Report of the Scoping Inquiry into Historical Sexual Abuse in Day and Boarding Schools Run by Religious Orders

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Chapter 14:
Functions, Powers and Procedures of Tribunals of Inquiry and Commissions of Investigation

A. Introduction

1. This section of the Report deals with inquiries. It sets out a description of the various types of inquiries, with an explanation of their respective powers and procedures under Irish law. It then discusses the constitutional rights of individuals who may be the subject of an inquiry's investigation, and in respect of whom adverse findings may be made by an inquiry.
2. The following chapters in this section examine previous sexual abuse inquiries in Ireland, looking at their methodology, terms of reference, and analyse the issues that arose for those inquiries, and how they were resolved. This section also examines a sample of international inquiries.

B. Types of Inquiries

3. There are a number of different types of public inquiry available under Irish law as follows:
   (i) A tribunal of inquiry;
   (ii) A commission of investigation;
   (iii) A bespoke statutory inquiry; and,
   (iv) A non-statutory inquiry.
4. In addition, confidential committee processes have operated concurrently alongside both bespoke statutory inquiries and commissions under the Commissions of Investigation Act 2004.

(i) Tribunals of Inquiry

5. The principal function of a tribunal of inquiry is to ascertain the facts in relation to some matter of public interest which has been identified by its terms of reference and, where appropriate, to make recommendations as to how to prevent future incidents of the same nature.

6. It is important to state at the outset that tribunals of inquiry are not courts. As the Supreme Court held in *Goodman International v Hamilton*,[1] they are not involved in the administration of justice and they have no power to determine civil or criminal liability. The Supreme Court also held that tribunals should not, however, be inhibited from making recommendations or findings merely because of a potential impact on civil or criminal proceedings.[2] Tribunals have been described as unusual in our legal system, as inquisitorial and as not having an adversarial format.[3]

7. There is an important difference between court proceedings and a tribunal of inquiry to which a person is called to give evidence. The tribunal hearing is not a criminal or civil trial and the person is not a party; rather, the tribunal hearing is an inquiry to which the person is a witness.[4]

8. The findings of a tribunal have sometimes been described as 'legally sterile', which is an allusion to the fact that the findings of a tribunal are only the conclusions of the tribunal's chairperson and/or its members, and in no sense have the status of a judicial finding, whether civil or criminal.[5] Persons who are the subject of inquiry by a tribunal are not charged with an offence nor are they on trial. A tribunal can never be seen as a substitute for or an alternative mode of a criminal trial.[6] Nevertheless, the Supreme Court has recognised that adverse reputational consequences can flow from both the hearings and the findings of a tribunal, acknowledging that while the finding may be 'legally sterile' that does not take away from the fact that 'adverse findings of grave wrongdoing can have devastating consequences for the standing and reputation of a person in the community'.[7]

9. Notably, in considering the positions of public inquiries, the Law Reform Commission concluded that they should only be established in the most serious cases where no other alternative means of protecting the public interest is available.[8]

10. The Government typically appoints the members of tribunals.[9] Generally, judges (sitting or retired) are appointed to chair or be panel members of a tribunal of inquiry. In circumstances where the 1921 Act gives tribunals many of the powers, privileges and immunities of the High Court, judges are generally appointed as persons who are familiar with making rulings and following fair procedures.

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1 [1992] 2 IR 542.

2 ibid, paragraph 2.03.

3 *Boyhan v Beef Tribunal* [1993] 1 IR 210, 222 per Denham J.

4 See comments of Denham J. in *Lawlor v. Flood* [1999] 3 IR 107, 137.

5 *Goodman International v. Mr. Justice Hamilton* [1992] 2 IR 542.

6 *Lawlor v. Planning Tribunal* [2010] 1 IR 170, 183. per Murray C.J.

7 ibid. See also *Maguire v. Ardagh* [2002] 1 I.R. 385, 576 and 689.

8 The Law Reform Commission, *Consultation Paper on Public Inquiries Including Tribunals of Inquiry* (LRC CP 22 – 2003) ('**LRC 2003 Consultation Paper**'), at paragraphs 1.27 – 1.31.

9 The Tribunals of Inquiry (Evidence) (Amendment) Act 1979 deals with the membership of the tribunals of inquiry. Section 2(1) provides that a tribunal may consist of more than one person sitting with or without assessors.

11. The Tribunals of Inquiry (Evidence) Acts, 1921 to 2004, as amended, ('**the 1921 Act**') do not lay down any detailed model of procedures to be adopted by a tribunal in carrying out its functions. A tribunal may enforce the attendance of witnesses before it, and compel the production of documents.[10] It is an offence to fail to comply with an order of a tribunal. For example, if a witness fails to appear before a tribunal without just cause, or fails to produce documents, or answer questions put by the tribunal, that person is guilty of an offence.[11] A tribunal may make such orders as it considers necessary for its functions, and has all the powers rights and privileges that are vested in the High Court for this purpose.[12]

12. In some inquiries the granting of legal representation will require that the person be represented at all stages of the inquiry. In other inquiries, this will require that the person be represented only at certain stages of the inquiry, where their rights are at risk.[13]

13. The Tribunals of Inquiry (Evidence) (Amendment) Act 2002 deals with the procedure to be followed if, on receipt of an interim or final report, the relevant Minister takes the view that publication of the report in full or in part might prejudice criminal proceedings. Section 3(1) of the 2002 Act provides that in such circumstances the Minister should apply to the court for directions concerning publication. The Attorney General, the Director of Public Prosecutions and the person affected must be notified of the application and given an opportunity to make submissions. Having heard submissions the court may direct that the report or a specified portion of it may not be published for a specified period or until the court directs. The application can be heard in public or private at the discretion of the Court.

(ii) Commissions of Investigation

14. The Commissions of Investigation Act 2004 ('**the 2004 Act**') provides that a commission of investigation may be established by the Government, based on a proposal by a Minister, with the approval of the Minister for Finance, to 'investigate any matter considered by the Government to be of significant public concern' (s 3(1)(a)). The Houses of the Oireachtas must consent to the establishment of a commission of investigation.

15. The 2004 Act gives the commission the power to conduct its investigation in any manner it considers appropriate, subject to the provisions of the Act and the commission's rules and procedures.

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10 Tribunals of Inquiry (Evidence) Act 1921, s. 1.

11 Tribunals of Inquiry (Evidence) (Amendment) Act 1979, s 3 amends s I of Tribunals of Inquiry (Evidence) Act 1921.

12 Tribunals of Inquiry (Evidence) (Amendment) Act 1979, s.4.

13 *Boyhan v Beef Tribunal* [1993] 1 IR 210, 219.

16. Section 7(2) of the 2004 Act provides that the members of commissions are to be appointed by the specified Minister or by the Government where there is no specified Minister. Section 7(4) of the 2004 Act requires that appointees should be persons who, having regard to the subject matter of the investigation, have the appropriate experience, qualifications, training or expertise.

17. Section 11(1) of the 2004 Act provides that:

    A commission shall conduct its investigation in private unless

    (a) a witness requests that all or part of his or her evidence be heard in public and the commission grants the request, or

    (b) the commission is satisfied that it is desirable in the interests of both the investigation and fair procedures to hear all or part of the evidence of a witness in public.

18. Thus, in contrast with tribunals, the default is that commissions occur in private, and the exception is for evidence to be given in public. However, as is clear from the above, a public hearing can be granted on a case-by-case basis upon request.

19. The 2004 Act also clearly sets out the rights of interested parties at private sessions. Section 11(2) of the 2004 Act states:

    Where the evidence of a witness is heard in private –

    (a) the commission may give directions as to the persons who may be present while the evidence is heard,

    (b) legal representatives of persons other than the witness may be present only if the commission –

        1. is satisfied that their presence would be in keeping with the purposes of the investigation and would be in the interests of fair procedures, and

        2. directs that they be allowed to be present,

    (c) the witness may be cross examined by or on behalf of any person only if the commission so directs, and

    (d) any member of the commission or a person who has been appointed under section 8 and is authorised by the commission to do so may, orally or by written interrogatories, examine the witness on his or her evidence.

20. Section 14 of the 2004 Act provides that a commission may receive evidence given orally before the commission, by affidavit, or as otherwise directed by the commission or allowed by its rules and procedures. This may include by means of a live video link, a video recording, a sound recording or any other mode of transmission.

21. Section 15 confers on commissions the power to establish their own rules and procedures in relation to evidence and submissions received. In addition, the commission is entitled to compel witnesses to give evidence whether under oath or by means of interrogatories or to direct a witness to answer questions it believes to be relevant to its investigation. A failure, without reasonable excuse, to comply with a direction to attend before a commission is an offence, and may be punishable as either a contempt or as an offence.[14] A commission also has powers to direct a witness or any other person to produce documents in their possession or power relevant to the investigation. A commission may apply to the High Court to compel compliance with its directions. A commission also has a power to enter premises, including private residences, in accordance with the provisions of the 2004 Act, to secure documents.

22. The 2004 Act provides that a commission has a duty to disclose to a person who gives evidence, or about whom evidence is given before the commission, the substance of any evidence the commission has that, in its opinion, the person should be aware of for the purposes of the evidence that person may give, or has given, to the commission. The source of the evidence or document does not have to be disclosed, unless the commission considers that it should be, in the interests of fair procedures or for the purposes of the commission's investigation.[15]

23. The commission must send a copy of the draft report, or a portion thereof, to any person who is identified or identifiable in it prior to submitting it to the specified Minister.[16] The draft report must be accompanied by a notice setting out the periods for making submissions or applying to the court for an order amending the draft report. If it is proposed that the draft report is to be amended in a manner that materially affects another party, further submissions on the relevant amendments may be sought.[17]

24. An application to amend a draft report may be made where the information contained is (a) commercially sensitive and (b) disclosure is not necessary for the purposes of the investigation.[18]

14 Commissions of Investigation Act 2004, s. 16(8) & (9).

15 ibid, s. 12(1) & (2).

16 Section 34(1) of the 2004 Act. Section 34(3) provides that 'A person will be regarded as being identifiable if the report contains information which could reasonably be expected to lead to the person's identification'. Section 37 imposes a duty of confidentiality on those to whom the draft report is sent.

17 This process is described, for example, in the Dublin Archdiocese Report, at para [2.40].

18 Section 36(1) of the 2004 Act.

25. On receipt of a commission's report, the specified Minister can do one of two things, publish it or, where the Minister believes that the report or a specified part of it might prejudice criminal proceedings, apply to the High Court for directions concerning publication. Having heard submissions the High Court may direct that the report or some portion of it may not be published for a specified period or until the court directs.[19]

26. The 2004 Act also envisages that in certain circumstances it may be deemed appropriate to establish a tribunal of inquiry to inquire into a matter which was within the commission of investigation's terms of reference. In such circumstances, the specified Minister or the commission, if it has not been dissolved, shall make available to the tribunal all the commission's evidence and documents.[20]

(iii) A Bespoke Statutory Inquiry

27. A bespoke statutory inquiry is an inquiry set up under a specific legislative provision. The Commission to Inquire into Child Abuse ('**CICA**') is an example of a bespoke statutory inquiry. It was established by the Commission to Inquire into Child Abuse Act 2000 ('**the 2000 Act**'). The terms of reference of CICA and its powers are discussed in detail elsewhere in this Report, but it is notable that CICA was an unusual form of inquiry, in that it provided for both an Investigative Committee and a Confidential Committee, with the intention that the latter would have a primarily therapeutic function. The Investigation Committee heard evidence and had the power to make findings about whether an institution or an individual was responsible for abuse and other such matters pursuant to its terms of reference. However, CICA's terms of reference were amended in 2005 so that, while it retained the power to investigate and report on abuse in institutions, it was not permitted to name any person responsible for abuse unless that person had a criminal conviction relating to abuse of children.

28. The purpose of the Confidential Committee, on the other hand, was therapeutic. It was not empowered to make findings. It permitted survivors to speak of their experiences in an informal, non-adversarial setting, with no lawyers or other parties present. The accounts were recorded and set out in anonymised form in the Confidential Committee Report of CICA. This model of inquiry was adopted by a number of other jurisdictions in investigating sexual abuse.

19 Section 38(3) of the 2004 Act.

20 Section 45 of the Commissions of Investigation Act 2004.

29. CICA is referred to as a commission, and it might be thought that its powers under the 2000 Act were identical to those to be found under the later Commissions of Investigation Act 2004, referred to above. However, there are in fact some material differences between the two Acts. The default position of the Investigation Committee of CICA was that evidence of child abuse was to be heard in private. Subsequently, the 2000 Act was amended to give the Investigation Committee a discretion to hear such evidence in public or to allow other parties to attend private hearing of such evidence, at CICA's discretion.[21] In respect of all other evidence, the default position was to hear that evidence in public, but 'having regard to the desirability of holding such meetings in public', there was also a discretion to hear that evidence in private. CICA thus differed from either a tribunal or a commission, in that different statutory provisions governed the different types of evidence it dealt with.

30. CICA's legislation, similar to that in relation to tribunals, did not make specific provision concerning the requirements of fair procedures. In contrast, as set out above, the 2004 Act governing commissions of investigation does make such provision. Rather, it was provided by CICA, in its Third Interim Report, that a person whose conduct was impugned as part of the investigation was entitled to fair procedures, including: the grant of legal representation; an entitlement to a statement of the allegations made against him or her; permission to cross-examine by counsel his or her accusers; permission to testify in his or her own defence and permission to address, by counsel, the Committee in his or her own defence.[22]

31. In contrast, a commission under the 2004 Act is granted statutory powers to deal with fair procedure rights in a more flexible manner than was expressly conferred on CICA, or indeed is conferred on a tribunal pursuant to the 1921 Act. The case law on the fair procedures rights of persons who appear before various types of inquiries is considered below.

