Inquiry (Mother And Baby Institutions, Magdalene Laundries And Workhouses) And Redress Scheme Bill

Further Submissions on behalf of KRW Law

13th October 2025

We are grateful for your correspondence dated 9 October 2025 and for the continued opportunity to contribute evidence to the Committee in respect of this critically important Bill.

In response to the Committee's query regarding the potential application of Public Interest Immunity (PII) within the context of this Inquiry, we set out below our understanding of its deployment, drawing upon its established use in civil proceedings. We also provide further background on alternative mechanisms commonly employed in civil litigation to manage documentation of a sensitive nature. These mechanisms, we respectfully submit, may be adapted to suit the procedural framework of the Inquiry.

In formulating these submissions, we have been mindful of the imperative to ensure the Inquiry proceeds in a manner that is both efficient and fair, while also maximising, so far as is practicable, the disclosure and examination of relevant documentation.

Clause 17 (2) – Public Interest Immunity

We respectfully reiterate the surprise expressed during our oral evidence to the Committee regarding the inclusion of Clause 17(2) in the draft Bill. In our experience, the invocation of Public Interest Immunity (PII) is typically reserved for circumstances involving national security considerations. This generally encompasses material originating from policing or intelligence agencies, including but not limited to:

- Information obtained via covert human intelligence sources (CHISs);
- Material gathered through clandestine surveillance or undercover operations;
- Operational techniques and technologies employed by the PSNI or other security services.

PII is most commonly encountered in litigation concerning incidents related to the Troubles or matters involving state and paramilitary actors. It is therefore surprising to observe its proposed application within the context of an Inquiry into Mother and Baby Homes. To our knowledge, there have been no allegations suggesting the involvement of security services, paramilitary organisations, or police investigations of a nature that would warrant the invocation of PII in relation to these institutions.

We are concerned that the inclusion of PII in this Bill may be misplaced, given that the Inquiry is expected to focus on the conduct and failings of Church bodies, social services, and the judicial system. The potential for national security-related material to arise in such a context appears remote.

Furthermore, it is our understanding that any documentation subject to PII would be excluded entirely from the Inquiry's consideration and findings. This raises serious concerns about the potential impact on the Inquiry's ability to reach comprehensive conclusions. We are also mindful of the risk that the use of PII could undermine public

confidence in the Inquiry's transparency and integrity, particularly among victims and survivors whose trust in the process is paramount.

The Use of PII

In civil litigation and inquest proceedings, Public Interest Immunity (PII) operates as a judicially granted exemption from the duty of disclosure, where the release of certain material is deemed detrimental to the public interest. Once PII is determined to apply, the material in question is rendered inadmissible and is excluded from the proceedings entirely.

While a Minister may assert a claim for PII, it is ultimately for the Court to determine whether the immunity should be upheld. In doing so, the Court must undertake a careful balancing exercise, considering:

1. Whether the material is necessary for disclosure;
2. Whether disclosure would cause harm to the public interest;
3. Whether such harm can be mitigated or prevented by alternative means;
4. Whether the public interest in non-disclosure outweighs the public interest in disclosure for the purpose of achieving justice.

Where PII is granted, the affected documents are either wholly removed from the proceedings or redacted in part. In either case, the excluded material cannot be relied upon by any party, is not disclosed to non-state participants, and does not inform the judgment. It is, in effect, treated as though it does not exist.

Importantly, the presiding judge will have sight of the unredacted material when considering the application. However, if PII is granted, the judge must disregard the contents of that material entirely when reaching a decision. In limited circumstances, the judge may issue a "gist" or non-identifying summary of the excluded material as a means of balancing national security concerns with the principle of open justice. While such gists may be referenced in judgments, they are typically vague and constrained in scope. Crucially, the judge cannot rely on the underlying material beyond the contents of the gist.

The exclusion of material under PII can, in some cases, undermine the integrity of proceedings. In the context of inquests, this has led to proceedings being discontinued without findings, as exemplified by the recent inquest into the killing of Mr Sean Brown. In such instances, coroners have recommended the establishment of public inquiries capable of handling sensitive material appropriately.

It is therefore a matter of concern that the draft Bill proposes PII as the sole mechanism for managing sensitive documentation within the Mother and Baby Homes Inquiry. Unlike inquests, where the failure to reach findings due to PII may be remedied by a subsequent inquiry, the absence of an alternative route in this context risks leaving

victims and survivors without any effective legal mechanism to uncover the truth or seek justice.

As previously stated, we struggle to envisage any scenario in which PII would be relevant to this Inquiry. However, should such documentation exist, the application of PII would require the Inquiry Chair to disregard potentially significant material, thereby risking the integrity and completeness of the Inquiry's findings.

Closed Material Procedure

We respectfully submit that Public Interest Immunity (PII) is not the sole mechanism available for addressing sensitive material within civil proceedings. In recent years, it has become increasingly common for state bodies to seek a declaration under Section 6 of the Justice and Security Act 2013 to initiate a Closed Material Procedure (CMP) in cases where disclosure of certain documentation may compromise national security.

