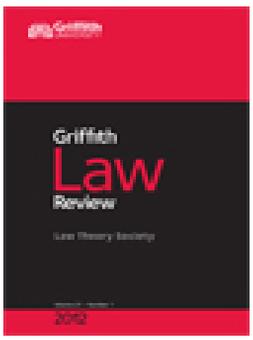

Griffith Law Review

ISSN: (Print) (Online) Journal homepage: https://www.tandfonline.com/loi/rlaw20

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To cite this article: Kate Gleeson & Sinéad Ring (2021): Confronting the past and changing the future? Public inquiries into institutional child abuse, Ireland and Australia, Griffith Law Review, DOI: 10.1080/10383441.2020.1855950

To link to this article: https://doi.org/10.1080/10383441.2020.1855950

Published online: 03 Feb 2021.

GRIFFITH LAW REVIEW
https://doi.org/10.1080/10383441.2020.1855950

Routledge
Taylor & Francis Group

RESEARCH ARTICLE

Confronting the past and changing the future? Public inquiries into institutional child abuse, Ireland and Australia*

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This article uses the framework of transitional justice to examine two prominent examples of national public inquiries into institutional child abuse: the Irish Commission into Child Abuse of 2000–09 and the Australian Royal Commission into Institutional Responses to Child Sexual Abuse of 2013–2017. It provides a detailed account of the practical workings of each inquiry in the context of the Irish and Australian political and legal environments, with a view to highlighting the particular nation-building function each played in informing a narrative about transitioning from the past to the present. Public inquiries are increasingly used by democratic states as a form of political and legal reckoning for mass crimes committed on children in the care of the state, with inspiration drawn from other examples of the political redress of atrocities (such as war crimes). While transitional justice approaches to peacetime human rights abuses have much to offer in their promise of truth recovery and accountability, they are limited in their ability to achieve justice in the context of consolidated democracies where the 'transition' from the past to the present is ambiguous and incomplete. This article points to the benefits of the national public inquiry approach to addressing institutional child abuse, while offering cautions about the expectations of transitional justice in this context, through the landmark examples of Ireland and Australia.

The advent of the twenty-first century saw an international wave of public inquiries addressing institutional child abuse. While governments have conducted inquiries into orphanages and foster care since the nineteenth century, recent initiatives are differentiated by their comprehensive scale, their focus on abuse that took place years ago, and the role they play in contemporary nation-building discourses.[1] This role includes the meaning that is made within the inquiries about the historical treatment of children

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*Many thanks to Peter O'Brien and Ann Barker for advice on this article.

[1]The UK staged at least 80 inquiries in the latter half of the 20th century: Wright (2017a); Fischer (2017). Swain (2014) documents 83 inquiries in Australia from 1853 and 2013: *History of Australian Inquiries Reviewing Institutions Providing Care for Children*, https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/Research%20Report%20-%20History%20of%20Australian%20inquiries%20reviewing%20institutions%20providing%20care%20for%20children%20-%20Institutional%20responses.pdf.

in different countries' economic, social and political developments, with a view to 'coming to terms with the past'.[2] At least 21 countries have held a recent public inquiry into child abuse, each with different legal powers and mandates.[3] To date, this is primarily a phenomenon of the Global North, albeit with Eastern European states absent from an otherwise widespread European trend.[4]

In this article, we examine two examples of these recent public inquiries: the Irish Commission into Child Abuse (the CICA), which conducted a decade of investigations between 2000–9 into all forms of historical child abuse in industrial schools and reformatories, and the Australian Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) of 2013–17, examining historical and contemporary sexual abuse in a range of institutions. Each has been described as 'landmark' in its own right.[5] Although reference is routinely made to the influence of the CICA internationally, especially in Australia, the two inquiries have not been examined together in depth.[6] Both are prominent examples of democratic states instituting legal mechanisms to publicly examine questions relating to child abuse through appeals to notions associated with transitional justice such as truth, accountability and 'healing' for individual survivors, as well as publicity, finality and legal, institutional and policy reform. But these functions were exercised differently in each country, an outcome of the internal political aims and drivers that established the inquiries.

The CICA was conceived of during a time of great transformation for Ireland, when it possessed the fastest growing economy in the world[7] and the government was increasingly powerful in areas where the Catholic Church once had a monopoly, such as health, welfare and education.[8] A year before the CICA's creation, in 1998, the major political parties of Northern Ireland and the British and Irish governments brokered The Good Friday Agreement.[9] This pivotal diplomatic moment ushered in relative peace in Northern Ireland for the first time in a generation and displayed the power of the Republic of Ireland on the international relations stage. It is no surprise the Irish government was keen to draw a figurative line in the sand demarcating a brutal past, including the maltreatment of children, from a more progressive political, economic and social present and future. The CICA was central to a national reckoning with the abusive past, including the historical and enmeshed relationship between the Irish state and Catholic Church.[10]

The Royal Commission can also be understood as a forward-looking political initiative with great significance for the perceived direction of the nation in the twenty-first century. Established by the first female Prime Minister, Julia Gillard (who happened to be an atheist), the Royal Commission formed but one of the many nation-building initiatives of her government, which is documented as the most reformist in history, especially on social policy. The Gillard years (2010–13) are described as a period of 'supercharged social reform' including overhauls to education policy and disability insurance in a flurry

[2]McAlinden and Naylor (2016), p 308.
[3]Sköld (2016) noted 19 countries. The UK has since initiated the Independent Inquiry into Child Sexual Abuse and New Zealand established a Royal Commission.
[4]Wright (2017b), p 14.
[5]Wright (2017b); Wright et al (2017).
[6]Wright (2017b). For an exception see McAlinden and Naylor (2016), focused mainly on Northern Ireland and Australia.
[7]Sweeney (1998).
[8]Inglis (1998).
[9]*Comhaontú Aoine an Chéasta*.
[10]McAlinden (2013).

of legislation that saw Gillard crowned the most productive Prime Minister in Australian history, even when working in minority government.[11] The Royal Commission, examining the past and working to create a safer future for Australian children, was a key symbolic plank in this greater secular modernisation program.

The Irish and Australian inquiries formed a core pillar of each country's response to institutional child abuse and may be understood as a form of 'truth' commission, a mechanism typically deployed in the expectation that it will reveal 'State or organisational complicity' in 'an unprecedented scale of abuse', and provide for 'subsequent prosecutions, compensation and public apology' to address the harms of the present and transition to a new state of affairs.[12] In this article, we contribute to the emerging field of scholarship on transitional justice and child abuse inquiries. We examine in detail the workings of the CICA and the Royal Commission that flowed from the unique political context of each country with particular attention paid to the functions each inquiry played in informing a narrative about transitioning from the past to the present. First, we briefly consider the political and academic paradigm of transitional justice, the traditions of which both inquiries may be understood as reflecting. Next, we explain in detail the legal environments governing both inquiries and the procedures and scope of each. We conclude by noting the impact of the inquiries in each country and the limitations of transitional justice inspired initiatives for remedying widespread social harms in the context of peacetime child abuse.

Transitional justice and institutional child abuse

Transitional justice is a relatively new field of political and legal-institutional practice and academic inquiry. Over the past 30 years, it has expanded from its roots in activism and practice in dealing with past human rights abuses to encompass an international academic field and a range of processes aimed at securing peaceful transition from conflict, or gross rights violations, towards peaceful, stabilised democracy.[13] The boundaries and normative content of the field remain contested but the dominant conception centres legal responses to past injustices.[14] Transitional justice embraces the discrete but linked 'pillars' of: investigation and truth-seeking (typically through truth and reconciliation commissions); accountability; reparation; guarantees of non-repetition; and reconciliation.[15] In recent years scholars have extended the scope of transitional justice to apply to peace-time contexts in consolidated democracies.[16] Increasingly, some have argued that it can be useful to understand and evaluate state responses to historical and institutional child abuse through this lens,[17] even if governments tend to make use of transitional justice rhetoric implicitly rather than explicitly in this context.[18] Various scholars point to a coherent pattern of responses including: political apologies on behalf of the

[11]Emma Griffiths, 'Labor's legacy: Social reforms and leadership spills' *ABC News* 9 September 2013 https://www.abc.net.au/news/2013-09-07/labors-legacy-social-reforms-and-leadership-spills/4942832.
[12]McAlinden and Naylor (2016), p 278. See also Sköld (2016); Gallen (2016).
[13]Arthur (2009).
[14]Teitel (2000).
[15]Gallen (2020); UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, (23 Aug. 2004), S/2004/616.
[16]Winter (2013).
[17]Gallen (2016). McAlinden and Naylor (2016).
[18]Balint et al (2014), p 195.