21 The Commission to Inquire into Child Abuse (Amendment) Act 2005, s 6 amended s 11 of the Commission to Inquire into Child Abuse Act 2000.

22 Commission to Inquire into Child Abuse, Third Interim Report (December 2003), p. 71; following *Re Haughey* [1971] IR 217. See also Commission to Inquire into Child Abuse, Investigation Committee: Final Ruling of the Investigation Committee (18 October 2002), p. 36.

(iv) Non-Statutory Inquiries

32. A non-statutory inquiry is not established pursuant to legislation, in contrast with commissions, tribunals, and bespoke statutory inquiries. Thus, such an inquiry possesses no statutory powers in aid of its investigation and relies on the co-operation of those concerned in its investigation to achieve its objectives. It cannot hear sworn evidence and witnesses appearing before it do not have the same privileges as witnesses appearing before a statutory inquiry. As such, it has no powers of compellability of witnesses or documents. The Ferns Inquiry, referred to in greater detail in the next chapter, is an example of a successful non-statutory inquiry.

33. Further, since the advent of the General Data Protection Regulation ('GDPR')[23] and the Data Protection Act 2018, there is a requirement for a statutory basis upon which personal data may be given to an inquiry and processed by an inquiry in furtherance of its investigation. A statutory power to require the provision of relevant documentation allows for the sharing of data which might otherwise not be disclosable because of data protection concerns. In the absence of such a power, a non-statutory inquiry could be greatly impeded in its work.

C. The Requirements of Fair Procedures Before Inquiries

34. The decision of the Supreme Court in *Re Haughey* [1971] IR 217 established that Article 40.3 of the Constitution provided 'a guarantee to the citizen of basic fairness of procedures'. Where, in proceedings before any tribunal, (in that case the 'tribunal' was an Oireachtas committee) a party to the proceedings is at risk of having his or her good name, or his or her person or property, or any of his or her personal rights jeopardised, then those proceedings may be correctly classed as proceedings which may affect his or her rights. In that case, the Court held that the affected party should be afforded the following minimum protections:

    (i) that he should be furnished with a copy of the evidence which reflected on his good name;

    (ii) that he should be allowed to cross-examine, by counsel, his accuser or accusers;

    (iii) that he should be allowed to give rebutting evidence; and

    (iv) that he should be permitted to address, again by counsel, the Committee in his own defence.

23 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ L 119, 4.5.2016, p. 1–88.

35. The Supreme Court has subsequently identified that this constitutional guarantee of fair procedures encompasses the principles of natural justice, that is, an obligation to hear the other side to a dispute and not to be a judge in one's own cause.[24] For the purpose of this chapter, we refer to constitutional guarantee of fair procedures and natural justice, as 'procedural rights' or 'fair procedures'.

36. While the tribunal that the court was considering in *Re Haughey* was an Oireachtas committee, a tribunal of inquiry, established under the 1921 Act is similarly obliged to conduct its inquiry in accordance with the principles of constitutional justice and in particular with regard to fair procedures.[25] A commission of investigation pursuant to the 2004 Act also has to act in accordance with fair procedures and constitutional justice. However, it has a discretion, pursuant to the provisions of the 2004 Act, to apply a less stringent version of *Re Haughey* rights, in that it may decide not to permit cross-examination and to instead afford the person concerned a right to respond to a witnesses' evidence by way of submission.

37. Further, the courts have made clear in the context of litigation concerning tribunals of inquiry, that the requirements of fair procedures may vary according to the character of the proceedings and the gravity of the findings being made.[26]

38. In *Lawlor v Flood,* a case concerning the Flood tribunal, Murphy J, speaking in the context of the right to cross-examine, stressed that the constitutional rights flowing from *Re Haughey* are 'not a ritual or a formula requiring a slavish adherence'.[27] Rather, he suggested that the constitutional entitlement of a particular individual will vary according to the position in which he is placed, a position that he acknowledged might well evolve during the course of proceedings.

39. Similarly, in *O'Callaghan v Mahon*, Geoghegan J stated that:[28]

> Given the clear public interest from time to time in having matters investigated by a 1921 Act tribunal, it may well be that the requirements of the constitutional obligation to vindicate as far as possible the good name of the citizen are in that context somewhat less stringent than in other circumstances. For that reason, I would prefer not to express any view on whether all the rules relating to evidence and cross-examination etc. fashioned by the courts or derived from the Common Law Procedure Acts are necessarily and in all circumstances equally applicable to a 1921 Act tribunal.

24 *Goodman International v. Hamilton* [1992] 2 IR 542, 609.

25 See, for example, *Haughey v. Moriarty* [1999] 3 IR 1, 60.

26 *Murphy v. Flood* [2010] 3 IR 136, 226.

27 [1999] 3 IR 107, 143.

28 [2006] 2 IR 32, 80.

(i) Who is entitled to fair procedures before a tribunal?

40. The Supreme Court in *Re Haughey* makes clear that where a person who is a party to proceedings is at risk of having his personal rights affected by the proceedings, then that person is entitled to fair procedures as a means of protecting and vindicating their rights.

41. Thus, where a witness to a tribunal may be prejudicially affected by the evidence given at the hearings, or by any of the inquiry's findings, they will be likely to be entitled to the full panoply of procedural rights set out in *Re Haughey.* However, full representation before a tribunal may be refused if there is no evidence that the party concerned is likely to be prejudicially affected by the findings of the inquiry or where no allegations are made against them.[29]

42. In the context of a bespoke statutory inquiry, there is authority for the proposition that members of a religious congregation should be granted full representation rights to defend the name of their deceased members who are alleged to be abusers. In *Murray v Commission to Inquire into Child Abuse*,[30] the High Court (Abbott J.) held that, while in general the law does not protect the reputation of a deceased person, the reflection on the reputation of living members of a congregation of an adverse finding against one of their deceased members meant that a distinction could be made.[31] The test for naming those accused of abuse is described as follows:[32]

> 155 From the foregoing authorities, I am of opinion that, **in the absence of other convincing evidence, the courts would be very reluctant, as a matter of prudence, to allow a claim against a deceased person unless it was corroborated in relevant material respects.**
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> …
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> 159 The question is whether that standard is one of a requirement of corroboration which is mandatory in all cases or one analogous to the standard in the Criminal law Rape (Amendment) Act 1990 and the so- called rule of prudence or practice of the courts in relation to civil claims against the deceased to leave the decision as to the requirement of corroboration to the tribunal deciding the facts, to cases where the evidence is not found to be otherwise convincing. I find that the proper construction and interpretation of the Act of 2000 is that **the investigating committee should exercise its discretion, in relation to corroboration, on the same basis as the courts have done in relation to the claims against the estates of deceased persons.** (emphasis added)

29 *Boyhan v Beef Tribunal* [1993] 1 IR 210.

30 [2004] 2 IR 222.

31 ibid, at 289.

32 ibid, at 296-7.

43. It should be borne in mind that the challengers to CICA in the *Murray* case expressly argued that if the 2000 Act establishing CICA allowed for the naming of deceased or incapacitated persons, then the Act was unconstitutional. Importantly, the High Court rejected this claim. While the judgment was under appeal to the Supreme Court, CICA made the decision not to name anyone in their findings, save where the individual concerned had been convicted of abuse. On that basis, the appeal did not proceed and the issue of the constitutionality of the CICA legislation, allowing the naming of individuals found to be responsible for abuse, was not determined by the Supreme Court.

44. In considering the decision in *Murray*, it is relevant that the fact that 'the congregation of the Christian Brothers is a congregation which is perceived in the State as having a distinct charism and tradition and has a distinct reputation which adheres to its members' was conceded by the CICA Investigation Committee.[33] The point was therefore not contested. A future case might take issue with this position.

45. Moreover, the reputational rights of a congregation is put in question by the Supreme Court's decision in *Hickey v McGowan.*[34] In that case, the Court that a religious order cannot be treated as if it were a body corporate and therefore a single entity capable of being sued or, on the facts of that case, vicariously liable for the acts of its members.[35] The Supreme Court found that since orders are unincorporated associations, members of the religious order who were not members at the time of an incident of sexual abuse by another member were not sufficiently connected to be vicariously liable for such a tortious act.[36] Absent the nomination of a representative defendant, the only way that the religious order could be sued was to sue all the Brothers who were members at that time individually. It could well be argued that if a religious order does not exist as a legal person for the purpose of being sued, it cannot exist as a legal person for the purpose of having a reputation.

46. In any event, *Murray* was decided in the context of a bespoke statutory inquiry and the specific terms of the 2000 Act, which at the time of the hearing expressly permitted the making of findings of abuse against named individuals. Finally, one would have to consider the extent to what a right of living members of a congregation to defend the congregation's reputation through defending claims of sexual abuse against deceased members could be relied upon where members of a particular order have already been convicted of sexual abuse or such abuse is admitted by the order.

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33 [2004] 2 IR 222, 263.

34 [2017] 2 IR 196.

35 ibid, at 230, per O'Donnell J: 'I cannot accept that, by some process of unexplained alchemy, a group of individuals such as that involved in this case, which is in law an unincorporated association, can come to be treated for the purposes of these proceedings only as if it were a corporate entity'.

36 [2017] 2 IR 196, 241.

(ii) Prejudice caused by passage of time in historical abuse inquiries

47. The issue of prejudice to those being investigated caused by delay and the passage of time since the sexual abuse complained of was alleged to have taken place arose for consideration in the *Murray* case. It was argued that those accused of wrongdoing could not properly defend themselves as the events complained of had happened a long time ago. The Investigation Committee ruled that it would deal with the issue of the lapse of time since the events complained of had occurred, on the basis of considering the prejudice caused by the passage of time and considering whether it was unsafe to make a determination as to whether a respondent was responsible for abuse.[37] The High Court upheld the Investigation Committee's ruling in this regard.[38]

48. A future inquiry concerning historical sexual abuse, if tasked with making findings as to whether abuse occurred, and identifying those responsible, is likely to be confronted with the same issues. However, it should be noted that in *Murray* the Christian Brothers seem to have conceded that 'in instances where there had been a confession or conviction for abuse in respect of complaint, the arguments [regarding the impact of delay on infirm priests] would not apply'.[39]

(iii) Aspects of the guarantee of fair procedures

(a) Interpretation of terms of reference

49. Fair procedures can require that a tribunal or commission provide an explanation of its interpretation of its terms of reference in early course to persons likely to be affected by the inquiry.[40] It may be necessary for the tribunal or commission to explain any further interpretation it may have placed on the terms of reference in the light of the facts that emerge.[41]

(b) The right to legal representation

50. In *Re Commission to Inquire into Child Abuse*,[42] the High Court found that the assistance of counsel was as an 'essential part of due process before tribunal' to vindicate a citizen's right to his good name. Notably, this case concerns the powers of CICA and not a tribunal of inquiry. CICA had ruled that legal representatives attending hearings on behalf of complainants and respondents should be limited to

37 [2004] 2 IR 222, 301.
38 ibid.
39 [2004] 2 IR 222, 289-290.
40 *Haughey v Moriarty* [1999] 3 IR 1, (Hamilton CJ).
41 ibid, per Hamilton CJ, at p. 56.
42 [2002] 3 IR 459.

one solicitor and one counsel to give effect to the CICA's statutory obligation to provide an atmosphere which was as sympathetic and as understanding as possible to persons who alleged that they were abused.[43] The High Court nonetheless found that CICA had no jurisdiction to limit the right to legal representation, holding that to do so was a 'substantial interference' with the right and was *ultra vires* its powers.

(c) The right to cross-examination

51. The right to cross-examination is well-established as a facet of the right to fair procedures under the Constitution. As set out above, CICA in its Third Interim Report, had stated that a person whose conduct was impugned before the commission was entitled to fair procedures, including permission to cross-examine by counsel his or her accusers. CICA had a procedural requirement that a statement from a person accused of wrongdoing had to be provided in response to allegations of a survivor as a precondition for the right to cross-examine the survivor. The Christian Brothers in the *Murray* case argued that this requirement effectively curtailed the ability of the representatives of the congregation and of deceased and incapacitated members of the congregation to cross-examine. The High Court found that cross-examination on behalf of the deceased and incapacitated (by representatives of their congregation) of a general nature ought to be allowed in accordance with fair procedures.[44] Again, the question of whether this aspect of *Murray* could be relied on by congregations in a future inquiry is subject to the overarching point, discussed above, as to whether congregations and fellow members properly have a right to represent deceased or infirm members before an inquiry to defend their reputation.

52. Under the 2004 Act, the Chair can decide that providing a draft report to affected parties with an opportunity to comment is sufficient to meet the requirements of fair procedures for affected persons, and to decline any cross-examination by such parties.[45] This is discussed in greater detail below.

43 Section 4 of the Commission to Inquire into Child Abuse Act 2000.

44 *Murray v The Commission to Inquire into Child Abuse* [2004] 2 IR 222, 304.

