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What is the most appropriate transitional justice model in addressing historical human rights abuses?

—*A comparative analysis of the experiences of Australia and the Republic of Ireland*

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Abstract

Transitional justice as a restorative framework may be used to address past, endemic human rights abuses in both transitional and non-transitional contexts. Different forms of transitional justice mechanisms—including truth commissions and national public inquiry models used in conjunction with other truth and justice seeking measures—have been utilised globally in diverse geopolitical settings to expose publicly State wrongdoings, and officially document (new) national narratives.

A critical finding of this research is the little scholarly comparative analysis available that assesses transitional justice mechanisms as they operate in culturally distinct contexts, and the related benefits. To arrive at these conclusions, like-inquiry models within the Anglosphere were assessed (namely, child abuse inquiries conducted in Australia and Ireland) in light of Chile's ongoing efforts in the Latin American context to address its dictatorial history. Focus was given to the (statutorily conferred) powers of each child abuse inquiry, the use of testimony and related evidence, in addition to the retention and archival management of information and documents collected during each inquiry process.

This piece postulates that analysing elements of mainstream transitional justice mechanisms in culturally distinctive contexts will more informatively and effectively heal countries torn apart by human rights atrocity. It is suggested this approach will better prevent the recurrence of systemic human rights violations, whether they occur in transitional or non-transitional settings, by fostering cross-cultural learning, appreciation and global dialogue within the realm of transitional justice.

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CHAPTER 1

Introduction

Transitional justice is most commonly understood as a restorative justice framework, used to address past and endemic human rights abuses, as well as to assist States during their transition from authoritarian rule to a more democratic system of government. Truth commissions as transitional justice mechanisms have been developed and conducted in countries all over the world wherein (new) truths are unearthed and publicly unveiled, State endorsed apologies are given and new national narratives written. The emergence and resultant prevalence of truth commissions heralded a shift in approach from predominately justice seeking, toward investigating and documenting truths as a form of justice. Truth and justice seeking are now firmly accepted as bedrock principles of an ongoing, dynamic form of transitional justice, typified by truth commissions. The definitional ambit of transitional justice has been widely debated, necessitating evolution of the framework to one that is robust and malleable to cater to differing geopolitical contexts and community needs. Despite an absence of contemporary scholarly consensus as to the exact definitional scope, transitional justice mechanisms have been shown to have applicability and effectiveness in non-transitional countries. Recalling the prominence of truth commission models conducted in Latin American at the downturn of the region's military dictatorial regimes, in addition to the watershed South African Truth and Reconciliation Commission contributing to the end of the Apartheid policy—since that time and notwithstanding design nuances, a suite of truth commissions have been employed in far-reaching and diverse contexts—from countries within Eastern and Western Europe to Africa, from Australia and New Zealand to the Republic of Ireland and Northern Ireland, as well as by the United Kingdom, Scotland and Canada. But despite the seeming universality of truth commissions and the emergence and persistence of transitional justice as an established field in its own right to address historical abuses, there remains little comparative analysis of truth commission models as they operate in distinctive cultural contexts.

The focus and need for this research therefore is to explore the ways in which select countries in the Anglosphere[1] have utilised transitional justice mechanisms, understood in its expansive

[1] Although some Irish scholars would argue Ireland in fact is culturally situated at the periphery of such a categorisation.

sense, by way of national commission of inquiries. Specifically, Ireland's Commission to Inquire into Child Abuse (the CICA) will be compared to the Australian Royal Commission into Institutionalised Responses to Child Sexual Abuse (the Royal Commission), with reference to Ireland's ongoing Mother and Baby Homes Commission of Investigation (Mother and Baby Homes Commission) to a lesser extent. This assessment will analyse the powers of the CICA and the Royal Commission, the use (and restriction of use) of testimony and related evidence, as well as the retention and archival management of information and documents collected during each inquiry. These two models have been selected for comparison given they are posited in culturally similar contexts, each model has structural likeness and both were, from their onset, designed to respond to allegations and information relating to systemic child abuses carried out in State-managed care facilities. As well, both countries face new challenges as each victim/survivor population ages, their needs also changing. This presents a timely opportunity for both States to take stock, to look to and learn from other contexts that have engaged in investigative journeys to address past historical abuses. The Republic of Ireland ought learn from flaws in its operation of the CICA (1999 to 2009) to build public trust and bolster the authority and credibility of its findings. It is anticipated this exercise will have likely ramification to the legitimacy of the current Mother and Baby Homes Commission. Likewise, the Royal Commission (2013 to 2017) must continue to build on the work of past inquires into institutionalised child abuse (broadly defined) previously conducted domestically at state, territorial and national levels, as well as to other international contexts, to ensure its recommendations are appropriately and more completely implemented.

This research gives credence to the call for the political gaze of each State not to remain fixed inwards. While the cross-jurisdictional momentum to establish like-inquiries in similar cultural settings is worth highlighting, a critical finding of this research is the little scholarly analysis available comparing elements of mainstream transitional justice mechanisms in culturally distinct contexts for use in the realm of child abuse inquiries. Using comparative analysis this piece seeks to demonstrate that countries within the Anglosphere should—as a matter of course—learn lessons from and inform one another. Cross-cultural learnings and the international exchange of ideas between countries of differing geopolitical and cultural backgrounds is also supported, such as Chile as part of the broader Latin American post-dictatorial landscape compared against countries within the Anglosphere[2]. This study suggests

[2] The ongoing and multidisciplinary efforts made since the public release of the Rettig Report in 1991 by Chilean civil society, non-governmental organisations, human rights and legal professionals, as well

that this approach may help better prevent further atrocities as they occur procedurally in an institutionalised, non-conflict context and/or in more traditional conflict environments, given their design usually has the effect of creating a more dynamic framework. This research is limited to a structural analysis only; discussion of the minutiae of type of offending addressed by each model is outside the ambit of this piece. To that end, consideration and assessment of childhood abuses committed against vulnerable groups will also not be explored. The importance of engagement with such groups and incorporation of their stories into (newly formed) national narratives is absolutely acknowledged but given the brevity of this piece, is outside scope.

The emergence and theoretical overview of truth commissions as transitional justice mechanisms

The emergence of truth commissions as a form of transitional justice derives largely from international deliberation post World War II (WWII) that was seeking to respond to discriminatory regimes committing large-scale human rights atrocities at all corners of the globe. These deliberations were made all the more urgent by the Cold War brinkmanship of the time, intensified by multiple authoritarian, militarily-run Latin American countries. The United States of America (surreptitiously) endorsed and supported the anti-communist, dictatorial Latin American governments, which had ramifications to global stability and security. Against this volatile backdrop, the transitional justice apparatus became an indispensable means of rationalising a series of diverse bargains derived from the past[3] in exchange for (a greater degree of) peace and political stability during transitional periods[4]. Complex problem solving and debate regarding what to do with those responsible for murder and torture persisting in society following the brokering of a fragile peace[5], in effect operated as the necessary catharsis prompting the development of new ideas. This kick-started many more debates centred on how best to acknowledge the suffering caused by those at the highest

as the government authorities (to varying degrees over time) to come to terms with its past is a success in and of itself.

[3] Johanna Sköld, 'Historical Abuse—A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Car Worldwide', *Journal of Scandinavian Studies in Criminology and Crime Prevention*, Routledge Taylor & Francis Group, Vol. 14, No. S1, (2013), 5–23, p. 16; citing Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'NonField'', *The International Journal of Transitional Justice*, Oxford University Press, Vol. 3 (2009), 5–27, p. 6.

[4] Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice', *Human Rights Quarterly,* The John Hopkins University Press, Vol. 31, No. 2 (May, 2009), pp. 332, 347.

[5] Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice', *Human Rights Quarterly,* The John Hopkins University Press, Vol. 31, No. 2 (May, 2009), pp. 332, 347, citing Weschler, L., *Afterword,* in State Crimes: Punishment or Pardon 89, 90, 92 (Justice and Society Program of the Aspen Institute ed., 1989).

echelons of society by bringing them to account during processes of democratisation, and how then could it be possible to restore societal trust in governmental authorities. Domestic and international debate on these seemingly multifaceted and incredibly sensitive matters contributed to the creation of a non-linear, multidisciplinary framework centred on the perspective of victims/survivors. Importantly, the international community officially acknowledged that survivor needs were often considered incidental to the punishment of perpetrators. The criminal justice system was deemed ill-equipped to deal adequately with the diverse needs of communities having endured endemic human rights abuses, with only a limited range of redress options available. The judicial process was not best placed to expose systemic failures, and nor was it a forum that was able to encourage apology, acknowledgement or reconciliation. Hence, the global political stalemate of this era acted as a primer of possibility from which the purposefully malleable, multidisciplinary, transitional justice framework emerged, an apparatus able to be tailored to suit a respective geopolitical context.

An historical review

Since transitional justice received international recognition as a stand alone field during the later part of the 1990s, scholars have delineated its development into two predominant phases (herein referred to as Phase I and Phase II respectively). Phase I and Phase II may be distinguished by the time in which they emerged and operated, and in accordance with structural goals and functions of each. The normative aims developed therein emerged largely during critical talks held by State and non-State actors[6] primarily in response to South Africa's Apartheid regime during the late 1980's and early 1990's. Phase I saw the establishment of justice seeking as a normative aim, in that the international community agreed that justice was to be afforded to those who had suffered under the rule of a repressive regime[7]. Despite the observed successes of the international legal system of the time, most notably the criminal prosecution of high-ranking war criminals at the close of WWII, José Zalaquett warned against homogenous, legalistic approaches when confronting and dealing with historical, widespread and organised human rights atrocities. Referring to the rise and fall of the late Latin American military regimes, Zalaquett stressed that a siloed, strictly legal strategy would not bring about peace or stability, particularly given that, in such dictatorial

[6] at the 1988 Aspen Institute Conference followed by the 1992 Charter 77 Foundation conference and the 1994 Conference, as cited in Paige Arthur's 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice', *Human Rights Quarterly,* The John Hopkins University Press, Vol. 31, No. 2 (May, 2009), p. 325.

[7] Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice', *Human Rights Quarterly,* The John Hopkins University Press, Vol. 31, No. 2 (May, 2009) 321-367, p. 355.

contexts, primary perpetrators retained considerable power and support during regime change[8]. To disregard this reality could have the affect of damaging negotiations for a peaceful transition, reinvigorate tensions and/or prolong instability.

Phase II saw the recalibration of the transitional justice norms, from the pursuit of justice predominantly in the courts (in domestic or international systems) to the pursuit of unearthing and officially documenting truths as a form of justice in and of itself. Decision-makers involved in negotiating regime change were identified as routinely confronting seemingly competing priorities: criminal prosecution or civil litigation on the one hand, or negotiating a fragile peace during processes of democratisation largely absent criminal justice pursuits on the other. Questions then arose regarding whether truth and justice seeking aims were in fact complementary or binary approaches if pursued as substitutes. This debate had the effect of propelling truth commissions as a hybrid model into post-conflict settings as a sort of political compromise[9]—*'truth, and justice to the extent possible'*[10], heralded by the deconstruction of Latin American military dictatorships of the 1970s and 80s. Truth commissions began to be perceived as superior forums in post-conflict settings due to their capacity to build a culture of respect for human rights and prevent future abuses (compared to international criminal courts), as well as their proven aptitude to maintain stability in a region, given that decision-makers could negotiate and develop terms of the regime change[11].

Historically however this compromise often came at the price of impunity. Given its reconciliatory nature, deals are often negotiated during transitional periods to dissolve the incumbent leadership and bring about (albeit a fragile) peace. Fulfilment of transitional justice goals often then becomes a kind of trade-off, commonly seen to play out in the form of amnesties in lieu (or instead) of judicial proceedings. Bargains with elite leaders atop an authoritarian regime as a condition of relinquishing power have resulted in pardons from criminal prosecution and assured positions in the ensuing government[12]. This was famously the case for the former General and military dictator Augusto Pinochet, in that he became a

[8] José Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies, Confronting Past Human Rights Violations', 43 *Hastings Law Journal*, Vol. 43, Issue 6, 1425 (1992).

[9] Anita Ferrara (2019) 'Week 2: Truth Commissions', *Transitional Justice* module, National University of Ireland (Galway) 28 January 2019.

[10] Ibid, with reference the former Chilean President Patricio Alywin's famous dictum.

[11] Martha Minow, 'Making History or Making Peace: When Prosecution Should Give Way to Truth Commissions and Peace Negotiations', *Journal of Human Rights*, Vol. 7, No. 2, 174-185, p. 180.

[12] Robert Cryer, 'International Criminal Law', in: Evans, M. D. (ed.), *International Law* (Oxford: Oxford University Press, 2014), p. 776.

senator for life by amending the State Constitution prior to being ousted as leader in 1990[13]. In a similar vein, prosecutions were relinquished in exchange for a power-sharing arrangement after extensive, prolonged negotiations that in effect brought an end to the violent 'Troubles' in Northern Ireland[14]. As a result, Phase II may now be viewed as having its roots embedded in change at a domestic level. Its focus was predominantly centred on implicating figures lower in the political hierarchy to help facilitate the State's transition out of authoritarianism toward a more democratic system of government. Running truth commissions in conjunction with judicial proceedings as a combined strategy, whether such proceedings commence during or at the close of a respective inquiry, open up space for story telling and make possible the re-imagination of remedial, legal and non-legal action[15].

Challenges posed

While transitional justice mechanisms were perceived as successful innovations at local and international levels, Ruti Teitel from a genealogical perspective noted that the field's broadening scope could have a secondary effect of increasing its propensity for politicisation. Teitel challenged whether the same State where the harm occurred ought to control the response to the harm suffered. In her view, should the same State retain control of the redress process, the likely politicised outcome would ultimately undermine the proper functioning of the rule of law during a State's transition toward democracy, in exchange for regime change at too high a price[16]. Nodding to a changed global context comprised of unprecedented interconnectedness socially, politically and juridically, Teitel called for a robust, dynamic transitional justice framework able to withstand and respond to diverse needs for the field to retain its legitimacy and effectiveness. The primary challenge that thereby arose was how best to preserve authority in a volatile transitional climate, particularly given the value of non-legal remedies was yet to be fully realised and understood, in addition to community perceptions surrounding impunity and power bargaining[17].

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[13] Freire, D., Meadowcroft, J., Skarbek, D., & Guerrero, E., 'Deaths and Disappearances in the Pinochet Regime: A New Dataset', (webpage, 13 September 2017, available at <file:///Users/court/Downloads/freireetal-deathdisappearancespinochetregime.pdf>.

[14] Martha Minow, 'Making History or Making Peace: When Prosecution Should Give Way to Truth Commissions and Peace Negotiations', *Journal of Human Rights*, Vol. 7, No. 2, 174-185, p. 175.

[15] Ruti Teitel, 'Human Rights in Transition: Transitional Justice Genealogy', *Harvard Human Rights Journal*, Vol. 16 (2003) 69-94, p. 88.

[16] For example, the extradition of (then) General Augusto Pinochet, the former Chilean dictator, whereby action was taken independent of domestic actors to enliven universal jurisdiction resulting in his extraterritorial arrest. See Ruti Teitel, 'Human Rights in Transition: Transitional Justice Genealogy', *Harvard Human Rights Journal*, Vol. 16 (2003) 69-94, p. 88.