state; the establishment of statutory redress schemes; (limited) criminal prosecutions; and the creation of public inquiries.[19] McAlinden and Naylor describe this nascent international phenomenon as constituting 'an emerging interdisciplinary sub-field' within transitional justice.[20] A benefit of using transitional justice objectives such as accountability, reparations and guarantees of non-repetition as analytical frames is that they facilitate the evaluation of government responses based on principles that reflect commitments in national and international human rights law.[21]

While neither the Irish nor Australian governments described their child abuse inquiries explicitly as exercises in 'transitional justice', both initiatives may be understood as conforming to its principles of centring of victims' experiences, truth recovery and non-repetition. Both were part of wider packages responding to institutional abuse, including parallel processes of financial redress and civil and criminal law reforms. The CICA was the first national inquiry into institutional child abuse framed in terms of healing for victims and society, through listening to survivors and uncovering the past.[22] The Irish government envisaged the CICA as 'rather like a truth commission' designed to provide as complete a picture as possible of the causes, nature and extent of abuse and thereby help Irish society 'come to terms with a very negative, very black period in our history'.[23] At the same time, accountability underpinned the CICA's investigative and fact-finding functions. The CICA was empowered to make future-oriented recommendations, but its emphasis was on the past.[24] The Royal Commission was concerned with a greater variety of institutions, religious and secular, than the CICA, but it was framed in similar terms. The Royal Commission was initially presented as one part of doing 'everything we can to make sure that what has happened in the past is never allowed to happen again' through a process of discovering the truth of the past.[25] The Australian government also aimed for 'healing', but when compared to Ireland, greater emphasis was placed on future-oriented recommendations and research as a form of non-repetition of abuse. Gillard explained that she wanted the Royal Commission to both be a 'moment of healing' for survivors *and* to provide 'recommendations about the future'.[26] We turn now to a detailed examination of the CICA and the Royal Commission to explore these themes.

The CICA

The work and Final Report of the Commission to Inquire into Child Abuse are watershed moments in Ireland's national story for their laying bare the country's long history of sexual, physical, and emotional abuse of children in institutions. The CICA formed a core

[19] O'Donnell et al (2020).
[20] McAlinden and Naylor (2016), p 278.
[21] McEvoy (2007): Ambos (2009).
[22] At the time, the Commission of Inquiry into Abuse of Children in Queensland Institutions (the Forde Inquiry) was the only similar endeavour. It took only one year to complete its investigations and sampled survivors. It was described and reviewed in the Catholic journal *Studies* as a possible model for Ireland: Coldrey (2000).
[23] CICA Final Report: Vol 1, Chapter 1 at para 1.64.
[24] *Commission to Inquire in Child Abuse Act 2000* (Ireland), s 5(2)(a) and (b).
[25] In Royal Commission (2017) *Final Report*, Vol 1, p 3. https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_1_our_inquiry.pdf.
[26] Amy Simmons, 'Royal Commission into Child Sexual Abuse Begins' *ABC News*, 3 April 2013. https://www.abc.net.au/news/2013-04-03/royal-commission-into-child-sexual-abuse-begins/4606994.

element of a package of legal responses announced on 11 May 1999 by *An Taoiseach* Bertie Ahern TD in his apology to victims of institutional child abuse. The apology was provoked by the outcry following years of survivors talking about their experiences publicly, clerical sexual abuse scandals, the broadcast of a television documentary exposing abuse of children in former industrial and reformatory schools and the inaction of successive governments, including Ahern's, on abuse of children in care.

Industrial schools and reformatories originated in the nineteenth century as part of a broader patriarchal 'architecture of containment' [27] where high numbers of marginalised and stigmatised people were involuntarily detained, including Magdalene Laundries, Mother and Baby Homes and psychiatric hospitals.[28] Most of these institutions were administered and run by Catholic religious orders on behalf of the state, within an express legislative and policy framework underpinned by the coercive powers of the courts and the police. Industrial schools contained children who were powerful reminders of the shame of poverty and unmarried motherhood and in some cases the shame of having been abused at home. Reformatory schools were created to discipline deviant and criminalised boys and girls. Ahern's apology situated child abuse in a distant past, far removed from the Ireland of 1999. Survivors, he said, had 'performed an immense service in challenging our collective complacency' and

> shown us that we cannot put the past behind us by ignoring it. We must confront it and learn its lessons. That is the least we can do to address the injustices of the past and the dangers of the present.[29]

Ahern apologised for the State's and its citizens' 'collective failure to intervene, to detect [survivors'] pain, to come to their rescue',[30] thereby casting the state's legal and moral responsibilities for children in its care as a failure of intervention (shared with every citizen in the land). This rhetoric did not recognise the state's responsibility for violating children's rights to life, dignity, privacy, care and education.

Ahern's apology also belied the truth that successive governments since Independence had failed to act on evidence of child abuse. The Carrigan Committee (1931) had found that there was a particular social problem with 'criminal interference with children' (child sexual abuse) and had called for legislative and social reforms. The Cussen Report (1936), the Inter-Departmental Committee on the Prevention of Crime (1962) and the Kennedy Report (1970) each made recommendations on reformatories and industrial schools, many of which were ignored or only partially implemented.[31] National scandals in the early-to-mid-1990s had resulted in non-statutory inquiries.[32]

It was not surprising that a public inquiry was the cornerstone of the government response in 1999. By the end of the 1990s, public inquiries had become a central feature of Irish life. With respected High Court judge Ms Justice Mary Laffoy appointed as Chair, the CICA was initially established on an administrative basis and charged with developing its terms of reference and making recommendations on the powers and protections it

[27] Smith (2009).
[28] O'Sullivan and O'Donnell (2012); Enright and Ring (2020).
[29] Ahern (1999).
[30] Ahern (1999).
[31] Commission of Inquiry into the Reformatory and Industrial School System (1970) *Report of the Commission of Inquiry into the Reformatory and Industrial School System Dublin: Stationery Office*.
[32] Bruton (1998); Murphy (1998).

would need. It reported in autumn 1999 and the Government accepted its recommendations almost without reservation. The CICA was established on 23 May 2000 by the *Commission to Inquire into Child Abuse Act 2000* (CICAA 2000). The Act signalled a radical break with the existing model of public inquiry under the *Tribunals of Inquiry Act (Evidence) 1921*, which was very public, highly adversarial, and costly in terms of time and resources.[33] The core innovation was that the CICA was to have both therapeutic and investigative functions.

The CICA's primary objective was therapeutic: to help survivors to 'overcome the lasting effects of abuse' by 'giv[ing] their account to an experienced and sympathetic forum'.[34] This marked an important departure from previous inquiries into child abuse and, we suggest, resonates with a transitional justice ideal of bearing witness to lived experiences of abuse. A Confidential Committee (CC) was created for this purpose.[35] Its second objective was to determine the facts about institutional child abuse in Ireland.[36] The Investigative Committee (IC) was required to inquire into institutional abuse and, where satisfied that abuse had occurred, determine its causes, nature, circumstances and extent.[37] The IC was also required to inquire into the extent to which the individual institutions, and the systems of management and regulation, contributed to abuse.[38] Respondents in the IC could be an individual, a management body (usually religious organisations) or a regulatory body. A survivor could only appear before either the IC or the CC.