45 See comments of Charleton J in *Shatter v Guerin* [2019] IESC 9, at para 24.

(d) The right to be furnished with a copy of relevant evidence

53. In *O'Callaghan v Mahon*,[46] the applicant was a witness to the Mahon tribunal and had sought disclosure of all documents concerning allegations made against him by another witness to the tribunal to allow him to cross-examine that witness. The tribunal refused disclosure on the basis that the statements had been furnished to them in confidence, save that it agreed to disclose statements that revealed a significant, gross or glaring contradiction. The Supreme Court held that this failed to comply with the requirements of fair procedures and that confidentiality cannot undermine those requirements. Confidentiality can only apply to information that was not necessary to be used at oral hearings. If the information is essential for the purposes of a cross-examination then fair procedures mean the tribunal is not entitled to maintain confidentiality and could be judicially reviewed for doing so.[47]

(e) The right to be given notice and/or the right to make submissions

54. There have been several judgments of the Irish courts which have determined that, in the discrete circumstances of the relevant tribunal or commission, a witness or party to the inquiry ought to have been afforded notice of a course of action taken by the inquiry and, relatedly, an opportunity to make submissions on the same. The Supreme Court in *Caldwell v Mahon Tribunal*,[48] for example, held that fair procedures required that affected parties should have some opportunity of addressing the respondent tribunal on the question of whether to commence or proceed any further with the investigation of a module of the tribunal proceedings. The courts have similarly held that where a finding is made that a witness to a tribunal is obstructive or non-cooperative, that witness ought to be given notice of that intended finding and afforded an opportunity to make submissions.[49]

(f) The right to be furnished with draft findings of the inquiry

55. In *O'Callaghan v Mahon*,[50] O'Neill J observed that the applicants had access to the evidence given by witnesses in the course of the public hearings, had the opportunity to cross-examine witnesses where appropriate, and to provide written submissions to the Mahon tribunal, and as such there was no requirement that they were to be provided with the provisional findings of the tribunal insofar as they affect them, notwithstanding the voluminous evidence involved. The High Court contrasted the proceedings of a public tribunal of inquiry with other inquiries, such as a non-

46 [2006] 2 IR 32.
47 [2006] 2 IR 32, Geoghegan J at p. 81.
48 [2011] IESC 21.
49 See *Murphy v Flood* [2010] 3 IR 136 and *Chawke v Mahon* [2014] 1 IR 788.
50 [2009] IEHC 428.

statutory private inquiry or an inquiry under the Companies Acts, where evidence was initially assembled in private and without cross-examination. The same contrast can be drawn in relation to a commission of investigation under the 2004 Act, where the furnishing of a draft report to affected parties for comment is a key procedural protection, and can be of itself a sufficient minimum standard of fair procedures for affected persons.[51]

D. Can Tribunals Hear Evidence in Private?

56. One potential approach that might alleviate the difficulty of survivors facing cross-examination is to hear their evidence in private. As discussed above, commissions of investigation generally sit in private, while tribunals of inquiry generally sit in public.

57. As a tribunal of inquiry is not a court, the duty imposed on the courts by Article 34.1 of the Constitution that justice shall be administered in public has no application. However, section 2 of the 1921 Act clearly establishes that the default position is that a tribunal is to sit in public.

58. It appears that it is possible for tribunals to sit in private during the evidence-gathering stage[52] and also for hearings where, as provided by section 2 of the 1921 Act, 'in the opinion of the tribunal it is in the public interest expedient so to do for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given and in particular where there is a risk of prejudice to criminal proceedings'.

59. A number of cases examining section 2 of the 1921 Act have arisen in circumstances where a tribunal has refused an application to sit in private, and that decision was been challenged in the High Court.

51 See comments of Charleton J in *Shatter v Guerin* [2019] IESC 9, at para 24.

52 In *Haughey v Moriarty* [1999] 3 IR 1 Hamilton CJ, at 74, stated that the evidence-gathering stage must occur in private because '[i]f these inquiries in this investigation were to be held in public it would be in breach of fair procedures because many of the matters investigated may prove to have no substance and the investigation thereof in public would unjustifiably encroach on the constitutional rights of the person or persons affected thereby.'

60. In *Haughey v Moriarty* [1993] 3 IR 1, Hamilton CJ outlined the procedural phases of a tribunal of inquiry as follows:

(1) A preliminary investigation of the evidence available;

(2) The determination by the Tribunal of what it considers to be evidence relevant to the matters into which it is obliged to enquire;

(3) The service of such evidence on persons likely to be affected thereby;

(4) **The public hearing of witnesses in regard to such evidence and the cross-examination of such witnesses by or on behalf of persons affected thereby;**

(5) The preparation of a report and the making of recommendations based upon facts established at such public hearing. (emphasis added)

61. The Court concluded that section 2(a) applied only to the fourth stage, the public hearing of evidence and cross-examination.[53]

62. In *O'Callaghan v Mahon*, the Supreme Court considered the evidence-gathering stage of a tribunal's work. The Dáil Éireann resolution establishing the tribunal requested the tribunal to 'carry out such preliminary investigations in private as it thinks fit using all the powers conferred on it under the Acts, in order to determine whether sufficient evidence exists in relation to any of the matters referred to above to warrant proceeding to a full public inquiry in relation to such matters'.[54] Hardiman J accepted that tribunals had the authority to engage in a preliminary investigation to identify issues meriting further investigation at public hearings.[55]

63. In *Murphy v Flood*,[56] it was emphasised by Hamilton CJ that:[57]

> … a private session is an exception to the general mode of procedure contemplated for hearings before the Tribunal: The Tribunal must be conducted in public and it may not refuse to allow the public to be present "unless in the opinion of the Tribunal it is in the public interest expedient so to do" … It is purely a matter for the Tribunal to decide whether it be in the public interest expedient to refuse to allow the public or any portion of the public to be present at any of the proceedings of the Tribunal.

53 [1999] 3 IR 1, 74-75.

54 Quoted in [2006] 2 IR 32, 72.

55 ibid, at 74.

56 [2000] 2 IR 298.

57 ibid, at 305.

64. The court ultimately determined that since there was no evidence that the decision not to exclude the public from the hearing of evidence was in any way unreasonable or irrational, the Court was 'not entitled to interfere with the ruling made by the Sole Member thereof as there was no breach of the Applicant's constitutional rights …'[58]

65. A number of cases have addressed whether a tribunal has the discretion to require a public sitting. In *Flood v Lawlor (Planning Tribunal)*[59] and *O'Brien v Moriarty Tribunal*,[60] the Supreme Court held that it would not interfere with the tribunal's discretion to require a public hearing unless its decision was irrational or against common sense. In *Flood v Lawlor*, Keane CJ noted that:[61]

> As has been frequently pointed out, one of the objects and indeed probably the main object of an Inquiry, is to seek to allay public concern arising from matters comprised in the terms of reference of the Tribunal and affecting in general, although not exclusively, the conduct of public life at various levels and the conduct of public administration at various levels. That object of course will be defeated if the Inquiry as a general rule is to be conducted in private rather than in public.

66. However, the inverse proposition, being a challenge to a tribunal deciding to hear evidence in private, does not appear to have been considered by the courts. What can be said is that tribunals have a general discretion in determining their own procedures. In *O'Brien v Moriarty Tribunal*,[62] Denham J reiterated that:

> … the interpretation of the terms of reference is a function of the Tribunal and primarily is not a matter to be determined by the Court … Tribunals should be afforded a significant level of discretion as to the manner in which they carry out the important work which has been given to them by the Houses of the Oireachtas.

67. While the standard of review suggested in the cases where applicants have challenged a tribunal's decision not to hear their evidence in private, considered above, is the low *O'Keeffe* irrationality/unreasonableness standard (that the decision making authority had before it no relevant material which would support its decision) in the aftermath of subsequent cases such as *Meadows v Minister for Justice*[63] and *Burke v Minister for Education*,[64] which held that government or legislative action interfering with constitutional rights should be subjected to a more rigorous

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58 [2000] 2 IR 298, 305.
59 [2000] IESC 76.
60 [2005] IESC 32.
61 [2000] IESC 76, p. 4.
62 [2006] IESC 6.
63 [2010] 2 IR 701.
64 [2022] 1 ILRM 73.

proportionality analysis, the likelihood is that a proportionality standard of review would be applied to a decision to hear evidence in private.

68. The Law Reform Commission has previously recommended that uncontested evidence should be 'read into' the record where all the interested parties consent, with a written account of the evidence being, 'where appropriate, posted on a tribunal's website or circulated to parties present at the hearing', on the basis that this would satisfy the requirement imposed on tribunals of inquiry by section 2(a) of the 1921 Act to conduct proceedings in public.[65]

69. There have been tribunals that have primarily held hearings in private. The CervicalCheck Tribunal is not governed by the 1921 Act, but by the CervicalCheck Tribunal Act 2019, as amended ('**the 2019 Act**'). The CervicalCheck Tribunal was not investigatory, but rather was established to determine liability, subject to the consent of all parties, in respect of claims arising from the CervicalCheck scandal. Unlike tribunals under the 1921 Act, section 20 of the 2019 Act provided that the CervicalCheck Tribunal 'shall conduct its hearings otherwise than in public' unless 'a claimant requests the Tribunal to hold a hearing or part of a hearing in public and the Tribunal agrees that it would be appropriate to do so'. Thus, the CervicalCheck Tribunal provides an outlier example of a Tribunal which, due to its content and the focus on confidential medical information, was predominantly conducted in private.

70. The Lindsay Tribunal, often referred to as the Blood Tribunal, also took measures to preserve the anonymity of witnesses, including by pseudonymisation.[66]

71. The Morris Tribunal heard evidence in private from a witness who was subject to criminal prosecution and prevented publication of that evidence until the conclusion of the criminal case to prevent prejudice to an accused. The report in respect of that module of the tribunal's work was prepared in the normal way and submitted to the Minister. If criminal proceedings were still pending at that stage, the tribunal found that it would be a matter for the Minister under section 3 of the 1921 Act to proceed as he thought fit.[67]

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65 LRC 2003 Consultation Paper, at paragraph 7.52.

66 Report of the Tribunal of Inquiry into the Infection with HIV and Hepatitis C of Persons with Haemophilia and Related Matters (the "**Lindsay Tribunal**"), available at https://www.gov.ie/pdf/?file=https://assets.gov.ie/42662/ea2b2faad3434d4fa7afed177c1bbb0f.pdf#page=null.

67 https://www.gov.ie/en/collection/539ba-morris-tribunal/.

72. There is no case law on the provisions of the 2004 Act which establish the default position that in general a commission sits in private, but may sit in public if requested by a witness to do so, and the commission accedes to that request, or alternatively, the commission is satisfied that sitting in public is in the interests of the investigation and procedural fairness.

73. The main difference, however, between the procedures of a tribunal and those of a commission, apart from the fact that one sits mainly in public and the other in private, is that a commission enjoys much greater flexibility in the procedural rules it may apply. While there is some judicial commentary, including from the Supreme Court, that a tribunal does not have to apply the full extent of procedural rights to every person its findings may affect, it seems a departure from those procedural rights is much more likely to lead to legal challenges, as the position is uncertain. Further, in practice, case law suggests that generally the entitlement to full procedural rights before a tribunal will be upheld.

Chapter 15:
Methodology and Procedures of Previous Inquiries

(g) Revised Hearing Process

(h) Expert Evidence

(vi) Methodology of the Confidential Committee

(vii) Associated Redress Schemes

(a) The Residential Institutions Redress Board

(b) Caranua

A. The Ferns Report

1. The BBC documentary 'Suing the Pope' aired on 19 March 2002 and documented allegations of clerical child abuse in the diocese of Ferns. The documentary caused considerable public disquiet and in April 2002, the Minister for Health and Children appointed Mr George Birmingham SC to carry out a preliminary investigation into the matter and identify the central issues for any inquiry. The Birmingham Report was published on 1 August 2002.[1]

2. On foot of the recommendations of the Birmingham Report, in March 2003 the Ferns Inquiry was established as a non-statutory inquiry. The Birmingham Report recommended a non-statutory inquiry in light of the desire to hold proceedings in private, and because there was not a wide dispute as to the facts to be established.[2] It was felt that a non-statutory inquiry 'would be able to answer the basic question of who knew what when'.[3] The relevant church authorities had also confirmed they would cooperate with an inquiry in the absence of any powers of compellability or discovery. The terms of reference, however, made clear that, if there was a lack of cooperation, this would result in the Government granting the inquiry statutory powers.[4]

3. The Ferns Inquiry was tasked with identifying allegations of child sexual abuse made against clergy in the diocese of Ferns, and the church and authorities' response to those complaints. The Inquiry examined not only the response of the diocese, but also the response of the Southeastern Health Board and An Garda Síochána to the allegations of abuse. The Ferns Report was presented to the Government on 25 October 2005 and was published on the following day.[5]

(i) Methodology of Ferns

4. The Inquiry's aim was to establish the factual background to child sexual abuse in the diocese by reviewing all relevant documentation and by inviting statements from witnesses, at oral hearing, in written form, or both.[6] Survivors were given the option to write a statement, speak in person/by telephone or attend an oral hearing. Most survivors gave oral evidence, and many made a written statement also.

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1 Report of George Birmingham SC, 'Proposed Inquiry into the Handling of Allegations of Child Sex Abuse Relating to the Diocese of Ferns' (August 2002) ('**Birmingham Report**').

2 Birmingham Report, p. 90.

3 The Ferns Inquiry was established prior to the coming into effect of the Commissions of Investigation Act 2004, ('**the 2004 Act**') so that at the time of the Birmingham Report the options available were a tribunal of inquiry, a non-statutory inquiry, or to enact special legislation setting up a specific statutory inquiry.

4 This was stated at para. h of the terms of reference.

5 Murphy, Francis D, Buckley, Helen, Joyce, Laraine. 1995. The Ferns Report: presented to the Minister for Health and Children, October 1995. Dublin: Stationery Office. ('**Ferns Report**').