[17] Ruti Teitel, 'Human Rights in Transition: Transitional Justice Genealogy', *Harvard Human Rights Journal*, Vol. 16 (2003) 69-94, p. 89.

It is important to highlight at this juncture that transitional justice, as a strategy to deal with large-scale legacies of abuse, comprises four fundamental pillars: truth seeking; criminal prosecutions; victim reparations; and vetting/lustration processes[18]. These pillars will be used to varying extents and incorporated into differing models in the form of redress schemes, truth commissions or reconciliation projects. Johanna Sköld reminds us that these bodies are never equivalent, nor do they encounter or seek to address the same raft of issues[19]. Therefore it is imperative that transitional justice frameworks are structurally sensitive and adaptive in order to respond adequately to cultural and geopolitical specificity. This in-built malleability is crucial to a State's aptitude to develop meaningful and multidisciplinary resolutions that have continued relevance and longevity. A strong political will is needed to support a political community come to terms with its past. It also plays an integral role in maintaining and developing truth and justice seeking efforts even after the close of a given inquiry. Moreover, contemporary scholarship has found that an affected community's needs change over time in response to newly discovered and documented national histories. This has been seen to operate as the cathartic process, having the demonstrated effect of prompting additional projects such as museums of memory to acknowledge and respect a country's past.

This is evident upon analysis of child abuse and neglect inquiries employed in multiple Anglo-Saxon countries in recent years. There has been a 'justice cascade'[20] of sorts, a phrase notably coined by esteemed human rights academic Kathryn Sikkink, depicting a transnational contagion of responsibility to acknowledge previously taboo, unpalatable pasts. This international trend, or what Johanna Sköld refers to as the 'politics of apology'[21], centres on States taking responsibility and apologising for past abuses. Some non-State actors followed suit, with religious organisations and other implicated institutions apologising for their role in the provision and maintenance of unsafe environments for children. In doing so, normative discourses surrounding sacrosanct institutions, in particular the imperative of maintaining their legitimacy ahead of acknowledging and addressing individual and collective

[18] Matthew Evans, 'Structural Violence, Socioeconomic Rights, and Transformative Justice', *Journal of Human Rights*, Taylor & Francis Group, LLC, 15: 1-20 (2016), p. 4.

[19] Johanna Sköld, 'Historical Abuse—A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Car Worldwide', *Journal of Scandinavian Studies in Criminology and Crime Prevention*, Routledge Taylor & Francis Group, Vol. 14, No. S1, (2013), 5–23, p. 12.

[20] Kathryn Sikkink and Hun Joon Kim, 'The Justice Cascade', *W.W. Norton and Company Inc.* (New York, 2011), pp. 269-282.

[21] Johanna Sköld, 'Historical Abuse—A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Car Worldwide', *Journal of Scandinavian Studies in Criminology and Crime Prevention*, Routledge Taylor & Francis Group, Vol. 14, No. S1, (2013), 5–23, p. 10.

victim needs, shifted. This had the effect of allowing child abuse to be discussable, and no longer a subject of such social taboo in public discourse.

The broadening definitional ambit of the field to encompass some commission of inquiry models

Inquiries into child abuse and neglect differ from traditional truth commission models in that they are built on adult memories of their childhood rather than recounts of historically specific eras. Child abuse inquiry models also usually do not relate to regime change[22]. Nevertheless, an important commonality identified as fundamental to the effectiveness of both forms is a political discourse that informs the social climate, which has been found to facilitate challenge of hegemonic societal structures[23]. History has demonstrated the forerunners of public inquiries and truth commissions, in both transitional and non-transitional contexts, will encounter and be required to confront political elites and other 'untouchables' during negotiations. Therefore, in addition to a strong, politically engaged civil society and necessary support and advisory agencies, the ambit of transitional justice and its in-built structural malleability needs to be understood by all stakeholders as a starting point in negotiations, to ensure tailored solutions are developed via meaningful dialogue.

Notable human rights and transitional justice scholar, Priscilla Hayner, reviewed fifteen inquiry bodies during the 1990s that had been established to investigate an historical period of human rights atrocities or violations of international humanitarian law[24]. Hayner consequently developed a working definition, which she released in 1994 in her seminal piece *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*. The analysis attested to the fifteen sample inquiries as truth commissions, and posited that such frameworks were captured within the broader transitional justice sphere. Hayner's 'truth commission' definition was comprised of four limbs: namely, that the relevant body 1) had a historical focus; 2) sought to investigate systematic and ongoing abuses over a period of time; 3) was temporary in nature and 4) officially endorsed by the State[25]. Since that time Hayner herself, along with a raft of

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[22] Johanna Sköld, 'Historical Abuse—A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Car Worldwide', *Journal of Scandinavian Studies in Criminology and Crime Prevention*, Routledge Taylor & Francis Group, Vol. 14, No. S1, (2013), 5–23, p. 12.

[23] Johanna Sköld, 'Historical Abuse—A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Car Worldwide', *Journal of Scandinavian Studies in Criminology and Crime Prevention*, Routledge Taylor & Francis Group, Vol. 14, No. S1, (2013), 5–23, p. 16.

[24] Priscilla Hayner, 'Fifteen Truth Commissions—1974 to 1994: A Comparative Study', *Human Rights Quarterly,* Vol. 16, No. 4 (The John Hopkins University Press, 1994), pp. 597-655, p. 598. Of note, human rights violations were defined as including acts committed by government or armed opposition forces, or by the military.

[25] Ibid, at p. 600.

other transitional justice scholars, has deconstructed and refined this definition. A number of commission of inquiry models have been found to satisfy the most recent recalibration of Hayner's definition (outlined below), which on the whole may be explained as being broader and purposefully more dynamic in scope.

Definitional conceptualisations that attempt to create parameters for political, social and cultural phenomena require ongoing review to accord with a changing world. The emergence of non-State actors, their effect on domestic and international laws and modern warfare, has significantly altered geopolitical landscapes felt globally. This necessitated a recalibration of what constitutes a truth commission, evidenced through scholarly submissions of slightly refined definitional frameworks. Notably, Mark Freeman highlighted that procedural fairness ought be an integral component of any truth commission model to help ensure its perceived legitimacy and authority[26]. How a political community perceives a truth commission model goes to the very heart of what a truth commission is; a victim-centred mechanism adapted to suit the relevant context and those affected, be it in a transitional context or otherwise[27]. In many ways 'it does seem that the intention of truth commissions is part of what defines them'[28]. How a truth commission is received evidently plays a critical role in bolstering the position that one ought be sufficiently malleable, catering to cultural specificity on the one hand, bearing in mind their impact on, and potential use by, other jurisdictions to inquire into like abuses on the other. While responsive and tailored approaches are necessary[29], such variations have been central to international debate regarding the effectiveness and legitimacy of truth commissions as transitional justice strategies. The broadened conceptualisation and accepted use of quasi-judicial frameworks has evolved significantly in a short period of time from what was originally thought of as an exceptional measure[30]. This contemporary approach to addressing historical human rights abuses is epitomised by commission of inquiry models, which have been seen utilised by multiple countries within the Anglosphere.

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[26] 'Truth Commissions and Procedural Fairness', *Cambridge University Press* (Cambridge, 2006), p. 422.

[27] Courtney Martin, 'Truth commissions as transitional justice mechanisms outside transitional contexts: The Australian Royal Commission experience', unpublished paper, *National University of Ireland, Ireland* (2019), pp. 5-6.

[28] Priscilla Hayner, 'Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions', *Routledge* (2nd edn, 2010), p. 11.

[29] Matthew Evans, 'Structural Violence, Socioeconomic Rights, and Transformative Justice', *Journal of Human Rights*, Taylor & Francis Group, LLC, 15: 1-20 (2016), p. 4.

[30] Priscilla Hayner, 'Unspeakable Truths; facing the challenge of truth commissions', *Human Rights Quarterly,* Vol. 25, No. 1 (Routledge, 2003), Ch 3., pp. 24, 25.

In 2011, Hayner released the second edition of *Unspeakable Truths*[31], initially printed in 2001, which provided the synthesis of review of further truth commission models[32]. In the later publication Hayner offered a modified, four-pronged definitional criteria that classified a truth commission as being '(1) focused on the past; (2) set up to investigate a pattern of abuses over a period of time, rather than a specific event; (3) a temporary body, with the intention to conclude with a public report; and (4) officially authorized or empowered by the state'[33]. This analysis continues to be relevant and significant to transitional justice theory, particularly how it is understood globally and its interface with international and domestic spheres. Of note, the requirement that a truth commission have inherent reconciliatory or democracy-building goals is absent from Hayner's revised set of criteria. While some commissions have incorporated reconciliatory aims into their mandates, it is not a requisite element needed to satisfy the most contemporary truth commission definition. Indeed, it may be premature to pursue reconciliation efforts dependent upon how a given political community and its leadership is postured to address its past. Reconciliation processes may organically stem from societal attitudinal shifts with respect to understanding or re-writing a country's history; Hayner acknowledged the need for this feature not to form part of the truth commission definition, so as to allow cross-jurisdictional analysis, to encourage transnational learnings about other forms of truth and justice seeking, with the view of fostering ongoing research and debate that is alive and responsive to a changing world.

Legal underpinnings of commissions of inquiry models (and their inherent limitations)

Criminal proceedings around the world largely apply retributive justice approaches that seek to punish perpetrators and banish them from society for committing crimes that violate the relevant legal order of things[34]. Criminal proceedings play an important role in multi-pillar transitional justice strategies. Prosecutions that end with the offender 'being put behind bars' promotes victim satisfaction and offers a sense of finality in knowing offenders will be punished for their crimes committed. Contrarily, restorative approaches of truth commissions and like-bodies aim to reintegrate links between victims, perpetrators and the broader community, and so inherently are not limited by pursuits of punishment. Moreover, the

[31] Priscilla Hayner, 'Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions', *Routledge* (2nd edn, 2010).

[32] Priscilla Hayner, 'Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions', *Routledge* (1st edn, 2001).

[33] Ibid, at p. 11.

[34] Pietro Sullo. & Valerie Arnould, (2018) 'Criminal Prosecution, case study on Rwanda's post-genocide transitional justice approach, Cluster on Transitional Justice, European Inter-University Centre (Lido-Venice, Italy) 20 November 2018.

adversarial nature of a courtroom, and the burden of proof falling on the prosecution to prove beyond a reasonable doubt an accused persons' guilt, can and does create obstacles and dissatisfaction for survivors pursuing traditionally legal forms of justice. Truth commissions and other forms of commissions of inquiry however are investigative in nature rather than adjudicative in operation, and so are not bound by the strict rules of evidence or court procedure. Such transitional justice tribunal models are quasi-judicial, and although governed statutorily, their in-built and flexible design enlivens far superior powers to meet fact-finding, truth-gleaning goals.

By way of example, the rules of evidence applicable in traditional court settings do not rigidly apply to investigative tribunals[35]. This technique was innovatively incorporated into Chile's National Commission on Truth and Reconciliation (the Chilean Commission), which allowed the commission to make some of its findings based on—*vis-à-vis*—similarities regarding the locations of the reported disappearances, the attributes of the disappeared persons and their affiliation with certain political agendas, and information provided by the victims' next-of-kin/s, in order to garner and officially document truths[36]. Further, potential evidentiary issues with information or evidence obtained that may be insurmountable in criminal or civil proceedings may be tolerated in truth commissions or commissions of inquiry, albeit possible restrictions on its use during consequential proceedings. For example, admissions obtained during commission of inquiry hearings may not be used directly as evidence against that person in a later criminal or civil trial arising if the admission was garnered under compulsion or summons[37]. That same piece of information however may be used in its derivative sense against a third party individual implicated by the person who provided the information. Protections against self-incrimination may also be used as leverage so that a witness testifies honestly. These strategies highlight the innovations of transitional justice mechanisms, in that

[35] This was an important approach adopted by the National Commission on Truth and Reconciliation (the Chilean Commission) to respond to disappearances that occurred *en masse* as the 'perfect' State-sanctioned crimes i.e. the notorious death flights, the use of clandestine arrest and torture facilities, and the Chilean army's 'Caravan of Death' squads, as explained by Jonathan Franklin, 'Chilean army admits 120 thrown into sea', *The Guardian* (Santiago), (webpage, 9 January 2001), available at <https://www.theguardian.com/world/2001/jan/09/chile.pinochet>.

[36] Courtney Martin, 'Truth commissions as transitional justice mechanisms outside transitional contexts: The Australian Royal Commission experience', unpublished paper, *National University of Ireland, Ireland* (2019), p. 7.

[37] if, for example, such powers of compulsion are enlivened by a governing statutory scheme i.e. the Australian Royal Commission was governed by the *Royal Commissions Act 1902* (Cth) and the *Royal Commissions Regulations 2001* (Cth) and respective State counterparts. The CICA also had compellable powers by virtue of Part 3 of the *Commission of Investigation Act 2004* and more specifically pursuant to section 14 of the *Commission to Inquire into Child Abuse Act 2000* [Powers of the Investigation Committee].

they operate effectively in furtherance of truth-seeking, despite legal evidentiary drawbacks. This aspect will be explored in greater detail, couched in the context of the powers conferred to the Royal Commission and the CICA, in the proceeding chapters.

The forms and powers available to an inquiry body to investigate historical, systematic human rights violations are abundant and diverse; decisions regarding the structure of the inquiry, what powers to confer and codify, whether to appoint commissioners as quasi-judicial officers, to conduct public and/or private hearings, to use and/or restrict the use of testimony and to what extent, whether to confer search and seizure and/or subpoena powers to tribunal members, are all important decisions that ought be made at the very onset of the process. For the inquiry body to be effective, such decisions must also be tailored to suit the social, cultural and geopolitical context in which it seeks to operate and clearly articulated, preferably for the general public, prior to its commencement[38]. For the sake of relevance and authority, debate and decisions regarding an intended inquiry model ought to be had between a diverse collective of State and non-State actors, as well as public and private sector stakeholders, in order to create robust frameworks with greater prospects for success, quantified by their capacity to bring about (various forms of) truth, justice and accountability[39]. Executive decision-makers must be informed by delegates of a strong civil society, supported by human rights and legal professionals, advocated for by victims-rights organisations, and bolstered by the strong political will of a given administration.

Inquiries into historical and systemic rights violations against children share commonalities with archetypal truth commission models. Hayner highlighted a distinctive and 'special' feature of truth commissions as part of her refined definition, namely 'their intention of affecting the social understanding and acceptance of the country's past, not just to resolve specific facts'[40]. The intention of child abuse and neglect inquiries is largely to pursue the collection of evidence for potential use in downstream proceedings. The product obtained during such inquiries has often contributed to the later establishment of truth commissions or ad hoc international tribunals[41]. An inquisitorial body is distinguishable from a truth

[38] Anita Ferrara (2019) 'Week 2: Truth Commissions', *Transitional Justice* module, National University of Ireland (Galway) 28 January 2019.

[39] Kathryn Sikkink and Hun Joon Kim, 'The Justice Cascade', W.W. Norton and Company Inc. (New York, 2011), pp. 274-278.

[40] Priscilla Hayner, 'Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions', *Routledge* (2nd edn, 2010), p. 11.