Third, the CICA was to report to the public about the incidence of abuse to identify 'the institution and the persons who committed the abuse',[39] and make public findings about the management, administration, operation, supervision and regulation (direct or indirect) of an institution and the persons in whom those functions were vested, and, controversially, to identify those persons.[40] Finally, the Commission was empowered to make future-oriented recommendations, although the statutory requirement was cursory (that any recommendations should include action to be taken to address the effects of abuse on survivors and to reduce the incidence of child abuse in institutions).[41]

The membership of the therapeutic and fact-finding arms of the CICA represented a further innovation in child abuse inquiries. The CICA clearly preferred specialist expertise in child care, health and psychology over legal knowledge in the performance of its functions. The CC was chaired by Norah Gibbons, a social worker and childcare director at Barnados.[42] The other members were Paddy Deasy, a consultant paediatrician and Dr Kevin McCoy a retired Chief Inspector with the Social Services Inspectorate in Northern Ireland, and, from 2002, Anne Mc Loughlin, a Senior Social Worker.[43] Judge Laffoy

[33]With the notable exceptions of the Hepatitis C Tribunal and HIV Compensation Tribunal.
[34]516 *Dail Debates* Col 293.
[35]*Commission to Inquire in Child Abuse Act 2000* (Ireland), ss 4(1)(a) and 10(1)(a).
[36]*Commission to Inquire in Child Abuse Act 2000* (Ireland), s 1.
[37]*Commission to Inquire in Child Abuse Act 2000* (Ireland), ss 4(b)(i) and (ii) and Statement Delivered at First Public Sitting of the Commission to Inquire into Child Abuse held on 29th June 2000; section 10(1)(b).
[38]*Commission to Inquire in Child Abuse Act 2000* (Ireland), ss 4(1)(b) (i)-(iii).
[39]*Commission to Inquire in Child Abuse Act 2000* (Ireland), s 5(3)(a).
[40]*Commission to Inquire in Child Abuse Act 2000* (Ireland), s 5(3)(b). The Commission was not allowed to identify the survivors of abuse.
[41]*Commission to Inquire in Child Abuse Act 2000* (Ireland), s 5(2)(a) and (b).
[42]Ms Gibbons was preceded by Bob Lewis CBE, a former director of social services in Stockport, England. He resigned after two months in the role.
[43]For details of resignations and appointments to CC during the period 2000–2003 see the Third Interim Report (December 2003) at p. 6

chaired the IC. Its ordinary members included a Fred Lowe, a clinical psychologist, and Dr Imelda Ryan, a child and adolescent psychiatrist who was also the director of the child sexual abuse assessment and treatment unit at Our Lady's Hospital, Dublin. The Commission had no ordinary members who were lawyers until 2004, when solicitor Marian Shanley was appointed to the IC.

Scope

Under the *CICAA* 2000, the CICA was empowered to investigate and hear testimony relating to a range of institutions, including: day schools, industrial schools, reformatory schools, orphanages, hospitals, children's homes and any other form of out of home care.[44] Abuse by parish priests or abuse in community or (foster) family settings were outside its terms of reference.[45] The inclusion of hospitals and schools, both public and private, was welcomed.[46] Its broad remit, coupled with the Act's flexible definition of the 'relevant period',[47] meant that the CICA could have considered contemporary care provision. However, this did not eventuate; the focus remained on historical child abuse in industrial schools and reformatories.[48] The time period to be considered was 1940–99, but that period could be extended by the Commission in either direction. The IC exercised this power by extending its investigations back to 1936. The CC heard from survivors relating experiences between 1914 and 2000.

The CICA was tasked with considering acts of sexual and physical abuse, failure to prevent physical injury, neglect, and any other act or omission resulting in serious impairment of the physical or mental health or development of the child, or serious adverse effects on the child's behaviour or welfare.[49] The Commission was initially given two years to complete its work[50] on the expectation that hundreds of victims would come forward.[51] This proved to be a vast underestimation; four extensions would be required.

Structure and procedures

Under the Act, the CICA was empowered to create its own procedures.[52] These were set out in its first public hearing and on its website and were later praised by the Irish Law

[44] *Commission to Inquire in Child Abuse Act 2000* (Ireland), s 1.
[45] Other Commissions of Inquiry established later examined clerical sexual abuse in certain dioceses: Department of Justice Equality and Law Reform (2005); Commission of Investigation (2009) and (2010).
[46] *The Irish Times*, 'Child abuse commission to have High Court powers and a therapeutic function', February 5, 2000. https://www.irishtimes.com/news/child-abuse-commission-to-have-high-court-powers-and-a-therapeutic-function-1.241647?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fchild-abuse-commission-to-have-high-court-powers-and-a-therapeutic-function-1.241647.
[47] *Commission to Inquire in Child Abuse Act 2000* (Ireland), s 1.
[48] The final Report included a chapter prepared by an academic on Residential Child Welfare from 1956–2008, as well as a chapter on interviews with people who did not proceed to an oral hearing, some of whom recounted abuse in orphanages, hospitals, national schools, special schools and other institutions.
[49] *Commission to Inquire in Child Abuse Act 2000* (Ireland), s 1.
[50] *Commission to Inquire in Child Abuse Act 2000* (Ireland), s 5(5)(b).
[51] *Irish Times*, 'Child abuse commission to be given powers of tribunal', 14 January 2000. https://www.irishtimes.com/news/child-abuse-commission-to-be-given-powers-of-tribunal-1.233653?mode=sample&auth-failed=1&pw-origin=https%3A%2F%2Fwww.irishtimes.com%2Fnews%2Fchild-abuse-commission-to-be-given-powers-of-tribunal-1.233653.
[52] *Commission to Inquire in Child Abuse Act 2000* (Ireland), s 7(4).

Reform Commission as innovative.[53] Close examination of these procedures reveals that the CICA was working hard to try to achieve truth-telling and accountability for wrongdoing while protecting the legal rights of individuals accused of abuse.

The CC performed the Commission's therapeutic function. This 'healing forum'[54] was intended to provide an informal, private forum for survivors to share their experiences. Survivors were allowed to bring one companion with them. Their testimony formed the basis of a report containing general findings. No findings were made against individuals, nor were they informed of the allegations. The CC was prohibited from identifying or publishing information that could lead to the identification of survivors, or alleged abusers, or institutions.

The IC could hold both private and public hearings. It was conferred with powers to compel attendance of witnesses and discovery of documents and powers to punish non-cooperation or obstruction.[55] It took evidence on oath. It was only to consider evidence which would have been admissible in a court (hearsay, for example, was not to be admissible).[56] In making findings of fact the IC was to apply the civil standard of proof: the balance of probabilities. As noted above, the CICA was empowered to identify individuals and institutions responsible for abuse in its Final Report. This statutory power provoked strong opposition from religious congregations, especially the Christian Brothers.

In a nod to its accountability function, respondents giving evidence to the IC could not rely on the privilege against self-incrimination; they were not entitled to refuse to answer a question on the ground that the answer might be incriminating.[57] However, and perhaps to balance this, witnesses were granted immunity from liability in respect of his or her testimony. Many commentators concluded that this created an effective amnesty for those individuals who admitted abuse. This was incorrect; it was simply that if they were later to be prosecuted or sued, the case against him or her could not include the incriminating statement or admission they made to the Commission. However, a statement from the complainant could still ground a civil action or criminal prosecution. In its First Public Statement the Commission was keen to state that coming forward to give evidence would not affect survivors' right to testify to the abuse in a criminal or civil court.[58]

The Laffoy years

The first few years of the Commission were fraught and progress was slow. Survivors adopted a cautious approach to the IC. This was well-founded; the Commission found that the vast majority of religious orders adopted 'an adversarial, defensive and legalistic approach'.[59] Most allegations were contested or strict proof was called for. The Department of Education, whose duty it was to inspect and regulate the institutions, did not fully cooperate with the CICA's requests for documentary evidence, forcing it to schedule

[53]Law Reform Commission (2003).
[54]516 *Dail Debates* Col 293.
[55]*Commission to Inquire in Child Abuse Act 2000* (Ireland), s 14.
[56]Statement at first Public Hearing June 2000 available at http://www.childabusecommission.ie/publications/documents/29-06-2000.pdf.
[57]*Commission to Inquire in Child Abuse Act 2000* (Ireland), s 21(1). This did not apply to survivors.
[58]*Irish Times*, 'Child abuse commission to be given powers of tribunal'.
[59]Investigation Committee Framework of Procedures, 2002, http://www.childabusecommission.ie/publications/documents/Child%20Abuse%20Commission%20Framework%20of%20Procedures.pdf.

procedural hearings and even require the attendance of the Secretary General of the Department, in an effort to procure compliance with statutory requests and directions.[60]

The IC imposed a deadline of 30th June 2002 for complainant statements, by which time statements had been provided by 1800 people.[61] It responded by issuing a new framework, including a procedure for hearing together all allegations relating to an institution.[62] The Congregation of the Christian Brothers, against whom more allegations were made than all of the male orders combined, issued legal proceedings. They argued that the new procedures did not ensure natural and constitutional justice and claimed it was unfair that findings of fact relating to abuse could be made against members of the congregation who were dead or too infirm to defend themselves. The High Court agreed that the procedures needed to be amended, but it upheld the CICA's power to name abusers.[63]

In 2002 the government reviewed the Terms of Reference with the stated purpose of making the CICA more cost- and time-effective. Without having published that review, in September 2003 the government announced it would engage in another review that would radically change the Commission's mandate. This proved to be the final straw for Judge Laffoy; the day after the press release announcing the second review, she resigned as Chair. Laffoy cited a range of factors for her resignation, including the government's delay in dealing with redress for survivors,[64] which affected their cooperation with the Commission; the issue of payment of legal costs of complainants and respondents in the IC; inadequate resources; and delays in concluding the 2002 review. Laffoy stated that the effect of these factors was that the Commission could not be independent in the performance of its functions and that they militated against its ability to work with reasonable expedition.[65]

