that this must be to “enable his or her exercise of the freedom to receive and impart information and ideas to others”.²⁸ The ECtHR has placed emphasis on whether the gathering of information was a relevant step in “journalistic activities or in other activities creating a forum for, or constituting an essential element of, public debate”.²⁹
- 2.15 Regarding the nature of the information being sought, the ECtHR considers that “information, data or documents to which access is sought must generally meet a public interest test in order to prompt a need for disclosure under the [ECHR]”.³⁰ The ECtHR notes that what meets the definition of what might constitute public interest is dependent on the circumstance of each case, but that public interest:
- relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community.³¹
- 2.16 This is also the case for matters which are capable of causing considerable controversy.³² The ECtHR further notes that public interest cannot be “reduced to the public’s thirst for information about the private lives of others”.³³
- 2.17 The ECtHR has noted that the role of the applicant in seeking information is of particular importance.³⁴ The ECtHR has noted the importance of

²⁷ *Magyar Helsinki Bizottsag v Hungary* (2016) ECHR 975, at para 157.

²⁸ *Magyar Helsinki Bizottsag v Hungary* (2016) ECHR 975, at para 158.

²⁹ *Ibid.*

³⁰ *Ibid.*, at para 161.

³¹ *Ibid.*, at para 162.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*, at para 164.

journalists,³⁵ non-governmental organisations,³⁶ academic researchers,³⁷ and authors of literature on matters of public concern.³⁸

- 2.18 On the availability of information, the ECtHR has considered that the fact that the information being requested is ready and available should constitute a criterion in determining whether a refusal to provide information can be regarded as an interference with freedom to receive and impart information.³⁹ The argument that gathering information over lengthy periods of time may prove difficult or burdensome on the State has been dismissed by the ECtHR “where such difficulty was generated by the authority’s own practice”.⁴⁰
- 2.19 Article 19(2) of the UN ICCPR also protects the right to freedom of expression, which includes “the right to seek, receive and impart information of all kinds”. The UN Human Rights Committee notes that the right of access to information covers information held by public authorities, applies to all branches of government and may include other entities carrying out public functions.⁴¹ The right to access information applies irrespective of the content of the information and the manner in which it is stored.⁴² With Article 19(3) of the UN ICCPR and Article 10(2) of the ECHR adopting similar approaches, the UN Human Rights Committee has also identified that, when imposing restrictions on the exercise of freedom of expression, a State “may not put in jeopardy the right itself”.⁴³ Any restriction placed on the right must be compatible with the principle of proportionality.⁴⁴
- 2.20 Additionally, the right to freedom of expression, including the freedom to seek, receive and impart information is given specific protection for children and persons with disabilities.⁴⁵ Article 9(4) of the UN CRC also states that, where a child has been separated from its parents, the State:

³⁵ *Rosianu v Romania* (2014) ECHR 648, at para 61.

³⁶ *Association Burestop 55 and Others v France* (2021) ECHR 592, at para 88.

³⁷ *Gillberg v Sweden* (2010) ECHR 1676, at para 93.

³⁸ *Chauvy and Others v France* (2004) ECHR 295, at para 68.

³⁹ *Magyar Helsinki Bizottsag v Hungary* (2016) ECHR 975, at para 170.

⁴⁰ *Österreichische Vereinigung v Austria* (2013) ECHR 1204, at para 43.

⁴¹ CCPR/C/GC/34, ‘UN Human Rights Committee General Comment No 34: Freedoms of Opinion and Expression’, 12 September 2011.

⁴² *Ibid*, at para 18.

⁴³ *Ibid*, at para 21.

⁴⁴ *Ibid*, at para 34.

⁴⁵ Article 13, UN Convention on the Rights of the Child 1989; Article 21, UN Convention on the Rights of Persons with Disabilities 2006.

shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child.

- 2.21 **The NIHRC recommends that the Executive Office ensures that access to information regarding Mother and Baby Institutions, Magdalene Laundries and Workhouses is only limited where it is lawful, proportionate and necessary to do so. This includes ensuring that there is a clear structure and statutory guidance for indexing, facilitating, managing, restricting and monitoring access to information. Also, that there is an accessible, robust and human rights compliant complaints mechanism in place to challenge decisions regarding access to information.**

Right to respect for private and family life

- 2.22 In the context of Mother and Baby Institutions, Magdalene Laundries and Workhouses in NI, the right to respect for private and family life is relevant for both the individual seeking to maintain their privacy and the individual seeking to access information.
- 2.23 The right to respect for privacy and family life is protected by Article 8 of the ECHR and several other human rights treaties.⁴⁶ There should be no interference with the exercise of this right:

except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁴⁷

- 2.24 The ECtHR recognises that paternity, and by extension maternity, proceedings fall within the scope of the right to respect for family life.⁴⁸ In

⁴⁶ Article 17, UN International Covenant on Civil and Political Rights 1966; Article 16, UN Convention on the Rights of the Child 1989; Article 22, UN Convention on the Rights of Persons with Disabilities 2006.

⁴⁷ Article 8(2), European Convention on Human Rights 1950.

