

The Separation, Appropriation & Loss Initiative:

An Scaradh, Toiliú agus Cailleadh Tionscnamh

Injustice | Recognition | Transitional Justice

The themes of Injustice, Recognition & Transitional Justice for Victims, Survivors and Families of the Mother and Baby Home Institutions, and associated issues and settings

Legislating for the Institutions Recognised or Suspected Burial Grounds



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Introduction:

On 21 June 2021, the members of SALI published and circulated their own draft of the Burials Bill in response to the Irish government's publication of:

General Scheme of a Certain Institutional Burials (Authorised Interventions) Bill¹, which is compared and contrasted with SALI's - The Institutions Recognised or Suspected Burial Grounds Bill 2021².

The SALI proposed Bill was circulated to all members of the Oireachtas and a number of Irish media outlets.

Objectives:

The first 'compare and contrast' document was published on 11 July 2021; this paper is an updated version of that document.

The purpose of this paper is to provide analysis, to compare and contrast and provide comment upon the aforementioned Bills.

The first Bill is an official document currently making its passage through the Oireachtas.

The second Bill is an unofficial document, but produced by the Separation, Appropriation and Loss Initiative (SALI) and its members. This document is intended to offer an alternative path, to bring about a more comprehensive set of solutions to the difficult problem of un-located, unknown, unmarked and inappropriate Burials found within the entire Magdalene system, (eg: those found within the carceral system - Mother & Baby Homes, Magdalene Laundries, Industrial Schools, County Homes, Workhouses etc).

This secondary document has been created following review of the government's own Bill and following the recognition that there exists in Irish Law a number of provisions that could adequately deal with the problem at hand.

The SALI Bill provides a vehicle to bring those laws together, whilst providing additional and logical provisions to allow for the smooth operation of the SALI Bill.

SALI is providing constructive criticism of the Irish government's own Bill, seeking to highlight the usefulness of existing provisions, providing valuable input from a survivor cohort and valuable solutions.

¹ <https://www.gov.ie/en/publication/51a535-general-scheme-of-a-certain-institutional-burials-authorized-interve/#>

² <http://frankbrehany.com/blog/sali-campaigners-launch-alternative-irish-institutions-burial-bill/>

Since producing the first ‘compare and contrast’ document, the Oireachtas Joint Committee on Children, Equality, Disability, Integration & Youth has produced its own commentary on the government’s Burials Bill³. This document compares this latter report’s comments and provides comment and observation where appropriate.

Following further review of the issues, SALI again recommends that the Irish government’s Bill is re-examined in its entirety against the backdrop of existing laws and expectations and adopt the SALI Bill, or alternatively, to radically amend the current Irish government’s Bill with key provisions from the SALI Bill.

Throughout this document we use the term “Community Survivor”, particularly where the Irish government & the Oireachtas Committee references consultative issues. In the SALI Bill, we define “Community Survivor” as being: “ “Community Survivor(s)” shall mean those who were former inmates, children or adoptees of any of the said Institutions, for whatever period, or those relatives of a Community Survivor or of a suspected Community Survivor”. Whilst this term is used by SALI we must not forget that the persons alive or dead, affected by any government Bill, are first and foremost, victims.

The following summary is only intended to provide a general overview of the issues.

³ https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_children_equality_disability_integration_and_youth/reports/2021/2021-07-15_report-on-pre-legislative-scrutiny-of-the-general-scheme-of-a-certain-institutional-burials-authorized-interventions-bill_en.pdf

Comparison Table:

Irish Government's Bill (SALI critique):	SALI Bill (and additional comment):	The report of the Oireachtas Joint Committee on Children, Equality, Disability, Integration & Youth:
	<p>The SALI members dispute the use of the term 'Communal Graves' as they consider that there are sufficient examples that act as precedents for this unique Irish situation. They should be referred to as 'Mass Graves', as this imports a different set of considerations (eg: does the discovery of a mass grave(s) indicate failures of a country's constitution, exclusionary discrimination, a crime(s) against humanity by a State and its acknowledged actors etc?), onward historical legacy actions and decision-making</p>	<p>At Page 3, the Committee debates the definition of Mass Graves vs Communal Graves. They conclude that their report will use the term 'Communal Graves', suggesting a mechanism to help determine whether the 'graves' in question should be classified as 'Mass Graves'</p>
	<p>SALI notes these references</p>	<p>At Page 5 the Committee recommends that the government references the following reports:</p> <ul style="list-style-type: none"> • "Human Rights Issues at the Former Site of the Mother and Baby Home, Tuam, Co. Galway" a report by the Special Rapporteur for Children Dr. Geoffrey Shannon; and • The Expert Technical Group Report on the site of the former Tuam Mother and Baby Home.