The Ryan years

In 2003 Seán Ryan SC was chosen to replace Judge Laffoy as Chair and was appointed a judge of the High Court. His appointment was widely welcomed. Marian Shanley, a solicitor, joined the IC in 2004. In June 2004 the Commission published consultation documents aimed at speeding up its work.[66] These proposals were translated into legislation amending the 2000 Act. The *Commission to Inquire into Child Abuse (Amendment) Act 2005* removed the obligation to hear every allegation of abuse. The Committee could now decide on which cases to hear based on a prior examination of the documentation associated with each complainant. This new discretionary 'sampling' approach was reminiscent

[60]Third Interim Report, 2003, ch 10, http://www.childabusecommission.ie/publications/documents/abuse.pdf.
[61]Legal Team's Statement 7 May 2004, http://www.childabusecommission.ie/events/documents/SC%20Address%20-%20070504.pdf.
[62]The High Court rejected the Commission's attempt to limit the number of legal representatives for a person attending the IC: *Re Commission to Inquire into Child Abuse* [2002] 3 IR 459.
[63]*Michael Murray and David Gibson v the Commission to Inquire into Child Abuse the Minister for Education and Science, Ireland and the Attorney General* [2004] IEHC 102.
[64]This was finally addressed in 2002.
[65]Mary Laffoy, 'Letter of Resignation', https://www.irishtimes.com/news/justice-mary-laffoy-s-letter-of-resignation-1.373996.
[66]'A Position Paper on Identifying Institutions and Persons under the Commission to Inquire into Child Abuse Act 2000'; 'Opening Statement by Judge Ryan' and 'Statement by The Legal Team' (7 May 2004), http://www.childabusecommission.ie/publications/index.html.

of the approach adopted by the Forde Inquiry in Queensland.[67] This compromise was heavily criticised by survivor groups.[68]

Surprisingly, given that the Government had resisted efforts to include a review of the actions of the courts in sending children to industrial schools,[69] the 2005 Act added a new function: to inquire into how children were placed in institutions and the circumstances in which they continued to be resident there. This could have involved investigating the issue of criminality of those who had been committed to an institution on foot of a conviction, or the complicity of the legal profession in the abusive system. However, this was not to be.

The most significant change in 2005 was the decision that the Final Report would not identify any abusers.[70] Anyone found by the IC to be an abuser would be given a pseudonym. This satisfied the Christian Brothers, who dropped their appeal against the High Court's rejection of their challenge to the IC's new procedures. However, for many survivors the decision to use pseudonyms fatally undermined the CICA's goals of truth telling and accountability.[71]

Under Ryan the IC conducted its work in three phases:

- First, public hearings allowed religious congregations to describe how the institutions were managed. The aim was to establish the context in which abuse occurred. However, the effect was to create a public platform for institutions without any contextualisation or contestation by historians or survivors.
- In the second phase, private hearings were conducted into specific allegations of abuse. Statements from survivors, individuals, religious congregations, and Departments of Education/ Health/Justice were obtained before the hearings.
- In the third phase, public hearings examined particular institutions, the Department of Justice, Equality and Law Reform and the Irish Society for the Prevention of Cruelty to Children. The Commission appointed eight firms of solicitors to act as *amicus curiae* to represent complainants' interests at these hearings.

The IC received 2107 applications; 1007 proceeded to hearing. Both Committees concluded their inquiries in 2006. The CC heard from 1090 witnesses who gave testimony of their experiences including abuse as recently as 2000, in industrial schools and other institutions, all of which are still in existence.

The final report

The CICA published its *Final Report* on 20th May 2009.[72] Every copy of the five-volume, 2600-page report was sold that morning. The Report painted a devastating picture of the

[67]The Position Paper (n88) referred to the approach taken by the Forde Inquiry. See Leneen Forde AC, Report of the Commission of Inquiry into Abuse in Queensland Institutions (1999). https://www.qld.gov.au/__data/assets/pdf_file/0023/54509/forde-comminquiry.pdf.

[68]Eoin Burke Kennedy, 'Group says abuse sampling approach a "stab in the back"' *The Irish Times*, 18 September 2003, https://www.irishtimes.com/news/group-says-abuse-sampling-approach-a-stab-in-the-back-1.499663.

[69]Seanad Eireann Debate 20 April 2000, Dr Michael Woods. The provision was s 58 of the *Children Act 1908* (Ireland).

[70]*Commission to Inquire into Child Abuse (Amendment) Act 2005* (Ireland), s 8. There was an exception for those convicted of crimes, but in the Final Report, even convicted abusers were given a pseudonym.

[71]Reclaiming Self (2017) *Ryan Report Follow-Up. Submission to the United Nations Committee against Torture Session 61*, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=1132&Lang=en; Pembroke (2019).

[72]Commission to Inquire into Child Abuse (2009).

industrial school system, the Department of Education and the various religious orders. It found that thousands of children suffered abuse over several decades in institutions run by religious congregations on behalf the state. It found that sexual abuse was endemic in boys' schools and that physical and emotional abuse and neglect were pervasive across the entire system. It found that cases of sexual abuse were hidden by the congregations and that offenders were transferred to other locations where they were free to abuse again. It included research on the history and operation of the residential child care system and the psychological adjustment of adult survivors. It found that the state failed to protect children in industrial and reformatory schools.

Despite its immensely significant findings, and its provocation of subsequent academic and social commentaries and research, the *Final Report* was far from definitive in terms of establishing the truth for the participants and the public. Truth recovery involves both establishing what happened and developing a comprehensive understanding of the causes, context and consequences of past abuses.[73] The *Final Report* is found wanting on both counts. No quantitative analysis of the incidence of abuse was offered. In 2019, the *Final Report's* figure for the number of children in the institutions was announced as incorrect.[74] Despite the broad range of institutions covered by the terms of reference, the CICA's work focussed almost exclusively on industrial schools and reformatories. Of these, only institutions that attracted more than 20 complainants were examined by the IC, with varying degrees of scrutiny. Each institution was addressed separately in the *Final Report*, hampering analysis of the system and of how abusers were transferred between schools.[75] The use of pseudonyms prevented any contextualisation or comparison with information about institutions or abusers already in the public domain.[76] The focus on selected testimonies excluded certain accounts of victimhood and subordinated the experiences of some survivors.[77] Furthermore, although the Report noted 'the deferential and submissive attitude of the Department of Education towards the Congregations [which] compromised its ability to carry out its statutory duty of inspection and monitoring of the schools',[78] it did not investigate the state's responsibility for allowing the industrial schools system to operate effectively unregulated for so long, for ignoring pleas for reform, and for allowing children to continue to be incarcerated despite evidence of abuse. The Report failed to consider the question of race in the systemic institutionalisation and abuse of minority racialised groups such as *Mincéirí* (Travellers) and those of mixed-race heritage.[79] It also grossly underestimated the role of the Irish Society for the Prevention of Cruelty to Children in the transfer of children to industrial schools.[80]

The *Final Report* made several recommendations aimed at addressing the effects of abuse on survivors and preventing abuse in institutions.[81] The first recommendation,

[73]McEvoy (2006).
[74]The 2009 Report put it at 170,000 but the correction in 2019 stated the correct figure, based on flow and not stock figures, was closer to 42,000. See Statement 25 November 2019, published on, www.childabusecommission.ie.
[75]https://industrialmemories.ucd.ie/project.
[76]Reclaiming Self (2017) *Ryan Report Follow-Up*.
[77]Enright and Ring (2019); McAlinden and Naylor (2016) p 287.
[78]Commission to Inquire into Child Abuse (2009) Vol IV, p 451.
[79]Mixed Race Ireland and Rosaleen McDonagh in Reclaiming Self (2017) *Ryan Report Follow-Up*.
[80]Buckley (2013).
[81]CICA (2009) Vol IV, ch 7.

the construction of a memorial to survivors, has yet to be fulfilled. The second simply urged the state and the congregations to learn the lessons of the past, and to examine their attitudes and processes. It is impossible to evaluate whether or how that recommendation has been acted on. Other recommendations include the continuation of the existing provision of counselling, educational services and family tracing. Sixteen other recommendations were aimed at preventing abuse. The most specific of these related to the accountability of management and the need for independent inspections of institutions. These recommendations, along with the Report's findings, have contributed to the implementation of the Children First Guidelines (originally formulated in 1999), a referendum in 2012 to enshrine children's rights in the Irish Constitution, the creation of the Child and Family Agency in 2013 and the introduction of mandatory reporting in 2015.[82] However, high profile child protection failures, especially around children in foster care, persist.[83]