CMPs begin in a manner similar to PII applications, with the PSNI or security services identifying material that is relevant to the proceedings but whose disclosure would be injurious to the public interest. However, unlike PII, material subject to a CMP is not excluded from the proceedings entirely. Instead, it is considered within a closed aspect of the case, known as a closed hearing, where the judge retains access to and may rely upon the material in determining liability and other substantive issues.

This distinction is critical. Under CMP, the judge may factor the contents of sensitive material into their rulings, and may also authorise the release of summaries or "gists" of the material to the open proceedings. This ensures that judgments are informed by all relevant evidence, thereby enhancing their accuracy and completeness.

While legal representatives for non-state parties are excluded from the closed hearing and do not receive the sensitive documentation, Special Advocates are appointed to represent their interests. These advocates are permitted to challenge the state's position and advocate on behalf of the excluded parties within the closed proceedings.

In our experience, CMPs offer a more balanced and effective approach to managing sensitive material. They better reconcile the competing imperatives of national security, truth recovery, and procedural fairness. We therefore respectfully suggest that the principles and mechanisms underpinning CMPs could be incorporated into the draft Bill, either in place of or alongside Clause 17, as a means of ensuring that the Inquiry has access to all relevant material and that its findings are both thorough and credible.

Such an approach would also provide greater assurance to victims and survivors that the Inquiry is equipped to consider all pertinent evidence, including sensitive documentation, and that its conclusions can be relied upon as a full and fair account of the truth.

Proposal for a Streamlined Closed Hearing Mechanism within the Inquiry

We respectfully submit that a mechanism modelled on the principles of a Closed Material Procedure (CMP) could offer a more appropriate and proportionate means of addressing any sensitive material that may arise during the course of the Inquiry. Such a mechanism would preserve the Inquiry's ability to consider all relevant documentation while safeguarding the public interest. We further suggest that this process could be streamlined to ensure the Inquiry proceeds efficiently and without undue delay.

We propose the following procedural framework:

1. *Application for a Closed Hearing*

State parties should be permitted to apply to vary their disclosure obligations within the Inquiry by seeking a closed hearing. Any such application must be accompanied by specific and detailed reasons explaining why the material cannot be disclosed in open proceedings and why a closed hearing is necessary.

2. *Chair's Determination*

The Chair of the Inquiry Panel should be under an obligation to consider the application, including reviewing the sensitive material in question. The Chair must assess whether the material poses a genuine risk to the public interest and conduct a balancing exercise between the public interest in open justice and the public interest in non-disclosure.

3. *Convening a Closed Hearing*

Where the Chair determines that non-disclosure is justified, a closed hearing should be convened. Within this hearing, the relevant documentation may be disclosed to and considered by the Panel, and/or oral evidence may be taken from state bodies. Parties excluded from the closed hearing should be permitted to make open submissions to assist the Panel.

4. *Representation of Non-State Interests*

Given the inquisitorial nature of the proposed Inquiry, we believe there is scope to adapt the role of Special Advocates to ensure the Inquiry continues to operate efficiently and fairly. While CMPs in civil proceedings typically involve the appointment of Special Advocates to represent the interests of excluded parties, we propose a more flexible and streamlined approach for the purposes of this Inquiry.

Specifically, we suggest that parties excluded from a closed hearing such as victims, survivors, or religious institutions should be represented by Advocated appointed to

safeguard their interests. This Advocate would perform a function akin to that of a Special Advocate in CMP proceedings, but with procedural modifications tailored to the Inquiry's structure and objectives.

To minimise cost and avoid unnecessary delay, we propose that such Advocates be drawn from the existing pool of Special Advocates and appointed on a case-by-case basis, as required. The appointment could be made at the point of convening a closed hearing, ensuring that representation is available without impeding the progress of the Inquiry. Advocates could be selected to represent, for example, the interests of all victims within the closed hearing or the interest of religious institutions.

This approach would preserve the core protections afforded by CMPs while adapting them to the unique context of the Inquiry. It would also reinforce the Inquiry's commitment to fairness and transparency, ensuring that the interests of excluded parties are actively considered and protected throughout the process.

Special Advocates, representing a range of Plaintiff's has been effectively used in Legacy litigation currently proceeding through the High Court of Northern Ireland. Legacy cases have been grouped together thematically (Mid Ulster Group, Glennane Group etc) with Special Advocates acting on behalf of multiple Plaintiffs when they enter in the CMP. This avoid duplication of work, running out of available Special Advocates and insures that all parties are adequately represented.

Outcome and Use of Sensitive Material

Following the closed hearing, the Chair should have discretion to authorise the release of redacted documentation or a gist of the sensitive material. The Panel should be permitted to rely upon the contents of the closed material when making findings and recommendations in the final report.

We believe that this proposed mechanism would better balance the need for truth recovery and justice with the protection of sensitive information. It would also enhance the credibility and completeness of the Inquiry's findings, thereby strengthening public confidence in the process and ensuring that victims and survivors can rely on its conclusions.

We appreciate the opportunity to provide further submissions on this key point.