6 Ferns Report, p. 3.

5. As the Inquiry was non-statutory, those appearing before it did not give sworn testimony, were not cross-examined, and were not entitled to legal representation. Where the Inquiry conducted oral hearings, this evidence was unsworn, and witnesses were guided through their testimony by senior counsel engaged by the Inquiry. Persons against whom allegations were made were not entitled to cross-examine witnesses.[7]

6. The Ferns Report records the extensive cooperation of Bishop Eamon Walsh. On accepting his appointment as Apostolic Administrator of the Diocese of Ferns, Bishop Walsh stated:

> In my caretaker capacity I will fully co-operate with whatever instrument of inquiry is deemed most appropriate in our search for the truth. It is only when the truth has been established that all of us can move on from the crimes that were committed, and the responses made.[8]

7. The Ferns Report also included research on the areas of child sexual abuse, paedophilia, and the management structures of the church, the Health Board, and An Garda Síochána.

8. Unlike later inquiries, no 'sampling' approach was taken, and the Inquiry appears to have assessed the responses to all the complaints and allegations it discovered. Oral evidence was heard from 90 survivors and the Inquiry received a further 57 written submissions. In addition, it also heard over 100 witnesses from church authorities, representatives of the Southeastern Health Board, and the Gardaí.

9. The Inquiry identified more than 100 allegations of child sexual abuse made between 1962 and 2002 against 21 priests.[9] Over 40 of those complaints related to two priests. 10 of the priests against whom allegations were made were deceased, 3 had been laicised and the remaining 8 priests were no longer in active ministry at the time of the report.[10]

7 ibid, pp. 246-7.
8 Birmingham Report, p. 6.
9 Ferns Report, p. 6.
10 ibid.

10. The Inquiry's terms of reference were directed towards the response to complaints or allegations of child sexual abuse, including *inter alia* identifying what complaints or allegations had been made prior to April 2002, and the nature of the response to the complaints by the church authorities and any public authorities to which the complaints were reported.[11] The Inquiry was also to identify the reasons for the inadequate or inappropriate responses and whether any shortcomings had been addressed, and to look at communications between the relevant authorities, and make any necessary recommendations, including recommendations to improve child protection.

11. In circumstances where its Terms of Reference were directed towards responses to allegations, rather than allegations themselves, the Report contained an important caveat:[12]

> The Inquiry has identified approximately 100 allegations or complaints of child sexual abuse … **It is no part of the function of the Inquiry to form any view as to whether those complaints or allegations are, or anyone of them is, well founded.** The primary task of the Inquiry is to identify the response by the Church and public authorities to such complaints whether they are true or false.
>
> … The Inquiry emphasises that the contents of this chapter consist of allegations or complaints substantially in the terms of the history provided directly or indirectly by the complainants. **With the exception of the two priests who pleaded guilty to certain charges brought against them and to certain specific and limited admissions referred to in Chapter 5, all of those allegations and complaints are and were vehemently denied by all of the priests living at the time when the allegations were made against them.** The priests who were dead at the time when the allegations were made did not have the opportunity to refute such allegations. **Again, it must not be assumed that the Church or lay authorities accept that the allegations set out in this Chapter were made to them at all or were made in the terms recorded in this Chapter save to the extent that it is expressly so admitted** elsewhere in the Report. The failure to repeat the phrase "it is alleged" throughout every paragraph of t**his Chapter must not be taken as indicating that the Inquiry has accepted that the allegations or complaints are, or any of them is, true.** (emphasis added)

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11 ibid, p. 2.

12 ibid, p. 70. Similarly, in the Conclusion it is stated: The persons against whom the allegations were made were not given an opportunity to confront or cross-examine the complainants in the course of this Inquiry. The Terms of Reference of the Inquiry require it to identify the allegations of child sexual abuse as reported and to consider the response to those allegations by the appropriate authorities. Such response could not be predicated on proving the truth or otherwise of such allegations. The Inquiry does not express and was not required to express any view as to the truth or otherwise of any allegation. (p. 246-7)

(ii) Findings and Impact

12. The Inquiry identified more than 100 allegations of child sexual abuse made between 1962 and 2002 against 21 priests.[13] The report found that the church authorities failed to act to protect children and placed the interests of individual priests ahead of those of the community in which they served.[14] The Inquiry found that the bishops consistently failed to appropriately respond to allegations of child sexual abuse in failing to have the accused priest to step aside from active ministry pending a determination of the allegation. The Inquiry found complaints were inappropriately investigated because they required that complaints be corroborated or substantiated by convincing evidence before suspending the accused priest.[15]

13. In total, some 20 recommendations were made in the Ferns Report, including recommending a national publicity campaign about child sexual abuse; that legislation and publicity preserve and strengthen the more open environment of reporting child sexual abuse; that organisations which employ people to work with children should have codes of conduct; and that all complaints should be detailed in written record and that records be accurately kept.[16]

14. However, while the Inquiry was required to identify any 'complaints and allegations' and to further assess the adequacy of responses to such complaints and allegations, the matter-of-fact manner in which such allegations were set out could fairly be taken as suggestive of an actual finding of wrongdoing. This approach appears to be borne out of the recommendations of the Birmingham Report as to how the Inquiry should be conducted which suggested that, while the focus of the inquiry should be on responses, the Inquiry should not be 'artificially' constrained in its reporting of complaints and allegations and that the 'inquiry should be able to deal with situations where it was established that there was actual knowledge, or strong and clear suspicion, of abuse'.[17]

15. The great majority of allegations were reported using anonymisation of both the victim and the alleged perpetrator. While there may have been concerns as to potential legal challenges underlying these choices, it also appears from the Birmingham Report that the decision to anonymise alleged perpetrators may have been motivated, in part, by a concern for the welfare of the family members of alleged abusers. The Birmingham Report speaks of the distress experienced by

13 Ferns Report, p. 6.
14 ibid, p. 254.
15 ibid, p. 255.
16 Ferns Report, p. 263.
17 Birmingham Report, p. 93.

family members of persons accused of abuse during public revelations of such abuse, and suggests that 'any inquiry should be structured so as not to increase their pain'.[18]

16. The Ferns Report named two clerics as being the subject of child sexual abuse allegations, on the basis that they had previously been convicted of offences.[19] The notorious paedophile Fr Sean Fortune, who was awaiting prosecution at the time of his death by suicide, was also named. While the majority of other priests were anonymised and referred to by letters of the Greek alphabet, a number of others were named, it seems on the basis that they were deceased by the time of the publication of the report.[20] One living priest who had not been convicted of offences is named as having allegation against him, although the Report set out his unequivocal denial of the allegations.[21] There has been some criticism of the Ferns Report not naming the majority of priests involved.[22]

17. In contrast, the Ferns Report takes a more liberal approach to the naming of individuals involved in responding to allegations and complaints, including in particular Bishop Comiskey, in respect of whom a number of very serious findings are made, including that he had failed to appropriately respond to allegations of child sexual abuse in failing to have the accused priest step aside from active ministry pending investigation of the complaint, and requiring that complaints be corroborated by convincing evidence before suspending an accused priest.[23] Bishop Comiskey is noted to have co-operated fully with the Inquiry. Bishop Comiskey was himself the subject of an allegation by Fr Sean Fortune that he had abused him, which was recorded in a letter made shortly before his death by suicide.[24] The Ferns Inquiry heard from a number of persons in relation to this allegation. In the Report, it is noted that Bishop Comiskey said he 'would have welcomed an opportunity to actually cross-examine people who made allegations against him at a public inquiry because from his perspective, it was unsatisfactory that he was being questioned about unsworn evidence'.[25]

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18 ibid, p. 89-90.

19 Ferns Report, p. 70.

20 Ferns Report, p. 70.

21 ibid, p. 102. Monsignor Ledwith was dismissed from the clerical state by the Pope: 'Monsignor Ledwith dismissed from priesthood by the Pope' *Irish Independent* (27 October 2005) https://www.independent.ie/regionals/wexford/enniscorthy-news/monsignor-ledwith-dismissed-from-priesthood-by-the-pope/27182838.html.

22 Paul Michael Garrett, 'A "Catastrophic, Inept, Self-Serving" Church? Re-examining Three Reports on Child Abuse in the Republic of Ireland', (2013) 24(1) *Journal of Progressive Human Services*, 43-65, p. 47.

23 Ferns Report, p. 255.

24 ibid, p. 169.

25 ibid, p. 170.

18. The then Attorney General, Rory Brady SC, appears to have raised concerns about the naming of particular individuals immediately prior to the publication of the report, but the report was nevertheless published in an unredacted format.[26]

19. The Ferns Inquiry's Terms of Reference were criticised by some as being unduly narrow insofar as they did not contain an express mandate to make findings of fact in relation to particular instances of abuse so that, at least in part, the investigatory process failed to establish who was responsible and provide a measure of accountability for the perpetrators.[27]

20. The ability of the non-statutory Ferns Inquiry to name individual clergy as responsible for serious failings in the handling of abuse allegations, in circumstances where its findings could adversely affect the good name and reputation of the clergy concerned, and where no right to cross-examine was afforded to those clergy to defend their good name and reputation, is in retrospect surprising. It seems that the clergy in question did not challenge the entitlement of the Inquiry to proceed on that basis. However, the Ferns Inquiry also had documentary evidence obtained from the diocese about the handling of abuse allegations which assisted it in arriving at conclusions without the necessity for cross examination of the complainants.

21. The Ferns Inquiry was not required, and specifically noted that it did not make, findings as to the truth or otherwise of the allegations made, as opposed to the manner in which those allegations were handled. Thus, accounts of abuse given by complainants was fully set out, and arguably in a manner which suggested acceptance of the truth of the allegations made, without specific findings to that effect. Further, in the vast majority of cases, the names of alleged abusers were anonymised, unless the cleric concerned was deceased or a convicted child abuser. One living cleric, with no convictions, was named and his unequivocal denial of the allegation was also set out. A future inquiry, held in private, which like Ferns, adopted more limited procedural rights, and named individuals accused of abuse in the same manner, could find itself subject to legal challenge. The *Murray* judgment found that the Commission to Inquire into Child Abuse could not name deceased religious order members as responsible for abuse, without full procedural rights afforded to the congregation to defend their good names. On the other hand, there is more recent comment, albeit *obiter*, from a member of the Supreme Court, suggesting that it is permissible to name individuals as responsible for serious wrongdoing while affording those individuals more limited procedural rights, in the context of Commissions of Investigation.[28]

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26 Liam Reid and Patsy McGarry, 'Legal concerns as Ferns sex abuse report to be published' *The Irish Times,* (25 October 2005), available at: https://www.irishtimes.com/news/legal-concerns-as-ferns-sex-abuse-report-to-be-published-1.509880.

27 Anne-Marie McAlinden, 'An Inconvenient Truth: Barriers to Truth Recovery in the Aftermath of Institutional Child Abuse in Ireland' (2013) 33(2) *Legal Studies*, 189-214, p. 11.

28 *Shatter v Guerin* [2019] IESC 9, para. 24.

B. The Commission of Investigation into the Dublin Archdiocese

22. The Dublin Archdiocese Commission of Investigation was established in March 2006 pursuant to the 2004 Act.[29] Its mandate was to report on the handling by church and state authorities of a representative sample of allegations and suspicions of child sexual abuse against clerics operating under the aegis of the Archdiocese of Dublin over the period 1975 – 2004.

23. It seems that the broadcast by RTÉ of the Prime Time programme *Cardinal Secret* in October 2002 concerning the handling of clerical sexual abuse allegations in the Dublin Archdiocese was a spur to the establishment of the Commission. Following the programme, the Minister for Justice, Equality and Law Reform introduced the Commissions of Investigation Bill which was intended to provide a new form of inquiry into the child sexual abuse scandals of the Catholic Church. Subsequently, on 18 July 2004, the Commissions of Investigation Act 2004 was enacted.

(i) Methodology

24. The Terms of Reference of the Commission did not mandate it to establish whether or not child sexual abuse had occurred, but rather it looked at the manner in which complaints were dealt with by church and state authorities.[30]

25. As well as looking at the handling of complaints/allegations of abuse, the Commission was mandated to 'select a representative sample of cases where the archdiocesan and other Catholic Church and public and State authorities had in the period 1 January 1975 to 1 May 2004 knowledge of or strong and clear suspicion of or reasonable concern regarding sexual abuse involving Catholic clergy operating under the aegis of the Catholic archdiocese of Dublin'[31] and to assess the response of church and state authorities to those cases.[32]

26. This part of the Commission's terms of reference necessarily involved some consideration of the nature of allegations made by survivors who came forward to the Commission, and an assessment of whether the facts alleged were such that it would at least create a reasonable concern of sexual abuse.

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29 Murphy et al, *Report by Commission of Investigation into Catholic Archdiocese of Dublin* (29 November 2009) Dublin: Stationery Office ('**the Dublin Archdiocese Report**').

30 Dublin Archdiocese Report, [1.4].

31 S.I. No. 137/2006 – Commission of Investigation (Child Sexual Abuse) Order 2006, art. 2(d).

32 The Cloyne Inquiry has similarly worded terms of reference: S.I. No. 117 of 2009 Commission of Investigation (Child Sexual Abuse) Amendment Order 2009, art. 2(fa)(iv).

27. Crucially, identifying cases where the church and state authorities had at least a reasonable concern of sexual abuse involving clergy and to assess the response of those authorities did not require the Commission to make a finding as to whether the abuse had in fact happened. Thus, the Commission could conclude the failure to address a reasonable concern about sexual abuse was wrongful regardless of whether the complaint had ever been proved in a court process or before the Commission.