The CICA did not lead to increased accountability. Only eleven cases of abuse were forwarded to the Director of Public Prosecutions and only three resulted in a prosecution.[84] The religious congregations continued to enjoy a legal indemnity from civil actions under a 2002 agreement between them and the State.[85]

The Royal Commission

The Royal Commission into Institutional Responses to Child Sexual Abuse is considered to be 'one of the most important public inquiries into child abuse globally' and was used partly as a model in England and Wales.[86] Calls had been made for a Commonwealth Royal Commission into child abuse particularly in religious institutions since at least 1998 and intensified following the 2004 *Forgotten Australians* Senate inquiry into abuse in out-of-home care.[87] The release of the 'landmark'[88] *Final Report* of the CICA was met with horror and outrage among Australian survivors, prompting responses from the Catholic Church about the possibility that offending Irish priests had been transferred to Australia (a process the Australian church said would be difficult to trace due to the anonymity granted to suspects in the CICA *Final Report*).[89] Demands for a Royal Commission heightened as survivors condemned the anonymity and lack of prosecutions in Ireland. Mainstream Australian newspapers criticised the Irish process, arguing that

> the vast body of evidence obtained by the report, including the testimony of more than 1700 men and women about the abuse they suffered, can not be used for prosecutions. The guilty are, in effect, still being protected. It also makes it more difficult to establish which perpetrators might have been transferred to countries such as Australia, while casting a shadow over Irish clergy who are innocent of wrongdoing.[90]

[82] *Children First Act 2015* (Ireland).
[83] O'Mahony, Conor (2018) 'No Hashtags and street protests over abuse of children in care' 30 April *The Irish Times*.
[84] Holohan (2011); UN Committee Against Torture (CAT), *Consideration of reports submitted by States parties under article 19 of the Convention - Ireland*, 17 June 2011, CAT/C/IRL/CO/1, para. 20.
[85] See further Enright and Ring (2020).
[86] Wright et al (2017), p 1.
[87] Robbie Swan, 'Clergy is Over-represented' *The Australian*, 21 January 1998.
[88] Anonymous, 'An Unholy Conspiracy Against Children Exposed' *The Age*, 22 May 2009, p 14.
[89] Anonymous, 'Catholic Church in Australia to Seek Information on Irish Abusers', *BBC Monitoring Asia Pacific*, 21 May 2009.
[90] Anonymous, 'An Unholy Conspiracy Against Children Exposed' *The Age*, 22 May 2009, p 14.

However, other aspects of the CICA and the Irish Catholic diocesan inquiries into child sexual abuse that followed it were quickly recognised as setting a new international benchmark for the national reckoning of institutional child abuse and reform of the church. Victorian Labor MP Ann Barker travelled to Ireland to consult with Mr Justice Seán Ryan and returned in 2012 calling for an Australian inquiry with statutory powers comparable to the CICA.[91] One immediate outcome of Barker's lobbying was the Victorian state parliamentary *Inquiry into the Handling of Child Abuse by Religious and Other Non-government Organisations* established in June 2012, a crucial precursor to the Royal Commission. For the Commonwealth government, the tipping point came when a senior detective from the Newcastle region in NSW – Peter Fox – appeared on national television to allege police corruption in the covering up of sex crimes by Catholic clergy, including those of suspected prolific offender Father Denis McAlinden, who was transferred from Ireland to Australia in 1949.[92]

Gillard had resisted a public inquiry out of fears it would re-traumatise survivors but 'came to the decision that it would offer more healing than its potential capacity for hurt', and within three days of Fox's explosive interview, on 12 November 2012, she announced the Royal Commission.[93] Gillard described the abuse scandals as 'heartbreaking … insidious, evil acts to which no child should be subject. There have been too many revelations of adults who have averted their eyes from this evil'.[94] Seán Ryan was immediately interviewed by the Australian media because Ireland 'is the only other country to have launched a national child abuse inquiry similar to that announced yesterday by Australia's Prime Minister'.[95] When asked for his advice, Ryan emphasised the needs of survivors for recognition and belief, and for the state to acknowledge the extent of abuse.[96] Considering the practicalities of a national inquiry, Ryan advised that the Royal Commission should employ the 'sampling' methodology used in the CICA, whereby: 'We decided that we would not hear everybody in every institution so we said we will hear a selection of people that we will choose from the documentary evidence'.[97] Ryan also supported the Australian focus on institutional factors implicated in child abuse because, in Ireland,

> we found it difficult to envisage a trial of every allegation somebody made … . There was some consideration given to us recommending prosecutions [of individual perpetrators]. I know what I think of going down that path, but Australians will have to make their own decisions on that.[98]

Establishment of the Royal Commission

When compared to other forms of Australian inquiries, Royal Commissions are regarded as the most impartial, the 'most exalted' and even the 'most dignified'.[99] They constitute

[91]Paul Kennedy, 'Undeniable: Politicians Must "Resist Religious Influence" when Child Abuse Royal Commission makes Recommendations' *ABC News*, 13 December 2017, https://www.abc.net.au/news/2017-12-13/child-abuse-royal-commission-church-forces-cant-dilute-response/9222662.
[92]Joel Gibson, 'Irish Abuse Report Sparks Fears' *Sydney Morning Herald*, 22 May 2009.
[93]Paul Kennedy, 'Former Prime Minister Julia Gillard talks about the Royal Commission' *ABC 7.30 Report*, 14 December 2017, https://www.abc.net.au/7.30/former-prime-minister-julia-gillard-talks-about/9260498.
[94]Cited in Simon Cullen, 'Gillard launches Royal Commission into child abuse', *ABC News*, 12 November 2012, https://www.abc.net.au/news/2012-11-12/gillard-launches-royal-commission-into-child-abuse/4367364.
[95]Emma Alberichi, 'Interview with High Court Judge Sean Ryan from Dublin' *Australian Broadcasting Corporation Transcripts* 13 November 2012.
[96]Alberichi, 'Interview with High Court Judge Sean Ryan from Dublin'.
[97]Peter Wilson, 'Limit Terms of Reference Says Judge' *The Australian*, 14 November 2012.
[98]Wilson, 'Limit Terms of Reference Says Judge'.
[99]Donaghue (2001), pp 4–5.

ad hoc committees established by the executive of the Australian government (state or federal) and appointed by the Governor-General (or state Governor) to inquire into matters of serious public interest. They were used in the colonies from at least 1892 and continue as part of the colonial legacy of the Westminster system. Much like the CICA (and unlike their counterparts in the UK), Australian Royal Commissions are governed by special laws that confer on them coercive powers, the most significant being the *Royal Commissions Act 1902* (Cth) (*Royal Commission Act*, 'the Act'), passed as one of the first acts of the Australian parliament.[100]

The Royal Commission was established by way of Letters Patent (a written order by a head of state or equivalent constituting Terms of Reference), requiring it to inquire, *inter alia*, into: institutional responses to allegations of child sexual abuse including what institutions and governments should now do to protect children; appropriate redress and justice responses for survivors; and legal and other impediments to reporting crime. It was to carry out its investigations having specific regard to 'the experience of people directly or indirectly affected by child sexual abuse' including through 'the provision of opportunities for them to share their experiences in appropriate ways'.[101] Its extensive work was informed by three 'pillars', public hearings, private sessions and research and policy, and commenced in February 2013.

Australia's political federation necessitated processes of intergovernmental cooperation that were not required for a national inquiry in Ireland. As a means of protecting state sovereignty, the Australian Constitution limits what the Commonwealth may inquire into.[102] The constitutionality of an investigation into matters of state affairs such as welfare and child protection, which could be deemed beyond the Commonwealth's 'legislative competence', may be understood by reference to section 51 (xxxix) of the Constitution: the external affairs power granting the Australian parliament power to legislate to meet international treaty obligations.[103] Therefore, despite the lack of Commonwealth human rights mechanisms and culture in Australia, it was human rights discourse that legitimised the investigations. The Letters Patent made explicit mention of the *United Nations Convention on the Rights of the Child 1989*, ratified by Australia in 1990 and requiring (s19(1)) that state parties 'take all appropriate legislative, administrative, social and educational measures to protect children from all forms of … violence … including sexual abuse'.[104] While the Royal Commission did not pass laws to protect children, its investigations may be interpreted as an 'appropriate and adapted measure to meet Australia's s19(1) obligations'.[105] State and territory cooperation involving the sharing of information gained in other inquiries was imperative to ensure the respectful treatment of survivors who may have testified previously. The Letters Patent included provisions to request, but not compel, this cooperation, and each state was required to issue its own corresponding Letters Patent.