[41] Hayner gives the examples of Timor-Leste, Rwanda and (the former) Yugoslavia. See Priscilla Hayner, 'Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions', *Routledge* (2nd edn, 2010), p. 16.

commission in that the former technically operates independent of the State (despite it being endorsed by the State at least to some degree) and a truth commission seeks to ascertain a pattern of abuses conducted across a determinative period as opposed to the investigation of a specific event[42]. Inquiry findings may nevertheless be integral to the acknowledgement phase—it is not sufficient that only survivors and/or their families know the truth—all citizens must know. It is accepted in transitional justice scholarship that to *officially* document truth and past suffering is a 'minimum requirement of justice', an absence of which would perpetuate and allow potential continuation of human rights violations and undermine the legitimacy of the respective inquiry[43]. At the very least, inquiries have the potential to form an integral part of the acknowledgment phase following a human rights atrocity situation. Australia is exemplary in this regard, having conducted a number of regionally run inquiries—conducted far earlier than the subject Royal Commission—responding primarily to allegations of child abuse committed by religious congregations[44]. Ongoing pressure on government by a strong civil society to garner accountability officially is pivotal to the successful development of an appropriate transitional justice structure tailored the needs of the respective political community.

Historical and theoretical summary and research outline

The collective investment made by governments of the Anglosphere into re-writing the history of children is now significant. A conjunctive approach toward national healing is typified by transitional justice strategies as a multi-pillar approach to addressing and preventing systematic human rights abuses. A review of the historical and definitional evolution of truth commissions as a form of transitional justice has evidenced its broadening scope, which evidently has encompassed some national inquiry models. Looking forward, transitional justice mechanisms and manifestations thereof will likely remain on a trajectory of modification; an inclusive definition wide enough to capture public inquiry models in non-transitional contexts, which is anticipated will help 'let go' of pure legalism in favour of multidisciplinary, longer-lasting, victim-focused resolutions[45]. National healing via the

[42] Priscilla B. Hayner, 'Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions', *Routledge* (2nd edn, 2010), p. 16.

[43] Ibid, at p. 356, with reference to Zalaquett, *Confronting Human Rights Violations, supra* note 8, at p. 38.

[44] During the late 1990s and into the 2000s, a number of Australian State governments, namely Western Australia, South Australia, Queensland, Victoria and New South Wales, responded in some way to allegations of institutionalised child abuse and/or conducted inquiries albeit to varying extents and using different investigative models.

[45] Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice', *Journal of Law and Society*, Vol. 34, No. 4, (2007), p. 1.

recognition and acceptance of new childhood histories is an ongoing feat and redress goes well beyond traditional notions of criminal justice[46]. Strong and vocal victim/survivor networks and ongoing dialogue with executive government is vital during and long after the relevant inquiry has been dismantled, findings completed and articulated, reports and recommendations produced. This ongoing and dynamic process has been shown to help preserve an equitable path toward national healing that has integrity and longevity[47]. The Chilean struggle to address its past long after its first truth commission will be used as a vehicle to evidence this process. It is hoped exploration of these ongoing efforts will be referred to by Australia and Ireland given the benefit of time Chile has now had to respond to its history of human rights abuses and adapt its truth and justice seeking approaches. A thorough exploration of human rights archival practices, victim reparations and redress options is discussed in Chapter IV of this text having particular regard to the Chilean experience.

[46] Ibid, at paragraph 89.

[47] Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs', *Social & Legal Studies* (2012) Vol. 21(2), pp. 171-186, p. 172.

CHAPTER II

'Transitional justice' in its expansive sense applied and tailored to child abuse inquiries in non-transitional settings

It is necessary at this point to turn to the (perceived and actual) successes of transitional justice mechanisms utilised during the two decades preceding the child abuse inquiry phenomenon to understand how it came to fruition. As noted above, multiple truth commission models were used in Latin American countries during the 1980s and 1990s to address human rights atrocities, often during a State's transition from authoritarianism toward democracy. Following this suite of truth commissions, the watershed Truth and Reconciliation Commission was implemented in South Africa during the period 1995 to 2002, now viewed as a major contributor to ending the Apartheid regime. These transitional justice mechanisms directed at uncovering corruption and evil at the highest echelons of society and government helped dismantle the most powerful political elite and demoralise ingrained discriminatory ideologies. These explosive findings generated a groundswell of momentum already building with respect to child abuses inquiries.

Horrifying revelations of systemic child abuse found to have been committed and concealed by members of the Catholic clergy, pervading even the highest levels of canonical authority, shocked the world. Rafts of inquiries have since been conducted, most prominently since the 1990s, to investigate how revered and trusted institutions dealt with cases and allegations of child abuse. The investigations revealed a sophisticated cover-up culture that involved the falsification, fraudulence and destruction of evidentiary documentation, serving to maintain and perpetuate the endemic culture of abuse and control. This cascade[48] of inquiry is conceivably reflective of the contemporary age of apology politics, as has been postulated by noteworthy political theorists Barkan and Olick[49]. The resultant global trend of regret, it seems, is an expression of individual and collective demand for political responsibility.

[48] Kathryn Sikkink, and Hun Joon Kim, 'The Justice Cascade', W.W. Norton and Company Inc. (New York, 2011).

[49] Elazar Barkan, 'The Guilt of Nations, Restitutions and Negotiating Historical Injustices', W.W. Norton and Company Inc. (New York, 2000); and Jeffrey Olick, 'The Politics of Regret: On Collective Memory and Historical Responsibility', Routledge (New York, 2007); referenced in Johanna Sköld 'Historical Abuse—A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Care Worldwide', Journal of Scandinavian Studies in Criminology and Crime Prevention (2013) Vol. 14, No. S1, 5–23, available at http:/dx.doi.org/10.1080/14043858.2013.771907, pp. 5-23.

Sociologist John Torpey has described this yearning for historical (re)discovery as a way of 'making whole what has been smashed'[50]. Like an incurable contagion that grows only in size and ferocity as it sweeps across its host, a fervent social climate that enabled hegemonic structures to be challenged spread from post-conflict States across geopolitical contexts to non-transitional settings, all demanding accountability. Once cultured, the contagion of inquiries could no longer be contained.

A special focus and introduction to the Commission to Inquire into Child Abuse (the CICA) in Ireland

The CICA was one of the first projects of its kind. Commencing in 1999, the CICA emerged out of intense public pressure to expose and officially document systemic child abuse that had permeated Ireland's State-run religious congregations and out-of-home care facilities. A plethora of media revelations during the latter half of the 1990s urged authorities to act, most notably following the *Dear Daughter* RTÉ documentary that aired in 1996, and the watershed *States of Fear* documentary by notable investigative journalist Mary Raftery that first broadcast in 1999. The overwhelming national, emotive response espoused by the scale and type of abuse suffered by its children, facilitated and committed by its most trusted institutions, snowballed into an insuperable force. Public outrage and collective demands for accountability were mobilised by then Taoiseach, Bertie Ahern, upon his issuing of a formal apology on behalf of the government to all victims of childhood abuse—the apology was delivered just hours shy of the final episode of *States of Fear*. During the same announcement, the Taoiseach informed the country that a commission of inquiry would be established with a primary focus of providing an appropriate forum in which victims could tell of their abuse[51].

Since its inception the CICA evolved into a ten-year feat, far longer than other truth commission models of national inquiries that tend to operate for two to three years at most. As child abuse inquiries are generally not reflective of historical events, scholars have

[50] '"Making Whole What Has Been Smashed": Reflections on Reparations', The Journal of Modern History, University of Chicago Press, Vol. 73, No. 2, (2001), pp. 333-358.

[51] Conall Ó Fátharta, 'Ryan Report that shocked nation offers much but gaps in the detail still remain', *Irish Examiner* (webpage, 19 May 2019) available at <https://www.irishexaminer.com/breakingnews/specialreports/ryan-report-that-shocked-nation-offers-much-but-gaps-in-the-detail-still-remain-925312.html>.

commented that wider timeframes are necessitated[52]. Truth commissions, commissions of inquiry and other redress projects are not equivalent and therefore do not encounter the same issues or problems, structurally or otherwise. The CICA culminated in the production of an enormous five-volume final report (more commonly known as the Ryan Report), drawing on information obtained during public and private hearings, as well as private sessions to elucidate survivor stories. The CICA model was at the time radical in its approach, successfully hauling child abuse into contemporary discourses and lifting the veil on hitherto sacrosanct, untouchable religious institutions in quite an explicit way. National narratives were (re)written and new histories officially documented. Previously taboo and hidden stories of abuse were ventilated via the evolution of linguistic practices, making visible Ireland's dark childhood history. The advancement of language and the subsequent opening of space to communicate about Ireland's historical abuses of children acted as a toolkit of empowerment used to engage civil society, develop appropriate avenues of redress, and postulate preventative mechanisms moving forward.

The drafters of the governing legislation and decision-makers involved in the implementation of the statutory regime were pioneering at the time, particularly for the use of public hearings as information-gathering and public awareness raising strategies running parallel to other conventional methods of inquiry. This is plausible though, because the aims of the CICA were not to pursue individual criminality. The CICA's primary objectives were 1) to inquire into the emergence of child abuse and the extent of such abuses, and 2) to raise public awareness about the findings. Justice Ryan clarified in a Position Paper released when he took over as Chair that the CICA would not be used as a surrogate for the regular criminal process, reiterating that the CICA's primary function ought be to 'focus on the wrong or malfunction in the system and not on the individual wrongdoer'[53]. There was a recalibration of the CICA's focus following the leadership change on the back of a series of events that too convenient to be coincidental, discussed and unpacked in more detail below.

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[52] Johanna Sköld 'Historical Abuse—A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Care Worldwide', Journal of Scandinavian Studies in Criminology and Crime Prevention (2013) Vol. 14, No. S1, 5–23, available at http:/dx.doi.org/10.1080/14043858.2013.771907, pp. 5-23, p. 12.

[53] The Chairperson of the Investigation Committee Mr. Justice Sean Ryan, 'A Position Paper of the Investigation Committee: Identifying Institutions and Persons under the Commission to Inquire into Child Abuse Act 2000', *The Commission to Inquire into Child Abuse* (May, 2004), available at <http://www.childabusecommission.ie/events/documents/Position%20Paper%20-%20070504.pdf>, pp. 42-43.

The statutory architecture and related debate surrounding the establishment of the CICA

Initially set up as a non-statutory administrative body, the CICA was always envisaged as being a less formal, sympathetic forum[54] where victims/survivors would feel comfortable to recount their stories of abuse and suffering openly as children in institutionalised care facilities, and how this impacted their later lives. The remit of the interdepartmental body, set up following Ahern's public apology, was to hear evidence about abuse of children aged less than 18 years at the time of the abuse, as it occurred in Irish institutions. The administrative body made recommendations to the Oireachtas, by way of two State reports, that it be statutorily governed, which was given effect by the coming into force of the *Commission to Inquire into Child Abuse Act 2000* (the CICA Act) on 23 May 2000[55]. The terms of reference originally adhered to by the interdepartmental body were statutorily enlivened by section 4 of the CICA Act. The CICA's mandate was consequently to investigate the emergence of institutionalised child abuse and the circumstances that facilitated its systemic nature, as well as the institutions in which the abuses occurred. This included managerial, inspection and administrative functions, the persons or bodies by whom those responsibilities were vested, and how it contributed to the incidence and maintenance of child abuse[56].

The terms of reference of the CICA allowed for the investigation of abuse of children in State institutions ('abuse' including physical, sexual, and/or emotional)[57]. This aspect differed from the ambit of the Royal Commission in that the latter approach restricted the scope of its inquiry to sexual abuses[58]. The CICA's statutory architecture contained in the CICA Act, and

[54] pursuant to sections 6 (a) & (b) of the CICA Act.

[55] The CICA Act was amended in 2005 by the *Commission to Inquire into Child Abuse (Amendment) Act 2005* (the CICA Amendment Act), discussed further below.

[56] Volume II of the CICA Report, (Final Report, May 2009), Chapter 1, paragraph 1.05.

[57] 'Abuse' is defined in section 1(i) of the CICA Act (as amended by s.3 of the CICA Amendment Act) as:- '(a) the wilful, reckless or negligent infliction of physical injury on, or failure to prevent such injury to, the child; (b) the use of the child by a person for sexual arousal or sexual gratification of that person or another person; (c) failure to care for the child which results, or could reasonably be expected to result, in serious impairment of the physical or mental or development of the child or serious adverse effects on his or her behaviour or welfare; or (d) any other act or omission towards the child which results, or could reasonably be expected to result, in serious impairment of the physical or mental health or development of the child or serious adverse effects on his behaviour or welfare; and cognate words shall be construed accordingly'.

[58] and other (related) forms of abuse 'including measures for the prevention, identification, reporting, referral, investigation, treatment and follow up of incidents of child abuse'. See *Letters Patent*, Dame Quentin Bryce AD CVO (2013), 'Royal Commission into Institutionalised Responses to Child Sexual Abuse', available at <https://www.childabuseroyalcommission.gov.au/terms-reference>.

its practical operation, was divided into two fundamental strands with a redress scheme contained in a separate instrument[59]. The two strands consisted of: 1) a confidential committee wherein victims/survivors could express their stories in a private setting, which operated similarly to the Royal Commission private sessions; and 2) an investigation committee that was empowered with compellable powers thereby adopting a much more proactive and inquisitorial approach than the former pillar, which again was similar to the Royal Commission's private hearings. The CICA heard of abuses having occurred during the period 1914 to 2000 (the defined period)[60] in more than 200 residential settings that comprised schools, hospitals, industrial and reformatory schools, homes for children with special needs, foster facilities, as well as the 'Magdalene Laundries' as another form of childhood residential institution that was State-endorsed[61].

Despite its early enthusiastic and nuanced design approaches, resourcing and politics of the day interfered but three years into the CICA's operation, culminating in the original Chair of the Commission, Justice Mary Laffoy, resigning in September 2003. Highlighting in her letter of resignation, Justice Laffoy pointed to a 'real and pervasive sense of powerless' she had felt as Chair. Despite section 9 of the Commissions of Investigation Act, which requires that 'a commission shall be independent in the performance of its functions', in Justice Laffoy's view the government knowingly undermined and inhibited the proper functioning of the Commission, thereby preventing it from having control and autonomy over its own operations[62]. Of note, Justice Laffoy's consistent concerns prior to her resignation seem to have pivoted on the multiple reviews of the Commission structure itself and its progress, as authorised by the government. Three interim reports were conducted since the commencement of the CICA—the first published in May 2001, the second in November 2001 and the final in December 2003—with work relating to the third interim report well and truly

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[59] *Residential Institutions Redress Act 2002*.

[60] 2000 being the year of the commencement of the CICA.

[61] The current Mother and Baby Homes Commission of Investigation (Mother and Baby Homes Commission) seeks to address and respond to atrocities committed within the Magdalene laundries and other State-supported child care facilities run in Ireland during the 20th century. This commission will be returned to and discussed later in this piece as it pertains to learning lessons from the analysis subject of this research.

[62] Conall Ó Fátharta, 'The Ryan Report that shocked nation offers much but gaps in the detail still remain', *The Irish Examiner* (webpage, 27 May 2019), available at <https://www.irishexaminer.com/breakingnews/specialreports/ryan-report-that-shocked-nation-offers-much-but-gaps-in-the-detail-still-remain-925312.html>.

underway during and after Justice Laffoy's resignation in September of that year. Justice Laffoy and other commentators have viewed these repeated audits as deliberate interferences designed to delay and inhibit the CICA's progress and independence. These encumbrances by government also run counter to transitional justice scholarship more broadly, in that theoretically the CICA ought to have operated much more independently of government.