28. It appears that in some cases the documentary and oral evidence was such that the Commission felt comfortable concluding not only that there was direct knowledge of the abuse by the priest concerned, but that there were likely far more victims than had come forward to the Commission. Thus, in the case of a Fr Gallagher, the Commission concludes:

> There are 14 complaints of child sexual abuse against Fr Gallagher known to the Commission. It is likely, on the basis of evidence reviewed by the Commission, that he abused many more children.[33]

29. The Commission interpreted its terms of reference as requiring it to ascertain the full extent of complaints and allegations, knowledge, suspicions, or concerns of child sexual abuse, and to select therefrom a representative sample to examine in detail, in order to report on the response to the allegations by the archdiocese and other church authorities and by the public and state authorities.

30. The Commission considered the responses of church and state authorities to complaints in respect of over 320 children against 46 priests accused of abuse.[34] These 46 priests were selected as a representative sample of the 102 priests that the Commission established were within its remit.[35] The Commission obtained the assistance of a statistician to carry out the sampling exercise.[36] In selecting samples, the Commission decided to include all cases in which there had been a criminal conviction as there was likely more available information on such cases. Of the 46 priests in the sample, 11 had pleaded guilty to or were convicted in the criminal courts of sexual assaults on children.

33 Dublin Archdiocese Report, [22.2].

34 Dublin Archdiocese Report, [1.10].

35 ibid, [1.8].

36 This process is described in Chapter 11 of the Report.

31. The Commission noted that it took seriously the direction in the 2004 Act that information and documents should be sought voluntarily in the first instance and held preliminary meetings with church and state authorities, as well as with individuals whom it considered might have evidence relevant to its work.[37]

32. The Commission issued formal orders of discovery against the Dublin Archdiocese, the HSE, An Garda Síochána, the Director of Public Prosecutions (DPP), and a number of religious orders whose priests worked under the aegis of the Catholic Archdiocese of Dublin.[38] The Commission considered that it would be unreasonable to expect people to furnish such confidential information without giving them the statutory protection afforded by section 16 of the 2004 Act.[39]

33. The discovery process yielded almost 100,000 documents,[40] with the Dublin Archdiocese providing over 70,000 documents. Documents over which privilege and/or confidentiality were claimed were provided to the Commission and were read by the Commission members in order to ascertain whether privilege applied. Cardinal Connell was granted injunctive relief in relation to the Commission's review of 5,000 documents over which privilege was asserted by the Dublin Archdiocese. This case was later withdrawn by the Cardinal but was a cause of some delay to the Commission's work.[41]

34. The HSE files were searchable only by reference to the name of the abused person, and were not in any way cross-referenced to the alleged abuser. To assess whether an alleged abuser was a priest in the Dublin Archdiocese would have involved manually searching some 180,000 files, a process which it was estimated would take 10 years.[42] The Commission instead heard from employees of the HSE employed in the Dublin Archdiocese area as to their knowledge of complaints of child sexual abuse by clerics. The Gardaí had extensive documentation for the period after 1995. However, prior to 2002 complaints of child sexual abuse were handled locally, and there was no co-ordinated approach taken by the Gardai in relation to the complaints of child sexual abuse by clerics.[43]

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37 Enquiries were made of the Archbishop of Dublin, former bishops of the Dublin Archdiocese, a number of other diocesan authorities, 38 religious orders operating within the area of the Dublin Archdiocese, the Health Service Executive ('HSE'), An Garda Síochána, the Director of Public Prosecutions, Our Lady's Hospital for Sick Children, Crumlin, Children's University Hospital, Temple St., the Department of Education and Science, the Department of Health and Children and a number of individuals who the Commission considered might have information relevant to its work.

38 Dublin Archdiocese Report, [2.17].

39 ibid, [2.17].

40 ibid, [2.22].

41 ibid, [2.33].

42 ibid, [2.19].

43 Dublin Archdiocese Report, [5.42].

35. All persons who appeared to be within the Commission's remit were interviewed by the Commission's counsel and many gave formal evidence to the Commission. Where the complaints made were beyond remit, the Commission nevertheless listened to the complaints and referred people on to support services.[44]

36. The Commission decided that it would be necessary to hold formal hearings to fully establish the relevant facts and thus heard oral evidence on how complaints, allegations or suspicions of child sexual abuse were handled generally by the various authorities throughout the relevant period,[45] and heard from an expert in canon law.

37. The Commission conducted its investigation by means of oral evidence and analysis of the documentation supplied. Where gaps in the evidence were apparent, the Commission filled them, where appropriate, with questionnaires and follow-up interviews.[46] The Commission held some 145 hearings as part of its inquiry and a stenographer recorded all hearings. In addition to the formal hearings, a significant number of informal hearings took place.[47] It appears that victims were primarily heard at these informal hearings.

38. Following the conclusion of the formal hearings, as required by the 2004 Act, a draft of the report was sent to those who were identified or identifiable in the report.[48] Many submissions were received from the relevant parties and amendments were made as the Commission considered appropriate. A second draft was then sent to the parties who had made submissions and to others affected by any amendments made. All relevant parties were then invited to provide any further information or make any further submissions which they considered appropriate. This process took some 7 months. The final draft was completed in July 2009.

(ii) Findings

39. The Commission's report detailed the canon law and the procedures set out by the Roman Catholic Church for dealing with complaints of child sexual abuse, and the significant uncertainty regarding the power to conduct a canonical investigation into an accused priest or require them to step aside from active ministry.[49] However, the Commission concluded that canon law was used selectively when dealing with offending clergy, to the benefit of the cleric and the consequent disadvantage of his victims.[50]

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44 ibid, [2.12].
45 ibid, [2.14].
46 Dublin Archdiocese Report, [2.37].
47 ibid, p. 35.
48 ibid, p. 42.
49 Dublin Archdiocese Report, [4.11].
50 ibid, [4.2].

40. The Commission strongly recommended that canon law should provide for a clear, unequivocal power available to bishops to require priests to stand aside.[51] The Commission noted as a matter of grave concern that as a matter of canon law paedophilia may constitute a defence to a claim of child sexual abuse.[52]

41. The Commission further found that, while procedural rules issued by the Vatican in relation to child sex abuse existed since 1922, these were circulated only to bishops and under terms of secrecy such that virtually no one knew anything about them.[53] The Commission determined that child sexual abuse was covered up over much of the period investigated by the Commission and that the structures and rules of the church facilitated that cover up.[54] The Commission concluded that Church authorities were much more concerned with the scandal that would be created by revealing abuse rather than any concern for the abused.[55]

42. Like the Ferns Report, the Dublin Archdiocese Report named clerics accused of wrongdoing in handling of complaints. In addition, 10 clerics accused of abuse were named. Of these, 7 clerics were previously convicted. However, some convicted priests were not named,[56] and 3 priests were named who had not been convicted: Fr McNamee, who had been widely named in the media;[57] Fr Reynolds, who admitted abusing 20 girls but was not prosecuted due to dementia,[58] and; Fr Gallagher, where a flawed Garda investigation resulted in no prosecution.[59]

(iii) Criticisms of Methodology Utilised

43. The Dublin Archdioceses Inquiry proceeded on a similar basis to the non-statutory Ferns Inquiry, in criticising named members of the clergy for their role in the handling of child sexual abuse allegations and predominantly naming convicted clerics accused of abuse.

51 ibid, [4.92].
52 Dublin Archdiocese Report, [4.59].
53 ibid, [4.21].
54 ibid, [1.113].
55 ibid, [12.42].
56 For example, the Report refers, at [58.22], to 'the conviction of Fr Edmondus* for the child sexual abuse of Mrs Collins and others in the criminal courts'.
57 Dublin Archdiocese Report, [12.36]
58 ibid, [35.49].
59 ibid, [22.22].

44. It should be recalled that the Dublin Archdiocese Inquiry was a statutory inquiry established under the 2004 Act. Following publication, the report was praised by some as representing an effective use of the 2004 Act and was lauded as a model of how such a commission of investigation can operate effectively.[60]

45. However, the procedures were criticised by others. Fergal Sweeney criticised the Commission for criticising individual clerics handling of particular cases, rather than solely being concerned with the wider institutional response.[61] Sweeney particularly criticises the Commission as having no mandate to consider such individual wrongdoing in the handling of complaints and that, even if it had such a mandate, 'it was under an obligation to warn those clerics taking part in their investigation where it was heading and to give each of them a fair and balanced hearing before coming to any such conclusions'.[62]

46. Dr Marie Keenan has also noted a concern that the methodology adopted by the Commission in 'naming and shaming' particular clerics. Amongst other points, she criticised this approach as allowing the Archbishop and the Vatican to distance themselves from the events that had occurred.[63] Dr Keenan and others[64] have also criticised the sampling methodology of the report for not being a representative sample, but rather 'a biased sample from the available files in the Dublin Archdiocese that they were reviewing'.[65]

C. The Commission of Investigation into the Diocese of Cloyne

47. In March 2009, the Government amended the terms of reference of the Commission of Investigation into the Dublin Archdiocese to extend its ambit to include the Catholic diocese of Cloyne.

48. These additional terms of reference were very similar to those with respect to the investigation into the Dublin Archdiocese.[66] The Commission commenced its investigation in April 2009, just as its investigation into the Dublin Archdiocese was concluding.[67]

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60 Pádraig McCarthy, 'The Murphy Report Revisited', (2013) Vol. 102, *Studies: An Irish Quarterly Review*, p. 388.

61 Fergal Sweeney, 'Commissions of Investigation and Procedural Fairness' (2013) Vol. 102 *Studies: An Irish Quarterly Review* pp. 377-387, p. 381 – 382.

62 ibid, p. 382.

63 Marie Keenan, 'Masculinity, relationships and context: Child sexual abuse and the Catholic Church', (2015) Vol. 15(2) *Irish Journal of Applied Social Studies*, p. 72.

64 John McDonagh, 'The representative sample in the Murphy Report'. *Studies: An Irish Quarterly Review*, (2013) Winter, 456-467, p. 464.

65 ibid, p. 73.

66 Commission of Investigation Report into the Catholic Dioceses of Cloyne (December 2010) (the '**Cloyne Report**'), p. 25.

67 Cloyne Report, p. 24.

49. The extension of the remit of the Commission followed a number of developments; in July 2008, the National Board for Safeguarding Children in the Catholic Church in Ireland ('NBSCCCI') delivered a report which strongly criticised the handling of child abuse allegations in the Cloyne diocese. This report was published in December 2008.

50. In November 2008, the HSE issued the 'Report on allegations of child sexual abuse in the Diocese of Cloyne and complaints that the investigations of these cases were inadequate'. It noted that the actions taken by the Cloyne diocese had not been compliant with the Catholic Church's Framework document of 1996, in that the diocese had failed to notify the HSE of a number of the allegations.[68]

(i) Methodology

51. Similar to the Dublin Archdiocese Report, the Cloyne Report was directed to adopt a sampling approach and to assess the manner in which those representative allegations were responded to, in the period from 1 January 1996 until 1 February 2009. This timeframe was significantly later than that considered in the Ferns and Dublin Archdiocese inquiries and dealt with the period after the adoption of the Framework Document by the Catholic Church in 1996.[69] This meant that the 'learning curve' in relation to paedophilia, which church authorities had previously said explained the poor handling of complaints in other dioceses, had no applicability in the Cloyne inquiry.[70]

52. As it had done during the Dublin Archdiocese Inquiry, the Commission first sought the voluntary cooperation of church and state authorities. The Commission next sought discovery of documentation, which was largely completed by August 2009. It noted that the Department of Health claimed privilege over a number of documents. The Commission also wrote to the Papal Nuncio asking him to submit any information in his possession. The Papal Nuncio refused, and the Commission noted it had no powers to compel the Papal Nuncio. However, the Commission noted general cooperation with its requests for discovery from other parties.[71]

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68 Cloyne Report, p. 111. In January 2009, the HSE also published the 'Audit of the Catholic Church's current child protection Policy, Practices and Procedures & compliance with Ferns Report Recommendations report', which noted that the HSE had become aware of a case of non-compliance with child protection procedures in Cloyne.

69 The Framework Document directed new Catholic Church procedures to deal with complaints of child sexual abuse, including a clear direction that such complaints should be referred to the civil authorities.

70 Carole Holohan, *In Plain Sight: Responding to the Ferns, Ryan, Murphy and Cloyne Reports* (Amnesty International, 2011), p. 129.

71 Cloyne Report, [2.12].

53. Following an advertising campaign by the Commission, it received information about complaints, suspicions, concerns, or knowledge of child sexual abuse in respect of 32 named clerics. The Commission considered 19 of these clerics were operating under the aegis of the Cloyne diocese and hence were within its remit to investigate. While the terms of reference directed that only a sample of the total allegations should be investigated, the Commission received advice that the total number was too small to extract a representative sample, and therefore investigated all 19 clerics that were within remit.

54. The Commission did not seek to establish whether or not child sexual abuse occurred or whether or not there was a basis for the suspicions and concerns addressed. All complainants and all clerics, bar one, were anonymised in the report. Bishop Magee was named in the report in relation to concerns raised about his interaction with a 17-year-old boy. This identification was explained as unavoidable since he was clearly identifiable as a bishop. It appears that there were legal challenges that influenced the decision not to name particular clerics and delayed the publication of the report: in one case the High Court ordered that references in the report to an accused priest awaiting trial for child sexual abuse be deleted to avoid prejudicing his trial.[72]

55. The Commission conducted 55 formal hearings in relation to how complaints and concerns of child sexual abuse were handled generally by church and state authorities and how specific complaints were handled.[73] The Commission received some 12,000 documents from the diocese.[74] The Commission used questionnaires, follow up interviews and affidavits from relevant parties to address gaps in the evidence received.[75] In addition, a significant number of informal hearings took place.[76] The Report notes that very similar procedures to those used in relation to the Dublin Archdiocese investigation were used in the investigation into Cloyne, and indeed notes that the formal book of procedures used for the Dublin Archdiocese investigation was adopted, with some amendments where appropriate.[77] The oral hearings were completed in the first half of 2010, and a final draft of a report completed in November 2010.