⁴⁸ *Mikulia v Croatia* (2019) ECHR 93, at para 51.

doing so, the ECtHR has held “that the notion of ‘family life’... is not confined solely to marriage-based relationships, but may also encompass other de facto ‘family ties’ where sufficient constancy is present”.⁴⁹

- 2.25 Where there is no established family tie, the private life element is engaged.⁵⁰ The ECtHR has confirmed that private life “includes a person’s physical and psychological integrity and can sometimes embrace aspects of an individual’s physical and social identity. Respect for ‘private life’ must also compromise to a certain degree the right to establish relationships with other human beings”.⁵¹ Thus, respect for private life “requires that everyone should be able to establish details of their identity as individual human beings and that individual’s entitlement to such information is of importance because of its formative implications for his or her [or their] personality”.⁵² This can include “obtaining information necessary to discover the truth concerning important aspects of one’s personal identity, such as the identity of one’s parents”.⁵³ Furthermore, indications are that leaving someone in “prolonged uncertainty as to... [their] personal identity” constitutes a violation of the right to respect for private life.⁵⁴
- 2.26 However, the ECtHR has also recognised that “protection of third persons” must be considered.⁵⁵ Consequently, “it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons”.⁵⁶ However, the ECtHR has further noted that “the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent”.⁵⁷
- 2.27 The UN Human Rights Committee has elaborated that “the gathering and holding of personal information... must be regulated by law”.⁵⁸ The UN Human Rights Committee further identified that every individual should “be able to ascertain which public authorities or private individuals or bodies

⁴⁹ Ibid, at para 52.

⁵⁰ Ibid.

⁵¹ Ibid, at para 53.

⁵² Ibid, at para 54.

⁵³ Ibid, at para 23.

⁵⁴ Ibid, at para 66.

⁵⁵ Ibid, at para 65.

⁵⁶ *Gaskin v UK* (1989) ECHR 13, at para 49.

⁵⁷ Ibid.

⁵⁸ ‘UN Human Rights Committee General Comment No 16: Article 1 the Right to Privacy’, 8 April 1988, at para 10.

control or may control their files”.⁵⁹ Further, the right to respect for private and family life affords protection to personal honour and reputation, for which provision must “be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible”.⁶⁰

2.28 In this context, the requirements of General Data Protection Regulations will also require consideration.

2.29 The NIHRC recommends that the Executive Office ensures that effective steps are taken to strike the appropriate balance between the right to respect for private and family life of an individual seeking to maintain their privacy and an individual seeking to access information regarding Mother and Baby Institutions, Magdalene Laundries and Workhouses in NI. This requires establishing what is proportionate, taking into account the surrounding circumstances of the individual request.

2.30 The NIHRC recommends that the Executive Office ensures that effective steps are taken to ensure that individuals are able to ascertain who has control or may have control of their personal data regarding Mother and Baby Institutions, Magdalene Laundries and Workhouses in NI, including their pathways and practices. This could be achieved by indexing the information gathered during the public inquiry and archiving this after the inquiry, with a clear system in place to enable queries and access, as appropriate, to the index and the information held.

Right to highest attainable standard of health

2.31 There are several reasons why victims, survivors and their relatives may wish to access information for health purposes. It could be to establish and understand what happened medically during a person’s time at a Mother and Baby Institution, Magdalene Laundry or Workhouse in NI. It could be that a victim or survivor has developed symptoms that are either diagnosed as linked to their time in an institution, or have been difficult to diagnose and the individual wishes to understand this more. Or it could be

⁵⁹ Ibid.

⁶⁰ Ibid, at para 11.

that a victim, survivor or relative wishes to better understand their genealogy or genetic predisposition to certain health conditions. However, situations where a relative, including parents and offspring, wish to access medical information about another person, require a balance of their right to information and the other person's right to privacy.

2.32 Article 12 of the UN ICESCR provides for the right to the highest attainable standard of health. It is required that individuals with specific needs, particularly women, ethnic and racial minorities, children and persons with disabilities have equality of opportunity to exercise and enjoy their right to the highest attainable standard of health.⁶¹ The UN CESCR Committee has confirmed that this right is closely related to and dependent on other rights, including access to information.⁶² This includes the right to information under freedom of expression, and the right to respect for private and family life, both of which are dealt with more broadly above. However, in the context of health, the right to respect for private life requires specific consideration. The ECtHR has stated that:

respect for the confidential nature of health information constitutes an essential principle of the legal system... it is essential not only to protect the private lives of patients, but also to preserve their confidence in the medical profession and health services in general.⁶³

2.33 The ECtHR has further held that the protection of personal data, particularly medical data, is fundamental to a person's right to privacy and therefore, "domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 [of the ECHR]".⁶⁴ The ECtHR has further affirmed that any interference with an individual's right to privacy should:

have some basis in domestic law and to be compatible with the rule of law, that is to say to be accessible, foreseeable and accompanied by

⁶¹ Article 12, UN Convention on the Elimination of All Forms of Discrimination Against Women 1981; Article 5, UN Convention on the Elimination of All Forms of Racial Discrimination 1965; Article 24, UN Convention on the Rights of the Child 1989; Article 25, UN Convention on the Rights of Persons with Disabilities 2006.

⁶² E/C.12/2000/4, 'UN ICESCR Committee General Comment No 14: Right to the Highest Attainable Standard of Health', 11 August 2000, at para 3.

⁶³ *Mortier v Belgium* (2022) ECHR 764, at para 207.