Public perception regarding Justice Laffoy's resignation was intensified and worsened by a contemporaneous indemnity deal struck between 18 religious organisations so far implicated in the inquiry with the then government, without remit for requisite public scrutiny. The substance of the deal was that the religious bodies agreed to pay (a grossly underestimated monetary sum of) €128m comprising cash and property in exchange for indemnities against prosecution, which has left the State exposed to incur liability currently estimated at tipping €1.5bn[63]. Perhaps the most controversial aspect of the deal was its timing; the agreement was signed after the dissolution of the incumbent government, but before the new Dáil[64] convened. This meant the deal was settled absent a vote in the Oireachtas and without any opportunity afforded for public scrutiny.

Building and maintaining public trust to ensure (perceptions of) legitimacy crucial to ensuring authority and impact

The CICA's politicisation was a product of a crescendo of intersecting interests and circumstances. The hugely controversial, out-of-court deal above-mentioned was made in June 2002[65]. A legal challenge posed by the Christian Brothers as to the CICA's procedural and constitutional validity halted the progress of the inquiry temporarily during 2003. The discovery of the 'Rome archive' to the Investigation Committee in May 2004 by the Christian Brothers unearthed documentary evidence of religious staff members offending against children during the period 1936 to 1980, and the institution's knowledge and dealings with such cases[66]. By October 2003, the Christian Brothers had been ruled against by the High

[63] The €128m agreed figure turned out to have been grossly undervalued and inadequate and what's more, it was later revealed that no State authority had conducted a proper forensic analysis prior to the indemnity deal being made.

[64] Dáil is the lower house of the Irish Legislature (the Oireachtas).

[65] Conall Ó Fátharta, 'The Ryan Report that shocked nation offers much but gaps in the detail still remain', *The Irish Examiner* (webpage, 27 May 2019), available at <https://www.irishexaminer.com/breakingnews/specialreports/ryan-report-that-shocked-nation-offers-much-but-gaps-in-the-detail-still-remain-925312.html>.

[66] Volume I of the CICA Report, (Final Report, May 2009), Chapter 7, paragraphs 7.37 and 7.38.

Court, but the CICA Act was amended by the 2005 passing of the CICA Amendment Act[67], giving legal effect to a revised position not to name individual perpetrators. This storm of contestation had a seismic impact on the perceived authority and legitimacy of the CICA, then and continuing, also serving to further distance and disengage victims/survivors with the very same institutions that had failed them before as children.

(Re)establishing societal trust became one of the CICA's principal considerations moving forward. Widespread consultation was had between the Investigation Committee and victim/survivor networks, the Commission's legal team, and solicitors representing complainants or respondents regarding how best to accommodate the 1,712 complainants who had so far come forward. Although no consensus was reached, the consultations symbolised the pressing need for innovation to meet timeframes and resource constraints. It was also an attempt to voice to the general public that the Investigation Committee was genuine in its efforts to meet and respond to the difficulties faced by victims/survivors when engaging with the CICA, as well as the flow-on effects to their families. Despite these efforts, the CICA never quite regained the legitimacy it once had. Australia was careful not to make the same errors, while some compromises were unavoidably made.

The Royal Commission— an overview and its operation as a transitional justice mechanism

The global trend of accountability within the realm of child abuse inquiries contributed significantly to the call for, establishment of, and eventual structure of the Royal Commission. The Royal Commission—despite its operation outside a transitional context—may be categorised as a transitional justice mechanism in an expansive understanding of the trend. The Royal Commission's federal legislative architecture comprises the enabling *Royal Commission Act 1902* (Cth) (the Royal Commission Act) as amended by the *Royal Commissions Amendment Act 2013* (Cth) (the Royal Commission Bill)[68] and statutorily sets out the Royal Commission's structure, scope, and powers conferred. The accompanying *Royal Commissions Regulations 2001* (Cth) (the Royal Commission Regulations) provide procedural guidance and some rules concerning the custody and use of Royal Commission

[67] *Michael Murray and David Gibson v The Commission to Inquire into Child Abuse, The Minister for Education & Science, Ireland and The Attorney General* (Record Number 2003/1998P).

[68] that conferred (additional) coercive powers, with the view to enabling the Commissioners to fulfill specificities of the Terms of Reference. Of note, it authorised members of the Royal Commission to conduct private hearings.

records (which will be addressed further in Chapter III). Analysis of relevant provisions from the above-stated instruments attests to the Royal Commission falling within the definitional parameters of the latest 'truth commission' conceptualisation in accordance with contemporary transitional justice scholarship.

On 11 January 2013 the Governor-General of Australia issued Commonwealth letters patent and established the Royal Commission[69]. The Governor-General statutorily appointed six Commissioners and stipulated the Terms of Reference[70]. Letters patent were also sought for issue at state and territory levels to enable the Commissioners to conduct relevant inquiries under the respective laws. All Australian State governments did so during the period 22 January 2013 to 7 March 2013[71]. As to the scope of the inquiry, the appointed Commissioners were directed to 'inquire into institutional responses to allegations and incidents of child sexual abuse and related matters'[72]. The then Australian Prime Minister, Julia Gillard, explained further during a press release that the Royal Commission was to focus its inquiry onto institutions with responsibility for the safety and welfare of children and how they managed allegations or instances of child sexual abuse that occurred while under their supervision[73].

The Royal Commission's Terms of Reference were broad enough to allow inquiry into (suspected) continuing abuses. To that end, it was within the Royal Commission's power to communicate certain information to relevant office-holders for further investigation where there were grounds warranting follow up[74]. Section 1A of the Royal Commission Act stipulated that the ambit of the Royal Commission's inquiry was permissible to extend to 'any matter specified in the Letters Patent, and which relates to or is connected with the peace, order and good government of the Commonwealth, or any public purpose of the

[69] pursuant to section 1A of the Act and the Constitution of the Commonwealth of Australia.

[70] in accordance with section 4 and 5 of the Royal Commission Act. In truth commission language, Terms of Reference are more commonly referred to as a 'mandate'. Both provide the same function, that being to outline and express clearly and officially the scope of the inquiry.

[71] For the sake of completeness, the Northern Territory and the Australian Capital Territory were not required to issue Letters Patent despite each having their own government. Both territories are administrated under the Commonwealth of Australia, and by extension, the Commonwealth Letters Patent applied to each territorial jurisdiction.

[72] Dame Quentin Bryce AD CVO (2013), 'Royal Commission into Institutionalised Responses to Child Sexual Abuse', *Letters Patent*, available at <https://www.childabuseroyalcommission.gov.au/terms-reference>.

[73] Julia Gillard (former Australian Prime Minister), 'Government formally establishes Royal Commission' (media release, 11 January 2013).

[74] Dame Quentin Bryce AD CVO (2013), 'Royal Commission into Institutionalised Responses to Child Sexual Abuse', *Letters Patent*, paragraph (f).

Commonwealth'. Upon review of explanatory material[75] and with reference to section 6P of the Act (which provides an inclusive list of things that constitute a 'matter') it seems the drafters of the governing legislation and its subsidiary texts intended the Royal Commission have requisite power to investigate suspicions regarding ongoing institutional abuses. To balance this, a relevant limitation when discerning a 'matter' was that in most circumstances, the Royal Commission was prohibited from inquiring into a person's criminal conduct if that conduct was subject to ongoing judicial proceedings—to do so would have amounted to contempt of court[76].

The Royal Commission was established to investigate historical and systemic abuses that occurred over a protracted period of time, as required pursuant to Hayner's second definitional criteria. It inquired into institutionalised responses to child sexual abuse with a core focus of investigating where, how and why organised systems continually failed to protect children in care facilities[77]. The exact timeframe the Royal Commission operated within is unclear because of the nature of the offending and the impact it had on survivor testimony in terms of witnesses being (un)able to pinpoint exact offending between dates and/or to particularise abuse occurrences with sufficient certainty[78]. The need to express a definitive time period to investigate was not stipulated in the Terms of Reference, and nor were any specific events to investigate articulated. The third arm of Hayner's truth commission definition appears made out, in that the Royal Commission was a temporary body established on 11 January 2013, which ceased in effect on 15 December 2017 upon the submission of a Final Report. This document is publicly accessible online and contains a raft of recommendations and results of the inquiry, as required pursuant to the Letters Patent. Some information, witness testimony, documents and/or things obtained during the course of the inquiry, specifically during private hearings, have restrictions in terms of their use, communication and/or disclosure[79]. The Royal Commission was established and endorsed

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[75] Bills Digest, *Royal Commissions Amendment Bill 2013* (Cth), 'Subject matter of inquiries', (webpage, *Parliament of Australia*), available at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1213a/13bd083#_ftnref11>.

[76] pursuant to section 6(3)(a) of the Royal Commission Act.

[77] Julia Gillard (Prime Minister), 'Government formally establishes Royal Commission' (media release, 11 January 2013) viewed on 20 April 2019.

[78] A thorough discussion on this falls outside the scope of this research however more information is contained and publicly available on the Royal Commission's website, primarily in Volume 3 of its Final Report titled 'Impact', available at <https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_3_impacts.pdf>.

[79] for example, limitation on the use of certain information contained in the *Archives Act 1983* (Cth) and/or the *Freedom of Information Act 1982* (Cth). Analysis of the use, access to and archival

with bipartisan support by the Labor government of the time. Although it functioned independently of the Executive, it was an instrument of that branch of government and so had reporting obligations to the Executive head[80] thereby fulfilling the fourth and final arm of Hayner's latest truth commission definition.

There is extensive scholarly debate surrounding whether commission of inquiry models, such as the subject Royal Commission (and the CICA), are transitional justice mechanisms used to address historical abuses. Applying Hayner's latest truth commission definition rigidly may have the effect of precluding the subject Royal Commission from such a classification. Hayner herself however conducted analysis of similarly structured commissions, in conjunction with more archetypal models, for the purposes of *Unspeakable Truths*[81]. Hayner felt it important to refrain from 'defining the concept too rigidly…for the purposes of comparison and learning', highlighting the importance of safeguarding the evolving nature of truth commissions so as to cultivate space for future development[82]. The model established to investigate endemic child abuse, concealed and maintained for decades by some of the country's most revered religious institutions and other respected community organisations, was decades in the making. Using transitional justice scholarship as a foundation, child abuse inquiries such as the Royal Commission have developed rapidly in recent years to confront the devastating impact the abuse had, and continues to have, on victims/survivors and their families. These ongoing and persistent efforts, supported by academic scholarship, have helped shine a light on a dark chapter of childhood history.

Domestic political, social and cultural factors contributing to the call for the Royal Commission

Royal Commissions in Australia have acquired an almost mythical, cure-all status politically speaking. Writing in July 2014, a year and a half into the Royal Commission's operation and a month following its successful application for extension of the Final Report due date, political commentator Chris Berg writing for respected Australian news program *the Drum* noted the (then) three royal commissions underway at the time; namely, the subject Royal

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processes related to witness testimony following the close of the Royal Commission, as compared against the Irish experience on completion of the CICA, will be returned to and discussed in greater detail later in this piece.

[80] Department of Parliamentary Services (Cth), *Bills Digest*, (Digest No. 83 of 2012–13, 13 February 2013) '*Bills Digest, Royal Commissions Amendment Bill 2013*', available at <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd1213a/13bd083>.

[81] Priscilla Hayner, 'Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions', *Routledge* (2nd edn, 2010).

[82] Ibid, at p. 12.

Commission, another that was issued under the Kevin Rudd Labor government inquiring into a former government's home insulation scheme, and a third commission investigating alleged trade union corruption and other governance matters. Berg's article, 'Shining a light on the dangers of royal commissions' was a play on comments made by the Attorney-General of the time, Nicole Roxon. In response to Prime Minister Gillard's recommending the establishment of the subject Royal Commission on 12 November 2012, Attorney-General Roxon put forward her hopes that the Royal Commission would 'shine a light on the injustices that have occurred in places where the most vulnerable in our society should have been cared for and protected'. Gillard like-wise emphasised that Australia must 'start to create a future, where people who perpetrate child sexual abuse cannot hide in institutions behind a self-serving exterior of preserving the 'good name' of an organisation'. Berg commented that in appointing a royal commission, the government of the day commits to and conveys, with absolute conviction, its resolute and serious stance on the issue subject of the relevant inquiry—'nobody ever made headlines by calling for an interdepartmental review'[83].

Berg's piece largely focused on the evidentiary problems that may arise by virtue of the conferral of coercive powers to a royal commission. Berg points to the capacity of royal commissions to uncover just as many *un*truths as they are to unearth hidden truths, despite worthy inquiry goals. It also serves to demonstrate just some of the sticky points of negotiations had by decision-makers. How best to publicise societal abhorrence of child sexual assault committed and covered up by leaders of some of the country's most respected institutions? How then to broadcast this newly and officially exposed, ugly part of the nation's history appropriately while respecting the dignity of survivors and all those affected by the atrocities? What must be done to ensure the unveiled injustices from the past inform and help improve relevant policy, legislation and practices for current and future generations? Despite ongoing debate and questions thereby airisng as regards their quasi-judicial nature, truth commissions and commissions of inquiry have operated as an integral part of an ongoing, cathartic healing process, some assisting the later prosecution of perpetrators in more traditional court settings. They have worked as part of a multi-pillar approach, helping to mend the social fabric of a nation torn apart by past evils that may derive from, and contribute to, other transitional justice mechanisms.

In Australia, sexual and other forms of child abuse in organisational settings, and a systemic cover-up culture at the highest institutional levels, persisted long before the call for and eventual establishment of the Royal Commission. Transitional justice scholar Anita Ferrara

[83] Chris Berg, 'Shining a light on the dangers of royal commissions', *the Drum, ABC News* (webpage, 1 July 2014), available at <https://www.abc.net.au/news/2014-07-01/berg-shining-a-light-on-the-dangers-of-royal-commissions/5562354>.

explains that where a polity is traumatised from historical abuses and divided in terms of its understanding of the past, truth commissions can help reveal responsibility where it has been contested or concealed[84]. Almost three decades prior to the Royal Commission, multiple Australian States and Territories conducted inquiries and investigations into child abuse allegations in institutional contexts. Parliamentary committees and advisory bodies at a federal level also inquired into these kinds of child abuses[85]. These efforts had not rivalled the magnitude of the subject Royal Commission that was politically driven with bipartisan support, aptly resourced and carried by a societal intensity not yet witnessed in Australian memory. The reluctance of certain institutions to acknowledge and bear witness to the suffering that occurred within their confines contributed to a groundswell of support, first by victim/survivor advocacy networks, eventually permeating the broader general public's consciousness. Australians became disenfranchised and suspicious of institutions that persistently refused to cooperate with a government whose agenda was to inquire into the abuse of some of its most vulnerable.

The formation and resultant structure of the Royal Commission becomes an important consideration, given its overall success at officially bringing to light new truths, (re) forming an important part of Australia's modern history as it relates to children, and its contributions to criminal prosecutions (discussed later in Chapter III). The Royal Commission Terms of Reference set forth the primary objectives, namely to investigate governmental and institutional responses to child sexual abuse. 'Responses' included, but was not limited to, reporting and responding to reports or information relating to child abuse, supporting and protecting children from abuse, the provision of redress for abuse, and the proper investigation and prosecution of incidents of abuse[86]. The scope of the Royal Commission mandate therefore permitted the Chair to inquire into departments at the coalface of the abuse inquiry, as found to be relevant and necessary in the performance of the Royal Commission's functions.