72 Justine McCarthy, 'Further delay to Cloyne report as lawyers seek return to court', *The Sunday Times* (19 June 2011), available at https://www.thetimes.co.uk/article/further-delay-to-cloyne-reportas-lawyers-seek-return-to-court-pstg93wpg6b.

73 Cloyne Report, [2.24].

74 ibid, [2.22].

75 ibid, [2.22].

76 ibid, [2.24].

77 ibid, p. 29.

(ii) Findings

56. The Commission found that there had been a failure of the diocesan authorities to deal properly with complaints of abuse and this had placed children at risk of further harm within the Diocese of Cloyne. Bishop Magee and Monsignor O'Callaghan were particularly criticised for failing to implement the Church's own Framework Document on responding to complaints of abuse. Bishop Magee was criticised for leaving the management of child sexual abuse cases to Monsignor O'Callaghan until 2008.[78]

57. Monsignor O'Callaghan was found to have failed to follow the Church's 1996 Framework Document on handling sexual abuse, and particularly failed to comply with the Framework Document's requirement to report complaints of abuse to the Gardaí[79] and health authorities.[80] The Commission further found that the inter-diocesan case management advisory committee, charged with considering complaints of abuse, was not given the information it required in order to give informed advice.[81] The Commission also found that there was a failure to cooperate with Garda investigations.[82]

58. The Commission found that diocesan records of complaints of abuse were of poor quality and some were deliberately misleading.[83] It further found that persons investigating the handling of abuse were deliberately misled about the facts as known to Bishop Magee.[84]

D. The Commission to Inquire into Child Abuse ('CICA')

(i) Introduction

59. In May 1999, the Government apologised on behalf of the State to the victims of historical childhood abuse and announced a package of measures to be introduced in relation to institutional child abuse, including the establishment of a Commission to Inquire into Child Abuse.[85]

78 Cloyne Report, [1.17].
79 Cloyne Report, [1.22].
80 ibid, [1.17].
81 ibid, [21.92].
82 ibid, [15.49].
83 ibid, [21.91].
84 ibid.
85 McGarry, 'Bertie Ahern: State's 1999 apology to abused children was 'absolutely necessary', *The Irish Times* (11 May 2019).

60. In the immediate aftermath of the State apology, the Commission to Inquire into Child Abuse ('**CICA**') was established, initially on a non-statutory, administrative footing. CICA had broad terms of reference, including the requirement to identify and report on the causes, nature and extent of physical and sexual abuse, with a view to making recommendations for the present and future.[86]

(ii) Establishment

61. Under the chairmanship of Ms Justice Laffoy, CICA issued reports in September and October 1999 outlining how its terms of reference could be implemented. Following these reports, CICA was established as an independent statutory body pursuant to the Commission to Inquire into Child Abuse Act 2000 ('**the 2000 Act**') in May 2000.

62. CICA investigated the treatment of thousands of children in residential institutions, over many decades, including industrial schools run by various religious orders and congregations. The 2000 Act envisaged that CICA would carry out its functions through two committees, the Investigation Committee and the Confidential Committee.

(a) The Investigation Committee

63. The role of the Investigation Committee under the 2000 Act was to inquire into the abuse of children in relevant institutions, and if satisfied that abuse had occurred, to determine the nature, causes, circumstances, and extent of such abuse.

64. The Investigation Committee, pursuant to the 2000 Act, was also to determine the extent to which the institutions concerned contributed to the abuse, including in how they were managed, supervised, and regulated. The Committee was also required to determine whether the way those functions were performed by the relevant persons or bodies contributed to the abuse.

(b) The Confidential Committee

65. The Confidential Committee, on the other hand, heard evidence from persons who were victims of abuse who did not wish their abuse to be investigated by the Investigation Committee. Evidence heard by the Confidential Committee was heard in an informal and sympathetic setting, without lawyers. The Confidential Committee under the 2000 Act could make general findings in respect of abuse, and the nature and extent of same, but was prohibited from identifying, or publishing information that leading to the identification, of any persons or institutions in making those findings.

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86 Ryan et al, *Report of the Commission to Inquire into Child Abuse* (2009) ('hereinafter '**CICA Report**'), Volume 1, p. 1.

(iii) Methodology

66. The 2000 Act provided that CICA was to afford persons who had suffered abuse in childhood an opportunity to recount the abuse suffered, and to make submissions to a Committee. CICA was thus under a statutory obligation to hear the accounts of abuse from any person who wished to give such accounts, whether through the Investigation Committee or the Confidential Committee, at the option of the person. This provision was amended by subsequent legislation,[87] so that CICA's obligation to hear every account was limited to those attending the Confidential Committee. CICA said that it would take many years to deal with the number of applicants before the Investigation Committee if each person's complaint had to be investigated.

67. The 2000 Act defined 'abuse' widely as referring to the infliction of physical injury, sexual abuse, neglect, and emotional abuse. An 'institution' referred to a school, an industrial school, a reformatory school, an orphanage, a hospital, a children's home and any other place where children are cared for other than as members of their families.

68. The 'relevant period' for the purposes of CICA's work was from 1940 to 1999 but could be extended in either direction. The Investigation Committee determined that the relevant period in relation to its functions as being from 1936 to 1999, while the Confidential Committee determined the relevant period as between 1914 and 2000.

(iv) Problems Encountered by the Investigation Committee in Carrying Out its Work

(a) Operational Challenges

69. Difficulties arose in progressing the work of the Investigation Committee of CICA soon after its establishment. Disputes about the payment of legal costs to those appearing before the Investigation Committee and the establishment of a redress scheme for the victims of the institutions led to non-cooperation with the Investigation Committee by solicitors acting on behalf of victims. These difficulties persisted from the establishment of CICA in 2000 until April 2002, when the Residential Institutions Redress Board Act 2002 was enacted, establishing a redress scheme for victims of abuse in residential institutions. That legislation also resolved the dispute concerning the legal costs of survivors who were participating in CICA.

87 Commission to Inquire into Child Abuse (Amendment) Act 2005.

70. In June 2002, CICA applied to the Government for further resources to enable it to deal reasonably expeditiously with the volume of complaints to be investigated by the Investigation Committee. CICA indicated at that time that without additional resources, it would take between 7 to 10 years to complete the first phase of the Investigation Committee's work. At that point, the Government announced a review of CICA's terms of reference by the Attorney General. CICA was able to continue to operate during the review by the Attorney General.

(b) Legal Challenges to CICA's Power to Name Individuals and Institutions

71. In October 2002, an issue arose as to whether the Investigation Committee was entitled to name individuals and institutions as responsible for abuse, as provided by the 2000 Act. Some of the religious orders argued that members of their congregations who were deceased, incapacitated through age or infirmity, or otherwise unavailable, could not be named as responsible for abuse. They also argued that the institutions or the persons who managed those institutions could not be named. They argued that the lapse of time since the events complained of meant that the religious orders and their members could not properly defend themselves, including by reason of the fact that numerous accused persons or persons who had worked in the institutions concerned were deceased, elderly or infirm or otherwise unavailable. The religious orders asserted that in those circumstances the Investigation Committee was not entitled to make findings against those members or their institutions.

72. The Investigation Committee rejected those submissions. The Investigation Committee ruled that it would deal with issues such as alleged prejudice due to the lapse of time since the events complained of on a case-by-case basis.

73. The Christian Brothers challenged that ruling in *Murray v Commission to Inquire into Child Abuse.*[88] In January 2004, the High Court held that deceased persons did not have a constitutional right to their good name or reputation. However, the Court held that by reason of their positive association with those accused of abuse, members of the congregation had a right to a good name and a right to protect their reputations against adverse findings, including adverse findings against their deceased, incapacitated or otherwise unavailable members who were accused of abuse.[89]

88 [2004] 2 IR 222.

89 ibid, at 289.

74. Notably, the High Court found that in the absence of other convincing evidence, the court would be very reluctant to allow a claim against a deceased or incapacitated person unless the claim was corroborated.[90]

75. On the issue of delay and the lapse of time and the ensuing prejudice to persons accused of wrongdoing, the Court agreed that the test was whether it would be unsafe in all the circumstances to make a determination against a respondent.[91]

76. Amongst other matters, the High Court held that the representatives of the deceased and incapacitated members of the congregation and the representatives of the congregation itself, should be entitled to cross-examine witnesses in the interests of fair procedures and constitutional justice, and procedures should be in place to allow them to do so.[92]

77. While the Christian Brothers had challenged the constitutionality of the 2000 Act, the High Court held that they did not have standing to do so because their rights were not denied by the Act.[93]

78. The Investigation Committee suspended its work between September 2003 and March 2004 pending the delivery of judgment in *Murray*.[94] The decision was appealed to the Supreme Court by the Christian Brothers, with cross-appeals by CICA and the State, though the proceedings were rendered moot before the Supreme Court heard the case.[95]

79. Separately, a number of witnesses successfully challenged an attempt by the Commission to limit the number of legal representatives present at the evidentiary hearings of the Investigation Committee as a breach of the parties' constitutional right to fair procedures in *Re Commission to Inquire into Child Abuse*.[96] Kelly J. held that this would interfere with the right to decide how best to defend one's case and, as such an express statutory power would be required to support such a procedure.[97] In the course of his judgment Kelly J. indicated that he viewed the nature of the inquiry as attracting full *Re Haughey* fair procedures rights for individuals and congregations accused of wrongdoing:[98]

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90 [2004] 2 IR 222, 295-6. This finding drew on the requirement that claims against the estates of deceased persons are required to be corroborated.

91 [2004] 2 IR 222, at 301.

92 ibid, at 304-5.

93 ibid, at 309.

94 CICA Report, Volume 1, p. 5.

95 Statement of the Legal Counsel to the Commission to Inquire into Child Abuse, 7 May 2004, p. 6; Mary Carolan, 'Order settles dispute with abuse inquiry, *The Irish Times*, 29 June 2004.

96 [2002] 3 IR 459.

97 [2002] 3 IR 459, 476.

98 ibid, at 475.

> The allegations which have been made against respondents before the Investigation Committee of the applicant are in many cases of a most serious nature. A finding in favour of a complainant against an individual or institutional respondent would be of enormous significance.
>
> In the case of an individual vowed religious, a finding of in particular sexual abuse of a minor placed in his care would demonstrate truly evil conduct, a woeful breach of trust, behaviour directly at odds with the vows taken, to say nothing of any infringements of the criminal law. In the case of a respondent which is a religious congregation, such conduct would be shameful and in conflict with the fundamental purpose of such a congregation. Truly, therefore, it can be said that the respondents to complaints are at risk of their good name and reputation being jeopardised.

80. The case of *Re Haughey* is discussed elsewhere in this Report.[99] It established that there are four protections that must be afforded to a person whose good name is under attack at an inquiry. Those entitlements are:[100]

(a) to be furnished with a copy of the evidence which reflects on his good name;

(b) an entitlement to cross-examine, by counsel, an accuser;

(c) an entitlement to give rebutting evidence; and

(d) a right to address the tribunal, by counsel if he wishes, in his own defence.

81. In that case O'Dalaigh C.J. stated as follows:[101]

> The provisions of Article 38, s. 1, of the Constitution apply only to trials of criminal charges in accordance with Article 38; but in proceedings before any tribunal where a party to the proceedings is on risk of having his good name, or his person or property, or any of his personal rights jeopardised, the proceedings may be correctly classed as proceedings which may affect his rights, and in compliance with the Constitution the State, either by its enactments or through the Courts, must outlaw any procedures which will restrict or prevent the party concerned from vindicating these rights.

99 [1971] 1 IR 217. See Chapter 14.

100 [1971] 1 IR 217, 263-4.

101 [1971] 1 IR 217, 264.

82. These *Re Haughey* protections were therefore reflected in the procedures of the Investigation Committee which provided that every person whose good name was under attack at the inquiry had the right to be furnished with all relevant evidence in advance, cross-examine survivors, give rebutting evidence and make submissions in defence. These rights extended to anyone who might be identified in the Investigation Committee's report as persons who committed abuse or persons who were involved in the running of institutions where abuse occurred.

(v) Changes to CICA's Methodology

83. Prior to the hearing of the Supreme Court appeal in the *Murray* case, in June 2004 CICA indicated that it would revise its policy on naming persons who had committed abuse, stating that they would not be named unless they had previously been convicted of an offence relating to abuse in the past. This revised policy emerged from the Position Paper published by CICA in May 2004, and was adopted by CICA in its Decision Document in June 2004. In those circumstances the Supreme Court appeal did not proceed.

(a) Reviews of CICA's Terms of Reference

84. The Government had in June 2002 announced a review of CICA's terms of reference by the Attorney General to address the requirement that CICA conduct an investigation into every allegation of abuse and to make recommendations in relation to issues of delay and costs.

85. The Attorney General's Report, recommending changes to the 2000 Act, was furnished to Government in February 2003. The Attorney General's review was not published at that time. Instead, in September 2003, the Government announced a second phase review of CICA. The second phase review was carried out by Mr Justice Ryan (Ryan J) who became Chair of CICA following the resignation of Laffoy J in December 2003. The Attorney General's Report and Ryan J's Report on the Review of CICA were published in January 2004. Both reports recommended changes to the 2000 Act.

