

A Brief Overview of the Institutional Burials Bill 2022

1. Background

The Commission of Investigation into Mother and Baby Homes was established in 2015 to investigate and report on a wide range of issues associated with Mother and Baby Institutions, including burial practices. In March 2017 the Commission confirmed the presence of juvenile human remains at the site of the former Mother and Baby Institution in Tuam. In response, the then Minister for Children and Youth Affairs commissioned an Expert Technical Group (ETG) to outline the options available for responding appropriately to the situation.

In October 2018 the Government decided that a phased, forensic-standard excavation, recovery and identification (if possible) of the remains should be carried out at the full available site at Tuam, followed by respectful re-interment of remains. The Attorney General advised that new legislation was required to implement the decision.

In December 2019 the Government approved and published the General Scheme and Heads of Bill, which set out the main legal changes or provisions of the proposed legislation. The General Scheme was scrutinised by an Oireachtas Committee during the first half of 2021. The Committee provided its report and recommendations in July 2021.

The Minister worked with the Attorney General to prepare the Institutional Burials Bill, taking account of feedback received from the Oireachtas Committee and other stakeholders. The Bill was approved by Government on 22 February. It now needs to be passed by both Houses of the Oireachtas before it can be signed into law.

2. Purpose of the Bill

The Institutional Burials Bill seeks to ensure that the remains of those who died in residential institutions, and who were buried in a manifestly inappropriate manner, may be recovered and re-interred in a respectful and appropriate way. It also provides for the identification of remains and their return to family members, where possible.

In summary, the Bill provides for:

- The Government to direct intervention at a site and to approve the appointment of a Director to head up an Office to oversee and manage this intervention.
- The establishment of an Advisory Board to provide advice and guidance to a Director in undertaking his/her functions. The Advisory Board will be chaired by a person with coronial expertise and will include members with scientific expertise and former

residents or family members of deceased persons believed to be buried at the site. Consultation with the Advisory Board will be required at regular intervals, including at key decision points in the intervention.

- A legal basis for a phased, step-by-step approach to an intervention which will comprise the following steps:
 - Excavation of the site
 - Recovery of human remains
 - Post recovery analysis of remains
 - Identification of remains through DNA familial matching (if possible)
 - Return of remains to family members or respectful re-interment of remains

All of the steps will be undertaken to a forensic-standard in line with international standards and best practice.

The legislation also provides for temporary rights of access to the land where an intervention is to take place, with an obligation to provide reasonable compensation and to restore land to its original condition and use upon completion.

3. Decision on Intervention and Establishment of Office of the Director

The legislation provides that the Government can consider a proposal by a relevant Minister to intervene at a site where manifestly inappropriate burials have taken place of persons who died while ordinarily resident at an institution. Where the Government is satisfied that an intervention is necessary for the purposes of safeguarding important objectives of public interest, it can direct that Minister to establish an Office of a Director of Authorised Interventions.

The Minister will appoint a Director to oversee the intervention and an Advisory Board to support and guide the Director in the role.

The Director will be required to conduct a forensic-standard excavation, recovery and post recovery analysis of human remains. He or she will be empowered to employ or contract the range of expertise and disciplines needed to discharge these functions to international best practice standard at a particular site. The Director will also provide updates on the work of the Office to relatives of persons believed to be buried at the site, other stakeholders and the general public. The Director may also be required to undertake a DNA programme of identification (this is intended in the case of the Tuam intervention).

The Advisory Board will provide advice and guidance to the Director. The Board will be chaired by a former coroner or someone with coronial expertise and will include scientific experts, former residents and/or family members. Consultation with the Advisory Board will be required at regular intervals, including at key decision points in the intervention.

4. Excavation, Recovery and Analysis – Forensic Approach

The excavation, recovery and analysis of remains requires specialised, distinct skillsets. It is critical that this work is undertaken at a forensic-standard by appropriately qualified individuals so that any evidence recovered is sufficient to satisfy legal requirements in relation to the identification of remains.