During early deliberations, decision-makers identified problems with the punitive nature of criminal justice system. The Commission held multiple public roundtable discussions (that

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[84] Ibid.

[85] 'Final Report – Volume 1, Our inquiry', *Royal Commission into Institutionalised Responses to Child Sexual Abuse*, pp. 4-9, available at <https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_1_our_inquiry.pdf>.

[86] 'Final Report – Volume 1, Our inquiry', *Royal Commission into Institutionalised Responses to Child Sexual Abuse*, p. 18, available at <https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_1_our_inquiry.pdf>.

were broadcast live and are currently available on the Commission's website[87]) with relevant interest groups, including with delegates from the Commonwealth and State Offices of the Director of Public Prosecutions (the DPP). These roundtable discussions provided an instructive function, with the information therein cultivated informing the Royal Commission's recommendations contained in its Final Report to government. Of note, a roundtable held on 29 April 2016, chaired by the Chair of the Royal Commission Justice Peter McClellan, considered the inadequacies of the domestic criminal justice system as a forum for bearing witness to the suffering of those affected by institutionalised child sexual abuse. The main roundtable theme was how best to design and apply oversight mechanisms and complaint processes regarding the work of the State, Territory and Federal DPP departments, and public officers under their employ. Significantly, the Chair highlighted the criminal justice system as a source of 'significant complaint'[88] that had been voiced frequently by victims/survivors during private sessions so far conducted.

Problems regarding the adversarial nature of the traditional court system and the strict rules of evidence, and how these processes disproportionately affected victims/survivors of child sexual abuse, were raised. The Chair facilitated discussion and asked questions regarding the sufficiency of evidence as it pertains to historical child sexual abuse. Amongst other things, the lapse of time since the alleged offending occurred, related issues regarding memory over time, difficulties with particularising relevant events, as well as a lack of corroborating evidence, were stated by DPP delegate Ms Saunders as some of the issues affecting witness credibility[89]. It was agreed that the criminal justice system on its own was an inadequate forum to acknowledge, restore and prevent child abuse occurring in State-run care facilities in a satisfactory manner.

Decisions made as to the Royal Commission architecture

The Royal Commission operated in civil jurisdiction similarly to a tribunal with its findings determinable on the balance of probabilities. The six appointed Commissioners comprised two judges, a child and adolescent psychiatrist, a former police commissioner, a productivity

[87] through the Royal Commission's public hearings powers.

[88] 'Public Hearing – Criminal Justice DPP complains and oversight mechanisms', Office of the Director of Public Prosecutions, *Royal Commission into Institutionalised Responses to Child Sexual Abuse*, roundtable minutes (Sydney, 2016), p. 2, available at <https://www.childabuseroyalcommission.gov.au/sites/default/files/roundtable_transcript_cj_dpp_complaints_and_oversight_mechanisms.pdf>.

[89] Public Hearing – Criminal Justice DPP complains and oversight mechanisms', Office of the Director of Public Prosecutions, *Royal Commission into Institutionalised Responses to Child Sexual Abuse*, roundtable minutes (Sydney, 2016), 17-20, available at <https://www.childabuseroyalcommission.gov.au/sites/default/files/roundtable_transcript_cj_dpp_complaints_and_oversight_mechanisms.pdf>.

commissioner, and a former senator. The strict rules of evidence did not apply in a procedural sense to the Royal Commission. For example, some hearings operated using a more inquisitorial approach. Nevertheless, the rules of natural justice were (as far as possible) abided by to ensure the inquiry's integrity. Legal representation was permissible[90] and legal advice available to all persons who had already engaged with, or were considering, engagement with the Royal Commission, both complainants and respondents. A fundamental distinction of the Royal Commission, as compared against traditional court settings, was its operation as a 'star chamber' through its strategic use of its coercive powers. These extraordinary powers have been the subject of scrutiny, as a Commissioner may essentially act as an 'informant, prosecutor and judge'[91]. The Law Council of Australia expressed concerns regarding procedural fairness, questioning the use of testimony and other forms of evidence obtained during private sessions and private hearings. In its submission to government, the Law Council queried whether such information could be communicated to other authorities, if consent needed to be obtained in such circumstances and whose consent would be needed. The Law Council also considered the impact that the use of coercive powers could have on the privacy of such forums, and more broadly how this could influence public perceptions of the Royal Commission, locally and internationally.

While the Royal Commission retained and utilised its coercive powers, the Chair of the Commission using his prerogative power, made a difficult but important architectural decision. A decision was made *not* to publish the names of institutions implicated by victims/survivors during private sessions. The six Commissioners were exactly divided as to their views on this matter. The dissenting Commissioners believed there was an overriding public interest to publish the list in order to: 1) help survivors feel affirmed and encourage others abused within the confines of the named institutions (or others) to engage with the Commission; 2) function as a transparent and publicly accountable mechanism to ensure continued legitimacy; 3) operate as another means of 'bearing witness' to Australian suffering as per the Term of Reference; and 4) to raise public awareness of the scale of the abuse that occurred within a cross-section of institutions nation-wide. While this position was accepted

[90] If the Commission deemed it relevant to the inquiry, a person's legal representative was able to examine and cross-examine witnesses, as provided for in section 6FA of the Royal Commission Act.

[91] Kirsty Magarey, 'Priests, penitents, confidentiality and child sexual abuse', *FlagPost*, Parliamentary Library, 24 November 2012, available at <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2012/November/Priests_Penitents_Confidentiality_and_Child_Sexual_Abuse>; cited by Mary Anne Neilsen and Kirsty Magarey, 'Royal Commissions Amendment Bill 2013', *Parliament of Australia*, Bills Digest no. 83 2012–13, 7 March 2013, available at <https://www.aph.gov.au/sitecore/content/Home/Parliamentary_Business/Bills_Legislation/bd/bd1213a/13bd083>.

as valid and was appreciated by the remainding three Commissioners, in the end procedural fairness gave rise to the decision not to publish.

If a list of named institutions were to be publicly released, it was argued the respective organisations would not have received information pertaining to the alleged abuse, the identity of the offender, or the testifying survivors. Adding to that, many victims/survivors of abuse did not provide their story to the Royal Commission and for this reason there are inevitably information gaps in the narrative gleaned from the Royal Commission's inquiries. It was considered that publishing a list of named institutions would not be wholly indicative or genuinely reflective of the full extent of child sexual abuse suffered in institutions across Australia. This was determined to be more of a disservice to the Australian public. This decision and related negotiations demonstrate the ongoing bargaining process as a series of complex compromises as an inherent part of transitional justice mechanisms. Keeping in mind the criticisms and perceptions surrounding the 'star chamber' inquisitorial aspect of the Royal Commission, perhaps choosing not to publish a list of implicated Australian institutions was also a means of balancing the need to protect privacy principles on the one hand, weighed against the need to be transparent and accountable on the other. Private sessions were always drafted with the intention that they be the most confidential forum. To release information obtained during such forums may have had the contrary effect of undermining public confidence.

CHAPTER III

Like-inquiry comparison—a non-linear process

Comparative analysis of like-inquiries is necessary, needed to explore ways in which different jurisdictions can learn from one another despite their inherent differences, culturally, socially and politically. This exercise not only helps States develop more appropriate and dynamic ways to address past wrongs during periods of instability, it also gives countries the opportunity not to ignore and perpetuate errors of past governments. This could never be a linear equation; analysis of contemporary national child abuse inquiries and related reports, cross-continental exploration of ongoing investigations into systemic abuses, as well as the review of information gleaned from historical truth and reconciliation commission models, help to inform and structure current and future forms of transitional justice mechanisms and their multitudinal manifestations. It is therefore valuable to first explore like-inquiries (the Royal Commission compared to the CICA) before embarking on a comparative examination of inquiry models that have responded to different kinds of human rights violations conducted outside of the Anglosphere. This research concludes that while the statutory structures of the CICA and the Royal Commission were similar, the budgetary constraints and political support of the respective commissions varied greatly, which had significant effects on the legitimacy and (ongoing) impact of each body.

The CICA—'Unspeakable' findings

This year marks ten years since the Final Report of the CICA (the Ryan Report) was published. The Report made headlines internationally, as it broadcast endemic child abuse inflicted by some of the Ireland's most sacrosanct religious organisations. It was reported that many of the named religious congregations were maintained and supported financially and socially by government (namely, the Department of Education and Science). The CICA not only officially unearthed and documented institutional childhood abuses as having pervaded childcare structures within the defined period; it also concluded that the Department of Education and Science had, in effect, relinquished its statutory obligations to inspect and monitor the relevant schools by adopting a 'serious indifference' toward the congregations with operational responsibility of the respective institutions, and most significantly related to the safety of the children housed therein[92]. These explosive findings were described

[92] Dáil Éireann debate, Houses of the Oireactas, 'Ryan Report on the Commission to Inquire into Child Abuse: Motion (Resumed), Thursday, 11 June 2009, available at

succinctly and perceptively by Deputy David Stanton, Minister of State at the Department of Justice and Equality with special responsibility for Equality, Immigration and Integration, during Dáil debates on 11 June 2009. Mr. Stanton put on the record that not only did the government and Dáil of the day defer to a 'dysfunctional church which was unquestioned and ruled completely'[93], but also to a societal deference of the treatment of its children in church-run care facilities, which served to perpetuate and extend the evil that pervaded its institutions.

Revised approach and its effect

On 7 May 2004, Mr. Seán Ryan S.C. (as he was at the time of appointment) reiterated in His Opening Statement as newly appointed Chair, the CICA's revised approach[94]. It was stressed that the investigation of factors contributing to the emergence of child abuse was the focus of the CICA's remit. Mr. Ryan affirmed the CICA would not be run as an adversarial process involving cross-examination of victims/survivors. It would rather operate as forum for victims to air their experiences in a sympathetic environment. Of significance, Mr. Ryan emphasised the decision of the CICA *not* to name individual abusers other than those whom had been found criminally guilty for child abuse offences. The new Chair cited witness rights to procedural fairness for both complainants and accused persons as the basis for the recalibration of approach. Specifically, Mr. Ryan said that cross-examination of witnesses was vital to test the resoluteness and truthfulness of evidence, an absence of which would be unfair to the accused. Although cross-examination was permissible in some forums (for example during Phase III public hearings, which are discussed in more detail below), it was largely avoided due to its inherently adversarial nature, deemed to be a source of further victimisation as it required witnesses to retell and be tested on their stories of abuse. Inquiries so far conducted gave certain credence to this view, as victims/survivors who had engaged with the criminal justice system had told the CICA that they had been left feeling 'branded as unreliable witnesses'[95]. In sum, the decision not to name perpetrators individually has, and continues to be, a highly divisive and debated aspect of the CICA.

<https://www.oireachtas.ie/en/debates/debate/dail/2009-06-11/7/>, referring to Volume I, Chs 11 & 12, the CICA Report, (Final Report, May 2009).

[93] Dáil Éireann debate, Houses of the Oireactas, 'Ryan Report on the Commission to Inquire into Child Abuse: Motion (Resumed), Thursday, 11 June 2009, available at <https://www.oireachtas.ie/en/debates/debate/dail/2009-06-11/7/>.

[94] Address by the Chairperson Mr. Seán Ryan S.C, Opening Statement of the Investigation Committee, 7 May 2004, available at <http://www.childabusecommission.ie/events/events_2004.htm>.

[95] Ibid.

In a similar vein and contained in Volume I of the Ryan Report (currently available online) the word 'Contamination' was used as a heading to describe evidentiary problems reported to have contributed to the Investigation Committee's decision not to name individual abusers. Contributory circumstances were noted as including: 1) the lapse in time since the offending occurred, problems associated with memory, and witness ability to identify abusers by name and/or particularise events; 2) witnesses having endured [subsequent] lives of hardship and poverty following episodes of childhood abuse, many afflicted with resultant physical illnesses, psychological problems and/or substance addictions that tended to impair their memory; 3) external media revelations and widespread commentary and debate domestically and internationally[96]; and 4) pressure on ex-staff members not to be full and frank to the CICA particularly when in the presence of more superior congregation members[97]. These factors were described in the Report as a source of 'potential influence and suggestion to witnesses'.

The conclusions reached, reasons given and the language used is worrying. It diverted blame onto victims/survivors, diminished accountability, it further engrained the view that victim testimony ought not be trusted, and by implication assumed that victims/survivors cannot be discerning about the media. The findings also outlined a scapegoat for some offenders (as bystanders) in institutions. Omissions to report abuses were excused as being the result of an inability to comprehend that religious, spiritual individuals like themselves could behave cruelly and self-indulgently. A failure to act was found not to be because of any 'desire to mislead the investigation'[98]. Instead, this ineptitude to report was referred to as a tendency by religious staff members to 'shut out unpleasant and embarrassing incidents' and an inability to 'recall any unfavourable aspects of their experiences in institutions'. Officially referring to endemic and concealed child abuse in all its manifestations as mere 'unpleasant' or 'embarrassing' incidents, or but an 'unfavourable' part of a staff-member's career, is degrading and diminishes the seriousness and life-long effects of child abuse. Nevertheless, the language used and official defences given to some of the most implicated institutions is instructive; it gives an insight into the decision-making of the time, and illustrates societal attitudes as regards childhood abuse, its impact and the later effects.

[96] For example, 'Suffer the Little Children: the Inside Story of Ireland's Industrial Schools', Mary Raftery and Eoin O'Sullivan, Bloomsbury Publishing Plc (2002), which helped break the story of Ireland's systemic abuse in State-run care facilities.

[97] Volume I, Chapter 5, paragraph 5.40 of the CICA Report, (Final Report, May 2009).

[98] Volume I, Chapter 5, paragraph 5.39 of the CICA Report, (Final Report, May 2009).

An overview of CICA hearings powers

The Investigation Committee of the CICA was statutorily responsible for conducting public and private hearings, which were carried out in three phases. The Confidential Committee provided an informal forum for witnesses to recount their stories as comfortably as possible, assuring absolute confidentiality of information therein provided. The Residential Institutions Redress Board was established separately in 2002 with statutory power to make 'fair and reasonable' compensatory awards to those who the CICA found, as children, had suffered abuse while resident in institutional care (namely, in residential schools, reformatories or other institutions under State regulation or inspection). For the purposes of this piece, the Investigation Committee's methodology will be assessed according to its *modus operandi* from 7 May 2004, that being the official date Justice Ryan became Commission Chairperson which heralded the revised Commission approach moving forward.

Phase I was comprised of public hearings[99], which gave congregations the opportunity to describe to the CICA their position with respect to the management of their institutions during the defined period. Phase I in effect provided an insight into how each congregation was likely to posture itself in the prelude to the following two hearings phases. Some congregations made concessions, and some put forward reasons related to the emotional abuse and/or neglect of children in their care. Other congregations took a much more defensive stance. Of note, there was no cross-examination of witnesses during Phase I. Phase II consisted of *private* hearings to investigate particular child abuse allegations alleged during Phase I. This was followed by Phase III *public* hearings, which (again) provided an opportunity for Congregations, including a select group of governmental departments[100], to respond. Cross-examination was permissible and utilised during Phase III hearings with legal teams used at the Investigation Committee's behest as *amicus curiae* to assist the questioning of relevant witnesses. This had the effect of Phase III hearings operating in a much more adversarial manner, more similar to a traditional court setting than the preceding hearings

[99] governed by section 11 of the Commissions of Investigation Act, and sections 11(3)(b) and 12(2) of the CICA Act. Of note, although still available under the Commissions of Investigation Act, public hearings powers remain unused by other national inquiries conducted in the Republic of Ireland to date, including the Murphy and Cloyne inquiries and of particular relevance, the Mother and Baby Homes Commission that remains ongoing.