86. Both the Attorney General[102] and Ryan J[103] recommended removing the duty of the Investigation Committee to hear each complaint of abuse. It was also recommended that the Investigation Committee be empowered to choose which complainants to receive evidence from. Ryan J considered that that the decision as to who should give evidence should be based on the likelihood of a finding of abuse being made.

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102 Report to the Government on the Review of the Laffoy Commission: Made pursuant to Government Decision SI180/20/10/0270B of 3 December 2002 (15 January 2004), p. 7.

103 Review of Mr. Justice Ryan into the Commission to Inquire into Child Abuse ('**Ryan Review**') (15 January 2004), pp. 49-51.

87. Ryan J's Review identified a number of obstacles that delayed or unduly prolonged the hearing of cases. He cited the necessity under the 2000 Act for the Investigation Committee to have a preliminary hearing to determine that abuse occurred in a particular institution as a preliminary factual issue, before going on to consider the causes, nature, circumstances, and extent of the abuse. He recommended that the requirement for such phased hearings be removed to enable the Investigation Committee to conduct its inquiry in one phase in respect of a particular institution and period.[104]

88. Ryan J also pointed to the requirement of the 2000 Act that the Investigation Committee hold hearings about instances of alleged abuse in private, which meant that it was not possible to hold joint hearings of complaints against a particular individual or institution.[105] He recommended that the 2000 Act be amended to allow for joint hearings where other victims and respondents may attend.[106]

89. Finally, Ryan J recommended that s 13(2)(c) of the 2000 Act which provided that the report of the Investigation Committee 'shall not contain findings in relation to particular instances of alleged abuse of children' be deleted, it being inconsistent with the purposes of the Act and its other provisions.[107] This had also been recommended by the Attorney General's Review.

(b) Ryan J's New Scheme of Procedure for CICA

90. Ryan J's review proposed that a new scheme of procedure be adopted, dividing the work of the Committee into units by institution, and sub-dividing that division into decades. He recommended that the Investigation Committee conduct a preliminary examination of complaints so that those with little prospect of being proven in evidence could be identified and persons advised that it might be appropriate to transfer to the Confidential Committee.[108]

91. Each unit would be conducted as a joint hearing, comprised of multiple allegations arising from the relevant complainants within a given time period in an institution. Procedures could be expedited by witnesses providing written statements and only attending hearings for cross-examination. The Investigation Committee would then weigh the evidence and come to conclusions about the specific allegations made against individual respondents and as to the other levels of responsibility envisaged by the Act.[109]

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104 ibid, pp. 46-48.
105 Ryan Review, pp. 21-22.
106 ibid, p. 52.
107 ibid, p. 54.
108 ibid, pp. 39-40.
109 ibid, pp. 40-41.

92. Ryan J's proposals appear to have been adopted fully within the revised methodology of the Investigation Committee as it recommenced its work in 2004. The necessary statutory amendments as suggested were put into effect by the Commission to Inquire into Child Abuse (Amendment) Act 2005 ('**the 2005 Amendment Act**') in July 2005.

(c) Further Changes Made Following the Position Paper

93. Two further changes relevant to the methodology of CICA were proposed and adopted by the Commission in 2004 in respect of naming individuals as perpetrators of abuse and selecting complainants as witnesses to provide evidence before the Investigation Committee.

(d) Naming Individuals

94. CICA was initially charged with making findings identifying abusers where appropriate. Section 5(3) of the 2000 Act provided that the Commission's report:

> (a) may, if the Commission is satisfied that abuse of children, or abuse of children during a particular period, occurred in a particular institution, contain findings to that effect and **may identify the institution and the persons who committed the abuse**,
>
> …
>
> (d) **shall not contain findings in relation to particular instances of alleged abuse of children**.' (emphasis added)

95. Thus, as initially enacted, the legislation appeared to envisage evidence of numerous incidents of abuse being used as the basis for findings that abuse happened at a particular institution and/or was perpetrated by a particular individual. However, somewhat confusingly, the report was not to contain findings in relation to particular instances of abuse. This dichotomy was criticised by Kelly J in *Re Commission to Inquire into Child Abuse*.[110]

96. A Position Paper published by the Investigation Committee in May 2004 examined the issue of naming individuals as perpetrators of child abuse or as involved in the management, administration, operation, supervision and regulation of the institutions concerned.

110 [2002] 3 IR 459, 474: 'This is but one of a number of instances of obscure draftsman-ship which does nothing to assist the applicant in its difficult task.'

97. The Position Paper stated that the practical implications of the Investigation Committee having this power were that all accused persons or bodies involved in the running of institutions were entitled to fair procedures, and that every case before the Investigation Committee was converted into an adversarial process. Considering this it would 'not be unreasonable to assume' that every case would take the same length of time as a criminal trial on such an issue, being 3-4 days. On this basis, it would take approximately 18 years to clear the caseload of the Investigation Committee.[111]

98. The Position Paper recommended that the 2000 Act be amended to delete the section concerning naming individuals and that CICA should pursue a general policy of not naming individuals.[112] The Investigation Committee stated that the emphasis of the Inquiry should be on analysis of the institutional and systems failures that led to the wrongs occurring rather than on making findings of abuse in individual cases.

99. Submissions were received by interested parties on this issue and in June 2004, CICA publicly announced that it intended to adopt the views set out in the Position Paper and would seek the necessary amendment of the 2000 Act. The relevant amendments were made by the 2005 Amendment Act, which provided that a report of CICA or of the Investigation Committee may identify a person who committed abuse, only if he or she had been convicted of an offence in respect of abuse.

100. The Act was amended by the Commission to Inquire into Child Abuse (Amendment) Act 2005 to limit the power to name abusers to those convicted of abuse. Section 5(a) of the 2000 Act was substituted to:[113]

> a) may contain findings that abuse of children, or abuse of children during a particular period, occurred in a particular institution and may identify—
>
> (i) the institution where the abuse took place, and
>
> (ii) the person or, as the case may be, each person who committed the abuse **but only if he or she has been convicted of an offence in respect of abuse**.' (emphasis added)

111 Commission to Inquire into Child Abuse, Position Paper on Identifying Institutions and Persons under the Commission to Inquire into Child Abuse Act 2000 (7 May 2004), p. 19.

112 ibid, p. 39.

113 Commission to Inquire into Child Abuse (Amendment) Act 2005, s 5.

101. Notwithstanding this amendment, the Final Report of CICA did not in fact identify convicted individuals by name, even where they had been convicted of the specific acts of abuse complained of,[114] or where they had admitted to the offence and had provided evidence to the Investigation Committee in relation to same.[115] In the Final Report of the Commission, all individual perpetrators of abuse were referred to by pseudonyms.[116]

102. The rationale for this approach was explained as being:[117]

> Even under the unamended legislation, naming some individuals was always going to be fraught with difficulty and inconsistency. The probability was that only a very small number of persons would actually be named. This issue was debated in the Position Paper and outlined to the public meeting of the Investigation Committee. The supposed benefits of being able to name persons who committed abuse were outweighed by the disadvantages.

103. One issue noted was that the amended legislation:

> … did not require that the person to be named should have been convicted of the specific abuse that was the subject of the report. In other words, if a person had been convicted of abuse of children of some nature at some time, it was permissible under the legislation for him or her to be named as being responsible for abuse in some quite different circumstances or at a different time.[118]

104. Beyond this, there does not appear to have been an explanation provided as to why CICA did not name convicted abusers, given they had the power to do so under the amended 2000 Act.

(e) Naming Institutions

105. The 2000 Act conferred CICA and the Investigation Committee with the discretion to identify institutions in which abuse took place. As referred to above, in *Murray v. Commission to Inquire into Child Abuse*,[119] the High Court found that the members of the congregation had a right under the Constitution to protect their good name, and accusations of wrongdoing against deceased or incapacitated members, or members who were otherwise unavailable, and because of the close association between such members of a congregation, this triggered the congregation's right to protect its good name.

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114 See, for example, CICA Report, Volume 1, pp. 306, 309 and p. 581.

115 For example, CICA Report, Volume 1, p. 306, para. 8.132, pp. 339-346, paras. 8.335-8.390.

116 CICA Report, Volume 1, p. 66-67.

117 ibid, para. 5.43.

118 CICA Report, Volume 1, para. 5.42.

119 [2004] 2 IR 222, 288 – 289.

106. In the Review of the Commission conducted by Ryan J, the impact of a potential appeal to the judgment of Abbott J. was discussed.[120] Ryan J commented that CICA could survive a prohibition on naming individuals but could not survive a prohibition on naming institutions. He was of the view that the Investigation Committee would be entirely toothless if such a prohibition were to apply stating that 'A restriction of that kind would be entirely fatal to the Investigation Committee'.

107. In the Decision Document of June 2004 there was no explicit decision made on the question of naming institutions. However, the document set out the procedures to be adopted by the Investigation Committee, whereby the attitude of the congregation and the discovered documentation would be considered before the Committee determined how many complainants were required to give evidence.

108. The format of the investigation would be decided by what was in dispute, e.g. where the respondent institution acknowledged the essential truth of the complaints, this would limit the number of witnesses required. Emphasis was placed on the approach of the congregations to the allegations of abuse, and the hope that 'congregations will accept that they have responsibilities to the victims of abuse and those who complain, even if some of them are thought to be in the wrong, and to the community as a whole and also to the congregations and their own members.'[121]

109. There does not appear to be any information provided in the Final Report of the Commission in respect of the decision-making process behind the naming of institutions. In many cases, it appears that congregations accepted that some sexual abuse took place in the relevant institutions.[122] In respect of certain institutions, such as St Joseph's Industrial School, Greenmount and St Patrick's Industrial School, Kilkenny, where it does not appear that sexual abuse was admitted by the institutions, the Investigation Committee set out the evidence received in relation to sexual abuse allegations, but appears to refrain from making findings as to the veracity of this evidence, and focused instead on failures in, for example, the investigation process undertaken by the relevant congregation, or its record-keeping practices.[123]

120 Review of Mr. Justice Ryan into the Commission to Inquire into Child Abuse ('Ryan Review') (15 January 2004), at paras. 7.1-7.11.

121 Decision Document, p. 13, available at https://childabusecommission.ie/?page_id=453

122 See, for eg, CICA Report, Volume 1, pp. 111, 293, 566; Volume 2, p. 86.

123 CICA Report, Volume 2, pp. 168-176, 193. See also Volume 2, pp. 485-489, 495, on St Patrick's Industrial School, Kilkenny.

110. In the case of St Conleth's Reformatory School, Daingean, where it was claimed by the relevant congregation that the passage of time precluded a meaningful investigation of allegations of sexual abuse by the Investigation Committee and no findings of abuse should be made, the Investigation Committee proceeded to make a finding that sexual abuse was committed by staff, but found that the full extent of this abuse was impossible to quantify because of the absence of a proper system of complaints.[124]

111. Further, from the Final Report of the Commission, it does not appear that the Investigation Committee required a minimum number of complaints to be made to investigate a particular institution; for example, in Our Lady of Succour Industrial School, Newtown Forbes, only five complainant witnesses lodged complaints with the Investigation Committee and gave oral testimony in respect of their experiences.[125]

(f) Selection of Complainants to Provide Evidence

112. At the public sitting of CICA in May 2004, a proposal was put forward that the Investigation Committee would have a discretion as to the complainants it wished to call, and that in certain circumstances it may be unnecessary to hear all available witnesses in respect of a given institution.

113. Witnesses had been selected on the basis of examination of documentary evidence. Some 1,300 persons remained who wished to contribute to the work of the Investigation Committee rather than transferring to the Confidential Committee.[126]

114. The Investigation Committee decided to interview each person who had indicated an intention to continue participating in CICA through the Investigation Committee. The body of evidence obtained, it was proposed, would be collected in databases and produced in report format, and where there were material areas of dispute arising, the Investigation Committee may arrange for further investigation.

115. Persons who made complaints in respect of the large institutions, who were not called to give evidence before a hearing of the Investigation Committee were invited for interview, as were all complainants in respect of those institutions which the Investigation Committee was not investigating by way of hearing. In respect of the inquiries into the remaining institutions heard by the Investigation Committee, many complainants who did not want to proceed to hearing engaged with the interview process instead.[127]

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124 CICA Report, Volume 1, p. 658; see more generally pp. 649-661.

125 CICA Report, Volume 2, p. 432.

126 CICA Report, Volume 1, p. 63.

127 CICA Report, Volume 1, p. 63.

116. The interview process was said to have two primary purposes: to ensure that all relevant topics arising in an institution had been properly considered and to give everyone who wished to do so a means of participating in the work of the Investigation Committee.[128]

117. The material catalogued by the Investigation Committee in its interviews was provided in summary form in Volume 4, Chapter 5 of CICA's Final Report. It was highlighted that while the information was not corroborated or tested, it demonstrated the range of abuse complained of in such institutions and operated as 'a reference for identifying weaknesses in the systems and indicating areas needing diligence and possibly reform'.

(g) Revised Hearing Process

118. The revised hearing process therefore proceeded as follows; first, initial general public hearings referred to in CICA's Report as 'Emergence Hearings'. These dealt with general topics such as historical context, the reasoning behind the Government's decision to issue a public apology, and related matters.[129]

119. The investigation into most institutions was held in three stages:

- Phase I public hearing allowed the congregations to present their case as to how their institutions were managed and set out their position as to what was in dispute, making concessions or arguments as relevant. Counsel for the Investigation Committee led this evidence and there was no-cross examination at this phase.[130]
- Phase II hearings were private hearings into specific allegations of abuse in institutions. Following from the relevant amendment to the 2000 Act, these were joint hearings at which multiple complainants could provide evidence.
- Phase III hearings were public hearings, which enabled congregations to respond to the evidence, and also included the Departments of Education and Science, Justice and Health, as well as hearings into the Irish Society for the Prevention of Cruelty to Children.