⁶⁴ *YG v Russia* (2022) ECHR 632, at para 44.

necessary procedural safeguards affording adequate legal protection against arbitrary application of the relevant legal provisions.⁶⁵

2.34 When considering a situation where an individual's private information was held within a secret police-register, the ECtHR found that "both the storing and release of such information, which were coupled with a refusal to allow [the individual]... an opportunity to refute it, amounted to an interference" with Article 8 of the ECHR.⁶⁶ This jurisprudence confirms that storing and releasing of personal information must be treated with caution.

2.35 The UN ICESCR Committee has identified that accessibility to health encompasses access to information, including the right to "seek, receive and impart information and ideas concerning health issues".⁶⁷ However, in agreement with the ECtHR, the UN ICESCR Committee has stated that "accessibility of information should not impair the right to have personal health data treated with confidentiality".⁶⁸ Thus, accessing personal medical records without the individual's express permission is difficult, however not impossible.

2.36 Exploring jurisprudence in the context of the disclosure of a HIV diagnosis offers some principles to be guided by. The ECtHR found that in situations where the disclosure of medical information:

may dramatically affect... [an individual's] private and family life, as well as social and employment situation, by exposing.. [them]... to opprobrium and the risk of ostracism... The interests in protecting the confidentiality of such information will therefore weigh heavily in the balance in determining whether the interference [with the individual's right to privacy] was proportionate to the legitimate aim pursued.⁶⁹

2.37 The ECtHR concluded that "such interference cannot be compatible with Article 8 of the [ECHR]... unless it is justified by an overriding requirement in the public interest".⁷⁰

⁶⁵ *Surikov v Ukraine* (2017) ECHR 100, at para 71.

⁶⁶ *Leander v Sweden* (1987) ECHR 4, at para 48.

⁶⁷ E/C.12/2000/4, 'UN ICESCR Committee General Comment No 14: Right to the Highest Attainable Standard of Health', 11 August 2000, at para 12(b).

⁶⁸ *Ibid.*

⁶⁹ *YG v Russia* (2022) ECHR 632, at para 45.

⁷⁰ *Ibid.*

2.38 Furthermore, in the context of disclosure of an abortion, the ECtHR:

noted that the medical records in question contained highly personal and sensitive data about the applicant... Although the records remained confidential, they had been disclosed to another public authority and therefore to a wider circle of public servants... Moreover, whilst the information had been collected and stored at the clinic in connection with medical treatment, its subsequent communication had served a different purpose... It did not follow from the fact that she had sought treatment at the clinic that she would consent to the data being disclosed... Having regard to these considerations, the [ECtHR found]... that the disclosure of the data by the clinic... entailed an interference with... right to respect for private life.⁷¹

2.39 The ECtHR has found disproportionate interferences with the right to private life in the disclosure of medical data to journalists, prosecutors and monitoring bodies.⁷² The ECtHR has also found disproportionate interference with this right where there have been tense relations between a mother and her daughter, or where a parent has requested that her medical records are kept private, even from her son.⁷³ However, the ECtHR has stressed the need to conduct an individualised assessment of proportionality for the purposes of establishing the appropriate balance between protecting privacy and enabling access to information.⁷⁴

2.40 It follows that “although the object of Article 8 [of the ECHR] is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference”.⁷⁵ The ECtHR has found that the State must provide essential information about severe risks to an individual’s health in a timely manner.⁷⁶ This finding was made regarding timely access to information on the harms of fertiliser, it did not concern access to an individual’s private information. However, it does set the precedent that the right to privacy does not automatically trump right to access of information and clarifies

⁷¹ *MS v Sweden* (1997) ECHR 49, at para 35.

⁷² *Mockutė v Lithuania* (2018) ECHR 200, at para 95.

⁷³ *Ibid*, at para 100; *Mortier v Belgium* (2022) ECHR 764.

⁷⁴ *Frâncu v Romania* (2020), at paras 63-75.

⁷⁵ *Guerra and Others v Italy* (1998) ECHR 7, at para 58.

⁷⁶ *Ibid*, at para 60.

that consideration of the individual circumstances surrounding the individual request for information is required.

2.41 This is further supported by cases where individuals were directly exposed to potentially dangerous trials and the ECtHR found that access to information would have “either allayed... fears... or enabled them to assess the danger to which they had been exposed”.⁷⁷ Therefore, given the “interest in obtaining access to the material in question and the apparent absence of any countervailing public interest in retaining it, the [ECtHR]... considers that a positive obligation under Article 8 [of the ECHR] arose”.⁷⁸ The ECtHR continued that:

where a Government engages in hazardous activities... which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 [of the ECHR] requires that effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information.⁷⁹

2.42 There are allegations of harmful practices that occurred in Mother and Baby Homes, Magdalene Laundries and Workhouses during or post-pregnancy that would or could have directly affected the health of the child, or pregnant woman or girl. The health of any further children (and subsequent generations) born to a woman or girl who experienced such institutions may also be affected. The jurisprudence indicates that in such situations, the women and children (now adults) involved should have access to that information or at least a viable opportunity to request such information. Specific to a third party trying to access information, there are questions over how valid a woman or girl’s consent was when signing documents to waive their right of contact and lock their personal records given the imbalance of power and the questionable practices undertaken at Mother and Baby Institutions, Magdalene Laundries and Workhouses in NI. This is stated with caution, as there will be women who, even if the circumstances in which the declaration was made was unlawful, did wish to retain their privacy. Thus, each experience was different and requires careful consideration.