[100] namely, the Departments of: Education and Science; Justice Equality and Law Reform; Health and Children, and the Irish Society for the Prevention of Cruelty to Children.

phases[101]. The storage and use (including access to and restriction thereof) of testimony and other evidence obtained during hearings becomes of crucial significance, not only for all those who engaged in the CICA, but also their families and the broader general public. The importance of ensuring process transparency and the need for a human rights-oriented approach to archiving (and its impact on memorialisation efforts) is part of ongoing and dynamic national healing, discussed further in Chapter IV of this piece.

The gathering, use and storage of witness testimony and related evidence

Without a sufficiently malleable system in place that is able to cater to the needs of a cross-section of society, an accurate picture of the historical abuse that occurred cannot be wholly elucidated. The CICA and the Royal Commission had similar ways to glean testimony and other personal accounts of abuse. Some distinctions include that the Royal Commission was very flexible as to the form of testimony it would accept, particularly as the stories pertained to those from the disability sector. The CICA had an additional (voluntary) filtering phase conducted by 'inquiry officers'[102] that operated largely as a triage point; it helped determine what forum was most suitable to hear the particular story. A comparison of design nuances of the Royal Commission and the CICA, as they relate to the gathering of witness testimony and related evidence is outlined below. Given the secrecy and shame associated with abuse inflicted against children, and only later recounted as adults, creating a safe environment to recount individual experiences has been proven as essential to obtaining the best evidence.

The Irish model

The governing legislation of the CICA was the Commission of Investigation Act and the CICA Act. The former Act has the function of establishing commissions to investigate and report on matters of public concern from time to time. It determines a commission's powers and makes provision for related matters. The CICA Act more specifically established the CICA to investigate child abuse in State institutions. It enabled persons having suffered child abuse to give relevant evidence to Commission committees. The CICA Act stipulated that a Commission report was to be prepared and published containing investigation results and recommendations considered appropriate to prevent and protect against child abuse. It also

[101] Volume I, Chapter 5, paragraphs 5.20-5.26 [The Investigation Committee's Method of Investigation] of the CICA Report, (Final Report, May 2009).

[102] pursuant to section 23 of the CICA Act.

allowed for actions of redress to be taken as regards continuing effects on persons who had suffered child abuse.

The Investigation Committee had statutorily conferred powers of compulsion[103] that near to mirror the powers of the Royal Commission counterpart provisions. The Investigation Committee could direct a person to attend a hearing and give evidence, produce documents, or issue any other directions deemed reasonable, just and necessary in furtherance of the performance of the committee's functions. A refusal or failure to comply with such directions was an offence[104]. Any evidence obtained under compulsion is inadmissible as evidence against that person[105]. As regards hearings powers, the establishing Commissions of Investigation Act stipulated that evidence was to be given in private unless the witness requested otherwise and the request was granted by the Commission, or if the Commission determined it desirable to hear the evidence in public to ensure procedural fairness or to progress the ongoing investigation[106]. It was an offence[107] to disclose or publish any evidence given (including the contents of any document produced) by a witness given in private.

Exceptions to the general disclosure prohibition available in the grounding Commissions of Investigation Act that seem wider in ambit than the Royal Commission regime. Such exceptions include: that a court may direct the disclosure or publication of private testimony[108]; the commission may disclose the substance of evidence in its possession if it considers the recipient ought be made aware of the relevant evidence; and if disclosure is considered appropriate, the source of the evidence is not required to be disclosed. However, the commission retains discretion to do so[109]. Interestingly, the recipient is then afforded an opportunity to comment (orally or in writing) on the evidence received[110]. Should the commission establish facts on the basis of evidence received in private, section 11(4) clarifies

[103] pursuant to Part 3 of the Commissions of Investigation Act, and more specifically section 14 of the CICA Act [Powers of the Investigation Committee].

[104] section 14(4) of the CICA Act.

[105] section 21 of the CICA Act.

[106] section 11 of the Commissions of Investigation Act.

[107] section 11(5) of the Commissions of Investigation Act.

[108] section 11(3)(a) of the Commissions of Investigation Act.

[109] sections 12(1) & (2) of the Commissions of Investigation Act.

[110] section 12(3) of the Commissions of Investigation Act.

that such facts will not be prohibited from being published in a report as the Act provides. There is no provision in the Royal Commission Act that provides for this process of passing on evidence obtained in private, and allowing the relevant person an opportunity to respond.

More specifically under the CICA Act, section 28 codified the general prohibition that a person (including the Commission and the Investigation Committee) shall not be required to disclose information provided to it or obtained in the performance of its functions under the Act. Exceptions to this are if a member of the Garda[111] or an appropriate person reporting under the *Protections for Persons Reporting Child Abuse Act 1998* (Child Abuse Act), acting in good faith, reasonably believes the disclosure is necessary to prevent an act or omission constituting a serious offence, or to prevent, reduce or remove a substantial risk to life, or to prevent the continuance of child abuse[112]. The same exceptions apply as regards Confidential Committee testimony and documents obtained therein. Judicial review was available of Confidential Committee decisions, proceedings of which were to be conducted otherwise than in public[113]. If a relevant court was satisfied the relevant disclosure was necessary in the interests of justice and that in doing so would not identify (or contain information that could lead to the identification of) persons subject of the child abuse, an exception would apply and permit such proceedings[114].

Of note, relevant documents and/or evidence provided to, or prepared by, the Confidential Committee were precluded from categorisation as 'Departmental records' under the *National Archives Act 1986* (the National Archives Act) by the dis-application of the definition section 2(2) of that Act. The interaction of the above-stated provisions has the effect of the given State department retaining the material and copies thereof (namely, the Department of Education and Skills in the case of the subject commission), which is a cause for concern given the same department concealed instances and allegations of child abuse knowingly for decades. As a means of balancing this, an offence was prescribed in section 27(6) of the CICA Act for prohibiting disclosure of information provided to, or prepared by, the Confidential Committee. Further protection is afforded by way of section 31, which restricts a court from ordering the discovery, inspection, production or copying of documents under the

[111] the Republic of Ireland police service.

[112] as per section 28(2) of the Child Abuse Act.

[113] section 27(4) of the CICA Act.

[114] section 27(3) of the CICA Act.

control of, or available to, the Commission or a Committee. This will be explored in more depth in the following section regarding documentary repositories of the CICA and the Royal Commission.

The Australian regime

The Royal Commission gathered witness testimony through private sessions, private and public hearings, each forum varying—*vis-à-vis*—in terms of use of evidence therein collected and the level of confidentiality attached. Persons that engaged in private sessions, governed by Part 3 of the Royal Commission Act, were not taken to be commission witnesses and all statements made (including documents/things produced) were then, and remain, inadmissible as evidence[115]. Absolute confidentiality is attached to private sessions by virtue of section 6OG of the Royal Commission Act, with section 6OH creating an offence[116] for the unauthorised use or disclosure of information provided during a private session. The intention of the strict confidentiality attached to private session evidence was to create an option for those persons that wished to contribute to the Royal Commission, but did not want to be identified or involved in any court-like procedures. Many persons that gave evidence during private sessions hoped their contribution would help convey the most accurate picture of the scale and extent of abuses that occurred in institutions nation-wide. To further that end, some de-identified stories were included in Royal Commission reports and recommendations as case studies[117].

The Royal Commission had similar extraordinary powers of compulsion as did the CICA. It too could compel witnesses to give evidence that may have been self-incriminating[118], or require a person to give evidence and/or produce documents or things[119]. To balance this, any testimony or other evidence provided was deemed to have been given under compulsion and therefore inadmissible as evidence directly against that person in any proceedings arising, criminal or civil, in Australian jurisdiction. Should a person fail to attend a hearing, the Commission had power to issue an arrest warrant and instigate contempt proceedings[120].

[115] section 6OE of the Royal Commission Act.

[116] punishable by 12 months imprisonment or 20 penalty units or both.

[117] permissible by way of section 6OJ(b) of the Royal Commission Act.

[118] pursuant to sections 6 and 6A of the Royal Commission Act.

[119] as per section 2 of the Royal Commission Act.

[120] see sections 6B and 6O of the Royal Commission Act.

Should a witness have given conflicting evidence—for example, if attending both a public and private hearing the witness testimony proved inconsistent—perjury proceedings may be enlivened or other penalties imposed[121].

Protections were afforded in the event that coercive powers were utilised as leverage to obtain honest accounts. The underlying rationale of this strategy was akin to the CICA's, that being to glean a body of information to contribute to a broader narrative, and to elucidate more completely the systemic nature of the abuse that was suspected to have occurred. The primary purpose of the Royal Commission was not to establish individual guilt; rather its Terms of Reference clearly stipulated that the inquiry be focused on institutional responses to allegations or incidents of child sexual abuse, with individual guilt arising as a subsidiary corollary. To balance these powers, strict protections regarding the use of information obtained under compulsion were codified[122] and utilised to ensure and maintain the confidentiality of evidence. Moreover, case studies were anonymised for reporting and recommendation purposes.

Synthesis of the CICA and Royal Commission models as they pertain to the treatment of testimony and evidence

Both the Irish and Australian models are similar in their approaches to gathering testimony. Similar regimes were created as regards coercive powers and similar safeguards against self-incrimination were available. Each system had rules governing confidentiality and disclosure, which varied according to the forum in which the testimony or evidence was given. Although it appears the CICA was actually legislatively broader in terms of circumstances allowing communication of testimony, the application of these provisions was not seen play out, nor was its scope to do so publicised. The Royal Commission however broadcast its referrals to authorities, including those to police, as one of its most commendable successes. On the Royal Commission website homepage, statistics regarding the number of referrals made by the commission take pride of place; at the close of the Royal Commission and at the time of public release of its Final Report in December 2017, there had been 2,757 referrals made by the Royal Commission to relevant authorities, 2,252 of which were to police; of those

[121] see section 6H of the Royal Commission Act for the offence of knowingly giving false or misleading evidence to a Royal Commission; the maximum penalty being five years imprisonment or a $20,000 (AUD) fine.

[122] governed by Parts 2 & 4 of the Royal Commission Act. The length of sentence conveys the seriousness the Commissioners attached to the disregard of a direction issued by the Commission and their insistence on garnering *truth* as a form of justice. Other offences are prescribed in Part 3 for acts or omissions that had the effect of misleading and/or intervening with the proper functioning of the Royal Commission's inquiry.

referrals to police, just over half (1,129) related to child sexual abuse in religious congregations[123].

Documentary repositories

This attitudinal distinction regarding action flowing from the course of each commission's inquiry is indicative of the surrounding political climate of the given context. One reading is that State and Church in Ireland are continuing to collude in order to prevent access to witness testimony that may result in downstream proceedings. The international community has likewise criticised Ireland for its low number of prosecutions as regards institutionalised abuse of women and children[124]. When questioned about the few prosecutions arising from the CICA by the UN Committee Against Torture, the government fell back on the decision not to name individuals as perpetrators as the basis for the few prosecutions arising. The Irish government said because of the preclusion of disclosure to the Garda as regards the names of perpetrators, initiation of criminal investigations was prevented, which correlated with the low prosecutorial figures[125].

Contrasting the attitude above against the highly publicised conviction of (the former Cardinal) George Pell as the most senior Catholic Church official to be convicted of personally committing acts of child sexual abuse, the outward portrayal is such that the Australian political community *wants* there to be punishment commensurate with the gravity of offences perpetrated. Of note, the guilty verdict was delivered just over one year following the release of the Royal Commission's Final Report. Retention and access to commission records, as a critical component of successful downstream proceedings, seems stifled in Ireland. During parliamentary debate on the current *Retention of Records Bill 2019* (the Retention Bill), Ministers have raised the retention by the Department of Education and Skills of relevant records as a concern given the distrust that remains with the department and victim/survivor groups. This Bill has implications not only for CICA records, but also to the current Mother and Baby Homes Commission of Inquiry.

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[123] 'Final Report – Volume 1, Our inquiry', *Royal Commission into Institutionalised Responses to Child Sexual Abuse*, p. 25, available at <https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_1_our_inquiry.pdf>.

[124] International Covenant on Civil and Political Rights, Human Rights Committee Concluding observations on the fourth periodic report of Ireland, CCPR/C/IRL/CO/4, 19 August 2014.

[125] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Committee Against Torture, Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure [Second periodic reports of States parties due 2012—Ireland], CAT/C/IRL/2, 20 January 2016, paragraph 223, p. 30.

The CICA records—a contemporary debate

The Retention Bill in substance seeks to retain records of the CICA, the Residential Institutions Redress Board and the Residential Institutions Redress Review, that would otherwise be disposed of with the dissolution of such bodies. It also seeks to seal and withhold from the public information obtained during the course of the CICA for a period of 75 years[126]. The rationale behind the proposed extension of the sealing period, currently prescribed under the *National Archives Act 1986* (the National Archive Act) as 30 years[127], is to protect the confidentiality of persons who gave evidence under assurances of privacy, and continues to be for the protection of the 'good names' of persons accused during Commission proceedings absent a criminal trial to test the evidence. In complete contrast and as mentioned above in Chapter II, then Australian Prime Minister Julia Gillard, when announcing her recommendation for the Royal Commission, affirmed Australia's refusal to accept justification for excusal from responsibility on the basis of 'self-serving' veils of (previous) reputation.

On 2 April 2019 during Dáil Éireann debate on the Retention Bill, some Ministers cited the need to balance the wishes of those who shared stories on the proviso of absolute confidence on the one hand, with the need to ensure the preservation of records that evidence a previously shunned, silenced part of the nation's history on the other. While some constituent representatives agreed the Retention Bill was needed to ensure the retention of records, they voiced the unreasonableness of the proposed 75-year sealing period, questioning why the 30-year period already provided for in the National Archives Act was not sufficient. Concern was also raised regarding the physical storage of records in the possession of the Department for Education and Skills and the proposed transfer to the National Archives; Minister of Carlow-Kilkenny, Kathleen Funchion reiterated the records as being 'the horrific lived experiences of the residents in all these institutions who suffered at the hands of this State. They belong to the survivors and families and nobody else'[128]. If passed, survivor testimony, administrative records and other evidence and information relating to the management of religious and other care facilities will be withheld from public inspection and scrutiny for at least 75 years. As a

[126] Explained in the context of the *Purpose of the Bill*, and sections 3 & 6 of the Explanatory memorandum to *Retention of Records Bill 2019*.

[127] when section 41 of the Commission of Investigation Act is read together with section 8(4) of the National Archives Act.

[128] Dáil Éireann debate, Houses of the Oireactas, 'Ryan Report on the Commission to Inquire into Child Abuse: Motion (Resumed), Thursday, 11 June 2009, available at <https://www.oireachtas.ie/en/debates/debate/dail/2009-06-11/7/>.

related point, this will impact on those affected and/or engaged in the Mother and Baby Homes Commission of Investigation, as records of the CICA may contain information relating to identity details if the testimony related to a child in residential care.