Medico-legal investigative references are not relevant nor appropriate in these cases. The members of SALI are concerned by the highlighted claim within the Committee's report, that there is a lack of comparative evidence to direct definition and action in this unique situation. SALI references a number of comparators for government information and attention. They provide key information as to the motives & methodology of such graves, which can result from crime, terrorism, religion to political rationale:

https://www.academia.edu/1185985/Managing_commingled_remains_from_mass_graves_Considerations_implications_and_recommendations_from_a_human_rights_case_in_Chile

<https://pubmed.ncbi.nlm.nih.gov/20399578/>

<https://www.ejiltalk.org/universal-standards-for-investigation-of-mass-graves/>

https://www.ohchr.org/Documents/Countries/IQ/UNAMI_Report_on_Mass_Graves4Nov2018_EN.pdf

https://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_1996_en.pdf

<https://www.icmp.int/flash-news/on-iraqs-mass-grave-day-icmp-calls-for-the-protection-and-investigation-of-mass-graves/>

<https://core.ac.uk/download/pdf/345084806.pdf>

<https://onlinelibrary.wiley.com/doi/full/10.1002/9781119188230.saseas0100>

https://www.ohchr.org/Documents/Issues/Executions/A_75_384_AdvanceUneditedVersion.pdf

At Page 5 the Committee references the work of the Expert Technical Committee:

*“The situation in Tuam is an unprecedented one for the agencies that usually deal with medico-legal death investigations in Ireland. **The group has not identified any directly comparable cases, either nationally or internationally, that involve the complexities of commingled juvenile human remains, in significant quantities and in such a restricted physical location.**”*

There are a number of factors that make this situation unique:

The forensic requirement of the site;
The ‘significant’ quantities of juvenile remains;
The commingled or intermixed state of the remains;
The position of the remains within subsurface chambers, with limited access.”

	https://www.bbc.co.uk/news/world-us-canada-57592243	
	The SALI Bill utilises existing Irish Law provisions and provides extensive definitions to support the flow of their Bill	
The Bill's Title contains the word 'Certain'. This word has been counted by SALI on 15 occasions throughout the Bill. The use of the word 'Certain' deploys and implies a limitation on the subject matter and should be viewed cautiously.	SALI rejects the use of the word 'Certain' as it has the potential to deploy political discretion over rights	
Within the Bill, SALI has counted the word 'may' 130 times. It is estimated that in approximately 2/3rds of the text, the use of the word 'may' provides a very clear discretion, a choice, by the Government, any Minister or any power given to the proposed Agency within the Bill. Given the subject matter, the prolific use of the word 'may' tends to read as a Standard rather than an adequate 'hard' law.	The underlying fear of SALI, through the government's own use of the words 'certain' and 'may' is that the intention of the Bill risks delivering an ineffective Bill and Judicial Review challenges without end.	
In examination of the Bill, at no place is the word Citizen discussed, defined or examined against the bodies within the unmarked or inappropriate graves. What of their initial and continuing rights?	Within the SALI Bill, there is contained the 'Overriding Objective' which obligates State Authorities to act in a particular manner but an emphasis is placed upon the ordinary Citizenship of the Victims, both at birth, death and in continuance through Human Rights Legislation; those rights are acknowledged for their surviving families.	
	SALI would observe that the government's own Bill deploys a far too wide discretion as to action. Note Head 6, subsection 10 as an overarching discretionary power	Key Issue 1 for the Committee was whether there were too many conditions and restrictions before an intervention can be made.