In the context of Tuam, it is important to be aware that the information currently available suggests that this process will be extremely complex because of the significant quantities of juvenile remains that are buried there, the fact that they are lying in a commingled or intermixed state and that they are located in a subsurface chamber with limited access.

While this intervention is therefore expected to be challenging, the legislation ensures that it will be carried out by professionals to a forensic-standard in line with international standards and best practice. It provides that the remains that are recovered shall be sorted into individuals insofar as is possible; that forensic testing will be carried out to establish as much information about the individuals as possible, including the circumstances and causes of death, and that the Director of the intervention will publish a general report on the findings.

The legislation also requires that the Director of an intervention inform An Garda Síochána and the relevant coroner where evidence emerges of a violent or unnatural death or where remains are not those of a person who died while resident in the institution.

5. Identification Programme

The legislation provides for the Director to oversee a programme of DNA identification to establish the likelihood that there is a familial link between people who believe they have family members buried at a site and the human remains that are recovered from that site. Samples will be taken from human remains and from relatives who participate in the programme. Forensic Science Ireland will undertake DNA testing to establish the likelihood of familial matches and the Director of the intervention will notify participants of the outcome.

While the legislation provides the legal basis to undertake such a programme, its success will depend on a number of factors, most notably the quality of the DNA that can be generated from the recovered human remains as well as the number of living relatives that take part. In the context of Tuam, isolating the remains into single individuals may present additional challenges to the success of a programme, where continued testing of remains to extract DNA risks destruction of those remains.

The legislation provides that an identification programme will proceed where there are living family members of persons believed to be buried at the site who wish to participate in

a programme and where DNA of sufficient quality is available from the remains to enable DNA comparison. It also provides for a review mechanism whereby the Director, having considered the factors above and, having consulted with the Advisory Board, can determine whether a programme should continue.

- [Privacy rights and Public Interest](#)

DNA testing is a very powerful tool and, in participating in an Identification Programme, it is possible that information will be revealed about familial relationships to persons other than to the deceased relative that a person suspects may be buried at a site. For example, if a person suspects they have a sibling interred at the site and provides a sample for matching, and a match is obtained, that will necessarily reveal information about that person's familial lineage.

The legislation balances the public interest of identifying remains buried in a manifestly inappropriate manner with the privacy rights of close living relatives by allowing for the participation of a wide range of relatives in a Programme but with provision for the closest living relatives (parent, child, sibling) to object to the participation of other, less closely related, persons.

An objection does not automatically mean that an applicant cannot participate in an Identification Programme and any objection will be considered by the Director in conjunction with the closeness of the genetic relationship of the person who wishes to participate in the Programme and the public interest of identifying human remains.

- [Information Campaign](#)

Before an Identification Programme begins, a Director will hold a public information campaign to raise awareness that a Programme is taking place and how eligible family members and spouses/civil partners of a deceased person can register an interest in participating in a Programme, an objection to another person's participation or an interest in receiving remains (see 'Register of Notifications' below).

Eligible family members are people who have reasonable grounds to believe that they are a **child, parent, sibling, half-sibling, grandparent, grandchild, aunt, uncle, niece or nephew** of a person who is buried at an intervention site.

- [Register of Notifications](#)

A Director will maintain a register of notifications received from eligible family members and spouses/civil partners of deceased persons. The following notifications can be made to a Director:

- Eligible family members of a deceased person can notify the Director of an interest in participating in an Identification Programme.
- Eligible family members and spouses/civil partners can notify the Director of their interest in being the person to whom any identified recovered remains are returned, as well as their wishes as to the final arrangements for remains.
- An eligible family member who is a parent, child or sibling can notify the Director of an objection to the participation of another, less closely related, eligible family member in an Identification Programme

In submitting a notification of their interest in participating in an Identification Programme, eligible family members can include a letter of support (in the legislation termed a “letter of non-objection”) from relatives who would otherwise be able to object to their participation.