There is no formal requirement that judges chair Royal Commissions, but they often do, and Justice Peter McClellan, Judge of Appeal in NSW, was appointed Chair. The

[100]Beck (2013).
[101]Royal Commission (2013) *Terms of Reference*, https://www.childabuseroyalcommission.gov.au/terms-reference.
[102]Beck (2013), p 5.
[103]Beck (2013), p 6.
[104]*United Nations Convention on the Rights of the Child 1989*.
[105]Beck (2013), p 6.

appointment of an otherwise relatively diverse range of Commissioners including Senator Andrew Murray, a former child migrant, and Professor Helen Millroy, a Palyku (Aboriginal) child psychiatrist, and three legal representatives including Justice Jennifer Coate AO, former judge of the Family Court of Australia, aimed for a breadth of expertise and national inclusivity, but it was a more legalistic team than that of the CICA. Unlike the CICA, the Royal Commission maintained its Chair and team throughout its five-year tenure and is regarded as a great success in terms of stability and continuity.

Scope

The Royal Commission's scope was unique internationally in its focus only on sexual, not other forms of abuse, in the past and the present, and in its broad definition of institutions which saw it examine the abuse of children in care as well as those who were not in care but were abused in the context of institutions (for example, by a parish priest or scout leader).[106] There were political reasons for these parameters and inevitably they were not satisfactory to all. The range of institutions investigated reflects the Australian public-private hybridity and religious pluralism in welfare provision and denominational education. Media focus on Catholic clerical child sexual abuse had led some religious representatives and their advocates to claim that investigations were disproportionately targeting Catholics.[107] In part to dispel these claims, Gillard consulted with the then leader of the Catholic Church in Australia, Cardinal George Pell, before announcing the Royal Commission and she ensured its investigations included a broad range of institutional settings including[108]

> any public or private body, agency, association, club, institution, organisation or other entity or group of entities of any kind (whether incorporated or unincorporated), and however described … for example, an entity or group of entities (including an entity or group of entities that no longer exists) that provides, or has at any time provided, activities, facilities, programs or services of any kind that provide the means through which adults have contact with children, including through their families.[109]

As with the CICA, however, the family was excluded from investigations.

One criticism of the Australian approach is that the distinct needs of survivors who were sexually abused in care and survivors of clerical child sexual abuse were fused in the inquiry and, therefore, in some government responses (such as redress).[110] The decision to examine only sexual abuse proved even more controversial.[111] This was rationalised by reference to resources.[112] Investigations were not bound by a historical time period, and it was soon apparent that heightened resources would be required. Commissioners were initially required to report by December 2015, but due to the massive volume of complaints received, their tenure was extended until December 2017.

[106]This model was then followed in England and Wales.
[107]For example, see Henderson (2017).
[108]Gillard (2014), p 278.
[109]Royal Commission (2013) *Terms of Reference*, https://www.childabuseroyalcommission.gov.au/terms-reference.
[110]Daly and Davis (2019).
[111]Daly and Davis (2019). There was scope for the Royal Commission to examine 'related matters' that occurred in the context of child sexual abuse.
[112]Gillard cited in Bianca Hall and Jane Lee, 'Child abuse inquiry criticised', *Sydney Morning Herald*, 16 January, https://www.smh.com.au/politics/federal/child-abuse-inquiry-criticised-20130115-2crmk.html.

Over 15,000 individuals contacted the Royal Commission and were within its Terms of Reference.[113]

Structure and procedures

An important difference between most other Australian inquiries into child abuse and the Royal Commission is the coercive and inquisitorial powers of the latter, including the power to compel the production of documents and require witnesses to answer questions, even those that might incriminate them.[114] A Royal Commission can make referrals to the police and other authorities, but any evidence given in its proceedings is not admissible in evidence against the person in any Australian court (criminal or civil).[115] In this sense, the Royal Commission had powers similar to the CICA, but it made far greater use of police referrals: over 2000 were made, with charges laid in 'a number of cases'.[116] The Royal Commission was also empowered to override any confidentiality agreements survivors and other witnesses might have signed, to allow them to testify with full frankness.[117]

Consistent with the ethos of the 'sampling methodology' used in Ireland and promoted by Ryan, public hearings took the form of 57 case-studies investigating institutional responses to allegations of child sexual abuse, where criminal convictions had been made; there was overwhelming evidence of abuse (such as a series of credible complaints made to the institution or elsewhere); or civil liability had been admitted. Case-studies were generally selected based on the number of allegations received about an institution, weighed up in the context of the potential for future reform, rather than justice for survivors. Commissioners considered 'whether or not the hearing would advance an understanding of systemic issues and provide an opportunity to learn from previous mistakes so that any findings and recommendations for future change the Royal Commission made would have a secure foundation'.[118] Most case-studies opened with survivor testimony. Each aimed to allow those affected by child sexual abuse to give evidence with legal representation and to 'examine the response of the institution to complaints made and importantly, to raise community awareness and understanding of child sexual abuse and the institutions in which it occurred'.[119] Witnesses were subject to cross-examination. The government established a free legal advice service for those who appeared (*knowmore*), but representation was funded privately or through the Attorney General's department.

Normal rules of evidence such as discovery did not apply. Evidence that might be inadmissible in a criminal trial, such as opinion evidence, was often important in forming an impression of how an institution functioned and how child abuse might have been

[113]Royal Commission (2017) *Final Report Vol 1* p 23 https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_1_our_inquiry.pdf.
[114]Prasser (2006), p 32.
[115]*Royal Commissions Act 1902* (Cth), s 6DD.
[116]Royal Commission (2017) *Final Report Vol 1* p 25, https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_1_our_inquiry.pdf.
[117]Cripps and McCreery (2013), p 24.
[118]Royal Commission (2017) *Final Report Vol 16*, p 3. https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_16_religious_institutions_book_1.pdf.
[119]Royal Commission (2017) *Final Report Vol 1* p 23, https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_1_our_inquiry.pdf.

concealed. However, anyone with the potential to have an adverse inference made against them had the opportunity to respond to allegations including viewing evidence and submissions provided before the hearing, to ensure natural and procedural justice. In total, 1302 witnesses appeared in public hearings examining 134 institutions in eleven locations across the country.[120] Again to deflect any potential charges of sectarianism, the first case-study did not examine religious organisations, but the activities of a convicted perpetrator associated with an Aboriginal children's service and the Boy Scouts. The second concerned the YMCA. Ultimately, however, most case-studies concerned religious schools and institutions. The Catholic Church was identified as the source of most reported abuse.[121]

The Royal Commission was committed to transparency, with public hearings live-streamed on the internet and testimonies, submissions and evidence uploaded quickly for maximum public access in processes meeting the terms of The Act. The educational function of the Royal Commission ('raising community awareness') was highlighted through its website and engagement with social and mainstream media. All case-studies were written up as reports with findings made about the responses of institutions according to the civil standard of proof. Identities of witnesses were protected with pseudonyms if required, pursuant to the Act, which provides for non-publication orders.[122] Convicted perpetrators and deceased persons with allegations made against them were usually named. Aside from the vulnerability of witnesses, considerations informing non-publication included the special status of schools, and the potential to prejudice current or forthcoming criminal proceedings (in which case pseudonyms were always used). Some information remains redacted in the Royal Commission's final outputs.[123]

Although Gillard initially framed the Royal Commission as a means by which to ensure history was not repeated, its investigations were not constrained to the past (unlike some related inquiries, such as the Northern Ireland *Historical Institutional Abuse Inquiry)*. Several case-studies involved contemporary allegations. These included a high-profile investigation into a Sydney dance instructor for child abuse and child pornography offences committed over some time until his arrest in 2013.[124] The Royal Commission quickly demonstrated that institutional child sexual abuse is not a historical relic, thereby complicating the idea of transitioning from the past that 'truth commissions' tend to uphold. The Terms of Reference had always included making recommendations to safeguard the future, and much of the Royal Commission's extensive research program was dedicated to this aim. In a departure from inquiries overseas, including the CICA, the Royal Commission reserved nine of its ten final case-studies for 'institutional reviews' of organisations it had scrutinised in earlier case-studies. This way, institutions could

[120]Royal Commission (2017) *Final Report Vol 1*, p 34. https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_1_our_inquiry.pdf.
[121]Timothy Jones, 'Royal Commission recommends sweeping reforms for Catholic Church to end child abuse' *The Conversation*, 15 December 2017, https://theconversation.com/royal-commission-recommends-sweeping-reforms-for-catholic-church-to-end-child-abuse-89141.
[122]*Royal Commissions Act 1902* (Cth), s 6D.
[123]Report of Case Study 43 - *The response of Catholic Church authorities to allegations of child sexual abuse in the Maitland–Newcastle region*.
[124]Liv Casben and Claire Blumer 'Grant Davies: Sydney dance teacher sentenced for child pornography and sexual abuse' *ABC News,* 21 October 2016, https://www.abc.net.au/news/2016-10-21/grant-davies-sydney-dance-teacher-sentenced-child-pornography/7953554.

demonstrate the progress they had made (or not) on modifying their procedures for detecting and responding to child abuse.