	<p>SALI supports the Committee recommendations 1 to 12.</p> <p>It should be noted that the Committee's comments at 12 raises their fears that some sites will not receive intervention. This supports our comments above about the discretionary language used in the government's own Bill, particularly at Head 6, Subsection 10.</p> <p>SALI does not support the creation of an Agency, thus cannot support recommendation 13 as our Bill utilises current State Law to achieve the objectives of this Bill</p> <p>SALI is concerned with recommendation 14 as this suggests an extension of definition and discretion</p> <p>It is clear from recommendation 15, that the Committee is concerned by Head 6, Subsection 10 and its overarching discretion. It should be removed. We agree that 'Memorialisation' should compliment the process</p> <p>We would agree with Recommendation 16, if the Bill remains in much of its current form.</p> <p>Recommendation 17's first sentence is supported, but SALI is concerned that 'statutory tests' imports political discretion</p> <p>SALI supports recommendation 18 with the exception of a reference to an Agency, which we have dealt with above</p> <p>At recommendation 19, SALI supports the call for compulsion but excepts itself from such powers being referenced to an Agency for the reasons stated above.</p> <p>SALI supports recommendation 20.</p>	<p>The committee then lists a number of recommendations to support their concerns Key Issue 1.</p>
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<p>Head 3 (8) - The following is an example of the discretionary power of the use of the word 'may': <i>"Having determined that there may be a Public Interest"</i></p>		
<p>Head 3 (8) - Another example of the overuse of discretionary language: <i>"[the] Government shall consider the proportionality of any intervention..". It then lists a number of factors</i></p>		
<p>Head 3 (8) - The list of factors contained within this Head have the potential to deploy too many interests against the wider Public Interest and Human Rights issues.</p> <p>Acknowledgement is given of the views of the relatives of the deceased, but are they actually known and what value does this contain against the remaining factors? What about the wider Community Survivor cohort and their consultation?</p>	<p>Section 7 of the SALI Bill provides a definition of 'Community Survivor', the obligation to consult with this cohort and this is reflected throughout the remaining provisions within the Bill</p>	
	<p>The SALI Bill already creates the methodology as to how this can be achieved through the 'Community Survivor' provision</p>	<p>At Key Issue 3, the Committee calls for a wider Survivor Consultation through the government Bill's actions</p>
	<p>SALI notes the recommendations (and refers to the status created within the SALI Bill), and repeats its lack of support to the creation of an Agency given that there are already sufficient State Laws to achieve the objectives of the Bill. The SALI Bill demonstrates how that can be achieved</p>	<p>The Committee presents its recommendations as to how Survivors can be consulted through this Bill</p>
	<p>SALI notes the recommendations of the Committee. The SALI Bill presents transparency, accountability and the rights to appeal as key core to its provisions</p>	<p>At Key Issue 9, the Committee presents its views and recommendations on transparency, accountability and a right to appeal</p>

	SALI notes the recommendations of the Committee. Reference should be made to the SALI Bill which highlights such issues, (Noting our lack of support to the appointment of an Agency. The SALI Bill makes full use of State Law with sufficient Ministerial oversight)	At Key Issue 10, the Committee highlights the issue of conflict in Survivor views
<p>Head 3 (8) - There is a conflict between two of the factors:</p> <p><i>“the social interest to be served by carrying out an intervention”</i></p> <p>vs</p> <p><i>“the economic impact of an intervention”</i></p> <p>The social interest could be equated to be the Public Interest - there is a risk of uncertainty in the Bill through the use of interchangeable language. But, is this first provision potentially trumped by the second provision, with the accusation that the Bill is about costs rather than social or public interest?</p> <p>This is another example of how the use of the word ‘may’ could be used to defeat the Bill’s intentions</p>	The SALI Bill uses existing State Laws but acknowledges that adequate resources will have to be deployed to satisfy the wider Public Interest.	
Head 5 - This provides a starting point for ‘intervention’ and it acknowledges that such criteria should not be limited to the provisions in the proposed Bill	The SALI Bill is explicit on such criteria to be found within Sections 3, 4, 5 & 6	