⁷⁷ *McGinley and Egan v UK* (1998) ECHR 50, at para 98.

⁷⁸ *Ibid*, at para 101.

⁷⁹ *Ibid*.

2.43 The NIHRC recommends that the Executive Office ensures that effective mechanisms are in place to consider and balance the interests in protecting the privacy of individuals and enabling individuals to have timely access to essential information about risks to their health. This requires individualised assessment of proportionality, including consideration of the individual circumstances surrounding the individual request for information.

Right to an effective investigation

2.44 A human rights compliant investigation is not one that is “half-hearted and dilatory”.⁸⁰ To be human rights compliant, an “investigation’s conclusions must be based on thorough, objective and impartial analysis of *all* relevant elements... failing to follow an obvious line of inquiry undermines the investigations’ ability to establish the circumstances of the case and the person responsible”.⁸¹ The NIHRC provides a fuller analysis of human rights compliant investigations in relation to the Executive Office’s Truth Recovery in its submission to the consultation process.⁸² This briefing paper focuses on the element of compellability.

2.45 The Executive Office’s consultation document on the Truth Recovery Inquiry states that it is intended that a public inquiry into mother and baby institutions, Magdalene Laundries and Workhouses in NI will have “the legal powers to compel evidence available” and that there will be an “independent body to administer and compel evidence from institutions and other parties”.⁸³

2.46 The Istanbul Protocol stipulates that the independent commission carrying out the inquiry must “have the authority to obtain all information necessary to the inquiry and should conduct the inquiry as provided for under these principles”.⁸⁴ The UN Revised Minnesota Protocol also states:

⁸⁰ *Acar and Others v Turkey* (2005) ECHR 313, at para 91.

⁸¹ *Kolevi v Bulgaria* (2009) ECHR 1838, at para 201; *Armani da Silva v UK* (2016), Application No 5878/08, Judgment of 30 March 2016, at para 234.

⁸² NI Human Rights Commission, ‘Submission to the Executive Office’s Consultation on Truth Recovery – Mother and Baby Institutions, Magdalene Laundries and Workhouses, and their Pathways and Practices’ (NIHRC, 2024).

⁸³ The Executive Office, ‘Truth Recovery - Mother and Baby Institutions, Magdalene Laundries and Workhouses, and Their Pathways and Practices’ (TEO, 2024), at 9.

⁸⁴ UN Office of the High Commissioner for Human Rights, ‘Manual of the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (OHCHR, 2022), at para 48.

an investigation must be carried out diligently and in accordance with good practice. The investigative mechanism charged with conducting the investigation must be adequately empowered to do so. The mechanism must, at a minimum, have the legal power to compel witnesses and require the production of evidence, and must have sufficient financial and human resources, including qualified investigators and relevant experts.⁸⁵

2.47 This supports the view of Dr Maeve O'Rourke that any public inquiry should have comprehensive powers of compellability.⁸⁶

2.48 The NIHRC has welcomed the Executive Office's proposals on compellability. However, there should be a victim-centred approach that respects the rights of victims, survivors and their families when determining the "other parties" that can be subject to compellability.

2.49 The NIHRC recommends that the Executive Office ensures that the public inquiry into mother and baby homes, Magdalene Laundries and Workhouses in NI has effective powers of compellability that are clearly set out. Balanced with the requirement to conduct a thorough investigation, this includes that a victim-centred approach is adopted regarding who can be compelled to provide evidence and the type of information that can be compelled.

Individual access and public scrutiny

2.50 Access to information regarding Mother and Baby Institutions, Magdalene Laundries and Workhouses is multifaceted. There is the individual right to have access to your own information or information that is relevant to you personally. There is the collective safeguard to understand, learn from and publicly scrutinise what happened for the purposes of ensuring that any violations that occurred cannot be repeated. The latter is also a duty for public authorities.

2.51 In terms of individuals, it is commonly accepted that a victim, next of kin or close family member has specific rights regarding the disclosure of

⁸⁵ UN Office of the High Commissioner, 'The Minnesota Protocol on the Investigation of Potentially Unlawful Death' (OHCHR, 2016), at para 27.

⁸⁶ Meeting between Dr Maeve O'Rourke and NI Human Rights Commission, 13 August 2024.

information.⁸⁷ As an indication of what is meant by a close family member in the context of Article 2 of the ECHR, the ECtHR has accepted married partners,⁸⁸ unmarried partners,⁸⁹ parents,⁹⁰ siblings,⁹¹ children,⁹² and nephews.⁹³ Principle 4 of the Orentlicher Principles identifies that “victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate”.⁹⁴

- 2.52 Furthermore, the UN Declaration on the Protection of All Persons from Enforced Disappearance states, in the context of investigating enforced disappearance, that “the findings of such an investigation shall be made available upon request by all persons concerned, unless doing so would jeopardise an ongoing criminal investigation”.⁹⁵
- 2.53 As set out above, there is no automatic right to have access to information. Yet, victims must not be denied access to information for “no valid reason”.⁹⁶ Moreover, victims and survivors should be able to participate effectively in the investigation.⁹⁷
- 2.54 The ongoing denial of information to victims and survivors including as to familial links and treatment, is an ongoing violation of their human rights.⁹⁸ The Truth Recovery Expert Panel believes, and the NIHRC agrees, that there should be a statutory order to preserve records and legislation to establish “a dedicated repository of all personal and administrative records relating to historical institutions, adoption, and related practices should be drafted in consultation with the Independent Panel, which through its work with victims-survivors will gain invaluable expertise”.⁹⁹

⁸⁷ *Tanas v Moldova* (2010), Application No 7/08, Judgment of 27 April 2010, at para 104; *Burden v UK* (2008) ECHR 356, at para 33; *Lambert and Others v France* (2015) ECHR 545, at para 89; CCPR/C/GC/36, ‘UN Human Rights Committee General Comment No 36: Right to Life’, 30 October 2018, at para 28; UN Office of the High Commissioner for Human Rights, ‘The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions’ (OHCHR, 2016), at para 11.