Much like the CICA's Confidential Committee, the Royal Commission also provided confidential 'private sessions' for survivors to tell their stories unchallenged, a mechanism that suggests a different way of producing and documenting 'truth' than inquisitorial or adversarial processes and which aimed to go partway to Gillard's objective of 'healing' for survivors through hearing and believing their experiences.[125] In recognition that the Royal Commission was 'as much about assisting victims of past abuse to be heard, as it is about investigating systemic failures to prevent future abuse',[126] the Act was amended to enable individual Commissioners to receive 'information from persons directly or indirectly affected by child sexual abuse in a manner less formal than a hearing', which is 'appropriate given the deeply personal and distressing nature of people's experiences of child sexual abuse'.[127] According to the amended Act, which was justified with reference to the right to privacy outlined in the *International Covenant on Civil and Political Rights* and elsewhere, a private session is not a hearing; individuals testifying are not witnesses and are not considered to be giving evidence. Survivors participating in private sessions 'were expected to tell the truth' and were not required to take an oath or affirmation or to be subject to cross-examination.[128] Freedom of Information legislation does not apply to information obtained at a private session, and under the Archives Act, associated records are not accessible for 99 years.[129] After much deliberation, the Commissioners determined that institutions named in private sessions would not be identified in the Royal Commission's final report.[130]

Over 8000 individuals attended private sessions in over 90 locations. A further 1000 submitted statements in writing.[131] Some private sessions were conducted with children; some with men and women in gaol.[132] Sessions were trauma-informed, meaning that Royal Commission officers and staff were 'aware of the diverse and far-reaching impacts of childhood trauma on survivors' and sought to engage people 'in ways that affirmed their experiences and responses while minimising interactions or processes that could increase their trauma'.[133] Survivors were offered counselling, and they could request a written copy of their transcript. One perhaps unexpected outcome of the Royal Commission's public profile has been an education of the public about the enduring effects of child sexual abuse and the grave need to revolutionise the way traumatised survivors are received and responded to. Numerous Royal Commission recommendations include

[125]Amy Simmons, 'Royal Commission into Child Sexual Abuse Begins' *ABC News*, 3 April 2013, https://www.abc.net.au/news/2013-04-03/royal-commission-into-child-sexual-abuse-begins/4606994.
[126]Mark Dreyfus MP 'Legislation to Amend Royal Commissions Act 1902' *Australian Government News*, 13 February 2013.
[127]*Royal Commissions Amendment Bill 2013* (Cth). Explanatory memorandum.
[128]Royal Commission (2017) *Final Report Vol 1* p 26, https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_1_our_inquiry.pdf.
[129]Anonymous 'Private Sessions to Enable People to Share Stories to Commissioner Voluntarily' *Australian Government News,* 22 March 2013.
[130]Royal Commission (2017) *Final Report Vol 1* p 32, https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_1_our_inquiry.pdf.
[131]Royal Commission (2017) *Final Report Vol 1* p 32, https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_1_our_inquiry.pdf.
[132]Royal Commission (2017) *Final Report Vol 1* p 32, https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_1_our_inquiry.pdf.
[133]Royal Commission (2017) *Final Report Vol 1* p 28, https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_1_our_inquiry.pdf.

reference to trauma-informed principles that should be adopted by services and agencies including welfare, child protection and the police.

Some commentators are very enthusiastic about these aspects of the Royal Commission, describing it as taking on a 'broad new understanding of trauma into its institutional practices' and creating an 'organisational culture that was humanistic and inclusive'.[134] Still, concerns remain about participation and the experiences of those who did participate. Early on, some Aboriginal legal and community representatives voiced fears that the Royal Commission could re-traumatise survivors who had cooperated with the 1996 *Bringing Them Home* inquiry into the Aboriginal Stolen Generations, only to be let down by the Commonwealth's failure to provide redress and find that, in reality, 'little has changed; children continue to be sexually abused and services to support and prevent such abuse are still lacking'.[135] Participation of First Nations' Australians in the Royal Commission was significant – fourteen per cent of people who attended a private session identified as Aboriginal or Torres Strait Islander.[136] But when considering their over-representation in institutions and other indicators about prevalence of abuse, the Aboriginal Legal Service of Western Australia considers it to have been under-representative.[137] Many Aboriginal people believe they have already informed the 'authorities' about what happened to them and 'there is no logical reason for them to come forward again and experience the re-traumatisation of providing their story to a different government "agency"'.[138]

Outputs

The Royal Commission was tasked with producing research (its third pillar) along with a report and recommendations. Together with written analysis of the 57 case-studies, the Royal Commission produced a lengthy 17-volume report making recommendations grouped in topics such as *Understanding Child Sexual Abuse in Institutional Contexts*, *Redress and Civil Litigation*, *Criminal Justice*, *Working with Children* and analysis of different types of institutions. The Report found that:

> Tens of thousands of children have been sexually abused in many Australian institutions. We will never know the true number. Whatever the number, it is a national tragedy, perpetrated over generations within many of our most trusted institutions.
>
> The sexual abuse of children has occurred in almost every type of institution where children reside or attend for educational, recreational, sporting, religious or cultural activities. Some institutions have had multiple abusers who sexually abused multiple children. It is not a case of a few "rotten apples". Society's major institutions have seriously failed. In many cases, those failings have been exacerbated by a manifestly inadequate response to the abused person. The problems have been so widespread, and the nature of the abuse so heinous, that it is difficult to comprehend.[139]

[134]McPhillips (2018), p 67.
[135]Barter et al (2014), p 3.
[136]Royal Commission (2017) *Final Report Vol 5* p 10, https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_5_private_sessions.pdf.
[137]Cripps and McCreary (2013).
[138]Barter et al (2014), p 8.
[139]Royal Commission (2017) *Final Report Preface and Executive Summary p* 6, https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_preface_and_executive_summary.pdf.

Individual institutions were named as harbouring specific incidents of abuse as well as abusive organisational cultures. Different religious organisations were identified as demonstrating 'remarkable similarities in the institutional responses' including: 'in-house' responses where alleged perpetrators were treated with leniency and secrecy; victims were disregarded, blamed, punished and lied to; criminality was ignored; and perpetrators were not removed from ministry or contact with children.[140] Only one volume was dedicated solely to examining historical residential institutions. In practice, many of the investigations culminated in contemporary analyses, with Commissioners imploring that 'although, inevitably, the Royal Commission has looked at past events, it is important that the momentum for change initiated by the Royal Commission's work is not lost and that lasting changes to protect children are implemented'.[141] As part of its research 'pillar', the Royal Commission commissioned a diverse program of research addressing institutional child sexual abuse according to the following themes:

- Causes
- Prevention
- Identification
- Institutional responses
- Government responses
- Treatment and support needs
- Institutions of interest
- Ensuring a positive impact

Generally, the report and research are highly regarded. Recommendations have begun to be implemented including reforms to civil and criminal law procedures, state and institutional child protection policies and practices, and redress. It is too early to assess the true impact of the Royal Commission, however, and the government's implementation of a national redress scheme for survivors of institutional child sexual abuse defies many of the Royal Commission's recommendations and has been the subject of much criticism and dissatisfaction.[142] Religious bodies such as the Catholic Church continue to resist recommendations for reform such as the removal of the confessional seal. In 2019 Justice McClelland, the former Chair of the Royal Commission, publicly excoriated Catholic Church leaders, stating that he could not comprehend 'how any person, much less one with qualifications in theology … could consider the rape of a child to be a moral failure but not a crime'.[143]

Conclusion

It is now over ten years since the internationally ground-breaking CICA report was delivered. The strength of feeling, of shock, disgust and horror it evoked in Ireland is difficult