- [Who can apply to participate in an Identification Programme?](#)

Eligible family members (child, parent, sibling, half-sibling, grandparent, grandchild, aunt, uncle, niece or nephew of a person who is buried at an intervention site) will be able to apply to participate in an Identification Programme. Eligible family members must provide evidence to satisfy the Director of their relationship to a deceased person who it is believed may be buried at the site.

- [Objection to participation in an Identification Programme](#)

A parent, child or sibling of a deceased person can notify the Director of an objection to the participation of another, less closely related, relative. The following objections are permitted:

- A child or parent of a deceased person can object to the participation of a child of the same deceased person
- A child, parent, sibling or half-sibling of a deceased person can object to the participation of a sibling, half-sibling, grandparent, grandchild, aunt, uncle, niece or nephew of the deceased person.

When making the notification, the parent, child or sibling must state the grounds for their objection.

An objection does not automatically mean that an applicant cannot participate in an Identification Programme. When a Director is making a decision in relation to a person’s participation, any objection will be considered in conjunction with the closeness of the genetic relationship of the person who wishes to participate and the public interest of identifying human remains.

- [Will a Director be required to contact a parent, child or sibling of a deceased person in relation to other family members’ participation?](#)

Given the significant privacy and data protection rights involved, the Director is required to take this step. In circumstances where neither an objection nor a letter of support has been received from a closer living relative, who would be entitled to object to a person's participation, the Director will make reasonable efforts to contact that closer living relative to establish whether they wish to register an objection to an applicant's participation.

- [How will a Director decide if someone can participate in an Identification Programme?](#)

A person can participate in an Identification Programme where the Director is satisfied:

- that the person is an eligible family member
- that the person has provided the required evidence of their relationship to the deceased person
- that the person has received information concerning participation in the Programme, including in relation to the taking and testing of samples and the notification of an outcome
- that the person has confirmed their decision to participate

Where another family member/s has registered an objection to a person's participation, the Director must take this into consideration before reaching a decision on whether or not an applicant can participate in the programme. The other factors to be considered by the Director in this context include the closeness of the genetic relationship of the person who wishes to participate in the Programme as well as the public interest of identifying human remains.

The Director will notify an applicant in writing of his/her decision as to whether or not the person may participate in the Identification Programme and will set out the reasons for the decision. The decision can be appealed to an Adjudicator appointed by the Minister.

A person who has been notified by a Director that he or she may participate in an Identification Programme is known as a "relevant person" under this Bill.

- [Nominees](#)

Participants in an Identification Programme can nominate up to two people to be notified of the outcome of a familial matching process if they die or become incapacitated before the outcome is notified and there is no other relevant person in respect of the same deceased person.

- [Results of an Identification Programme](#)

FSI will inform the Director of the results of DNA profile comparisons carried out in respect of participants in an Identification Programme. The Director of the intervention shall

consider the results and any other relevant information and inform a participant whether or not, on the balance of probabilities, a familial link has been established.

5. Final arrangements

The legislation provides that a Director will make final arrangements for human remains as soon as practicable after a familial link has been established or an Identification Programme has concluded. Remains which have not been identified will not be cremated. Where an Identification Programme is not undertaken a Director will make final arrangements as soon as practicable after the completion of post-recovery analysis of remains.

Where a familial match has been made, the Director will make arrangements at the request of family members to either return remains to family members or make arrangements in line with their wishes.

In cases where a familial link has not been established or where an Identification Programme is not undertaken, a Director will make final arrangements having regard to the stated wishes of persons who believe they have family members buried at the site, the dignity of the deceased and the condition of the remains.

6. Access to an intervention site

The legislation provides for a Director to acquire temporary rights of access to the land required to undertake an intervention, with an obligation to provide reasonable compensation and to restore land to its original condition and use upon completion.