⁸⁸ *McCann v UK* (1995) 21 EHRR 97; *Salman v Turkey* (2000) ECHR 357.

⁸⁹ *Velikova v Bulgaria* (2000) ECHR 198.

⁹⁰ *Ramsahai and Others v Netherlands* (2007) ECHR 393; *Giuliani and Gaggio v Italy* (2011) ECHR 513.

⁹¹ *Andronicou and Constantinou v Cyprus* (1997), Application No 86-1996-705-897, Judgment of 9 October 1997.

⁹² *McKerr v UK* (2001) ECHR 329.

⁹³ *Yasa v Turkey* (1998) ECHR 83.

⁹⁴ E/CN.4/2005/102/Add.1, ‘UN Economic and Social Council Report of the Independent Expert to Update the Set of Principles to Combat Impunity’, 8 February 2005, at Principle 4.

⁹⁵ A/RES/47/133, ‘UN Declaration on the Protection of All Persons from Enforced Disappearance’, 18 December 1992, at Article 13(4).

⁹⁶ *Eremiášová and Pechová v Czech Republic* (2012), Application No 23944/04, Judgment of 16 May 2012, at para 149.

⁹⁷ *Bouyid v Belgium* (2015) ECHR 819, at para 122.

⁹⁸ Deirdre Mahon et al, ‘Mother and Baby Institutions, Magdalene Laundries and Workhouses in NI: Truth, Acknowledgment and Accountability’ (TEO, 2021), at 118.

⁹⁹ *Ibid*, at 120.

- 2.55 The Istanbul Protocol states that an inquiry report should be public, be issued within a reasonable period of time and should be “published widely and in a manner that is accessible to the broadest audience possible”.¹⁰⁰ The Istanbul Protocol further advises that States should “reply promptly and publicly to the commission’s report and, where appropriate, indicate which steps it intends to take in response to the report, particularly with a view to expeditiously and effectively implementing its recommendations”.¹⁰¹
- 2.56 The UN Office of the High Commissioner identifies that “the right to the truth as a stand-alone right is a fundamental right of the individual”.¹⁰² However, the right to truth is “not only for the applicant and his family, but also for other victims of similar crimes and the general public”.¹⁰³ This is supported by the UN Revised Minnesota Protocol, which states that:
- the right to know the truth extends to society as a whole, given the public interest in the prevention of, and accountability for, international law violations. Family members and society as a whole both have a right to information held in a State’s records that pertains to serious violations, even if those records are held by security agencies or military or policy units.¹⁰⁴
- 2.57 Principle 3 of the Orentlicher Principles also notes the importance of preserving collective memory to guard against “the development of revisionist or negationist arguments”.¹⁰⁵ This can also be linked to the right to an effective remedy,¹⁰⁶ which when read with the right to life and freedom from torture requires States “to take steps to prevent the

¹⁰⁰ UN Office of the High Commissioner, ‘Manual of the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (OHCHR, 2022), at para 61.

¹⁰¹ Ibid.

¹⁰² E/CN.4/2006/91, ‘Study on the Right to the Truth: Report of the Office of the United Nations High Commissioner for Human Rights’, 8 February 2006, para 52.

¹⁰³ *El-Masri v The Former Yugoslav Republic of Macedonia* (2012), Application No 39630/09, Judgment of 13 December 2012, at para 191.

¹⁰⁴ UN Office of the High Commissioner for Human Rights, ‘The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions’ (OHCHR, 2016), at para 13.

¹⁰⁵ E/CN.4/2005/102/Add.1, ‘UN Economic and Social Council Report of the Independent Expert to Update the Set of Principles to Combat Impunity’, 8 February 2005, at Principle 3.

¹⁰⁶ Article 13, European Convention on Human Rights 1950; Article 3(a), UN International Covenant on Civil and Political Rights 1966; CAT/C/GC/2, ‘UN CAT Committee General Comment No 2 on the Implementation of Article 2’, 24 January 2008, at paras 3 and 15; CRC/C/GC/13, ‘UN CRC Committee General Comment No 13 on the Right of the Child to Freedom from all Forms of Violence’, 18 April 2011, at para 17.

occurrence of similar violations in the future”.¹⁰⁷ Once the investigation element has been satisfied, there are many additional steps that can help to prevent similar future violations. In addition to legal reform, improved training and revised guidance, access to information can be a key component.¹⁰⁸ Creating a permanent, accessible archive offers the opportunity for research experts to consider and analyse in detail what is uncovered by the public inquiry. It also offers the opportunity for societal learning through educational and awareness raising programmes. A public archive would also help to ensure that there is continued acknowledgement of the violations that occurred. This all contributes to a better knowledge and understanding, with a view to deterring future similar occurrences.