[140]Royal Commission (2017) *Final Report Vol 16*, p 26, https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_16_religious_institutions_book_1.pdf.
[141]Royal Commission (2017) *Final Report Preface and Executive Summary p* 4, https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_preface_and_executive_summary.pdf.
[142]Daly and Davis (2019).
[143]In Miki Perkins, '"I Cannot Comprehend". Sex Abuse Royal Commissioner Slams Religious Leaders' *Sydney Morning Herald*, 10 December 2019, https://www.smh.com.au/national/i-cannot-comprehend-sex-abuse-royal-commissioner-slams-catholic-leaders-20191210-p53inr.html.

to convey. The force of the testimony of so many survivors, underscored by the authority and sheer length of the Final Report, made the reality of institutional abuse, including sexual abuse, unavoidable. Thousands signed a book of solidarity with the survivors, suggesting at least a gesture towards reframing their position in the community from one of shamed subjects to people deserving of recognition and empathy. The *Irish Times* described the Final Report as 'a map of an Irish hell' that 'define[d] the contours of a dark hinterland of the State, a parallel country whose existence we have long known but never fully acknowledged'.[144] However, as was shown earlier, the map was incomplete. Furthermore, these instances of solidarity and recognition were in tension with some official interpretations of the temporal nature of institutional child abuse. In 2009, *Taoiseach* Brian Cowen issued another apology, continuing the theme begun by Ahern in 1999 by suggesting that the scandals concerned 'the darkest corner of the *history of the State*'.[145] But survivors are by definition, not historical. They continue to live, and in many cases, thrive. Many continue to have ongoing ethical, practical and therapeutic demands that the state must meet. Unfortunately, many of the practical responses that ran parallel to or followed the CICA (such as financial redress and other forms of support) have been judged as inadequate and, in some cases, actively harmful to survivors.[146] Symbolic redress through memorialisation is still absent: the CICA's first recommendation, a memorial to survivors, has yet to be acted upon. The repeated efforts to seal the records of the Commission for at least 75 years indicate a strong desire on the part of the state to move on and overcome the abusive past, rather than learn from it.[147] Moreover, the voice of adult survivors is still missing from much policy and practice.[148] This is despite national empirical evidence and international child protection experts suggesting that Ireland maintains a high level of child sexual abuse when compared with other Western nations.[149]

The public nature of the Royal Commission's proceedings and the extensive media attention they attracted meant that the final report was met with less shock than in Ireland. Many Australians were already familiar with its disturbing content. An interim report had been released in 2014. Similar to Ireland, public sympathies seem to lie increasingly with survivors who for years had been shunned and disbelieved. The public conversation about the impact of child sexual abuse, risk factors and the need for continued efforts at prevention, has invariably changed, often in ways that have altered people's perceptions of once-revered institutions. One national survey found that 48 per cent of practising Catholics lost confidence in church leaders throughout the Royal Commission hearings.[150] While the focus on child sexual abuse was generally received as important, even crucial, many survivors of other forms of child abuse and neglect remain disappointed with, or 'betrayed' by, the failure to investigate all forms

[144]*The Irish Times* 'The savage reality of our darkest days' 21 May 2009, https://www.irishtimes.com/opinion/the-savage-reality-of-our-darkest-days-1.7673.
[145]Cowen (2009).
[146]Reclaiming Self (2017) *Ryan Report Follow Up*; Enright and Ring (2020).
[147]Joint Oireachtas Committee on Education and Skills Retention of Records Bill 2019: Discussion, https://www.kildarestreet.com/committees/?id=2019-11-26a.422&s=speaker%3A411.
[148]Mooney (2018).
[149]David Finkelhor, quoted in Kitty Holland (2002) 'Study shows sex abuse figures here higher than Europe, US' *The Irish Times*, 20 April 2002; McGee et al (2002).
[150]Neil Ormerod, 'Royal Commission has been a major crisis for the Church leadership', *Sydney Morning Herald*, 8 February 2018, https://www.smh.com.au/opinion/royal-commission-has-been-a-major-crisis-for-the-catholic-church-leadership-20180208-h0vrz7.html.

of child abuse.[151] Still, others have gained great comfort from the Royal Commission's harnessing of the 'power of collective testimony' and shattering of illusions that 'the child welfare system always acted with the best interests of the child'.[152] The contemporary focus of much of the Royal Commission's investigations and research and its countless recommendations for reform appear to have dispelled some of the political tensions between what we care to believe about the past and the present. Prime Minister Scott Morrison's apology to survivors in 2018 was not particularly focused on a 'dark past' but on the contemporary situation of both survivors and children at risk. At the same time, the government has committed to establishing a museum, research centre and memorial to survivors to 'ensure the nation does not forget the untold horrors they experienced'.[153] Reflecting on both countries in 2017, former Labor MP Ann Barker, who first called for the CICA to be emulated in Australia, stated that each inquiry had 'changed the nation. They now talk about it [child sexual abuse]. They now talk about it in clubs and communities, where nobody talked about that before, but now they do'.[154]

In different ways, therefore, both the CICA and the Royal Commission may be understood as embodying and transforming orthodox transitional justice to achieve national reckoning with child abuse and individual restoration. Both inquiries have also gone beyond these national achievements and changed how child abuse is understood internationally by addressing it as an intergenerational trauma. They have proven that child abuse may be endemic to any institution, secular or religious, and at the same time that all children are at risk of abuse, all adults are at risk of participating in hierarchical organisational cultures that dehumanise the vulnerable. We are all bystanders to abuse. In its focus on developing social science research, the Royal Commission has also presented child sexual abuse as a measurable phenomenon that might be prevented by rational ordered responses. However, both initiatives illustrate the limits of institutional abuse inquiries to deliver on the goals of transitional justice. In Ireland, primary criticisms concern the fact that the systemic nature of abuse fostered by systems of incarceration, including the repeated transfer of perpetrators, and the ultimate responsibility of the state, were neglected in the CICA's inquiries. The sampling of case studies aimed to identify institutions with high volumes of complaints, but inevitably this meant that some institutions escaped scrutiny. Accountability and the related goal of ensuring non-repetition, were further stymied by the failure to name perpetrators, and the lack of engagement with the police and other authorities.

The Royal Commission's ready use of police referrals has drawn the criminal justice system into the process in important ways that, while facilitating this form of justice, have had the ironic effect of muting some aspects of transparency, at least temporarily (by ensuring the redaction of details in published accounts). In different but related ways, the Australian approach also tended to examine institutions individually. The Royal Commission's research pillar went some way to addressing systemic causes, a very important source of information, but not one associated with justice or restoration for individual survivors.

[151]Golding (2018), p 203.
[152]Golding (2018), p 203.
[153]Philippa McDonald, 'National apology to institutional child sexual abuse victims to include museum, research centre announcement' *ABC News*, 22 October 2018, https://www.abc.net.au/news/2018-10-22/apology-to-victims-of-sexual-assault-to-see-creation-of-museum/10402244.
[154]Kennedy, 'Undeniable: Politicians Must "Resist Religious Influence" When Child Abuse Royal Commission Makes Recommendations' *ABC News*, 13 December 2017, https://www.abc.net.au/news/2017-12-13/child-abuse-royal-commission-church-forces-cant-dilute-response/9222662.

The Royal Commission's focus on forward-looking reforms also meant that its resources were divided, resources that had already been denied survivors of abuse other than sexual abuse. The 'truth recovery' performed in Australia was mainly based on case-studies selected for their potential for future preventative effects. In transitional justice terms, this did fulfil the important mandate of the non-repetition of abuse (a priority that was marginalised in Ireland) but perhaps to the detriment of a comprehensive examination and discovery of the past. Finally, we have said little about financial redress. Redress was dealt with by government mechanisms other than the CICA and the Royal Commission and, in both countries, redress remains bitterly criticised as inadequate and demeaning.[155]

Transitional justice captures the important requirement that state responses recognise survivors as rights-bearing subjects, which reflects how the inquiries were framed in both the Irish and the Australian political cultures. As such, it is a valuable tool for analysing these inquiries. We suggest, however, that the case of peacetime child abuse presents special challenges to transitional justice's 'linear notion of time as progress'[156] associated with the endurance of offending (child abuse remains current and common) and, often, the lack of significant regime change despite the restructuring of institutions and other techniques of governmentality (power still does not reside with children). The complicity of contemporary (or recent) governments and societies in each country's record of institutional child abuse may inform and therefore limit the 'truth recovery' and accountability that can be performed. Ultimately, however, the principles of transitional justice help articulate the promises and goals of these inquiries, and in holding them to account accordingly.

Disclosure statement

No potential conflict of interest was reported by the authors.

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[155]Enright and Ring (2020); Daly and Davis (2019).
[156]Balint et al (2014), p 201.

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