The compensation amount will be calculated by a relevant professional and will take account of a number of relevant factors, including the time period for which access is required, the extent of the works and the disturbance to a trade or a person's peaceful enjoyment of the land. It is open to a landowner or occupier to challenge either access to the land or the amount of compensation offered. A challenge to the level of compensation does not affect the work and the Director can carry out the intervention while the case is before the courts. However, a challenge to access has the potential to delay the work of the Director.

The primary access provided for under the legislation is to the principal burial site, described as principal burial land. Where the principal burial land is on residential land, access cannot extend within the curtilage¹ or 20 metres (whichever is the lesser) of any dwelling on the land. The legislation also provides for access to residential land adjacent to the principal burial land where burials associated with burials on the principal burial site have taken

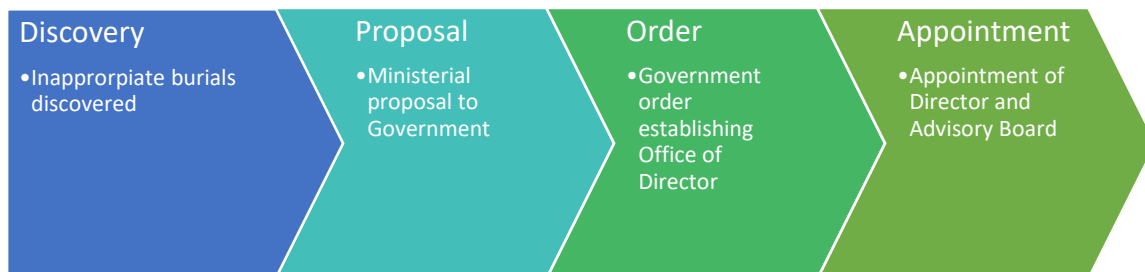
¹ land immediately surrounding a house and forming one enclosure within it

place, described as ancillary burial land. In this case, access does not extend further than 2 metres from the boundary of the land or encroach on any dwelling on the land. Finally, access can also be obtained to ancillary land where burials have not taken place but where access is required in order to facilitate works.

7. Key Steps, including where an Identification Programme is to be undertaken

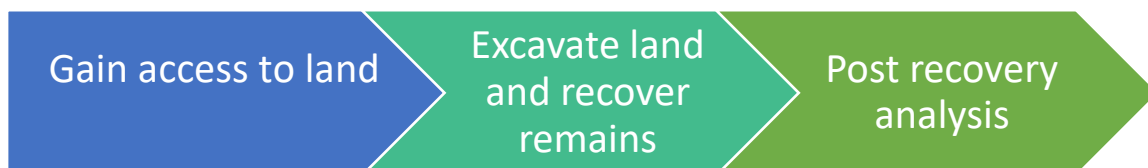
Phase 1 – Role of Government/Minister

Once the site of manifestly inappropriate burials is discovered, the relevant Minister takes steps to establish an Office of a Director of Authorised Intervention.



Phase 2(a) – Phased excavation and recovery

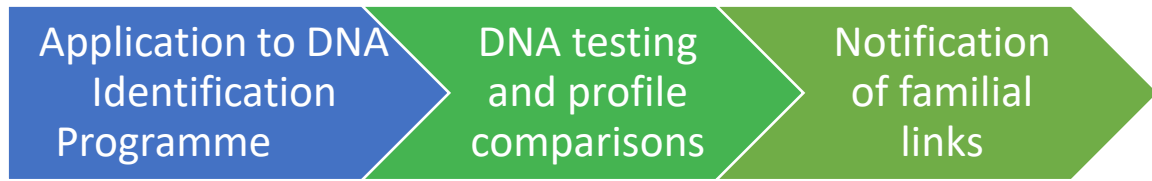
Having ensured that the appropriate expert team is in place, the Director's first tasks are to identify family members and gain access to the site. These tasks can happen in parallel.



Phase 2(b) – Public Information Campaign



Phase 3 – Identification Programme



Phase 3 – Final arrangements

The remains are then returned to family members or given a dignified burial.