2.58 Furthermore, the right to culture recognises historical and memorialisation processes.¹⁰⁹ The right to culture may be exercised by a person individually, in association with others, or as a community or group.¹¹⁰

2.59 Nevertheless, when the information being held concerns personal information there are particular considerations. The ECtHR has held:

that systematic storage and other use of information relating to an individual’s private life by public authorities entails important implications of the interests protected by Article 8 of the [ECHR]... and thus amounts to interference. This is all the more true where the information concerns a person’s distant past or when the processing affects highly intimate and sensitive categories of information, notably the information relating to physical or mental health of an identifiable individual.¹¹¹

¹⁰⁷ *Kaya v Turkey* (1998) ECHR 10, at paras 106-107; *Assenov and Others v Bulgaria* (1998) ECHR 98, at para 102; *Mocanu and Others v Romania* (2014) ECHR 958, at paras 319-325; Articles 12 and 14, UN Convention against Torture 1984; CAT/C/GC/2, ‘UN CAT Committee General Comment No 2’, 24 January 2008, at paras 5, 17, 18 and 25; CAT/C/GC/3, ‘UN Committee against Torture General Comment No 3’, 13 December 2012, at para 5; CCPR/C/GC/36, ‘UN Human Rights Committee General Comment No 36: Right to Life’, 30 October 2018, at paras 27 and 28; UN Office of the High Commissioner for Human Rights, ‘The Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions’ (OHCHR, 2016), at para 8(c).

¹⁰⁸ *Erdogan and Others v Turkey* (2006) ECHR 59; *Abdullah Yasa and Others v Turkey* (2013) ECHR 839; *McShane v UK* (2002) ECHR 469; *Khashiyev and Akayeva v Russia* (2005) ECHR 132.

¹⁰⁹ A/HRC/25/49, ‘Report of the UN Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, Memorialization Processes’, 3 January 2014; A/69/286, ‘Report of the UN Special Rapporteur in the Field of Cultural Rights’, 8 August 2014.

¹¹⁰ E/C.12/GC/21, ‘General Comment No 21: Right of Everyone to Take Part in Cultural Life’, 21 December 2009, at para 9.

¹¹¹ *Surikov v Ukraine* (2017) ECHR 100, at para 70.

2.60 The range of information that a public inquiry into Mother and Baby Institutions, Magdalene Laundries and Workhouses will be considering will be multifaceted. For example, the ECtHR has found that law which permits storage of health-related data “for a very long term” and allows “its disclosure and use of purpose unrelated to the original purpose of its collection” to be a disproportionate interference with the right to respect for private life.¹¹² Arguably, a public inquiry that includes a commitment to establish a way to store and archive the information it obtains from the outset fits within its intended purpose. If safeguards are in place to ensure that consideration is given to the terms under which each piece of information is stored and can be disclosed, with due regard to balancing rights, it would seem that such an approach would be human rights compliant.

2.61 To have access to information you first need to gather it. A safe space must be created, which avoids the risk of re-traumatisation and re-victimisation as much as possible both during the public inquiry and in any mechanisms for maintaining the information gathered afterwards. This is an opportunity to learn from the lessons of the Commission for Investigations into Mother and Baby Homes in Ireland. For example, many victims and survivors were given the option to provide testimony to the Confidential Committee (which would remain untested), or the Investigations Committee (which would be scrutinised). The testimony provided to the Confidential Committee was not considered by the Commission for Investigations when deliberating and evidencing its findings and recommendations.¹¹³ The differences between the two avenues were not adequately explained to victims and survivors, with many who had engaged with the Commission for Investigations finding that “their testimony had effectively vanished”.¹¹⁴ This is not a victim-centred or trauma-informed approach.

2.62 **The NIHRC recommends that the Executive Office ensures that there is a process for archiving the evidence and information sources recovered and collated by the Expert Panel, Truth Recovery Independent Panel and public inquiry. Access and publication should only be limited where it is lawful, proportionate and**

¹¹² *Surikov v Ukraine* (2017) ECHR 100, at para 89.

¹¹³ Excerpt from Professor Máiréad Enright’s interview in the documentary *Stolen* (2023).

¹¹⁴ Excerpt from Professor Catriona Crowe’s interview in the documentary *Stolen* (2023).

necessary to do so. This should include introducing and monitoring safeguards to ensure that any limits to access are not applied arbitrarily and that the commitments aimed at enabling effective public scrutiny are not illusory. There should also be measures in place to ensure that the process for providing and accessing evidence and information is transparent and fully accessible during and after the public inquiry. These mechanisms should be developed, implemented and monitored through meaningful consultation with victims, survivors, their relatives and representative organisations, with consideration of victim-centred and gender-sensitive approaches, particularly with a view to preventing re-traumatisation or re-victimisation.

Duty bearers

- 2.63 Human rights implementation is primarily the responsibility of the UK Government. However, it can delegate this responsibility to other bodies, including the NI Executive and NI Assembly. Furthermore, the Human Rights Act 1998 makes it clear that “it is unlawful for a public authority to act in a way which is incompatible with a [ECHR]... right”.¹¹⁵ A public authority includes “a court or tribunal, and person certain of whose functions are functions of a public nature”. This can include private organisations, when they are providing a public service, or their service is paid for in whole or part by public money.¹¹⁶
- 2.64 Where a human rights violation has occurred due to the actions of a third party, it is within the State’s discretion to legislate that a private body or individual must undertake, or prohibit a private body or individual from undertaking, certain actions to ensure that human rights obligations are adhered to within its jurisdiction.¹¹⁷
- 2.65 In the context of access to information regarding Mother and Baby Institutions, Magdalene Laundries and Workhouses, consideration of General Data Protection Regulation is also required.