The Royal Commission—archival access as a moving feat

This research strengthens the view that access to personal testimony is essential to facilitating the exercise of the fundamental right to live with dignity. It also helps to ensure process transparency, which affects the overall integrity of a commission of inquiry body. The right to know one's own identity may be facilitated through access to records, which is particularly relevant in the context of the Mother and Baby Homes Commission of Investigation, but also to victims/survivors who suffered in out-of-home care facilities investigated under the remit of the CICA.

In the case of testimony given during the Royal Commission private sessions, the person or body requesting access must have appeared at the private sessions or is an authorised representative. Records that contain private session information that identifies a natural person who appeared at a private session, is not publicly accessible for 99 years after the record came into existence[129]. Again, there remains discretion for the communication of any information or evidence (as the case may be) obtained by the Royal Commission to Attorney-General departments, prosecutorial or investigative agencies, or to an authority or persons responsible for the enforcement of the law at Commonwealth, State or Territory level, should it be deemed appropriate and the information relates (or may relate) to a contravention (or evidence of a contravention) of a law of the Commonwealth, State or Territory[130]. Further, the commission has discretion to prohibit or stipulate conditions to the publishing of evidence given before it; any publication in contravention of that section is an offence[131].

Accessing or obtaining copies of personal witness testimony, including from private sessions, is permissible and catered for by the Royal Commission Regulations[132]. Physical files are kept

[129] section 6OM of the Royal Commission Act.

[130] Part 5—*Miscellaneous*, section 6P of the Royal Commissions Act.

[131] pursuant to sections 6D(3) & 6D(4) of the Royal Commission Act.

[132] A *Royal Commission record* is defined in section 9(1) of the Royal Commission Act as a record that (a) was produced by, given to or obtained by a Royal Commission; and (b) is no longer required for the purposes of the Commission; and includes a copy of such a record. The Royal Commission Regulation

in the custody of the Secretary of the Attorney General's Department (the custodian)[133] and permissible circumstances are outlined in that instrument that may give rise to the custodian permitting access[134]. The custodian has discretion to allow a person or body a copy of (or access to) a Royal Commission record in any form reasonably considered by the custodian to give that effect. For example, it may be reasonable to give a copy of an audio recording in the form of a transcript to a requesting person[135]. Royal Commission records were also accessible for *enforcement purposes*[136], broadly defined in section 9(1) of the Royal Commission Act to include for prosecutorial and/or investigative purposes. The flexibility of the legislation permitting the communication of relevant information in a timely way to law enforcement was a key distinction of the Royal Commission model as compared against to CICA Act, which has evidently shaped downstream proceedings.

The interaction with the *Archives Act 1983* (Cth) (the Archives Act) is important for consideration with reference to the custody of Royal Commission records after the dissolution of the Royal Commission in December 2017. Section 22(2) & (3) of the Archives Act provides that all Royal Commission records are deemed Commonwealth records and the Commonwealth is entitled to their physical possession once they are no longer required by the Royal Commission. The responsible Minister[137] has power to determine and direct the custodian of the records. In making a direction however, the Minister must adhere to any determination by agreement made between Commonwealth and the State as to which Royal Commission records will be caught by such a direction[138].

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was amended in February 2019 by the *Royal Commissions Amendment (Custody of Records) Regulations Bill 2019*.

[133] by virtue of section 11(3) of the Royal Commission Regulations.

[134] as per sections 11(4) & (5) of Royal Commission Regulations. Such circumstance include if free access is not available (via the Royal Commission website for example), if the requesting person or body gave the record to the Royal Commission, the request was not made on behalf of a State or Territory or a Department thereof, and the custodian is reasonably satisfied of the identity of the requesting person or body.

[135] section 11(7) of the Royal Commission Regulations.

[136] as provided for in section 11(6) of the Royal Commissions Regulations.

[137] Section 3—*Interpretation* of the Archives Act defines *responsible Minister*, in relation to a Commonwealth record, as meaning the Minister to whose ministerial responsibilities the record is most closely related.

[138] In accordance with subsection (6) of the Archives Act.

In accordance with this regime and following the recommendations contained in the Final Report of the Royal Commission, on 23 October 2018 the National Archives of Australia issued a new *Records Authority 41* requiring Australian government agencies to retain records for at least 45 years that relate to child sexual abuse allegations and incidents. The requirement seeks to allow for delayed disclosure of abuse while taking into account statutory limitation periods (including state, territory and federal variances) for civil actions. It also ensures records are retained that may contain essential evidence for survivors of child sexual abuse[139]. The National Archives is also providing guidance to state and territory governments regarding identification and management of records that may become relevant to an actual or alleged child sexual abuse incident. This work and its objectives are contained in a formal advice to Australian government agencies, which relates to meeting the Royal Commission's recommendations regarding records and record-keeping principles[140]. Following the dissolution of the Royal Commission, it is possible for persons that provided testimony to obtain access to, or a copy of, their own personal testimony. The Australian political community, together with the support of a strong and informed civil society, views access to Royal Commission records as critical to the ongoing and dynamic nature of national healing following widespread abuses.

Summary of documentary repository findings and its impact, then and now

This exercise has also demonstrated that a strong political will and its ongoing support of a commission of inquiry is critical to its success during its progress and long after. Downstream proceedings, or investigation of avenues for compensation or redress, become significantly hampered (or prevented from even the realm of possibility in many cases) if overly stringent restrictions or inflexible prohibitions on access to testimony prevail, as is currently the case in Ireland. If able to withstand domestic and international pressure and (likely) legal challenges regarding the proposed increase of archival sealing periods, the government of Ireland may well perpetuate and reinforce a system that was, and to a large degree seems to remain, opaque and elitist. The protection of the 'good name' of religious institutions in Ireland seems preferred over the full and proper facilitation of access to justice. Ireland's deep, historical ties to the church seem not yet ready to be unbound. But perhaps it is precisely this, the Irish

[139] 'General Records Authority 41', *National Archives of Australia* (webpage, 2018), available at <http://www.naa.gov.au/about-us/media/media releases/2018/GRA41_response_to_Child_Sexual_Abuse.aspx>.

[140] via the 'Information Management Standard', *Australian Government* (webpage, 2018), <http://www.naa.gov.au/Images/Information%20Management%20Standard_17%20April%202017_tcm16-99205.pdf>.

government's historical interconnectedness with the Church that distinguishes it contextually from Australia, which has a comparatively far shorter history with the Catholic institution. In addition, Australia has a greater rate of secularism and multiculturalism, which may further distinguish the countries contextually. It appears these underlying, deeply engrained cultural specificities have influenced commission of inquiry outcomes and the implementation of recommendations handed down by each transitional justice project.

CHAPTER IV

The right to truth and its inextricable links to the preservation of archives

A comparison of transitional justice mechanisms used by Australia and Ireland to address historical, systemic child abuse has illuminated the importance of utilising multi-dimensional approaches to truth and justice seeking that extends beyond temporal boundaries. The analysis has juxtaposed the geopolitical contextual settings, the legislative architecture of each commission, the statutory powers conferred, and the use and retention of records therein obtained. In doing so, this exercise has revealed the importance of human rights archiving to preserve aptly a selection of records obtained during the course of inquiry processes, for current advocacy and future needs as they change over time. These findings correlate with current scholarly and political debate regarding the implementation of the (now firmly established) right to truth, the emergence of the right to memory, and the individual and collective dimensions of those rights. The duty to record is an inseparable corollary of the exercise of those rights that obligates States to preserve *habeus data*[141], as recognised by the European Court of Human Rights and other regional systems[142]. As seen play out across the Latin American landscape, transitional justice mechanisms continue to develop and expand in response to the diversification of societal needs over time. Ongoing and genuine victim/survivor engagement is therefore necessitated for building reparation packages, preparing civil or criminal claims arising, and for memorialisation efforts.

The established right to know

Victims of atrocity have the right to know the truth as a form of justice, and for that 'truth' to be promulgated to the broader community (about the abuses endured). Gaining knowledge of who is to be held responsible, the causes that led to the culture of abuse, the statistics of the violations that occurred, and (in the context of enforced disappearances) learning the fate and whereabouts of those victims, goes toward the establishment of truth 'to the fullest extent possible'[143]. While some attest to the derivation of the right to truth as stemming from other

[141] that is, documentation in an archive.

[142] namely, the African Commission on Human and People's Rights and the Inter-American Court of Human Rights.

[143] United Nations Human Rights Commission, *Human Rights Resolution 9/11*, 'Right to the truth', 24 September 2008), A/HRC/RES/9/11, cited by Eduardo González and Howard Varney, eds, 'Truth

rights codified in international human rights law (such as the right to dignity, the right to family life and the right to an effective investigation), others view the right to truth as a stand alone right in and of itself. Regardless, the right to truth has become a norm of customary international law, with various regional systems and domestic courts jurisprudentially confirming its enforceability[144].

The emerging right to memory

In its collective sense, the right to memory entails that countries are obligated to preserve their national memory. At an individual level, memory (unlike history) is not as inclined to political dictation by governmental authority, academic scholars or other field specialists. Nor can memory be totally erased by power or shaped in favour of the majority group, in furtherance of a national narrative absent the voices and lived experiences of marginalised others. Commission of inquiry models rely on memory, using it to document (officially) widespread abuses and make recommendations as regards reparations and other forms of redress to restore the dignity of those who have suffered—as far as possible. Put one way, commission of inquiry models as transitional justice mechanisms 'seek to arrive at the truth and to attain justice by accessing memory'[145]. Significantly, both the Irish and Australian models subject of this research drew upon the memory of adults of a certain era. This process of bearing witness to autobiographical memories helped to construct new narratives and shape collective memory[146].

Commission of inquiry findings comprise documentary evidence, testimony and other documents or things, and operate as tangible sources of individual and collective, social and public, memory. Antonio González Quintana, building on the seminal findings of Louise Joinet and Diane Orentlicher, regards the right to know and the need to record as central to

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Seeking: Elements of Creating an Effective Truth Commission', *Amnesty Commission of the Ministry of Justice of Brazil* (New York, 2013) International Center for Transitional Justice, Chapter 1, pp. 3-4.

[144] 'Promotion and Protection of Human Rights—Study on the right to the truth', United Nations Economic and Social Council, *Commission on Human Rights*, Report of the Office of the United Nations High Commissioner for Human Rights, Sixty-second session: Item 17 of the provisional agenda (8 February 2006) E/CN.4/2006/91, p. 5.

[145] Jo-Anne Duggan, 'The right to memory, *the Archival Platform*, (webpage, 2010), available at <http://www.archivalplatform.org/blog/entry/the_right/>.

[146] Johanna Sköld (2013) Historical Abuse—A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Care Worldwide, Journal of Scandinavian Studies in Criminology and Crime Prevention (2013) Vol. 14, No. S1, 5–23, available at http:/dx.doi.org/10.1080/14043858.2013.771907, p. 12.

the work of archivists[147]. In his piece, 'Archival Policies in the Protection of Human Rights'[148], Quintana (then Head of Archives and Documentation at the Consultative Council of the Community of Madrid) explained that because public archives comprise an integration of document types and sources, they function as proofs of human rights violations and 'spontaneously become mirrors of the society in which produced them'[149]. This research opines the view that the establishment and effective maintenance of human rights-orientated archives that appropriately catalogue commission of inquiry findings (related reports and recommendations) gives credence to the authority, and the exercise, of the right to memory.

International perspectives

The preservation of documentary evidence to protect human rights and denunciate atrocity has proven to be an 'essential' and 'unique' information source. Effective archiving has assisted in understanding organisational structures of regimes, their hierarchies and methods of systematically carrying out gross human rights violations. Downstream proceedings have benefited from having access to alternative sources of evidence that has proven to help verify cases occurring *en masse* as the 'perfect' State-sanctioned crimes[150], as one example.

Lessons from Chile

The Chilean National Commission for Truth and Reconciliation (the Chilean Commission) produced a report (commonly known as the 'Rettig Report' after its Chair, Raúl Rettig Guissen) regarding Pinochet's notorious death flights, the use of clandestine arrest and torture facilities, and the Chilean army's 'Caravan of Death' squads that were used to exterminate dissidents and spread fear. The Chilean Commission based some of its conclusions on

[147] United Nations Economic and Social Council (UN ESC), *Commission on Human Rights*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 'the Administration of Justice and the Human Rights of Detainees—Question of the impunity of perpetrators of human rights violations (civil and political), Forty-ninth session: Item 9 of the agenda (2 October 1997), revised final report prepared by Louis Joinet pursuant to Sub-Commission decision 1996/119 (E/CN.4/Sub.2/1997/20/Rev.1). The 'Joinet Report, as it is more commonly known, was revised in 2005 by Diane Orentlicher, UN ESC, *Commission on Human Rights*, 'Promotion and Protection of Human Rights—Impunity—Report of the independent expert to update the Set of principles to combat impunity', (8 February 2005), E/CN.4/2005/102/Add.1.

[148] Antonio González Quintana, 'Archival Policies in the Protection of Human Rights', *International Council on Archives* (ICA), (Paris, 2009), available at <https://www.ica.org/sites/default/files/Report_Gonzalez-Quintana_EN.pdf>. This is an updated and fuller version of the report prepared by UNESCO and the ICA (1995) regarding the management of archives of the State security services of former repressive regimes.

[149] Ibid, p. 23.

[150] Jonathan Franklin, 'Chilean army admits 120 thrown into sea', *The Guardian*, (Santiago, 9 January 2001), available at <https://www.theguardian.com/world/2001/jan/09/chile.pinochet>.

testimonial similarities. In order to garner truth, like-evidence—such as information as to the location of reported disappearances, the attributes of disappeared persons and their affiliations with certain political agendas, as well as information provided by their next-of-kin—was accepted and used to ground commission findings. Spanish judge Baltasar Garzón was pioneering in his use of the Rettig Report findings to ground and issue an international arrest warrant for Pinochet by virtue of universal jurisdiction[151]. From that point, the Rettig Report acquired legal character, which had ramifications domestically and internationally. Chilean lawyers and justices have since used and accepted documentation collected and preserved by human rights organisations and victims during Pinochet's reign. The material gathered helped evidence the sophistication and systemised methods used by Pinochet's secret organisations (the DINA and the CNI) during their campaign of terror. This documentation accompanied the bulk of evidence already collated by the Chilean Commission and was ultimately used to prosecute Pinochet[152].

The archives of the Chilean Commission, as well as the human rights archives of the Documentation and Archives Foundation of the Vicariate of Solidarity (the Foundation), contain publicly available files that seek to represent this dark chapter of Chile's history. The stated repositories contain some records that were used by the Chilean judiciary to prosecute recent human rights abusers. Quintana attests to the public visibility of human rights archives as indispensable to the dynamism of justice seeking aims. Significantly, in contexts that are 'ordinary or transitional', human rights archives and their access are essential in 'shaping the social memory'[153].

Resilience required to advance discovery – Spain's contribution

Looking elsewhere and particularly relevant to Ireland is the Spanish experience. Spain's use of transitional justice mechanisms to address atrocity inflicted under the Franco military dictatorship remains ongoing; it has been pioneering in its approach toward reconstructing families torn apart by State-sanctioned enforced disappearances. Current efforts focus on the disappearances of persons during the 1940s, namely crimes committed over 70 years past.