<p>Head 6 - This provides for some concerning 'restrictions' on the government making an Order under Head 3, for example:</p> <p><i>"Evidence that Human remains..were buried..following death in violent or unnatural circumstances"</i></p> <p><i>"Ongoing Garda investigation..into the circumstances..[of] the burials or the way the deaths took place"</i></p> <p>These provisions are contradicted by Head 7 which misapplies the role of the Coroner or the actions of the Local Authorities. Further, how does this Bill interplay with the recent call by the Garda for complaints - there appears to be difficult contradictions.</p> <p><i>"Exhumation would be unreasonably difficult or unsafe"</i></p> <p>This again adds to the discretion. What expertise will be deployed to determine safety? Does the government accept that war crimes, genocide examples provide good evidence that recovery is not impossible? This is a difficult provision and risks Judicial Review.</p> <p><i>"Evidence was available that...informed family consent was given for burials..."</i></p> <p>How will the government access religious records? Did the families have agency; were they coerced?</p>	<p>The SALI Bill is explicit on these issues and their proposals can be found within Sections 3, 4, 5, 6, 8, 9 & 10</p>	
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<p><i>“Evidence is insufficient to determine the existence of manifestly inappropriate burials...”</i></p> <p>Note the dwellings and other owners of land exceptions.</p> <p><i>“Government has formed the view that memorialisation of the site without further intervention is more appropriate”</i></p> <p>This latter point is the most obvious discretion that government ‘may’ deploy in this work. It will potentially do so in SALI’s opinion to quickly dispatch this work, as a cost effective mechanism, but it will fail to deal with the wider social and public interest issues at stake. It will lead to Judicial Reviews. This latter provision should be removed.</p>		
	<p>SALI considers that the government has erred in removing local/regional Coroners from this critical role in determining issues surrounding the mass graves</p>	<p>The Committee, at Key Issue 2, asks the question, should Coroners have a greater role?</p>
<p>Head 7 - This provides for the most concerning aspect to be found in any Common Law jurisdiction. This Head misapplies the role of the Coroner and the Coroners Act 1962, and, also the role of Local Authorities to seek exhumation Orders.</p> <p>This disapplication has serious implications for rights contained under the European Convention of Human Rights and should be vigorously challenged</p>	<p>The entire SALI Bill empowers not just Ministers & the State but also Local Authorities in this work.</p> <p>Importantly, it places the role of the Local Authority and the Coroner central to this work as found in Section 8</p>	

	SALI notes the recommendations of the Committee. We do not support the appointment of an Agency Coroner. Local and Regional Coroners have existing powers they could deploy. Noting recommendation 24 and the lack of a coronial investigation at Tuam, this suggests a national and local political failure and a failure at law. We are not convinced that the appointment of an Agency Coroner will rectify those issues (Noting our lack of support to the appointment of an Agency. The SALI Bill makes full use of State Law with sufficient Ministerial oversight)	The Committee provided its recommendations at Page 10
The provisions with regards to the creation of an Agency is noted. This simply provides an extra layer of bureaucracy, extra costs and legal challenges. Its role overrides that of existing bodies and institutions.	SALI rejects the appointment of an Agency when sufficient State Laws exist to utilise current structures; the SALI Bill demonstrates that position	
Heads 23 & 24 - It is noted the the Irish government has learned the lessons of the Commission of Investigation and compellability and introduced the word 'shall'. This word stands in stark contrast to the overuse of the word 'may' throughout the Bill. 'Shall' is extensively used to describe the role and work of the proposed Agency.	SALI's position ; we do not support the appointment of an Agency. The SALI Bill makes full use of State Law with sufficient Ministerial oversight	
Head 26 - Provides some concerning limitations on the dissemination of information, imposing the sanction of an offence. What of Public Interest Matters & the European Directive on Whistleblowing - (EU) 2019/1937 (to be transposed by December 2021)?	SALI is concerned that the Oireachtas Committee did not appear to reference this 'Whistleblowing' deficit, further, that reference to such EU Law was also not highlighted	
Head 27 - It is noted, and within the provisions that follow, that they simply replicate that found within the Planning Act of 2000	Note the SALI Bill and its provisions	

<p>Head 32 - This provides potential conflict between the Agency and the Garda - note the difficulty of conflict in comments within Head 6 above and the current call for criminal complaints. Are the investigative powers of the Garda being weakened in favour of the 'expeditious' work of the Agency?</p> <p>Note also the important exclusion of providing information to a criminal investigation by any individual involved in the Agency's work. What of the Common right or obligation to assist the police in their work? What of Public Interest Matters & the European Directive on Whistleblowing - (EU) 2019/1937 (to be transposed by December 2021)?</p>	<p>SALI is concerned that the Oireachtas Committee did not appear to reference this 'Whistleblowing' deficit, further, that reference to such EU Law was also not highlighted</p>	
<p>Head 45 - Note the problematic issues relating to the archiving of records, noting the difficulties presented by the Commission of Investigation for the Mother and Baby Homes?</p>	<p>The SALI Bill creates a publicly accessible record as detailed in Section 6 and within the sections referred to thereafter.</p>	
	<p>SALI supports the Committee's recommendation</p>	<p>At Key Issue 4, the Committee raises concerns about the limitations of the 30 years archive rule and provides one recommendation to except the Survivor and their relatives category from this rule</p>
	<p>SALI notes the recommendations, (Noting our lack of support to the appointment of an Agency. The SALI Bill makes full use of State Law with sufficient Ministerial oversight)</p>	<p>At Key Issue 5, the Committee raises concerns about the independence of an Adjudicator</p>