¹¹⁵ Section 6, Human Rights Act 1998.

¹¹⁶ Ministry of Justice, ‘The Human Rights Act 1998: the Definition of “Public Authority” – Government Response to the Joint Committee on Human Rights’ Ninth Report Session 2006-07’ (MoJ, 2009), at para 12.

¹¹⁷ Article 1, European Convention on Human Rights 1950.

2.66 The NIHRC advises the Committee for the Executive Office that the human rights requirements regarding access to information in the context of Mother and Baby Institutions, Magdalene Laundries and Workhouses can be far-reaching. They apply to public authorities, but can also extend directly to private individuals and bodies in certain circumstances.

3.0 Windsor Framework Article 2

- 3.1 Article 2 of the Windsor Framework is a UK Government commitment to ensure there is no diminution of rights, safeguards and equality of opportunity covered by the relevant section of the Belfast (Good Friday) Agreement as a result of the UK's withdrawal from the EU. This is given effect in UK law by section 7A of the EU (Withdrawal) Act 2018. In addition, section 6 of the Northern Ireland Act 1998 provides that the NI Assembly is prohibited from making any law which is incompatible with Windsor Framework Article 2. Section 24 of the 1998 Act also requires that all acts of the NI Departments comply with Windsor Framework Article 2.
- 3.2 The right to data protection is enshrined in Article 7 and Article 8 of the EU Charter of Fundamental Rights. Article 7 of the EU Charter of Fundamental Rights corresponds to Article 8 of the ECHR and guarantees the right to respect to private life, including correspondence, as well as protection from interference with these rights by a public authority except in limited circumstances. Article 8 of the EU Charter of Fundamental Rights guarantees everyone the right to protection of their personal data and requires that personal data must be processed fairly, for specified purposes and on the basis of consent or some other legitimate basis laid down by law.¹¹⁸ All relevant EU data protection rules must be interpreted in light of these obligations.
- 3.3 The right to data protection is given effect in several EU measures. The main EU law laying down rules for the protection of personal data is the EU General Data Protection Regulation (EU GDPR).¹¹⁹ The EU GDPR is clear that "the protection of natural persons in relation to the processing of personal data is a fundamental right".¹²⁰ The EU GDPR sets out in detail

¹¹⁸ Article 8(2), EU Charter of Fundamental Rights 2009.

¹¹⁹ Regulation 2016/679/EU, 'Regulation of the of the European Parliament and of the Council on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data', 27 April 2016.

¹²⁰ Recital 1, Ibid.

the rights of data subjects, the obligations to protect fundamental rights placed on those processing personal data, and the principles that govern the handling of personal data, which include lawfulness, fairness and transparency.¹²¹

- 3.4 As a Regulation, the EU GDPR is a binding legislative act that must be applied in its entirety across the EU in all Member States. Regulations are directly applicable without the need for them to be incorporated in domestic law.
- 3.5 The UK further implemented the EU GDPR in domestic law with the Data Protection Act 2018. Section 1(2) of the Data Protection Act 2018 states that most processing of data is governed by the EU GDPR.¹²² The High Court of England and Wales has confirmed that the UK GDPR is the retained version of the EU GDPR with amendments made to secure its political effectiveness, read together with the Data Protection Act 2018.¹²³ Currently, the UK GDPR aligns with the EU GDPR.
- 3.6 The NIHRC considers that the EU GDPR falls within the scope of Windsor Framework Article 2 and any legislative proposal that seeks to amend the data protection regime in Northern Ireland must comply with the principle of non-diminution under Windsor Framework Article 2.¹²⁴ Therefore, GDPR continues to be relevant to the collection, storage, sharing and access of information in NI and should be considered in relation to the right to information for the purposes of this Truth Recovery Inquiry.
- 3.7 The rights of victims of crime, including rights related to information and participation are addressed within the EU Victims Directive.¹²⁵ The UK Government has acknowledged,¹²⁶ and the Court of Appeal in NI has confirmed,¹²⁷ that the EU Victims Directive is within the scope of the protections afforded by Article 2 of the Windsor Framework. The EU

¹²¹ Recital 39, Ibid.

¹²² Section 3(10), Data Protection Act 2018.

¹²³ *The 3million and Open Rights Group v Secretary of State for the Home Department* [2023] EWHC 713, at para 9.

¹²⁴ NI Human Rights Commission and Equality Commission for NI, 'Working Paper: The Scope of Article 2(1) of the Ireland/NI Protocol' (NIHRC and ECNI, 2022), at 55 and 61.

¹²⁵ Directive 2012/29/EU, 'Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime', 25 October 2012.

¹²⁶ NI Office, 'UK Government Commitment to "No Diminution of Rights, Safeguards and Equality of Opportunity" in NI: What Does it Mean and How Will it be Implemented?' (NIO, 2020), at para 13.

¹²⁷ *Re Dillon and Others* [2024] NICA 59, at para 136.