[151] National Commission for Truth and Reconciliation, *Truth Commission: Chile 90*, Supreme Decree No. 355 (May 1990 – February 1991) available at <https://www.usip.org/publications/1990/05/truth-commission-chile-90>.

[152] Anita Ferrara, 'Assessing the Long-Term Impact of Truth Commissions—The Chilean truth and reconciliation commission in historical perspective' (Routledge, 1st ed, 2015), pp. 124-125.

[153] Antonio González Quintana, 'Archival Policies in the Protection of Human Rights', *International Council on Archives* (ICA), (Paris, 2009), available at <https://www.ica.org/sites/default/files/Report_Gonzalez-Quintana_EN.pdf>. pp. 34-35.

Despite Spain's transition toward democracy occurring during the later part of the 1970s, relatives of disappeared persons have only in recent years forged alliances to find out what happened to their loved ones. The arising non-governmental groups and associations aim to gather information related to (or that might help reveal) burial locations of deceased relatives, with the view to finding evidence in support of the correction of civil registry information. In the case of Spain, going 'beyond the temporal context of transition'[154] was and remains to be necessary in order to identify and rebuild family relationships, despite the passage of time since the crimes were committed. The assessment of these international experiences helps illustrate the possible durability of transitional justice mechanisms if used with the authentic intention of uncovering (further) truths.

Cross-continental learning

This research advocates against the findings and outcomes of the CICA and the Royal Commission becoming 'mere residue pressed into obscurity'[155], overshadowed by their dissolution and finalisation of respective recommendatory reports. The Office of the United Nations High Commissioner for Human Rights, reporting on the experience of archives as a means to guarantee the right to truth, attested to 'truth commissions and special courts and tribunals' oft being needed for 'prosecutions, reparations or other State action'. It was also highlighted that the need for access to relevant records 'does not diminish with the closing of the commission'[156]. Downstream proceedings, victim-centred reparation packages, and memorialisation efforts as 'other State action' should be bolstered by evidence collated during inquiry processes in order to address and take action with respect to the discoveries made. Relevantly and in the context of South Africa, criticism has been made regarding inaction (by the State and the international community) once new and officially documented truths were imparted. The perpetrators were afforded the opportunity to be forgiven for past crimes by telling their stories in the commission environment, this process seen by some favoured ahead

[154] Ibid, pp. 38-39.

[155] Hollie Kerwin and Maya Narayan, 'The Court as Archive—When the Carnival is Over: The Case for Reform of Access to Royal Commission Records', *Australian National University Press Library*, available at <https://press-files.anu.edu.au/downloads/press/n5044/html/ch03.xhtml#footnote-216-backlink>.

[156] UN General Assembly, *Human Rights Council*, 'Report of the Office of the UN High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to truth', Seventeenth session: Agenda items 2 & 3, (14 April 2011), A/HRC/17/21, p. 11.

of the provision of restorative justice for victims/survivors[157]. This example is emblematic of the need for the ongoing use and appropriate implementation of transitional justice mechanisms even after the close of the relevant inquiry, discussed further below. Attention will also be drawn to the relevance of cross-cultural analysis to expand transitional justice scholarship, to create new ways of addressing past abuses, and to ensure remembrance with the final aim of preventing recurrence.

Applicability to the Irish situation

This year, 2019, marked 20 years since Bernie Ahern's State apology in 1999 and ten years since the publication of the CICA's final report (the Ryan Report) in 2009. While there were significant achievements, there have been missed opportunities also. The framing of the CICA's scope in therapeutic terms may have been suitable for some survivors, but in terms of future pursuits of alternative forms of justice, it in effect constricted the space for victims to take ownership of the process and its findings. The CICA's decision not to name individual perpetrators made amid legal battles, was also a cause of frustration and angst to survivors, a legacy of which is still felt. More recently, the proposal to increase the sealing period of records (namely, records of the CICA, the Residential Institutions Redress Board and the Residential Institutions Redress Review Committee) from 30 years to 75 has raised concerns voiced by scholars, politicians, commentators and historians. Moreover, though the CICA provided a sympathetic forum for survivors to tell their stories, the 'sealing of their testimony revokes that power', and the extended period in effect puts out of range other lessons that could be learned and appreciated by those living now[158]. Of note, Dr. Sarah-Anne Buckley—historian of child welfare, childhood, youth and gender in Ireland—contends that historical justice is critical today and will remain an imperative to future generations. Where the records will be stored, their accessibility, and whether or not sincere consultation will occur regarding these decisions is, in Dr. Buckley's view, 'of utmost importance to survivors, academics and activists today'[159].

Some institutions fell outside the remit of the CICA, including the Magdalene Laundries, which are now being inquired into by virtue of the Mother and Baby Homes Commission. It

[157] Nishnu Pathak, 'A Comparative Study of World's Truth Commissions—From Madness to Hope', *World Journal of Social Science Research*, Vol. 4, No. 3, (2017), p. 216, available at <www.scholink.org/ojs/index.php/wjssr>.

[158] Conall Ó Fátharta, 'Ryan Report that shocked nation offers much but gaps in the detail still remain', *Irish Examiner* (webpage, 19 May 2019) available at <https://www.irishexaminer.com/breakingnews/specialreports/ryan-report-that-shocked-nation-offers-much-but-gaps-in-the-detail-still-remain-925312.html>.

[159] Ibid.

is anticipated the extended sealing period will have ramifications not only on those that engaged with the CICA and their relatives, but also to persons involved in the current the Mother and Baby Homes Commission, particularly with respect to making investigations to establish personal and familial identity. Ireland ought take heed of Spain's latest public calls to make available archives and other relevant documentary sources that may help identify and locate the forcibly disappeared. Additionally and of particular relevance to Ireland, Chile established a national DNA database in 2004 to assist with the identification of newly discovered human remains. This forms an essential part of an ongoing project to resolve missing persons cases that derive from the Pinochet regime. Being open about the past can help future generations come to terms with, and prevent against, lost opportunities. Developing a similar DNA database project in Ireland could help further this end. Despite these setbacks, the Ryan Report remains significant, as it was the first official and documented acknowledgement of the suffering of Ireland's children in some of its most trusted institutions.

Inhibiting access to the truth in its fullest form may be perceived as a further form of State-sanctioned control, and so ultimately undermine the work of the CICA with flow-on effects to the Mother and Baby Homes Commission. Writing about the ways in which Ireland is maintaining secrecy of its history of institutional abuse, Dr. Mauve O'Rouke, co-founder of the *Clann Project* (an initiative contributing to the establishment of the truth regarding unmarried mothers and their children in institutions during 20th century Ireland) and lecturer at the Irish Centre for Human Rights at the National University of Ireland in Galway, has highlighted her concerns regarding the codification of a criminal offence under the *Residence Institutions Redress Act 2002*—to publish information about an application or award made under that Act if it may lead to the identification of the applicant, another person or an institution. Dr. O'Rourke asserts this restricts survivors from speaking publicly or writing about their experiences, and impairs their understanding regarding whether they can make reports or complaints to the Gardaí[160]. The very founders of the CICA acknowledged the importance of bearing witness to victim suffering by listening to their stories, and this can be affected through the auspices of public conversation. O'Rourke contends that the inability of victims/survivors to access records pertaining to their testimony or personal information, including non-sensitive administrative files, denies the construction of identity and perpetuates the silence about the abuse suffered. Societal engagement is consequently hampered, which O'Rourke asserts will likely delay opportunities for civil society to disrupt

[160] Maeve O'Rourke, '10 ways institutional abuse details are still being kept secret', *RTÉ*, (webpage, 8 May 2019), available at <https://www.rte.ie/brainstorm/2019/0503/1047282-10-ways-institutional-abuse-details-are-still-being-kept-secret/>.

and undo the prevailing records retention regime. Further, there are not yet processes in place in Ireland that facilitate education of its history of institutional abuse. Memorialisation efforts have not been given the political support or resources needed, which stifles community recognition and engagement with its past. Anita Ferrara, transitional justice scholar, lawyer, and author of *Assessing the Long-Term Impact of Truth Commissions: The Chilean Truth and Reconciliation Commission in Historical Perspective*, attests to public memorialisation being inherently part of reparation processes. Therefore, memorialisation efforts functioning as public recognition of the private suffering of victims of past atrocities are crucial to individual and collective healing[161].

Australia's hold on private session information and the exclusivity of its redress scheme

In the context of the Royal Commission, it is anticipated survivors will take issue with restrictions of access to private session material. Such records are currently not accessible until they enter into the 'open access period', which is stipulated as being 99 years after the relevant record came into existence pursuant to the National Archives Act. That being said, survivors were able to request access to an audio recording of their private session, however this request was required to be submitted prior to September 2017. The process of accessing the audio recordings was reportedly closely monitored, no copies were permitted to be made, and nor were notes about commissioners', or commission officers' commentary allowable[162]. Moreover, if original documents given during private sessions were not returned to respective witnesses before the dissolution of the Royal Commission, it is considered likely these documents will be destroyed. Lawyers from a specialist community legal centre initially established to assist survivors engage with the Royal Commission, *Knowmore*, have raised concerns regarding possible destruction of documents and the inability of witnesses to access private session material. It has been contested that access to these records would help ground civil claims, or claims arising under the national redress scheme (discussed below). It would also be one way to prevent the possible re-traumatisation of survivors having to retell their stories to legal practitioners preparing their claims[163].

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[161] Anita Ferrara, 'Assessing the Long-Term Impact of Truth Commissions—The Chilean truth and reconciliation commission in historical perspective' (Routledge, 1st ed, 2015), pp. 196-197.

[162] Interview with Prue Gregory, Principal Lawyer, Knowmore (29 September 2017); cited by Hollie Kerwin and Maya Narayan, 'The Court as Archive—When the Carnival is Over: The Case for Reform of Access to Royal Commission Records', *Australian National University Press Library*, available at <https://press-files.anu.edu.au/downloads/press/n5044/html/ch03.xhtml#footnote-216-backlink>.

[163] Ibid.

The national redress scheme was created on the recommendation of the Royal Commission by way of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth) (the Royal Commission Redress Act). The scheme legislated the provision of recognition payments, expedited financial compensation awards, and access to counselling services required as a result of sexual abuse that had occurred in institutional care. Federal, State and Territory governments and a range of other institutional types[164] had to opt-in (voluntarily) to the scheme before 30 June 2020. There have been calls for institutions that are refusing to sign up to be penalised; namely, to suspend respective tax concessions and/or withdraw their charity status to denunciate the denial of responsibility. In relation to the claim process, applications may be made under the scheme on fulfilment of the following three-pronged set of eligibility criteria; namely, that 1) the childhood sexual abuse occurred prior to 1 July 2018 (the date the scheme commenced); 2) one or more institutions were responsible for the abuse; and 3) the applicant must be an Australian citizen or permanent resident at the time of application. Given it is still at its inception, examination of the scheme's proposed operation is necessary to ensure its rollout is efficient, having regard to the positive lessons and areas of improvement highlighted above in the context of Ireland.

One of the most debated aspects of the government's scheme was its decision to exclude persons with criminal history from accessing redress. Significantly, the Royal Commission did not recommend criminal history to be an exclusion from entitlement. Some political commentators have labelled this move as form of victim-blaming, connoting the idea that only some victims are worthy of public sympathy[165]. Even access to counselling expenses for survivors sentenced to five or more years imprisonment will require the person to participate in an additional assessment process[166]. While there have been calls for compensation not to be tied to a persons' past activities, there is discretion available in the legislation as it stands to allow redress in some circumstances to even those convicted of a serious criminal conviction. The redress would be permissible so long as in doing so, it would not bring the scheme into disrepute or adversely affect public confidence in, or support of, the scheme[167]. Although

[164] Namely, education institutions, religious institutions, non-for-profit organisations and charities, and any other body, entity, group of persons or organisation (incorporated or not) that work with children.

[165] Dave Hunt, 'When it comes to redress for child sexual abuse, all victims should be equal', *The Conversation*, (webpage, 31 October 2017), available at <https://theconversation.com/when-it-comes-to-redress-for-child-sexual-abuse-all-victims-should-be-equal-86456>.

[166] Governed by Part 3-2 [Special rules excluding entitlement to redress] of the Royal Commission Redress Act.

[167] As governed by sections 63 (2) & (5) of the Royal Commission Redress Act.

conveyed as a restrictive criterion of the redress process, it may in actuality operate as a constructive and inclusive option—that is yet to be seen.

In relation to the special recognition payments, this research views such awards as a material form of reparation. Such payments are tangible sources of acknowledgment signify the State's recognition of the wrong endured by victims/survivors of abuse. The tax-free payouts were decided by government to be capped at $150,000 (despite the Royal Commission recommending $200,000) as the highest payment. The scheme will not impact on survivors in receipt of government payments already in place prior to the commencement of the scheme. Additionally, those in receipt of judge-awarded compensation or a monetary out-of-court settlement amount may still be eligible to make a claim. In such cases, any payment made by a participating institution that relates to abuse categorically within scope of the scheme, will be deducted from the amount payable[168]. Compensation as a form of recognition is important to help restore victims/survivors to the position they were in (or would have been in, in the case of child abuse commission of inquiries) prior to the abuse. However, victim/survivor needs are likely to change over time, additional costs may consequently arise, and the Australian government must be prepared to listen and respond accordingly. Looking forward, consultation regarding memorialisation efforts to honour and remember past suffering will help maintain engagement with victim/survivor groups, and will raise public awareness about Australia's newly (re)structured history.

Conclusion

This piece urges Australia and Ireland to consider the centralisation of a cross-section of relevant commission records, in conjunction with effective archival management practices, to help current and future investigations of a like nature. While archival processes are under way (albeit to varying degrees) in each context, this ought not be a static project. Rather, the creation of ongoing, reflective and responsive schemes ought be preferred and supported at an executive level. Importantly, human rights archivists must be responsive to the changing needs of diversifying populations over time, keeping in mind always that there is never one singular history. It is recommended that in furtherance of transparency, democracy and good governance, effective records and human rights-oriented archival process must be mobilised to facilitate critical analysis of *versions* of the past, to ensure neutrality and to safeguard against manipulation.

[168] Explanatory memorandum, 'Entitlement to Redress, *Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017* (Cth).

In sum, this research demonstrates that an open-ended, non-linear comparative analysis of transitional justice mechanisms will likely contribute to the prevention of future atrocity and/or its exposure to, through the fostering of cross-cultural awareness and the exchange of knowledge, as regards processes of addressing past abuses. Comparative analysis of the implementation of transitional justice norms in conflict, post-conflict and non-transitional contexts, is required for the development of more robust ways to address and prevent human rights abuses. This research has shown value in exploring ways other States have confronted their pasts using combinations of complementary methods of inquiry. That is, examining the intersection of truth commissions, national public inquiry models, traditional court processes, the provision of legal and non-legal remedies, and the archival of carefully selected records—despite the geopolitical contexts in which they derive—may be the most instructive and fruitful way to build and develop better solutions to addressing historical, endemic abuses. It is hoped raising awareness cross-culturally and thereby fostering global dialogue will help States (individually and collectively) heal wounds of the past, unavoidably leaving scars to enable memory and instil a sense of caution and vigilance for the future.

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