<p>Head 47 et al. The purpose found within these provisions, of any excavations, is solely to exhume, to pilot a DNA extraction programme, to marry the results of DNA with existing relatives.</p> <p>On the question of reinterment, tacit acknowledgement is given to surviving relatives but where none exist, no consultation is to be made with a wider Community Survivor cohort</p> <p>There are no questions to be asked as to how or why those exhumed died. There is to be no investigation. There is to be no critical analysis of those responsible, either individually or through some body corporate. It provides no answers and cannot be said to be in the Public Interest</p>	<p>The SALI Bill covers this extensive area through Sections 8, 9 & 10</p> <p>Note Section 7 on the issue of consultation with a wider Community Survivor cohort</p>	
	<p>SALI notes the opening commentary of the Committee, which refers to the Expert Technical Group. It highlights the difficulties relating to Tuam (we note that references to other sites are not made). We have already dealt with the comparator and technical issue above.</p> <p>We note the references to a forensic anthropologist. The SALI draft Bill provide for an extensive methodology and expertise, which includes ‘forensic anthropology’. We also note how the Committee is very concerned by the lack of a coronial role in these investigations. Equally, there concern at recommendation 52 indicates their discomfort with the discretionary language used, which we have commented upon above; (Noting our lack of support to the appointment of an Agency. The SALI Bill makes full use of State Law with sufficient Ministerial oversight)</p>	<p>At Key Issue 6 of the Committee, they deal with the issue of DNA and identification of persons. They provide a number of recommendations</p>

	SALI notes the recommendations and would refer to the SALI Bill which sets out such issues within its provisions.	At Key Issue 7, the Committee expresses concern over the timeline and costs and provides its recommendations
	The SALI Bill starts with the premise that current State Law is sufficient to deal with the issues at hand and makes references to provisions and powers accordingly. Reference to International Law could be referenced within a preamble thus placing it at the centre of any Bill	At Key Issue 8, the Committee highlights the need to reference International Law and best practice; it provides its recommendations
It is noted that the Bill contains no references to cross-border issues or cross-border consultation	It should be noted that within Section 12 of the SALI Bill, provision is made for cross-border action & consultation, as this is an all-Ireland, cross border issue. Note: a mirror Bill has been created for the NI Assembly. This is an important point as there is a consistent failure to acknowledge the fate and in some cases, the burials of persons. These issues contain/hide a solid cross jurisdiction/inter-country set of factors	

Conclusion:

In SALI's opinion, the government's Bill is flawed and will provide little of value in terms of Public confidence nor indeed on matters of Public Interest. The current construct of the Bill will lead to legal challenges and a lack of public satisfaction on this important Public Interest issue.

In reading the Bill, the road of intention is clearly marked and this is bound by trying to find swift resolutions to this difficult problem, utilising exceptions/restrictions, in order to satisfy its goals. In particular, SALI is concerned by the provision within the government's Bill, found at Head 6, Subsection10 - this deploys far too much political power on such a sensitive issue - it should be removed.

SALI has noted the Oireachtas Committee's report. In our commentary, we have provided support, critical analysis or rejection to the Committee's observations. It is clear that the government's Bill and its commentary is in conflict, not just with Survivor Groups, but also with members of the Oireachtas. The government and its legal officers may be defining or meeting and receiving Survivor/Expert engagement, but they are in real danger of appearing not to be listening to valuable views nor of their obligations under International Law and best practice.

SALI would urge the government not to take the direction suggested by their Bill, but to create a Bill based around current legislation and governmental and local authority resources whilst providing adequate resources to complete this work - The SALI draft Bill demonstrates that possibility. In our view, we believe that such a Bill, constructed in this manner, creates an opportunity to present a global model on how to deal with dark chapters in a Nation's history; it would be to the Irish government's benefit if they did and would provide a clear message on Transitional Justice to Survivors!

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8 September 2021