Directive must in turn be interpreted in conformity with the EU Charter of Fundamental Rights ('EU Charter').¹²⁸

- 3.8 Recital 3 to the EU Victims Directive makes reference to EU competence in this area deriving from Article 82 of the Treaty on the Functioning of the European Union, and the wider aim of facilitating police and judicial cooperation in criminal matters having a cross-border dimension, in particular with regard to the rights of victims of crime.
- 3.9 Recital 6 to the EU Victims Directive acknowledges the connection between the EU Directive and other EU initiatives to combat violence against women and girls as well as UN CEDAW in the international legal framework. Recital 17 to the EU Victims Directive recognises violence that affects persons of a particular gender disproportionately as gender-based violence and a form of discrimination.
- 3.10 Article 1 of the EU Victims Directive states "the purpose of this [EU] Directive is to ensure that victims of crime receive appropriate information, support and protection...".
- 3.11 The EU Directive can apply outside the context of criminal proceedings. Article 8 of the EU Directive deals with access to support services. Article 8(5) of the EU Directive requires Member States to ensure that a victim's access to support is neither dependent on having made a formal complaint regarding the crime, nor conditional on the authorities launching a criminal investigation.
- 3.12 Article 16(2) of the EU Directive requires Member States to "promote measures to encourage offenders to provide adequate compensation to victims".
- 3.13 Article 9(1) of the EU Directive sets out minimum requirements in relation to services for victims including, amongst other things, "information, advice and support relevant to the rights of victims including on accessing national compensation schemes for criminal injuries" and "advice relating to financial and practical issues arising from the crime".
- 3.14 Article 6 of the EU Directive provides that victims have the right to information on any decision not to proceed with or to end an investigation. Related to this is Article 11 of the EU Directive, which sets out the right of

¹²⁸ *Re Dillon and Others* [2024] NICA 59, at para 126.

a victim to seek a review of a decision not to prosecute. According to European Commission guidance on the EU Directive, “to exercise the right to a review, victims must receive sufficient information to decide whether to request one”.¹²⁹

- 3.15 Several provisions in the EU Charter of Fundamental Rights are particularly important to the correct interpretation of the EU Victims Directive and in particular the provisions set out above. Article 47 of the EU Charter provides for the right to an effective remedy for violations of rights protected under EU law. The Court of Appeal in NI has found that a diminution of rights prohibited by Windsor Framework Article 2 might occur by reducing the efficacy of available remedies.¹³⁰
- 3.16 Article 4 of the EU Charter has the same wording as Article 3 of the ECHR in relation to protection from torture or inhuman or degrading treatment or punishment. By virtue of Article 52(3) of the Charter, Article 4 of the EU Charter therefore has the same meaning and the same scope as Article 3 of the ECHR. On this basis, the caselaw of the ECtHR on the right to truth and the duty to investigate, cited above, is relevant to the interpretation of Article 4 of the EU Charter.¹³¹
- 3.17 Article 11 of the EU Charter protects the right to freedom of expression including rights relating to information and under Article 52(3) of the EU Charter its meaning and scope are the same as those guaranteed by Article 10 of the ECHR, so the advice above is relevant in relation to access to information.¹³²
- 3.18 In response to an argument that the EU Victims’ Directive does not create substantive rights, the Court of Appeal in NI has found that the provisions of the EU Victims’ Directive are “clearly substantive in nature insofar as they pre-suppose the possibility of prosecution in respect of behaviour which constituted an offence at the time it was committed”.¹³³ Arguably, protections that pre-suppose the possibility of prosecution in turn pre-suppose an effective investigation and therefore one that should be carried out in line with Article 4 EU Charter or Article 3 of the ECHR and the

¹²⁹ European Commission Directorate-General for Justice, ‘Guidance Document Related to the Transposition and Implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA’ (ECDGJ, 2013), at 31.

¹³⁰ *Re Dillon and Others* [2024] NICA 59, at para 149.

¹³¹ See above at paras 2.3 and 2.44.

¹³² See above at paras 2.12-2.18.

¹³³ *Re Dillon and Others* [2024] NICA 59, at para 121.

associated rights of victims and next-of kin, to information. The Court of Appeal in NI also recognised the importance of the procedural rights afforded to victims of crime under the EU Victims Directive.¹³⁴

3.19 While the period of inquiry pre-dates the EU Victims Directive and the EU Charter, the law in NI must comply with the minimum standards they require, in relation to the treatment of victims of crime. The Court of Appeal in NI has confirmed that Windsor Framework Article 2 is directly effective and found that certain provisions of the EU Victims Directive, interpreted in line with the EU Charter, are also directly effective, meaning individuals can assert these rights before domestic courts.¹³⁵

3.20 The NIHRC recommends that the EU Victims Directive, the EU Charter of Fundamental Rights and related caselaw, are carefully considered in the development of legislation for a public inquiry, to ensure that provisions comply with minimum requirements set out.

¹³⁴ *Re Dillon and Others* [2024] NICA 59, at para 121.

¹³⁵ *Re Dillon and Others* [2024] NICA 59, at paras 85 and 125.

Contact us

For queries contact: Hannah.Russell@nihrc.org

www.nihrc.org | info@nihrc.org | +44 (0)28 9024 3987
4th Floor, Alfred House, 19-21 Alfred Street, Belfast, BT2 8ED