128 CICA Report, Volume 1, p. 63.
129 CICA Report, Volume 1, p. 7.
130 CICA Report, Volume 1, p. 64.

120. A small number of institutions were subject to a more limited form of investigation than by way of full hearings. This referred to two industrial schools run by the Christian Brothers, in respect of which the institutions and the system of management and the nature of the complaints were all very similar to matters which had been investigated in all the other Christian Brothers' schools, and one institution which was the subject of six separate Garda inquiries (referring to Lota, a special school in Cork).[131] Discovered documentary materials, and any comments received by way of submission or witness testimony which had been heard by the Committee prior to 2003, were all relied upon for the purposes of the investigations into such institutions. No evidence was heard in relation to 3 schools for the deaf, seemingly due to an impasse with the legal representatives of this cohort of complainants.

121. By way of general observation, it seems that the amendments made to CICA's terms of reference and statutory powers by the 2005 Amendment Act allowed CICA to progress and complete its work, without further challenge or interruption. The final report of CICA, which issued in 2009, suggests that the work of the Investigation Committee was enabled to be completed some 4 years following the 2005 amendments.

(h) Expert Evidence

122. The Commission engaged independent experts to provide reports on the 'state of knowledge' in respect of specified issues such as the historical context of industrial and reformatory schools in Ireland, the funding of such schools, and developments in the areas of child protection.[132]

(vi) Methodology of the Confidential Committee

123. The principal function of the Confidential Committee was to allow persons who did not wish to give evidence to the Investigation Committee an opportunity to recount their experience of abuse and make submissions in a confidential forum.

131 CICA Report, Volume 1, p. 62.

132 CICA Report, Volume 1, pp. 32-34.

124. Under the 2000 Act, the Confidential Committee had the power to make findings of a general nature in relation to the causes, nature, circumstances and extent of the abuse and the extent to which the systems, administration, operation, supervision, inspection and regulation of an institution contributed to the occurrence of abuse.[133] However, these provisions were amended by the 2005 Amendment Act so that the Confidential Committee was empowered to make 'proposals of a general nature with a view to their being considered by the Commission in deciding what recommendations to make'.[134]

125. The Confidential Committee in its report, could not include information that would identify or lead to the identification of any alleged victim of abuse, or alleged abuser or institution, or any other person, and could not make findings in relation to particular instances of abuse. The 2000 Act was also amended to provide that the Commission shall have regard to the fact that evidence received by the Confidential Committee could not be tested or challenged by any person and was not corroborated.[135]

126. Persons and institutions named before the Confidential Committee were not notified of the making of such allegations and had no opportunity to challenge the statements made. Evidence provided to the Confidential Committee could not be disclosed to the Investigation Committee or elsewhere.[136]

127. The Confidential Committee received evidence of abuse from 1,090 witnesses. It had Witness Support Officers who facilitated communication between witnesses and the Confidential Committee, arranging travel/accommodation for hearings and offering other assistance prior to and following hearings.[137] Travel and subsistence expenses of the witness were paid by CICA.[138] There was no provision for legal representation at hearings of the Confidential Committee.

128. Priority was given to elderly witnesses and those in poor health. Where necessary, the Confidential Committee scheduled hearings outside of Dublin and overseas to hear evidence.[139]

133 Section 15(1) of the 2000 Act.

134 See ss. 10 and 11(a) of the 2005 Amendment Act.

135 See s. 5(b) of 2005 Amendment Act.

136 This was subject to the limited exceptions set out under s. 27 of the 2000 Act which governed situations where the Committee was legally obliged to disclose information obtained by it.

137 CICA Report, Volume 3, p. 7.

138 Commission to Inquire into Child Abuse, Interim Report (May 2001), p. 16.

139 CICA Report, Volume 3, p. 11.

129. During the hearings, witnesses were asked whether they wished to make a self-directed statement or to be assisted by general questions from the Confidential Committee. The hearing was recorded, and witnesses were offered the opportunity to come back and listen to the recording of their hearing if they wished. The hearings before the Confidential Committee were conducted in an informal and sympathetic manner and there were no lawyers present.

130. The Confidential Committee produced a final report of its work setting out the oral evidence recounted, and the documentary evidence provided by witnesses to the Confidential Committee, and quotations were provided as a representative account of the witnesses' experiences in their own words. In its conclusions, the Confidential Committee made certain proposals for consideration in CICA's overall recommendations for the future.

131. The Confidential Committee also received evidence from a small number of third-party witnesses who reported abuse on behalf of their deceased family members and the impact on them of their relatives' abuse. This evidence was not included as evidence of abuse, but the testimony of third parties was included in consideration of the overall proposals made.

(vii) Associated Redress Schemes

(a) The Residential Institutions Redress Board

132. CICA did not have the power to award compensation. Instead, the Residential Institutions Redress Board ('**RIRB**') was established by statute in 2002 as a compensation scheme for former residents of certain residential institutions.[140] Those who went to the RIRB were not required to participate in the CICA inquiry.

133. An applicant to the RIRB was not required to prove in a public hearing that he or she had been abused by a particular person. Eligibility for compensation was that the RIRB was satisfied that the applicant was resident in an institution during their childhood, and that they had suffered an injury while resident there, and that their injury was likely the result of abuse.[141] It was a 'no-fault' scheme, meaning that an award of compensation did not have the effect of a finding that the school or institution had been negligent, or had any criminal liability.

140 Residential Institutions Redress Board Act 2002.

141 Section 7 of the Act provided that the Board must be satisfied that application contained: (a) proof of his or her identity; (b) that he or she was resident in an institution during his or her childhood; and (c) that he or she was injured while so resident and that injury is consistent with any abuse that is alleged to have occurred while so resident.'

134. Hearings by the RIRB were required to be in private, and as informal as possible.[142] An applicant was entitled to give oral evidence. The Board was also able to hear from other witnesses in support of the applicant's case, but it did not have any power to compel witnesses to attend.

135. The RIRB was required to notify a person or an institution accused of abuse.[143] They were then entitled to give a written statement to the RIRB. They could also, with the permission of the Board, give oral evidence or cross-examine the applicant if necessary to correct any factually incorrect statement or to protect or vindicate the personal rights of the person alleged to have committed the abuse. The applicant could also, with the permission of the Board, cross-examine the alleged abuser or the person in charge of the institution.

136. Following the hearing, the Board would proceed to make a decision on the award. The amount of the award was determined by reference to the severity of the abuse and of the injuries and effects of the abuse. The Board weighted the severity of the abuse by reference to the following scale:[144]

Weighting scale for evaluation of severity of abuse and consequential injury

Constitutive elements of redress	*Severity of abuse*	*Severity of injury resulting from abuse*		
		Medically verified physical/psychiatricIllness	*Psycho-social sequelae*	*Loss of opportunity*
Weighting	*1-25*	*1-30*	*1-30*	*1-15*

Redress Bands

137. This weighting was then translated into the following 'redress bands' which determined the amount awarded:

REDRESS BAND	TOTAL WEIGHTING FOR SEVERITY OF ABUSE AND INJURY/EFFECTS OF ABUSE	AWARD PAYABLE BY WAY OF REDRESS
V	70 OR MORE	€200,000 – €300,000
IV	55-69	€150,000 – €200,000
III	40 – 54	€100,000 – €150,000
II	25-39	€50,000-€100,000
I	LESS THAN 25	Up to €50,000

142 Section 10 of the 2002 Act.

143 Section 11(8) of the 2002 Act.

144 Schedule 1 of the Residential Institutions Redress Act 2002 (Section 17) Regulations 2002.

138. If not satisfied with the amount of an award, or if they had been refused an award, an applicant was entitled to apply for a review of the decision by the Residential Institutions Redress Review Committee. An applicant could either accept or reject the award offered by the Board, or on review, the Review Committee. Importantly, if the applicant accepted the award, he or she waived any right to take civil proceedings against the institution in question. However, if they rejected the award, they were entitled to seek redress in the courts. The time taken before the Board was to be disregarded for the purpose of the Statute of Limitations.

139. The average value of awards was €62,253, with the largest award being €300,500. There were 16,649 applications, of which 15,579 resulted in offers of payment.[145]

140. The RIRB was criticised by some for not publishing a report detailing the experiences of applicants[146] and being excessively legalistic and complex, which generally required survivors to get legal support in making their application.[147] The legal fees of applicants were paid by the Board, but only if the applicant accepted the Board's offer. If the applicant rejected the offer, the applicant became responsible for their own legal costs, which created an incentive for applicants to accept what they were offered. Only 17 applicants rejected offers made to them.[148]

(b) Caranua

141. Additionally, Caranua was established in 2012 to distribute additional funds pledged by religious orders in 2009. It provided additional supports and services to those who had already qualified for compensation under the RIRB. The scheme was capped at €110 million.

142. There was a two-stage application process. First, the survivor applied to verify their eligibility i.e. that they had received compensation from the Residential Institutions Redress Board. The second stage was more complex, and involved the Board identifying services or supports that best met the needs of individual applicants. This included housing supports, different medical supports or educational supports. Some examples of such support were: in the area health and services, optometry or dental work; in relation to housing support, disability modifications, repairs, and home improvements; and education included fees for third level education.[149]

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145 Stephen Winter, *Monetary Redress for Abuse in State Care* (Cambridge University Press, 2022), p. 48.

146 Irish Examiner, *Focus on redress: 'Aftershocks' of residential abuse reverberate* (27 June 2021).

147 Stephen Winter, *Monetary Redress for Abuse in State Care* (Cambridge University Press, 2022), p. 51.

148 ibid, p. 55.

149 See Stephen Winter, *Monetary Redress for Abuse in State Care* (Cambridge University Press, 2022), p. 46.

143. Caranua paid €97.9 million in support for applicants, while €13.7 million was spent on administration.[150] Caranua was criticised by some as spending excessive funds on administrative costs. It was also criticised for inefficiencies in its administration, and for alleged conflicts of interests on the part of Board members, some of whom were survivors and therefore potential beneficiaries from the scheme.[151] Caranua effectively closed in 2021 and had been winding down its activities since 2018.

150 Caranua, *Annual Report 2022*, p. 3.

151 Stephen Winter, *Monetary Redress for Abuse in State Care* (Cambridge University Press, 2022), p. 56, 57.

Chapter 16:
The Impact of the Scope of Inquiries on Survivors

A. Introduction

1. Some survivors who participated in the Scoping Inquiry's Survivor Engagement process spoke of their experiences of being cross-examined in the context of criminal or civil proceedings concerning sexual abuse. They said the process of cross-examination was retraumatising for survivors.
2. This chapter explores the extent to which the focus of an inquiry's investigation will determine the evidentiary and fair procedure requirements to be afforded to persons appearing before the inquiry. It also looks at some practical measures that have been taken to support victims of crime in the criminal justice system.
3. These issues arise in the context of the Scoping Inquiry's consideration of how an inquiry can be designed so as to minimise the difficulties experienced by survivors giving evidence before it.
4. In short, it appears that while practical steps can be taken in this regard, the scope of the questions asked of the inquiry will be key to determining the experience of survivors appearing before it as witnesses.

B. The Impact of the Scope of the Inquiry on the Experience of Survivors

5. In considering how the scope of what an inquiry is asked to investigate will impact the experience of survivors appearing before it, the key question is the extent of fair procedures required for those subject to allegations of wrongdoing and, in particular, whether they should be permitted to cross-examine their accusers.

(i) Comparing the Ferns, Dublin, and Cloyne Inquiries with CICA

6. There is a clear contrast in the experiences of survivors before domestic inquiries that were charged solely with looking at the handling of complaints of child sexual abuse, such as the Ferns, Dublin Archdiocese, and Cloyne Inquiries, and that of survivors who went before CICA, which was tasked with making findings as to whether abuse, including sexual abuse, had occurred in various institutions and identifying those responsible for abuse.

7. The Ferns, Dublin Archdiocese, and Cloyne inquiries were concerned only with investigating the handling of complaints and suspicions of child sexual abuse and were therefore not directly charged with making findings on whether abuse occurred in individual instances or whether individuals were responsible for abuse. The latter two inquiries were commissions of investigation under the 2004 Act.[1] Detailed survivors' accounts are included in the inquiries' reports on an anonymised basis and, in light of these accounts of abuse, the failures of civil or religious authorities in responding to complaints or suspicions of abuse are outlined and assessed.

8. The fact that no express findings as to the substance of the allegations were required to be made is a crucial difference between the task of the Ferns, Dublin Archdiocese, and Cloyne reports, on the one hand, and CICA on the other. Judge Yvonne Murphy commented on the difference between the Dublin Archdiocese report and that of CICA as follows:[2]

> The Ryan Report was concerned with establishing whether or not abuse occurred and the nature and scale of that abuse. It was not confined to sexual abuse. This Commission had no remit to establish whether or not abuse occurred although it is abundantly clear, from the Commission's investigation as revealed in the cases of the 46 priests in the representative sample (see Chapters 11 to 57), that child sexual abuse by clerics was widespread throughout the period under review. This Commission's investigation is concerned only with the institutional response to complaints, suspicions and knowledge of child sexual abuse. The Ryan Commission was required to make recommendations. The Dublin Commission has no specific remit to make recommendations but the Commission has given its views on a range of matters which it considers significant at various stages in the report.

(a) Findings of abuse

9. Where it is necessary for an inquiry to make findings of responsibility for abuse, the process is likely to be highly adversarial. It seems that even where it is not necessary to make findings that specific individuals were responsible for abuse, findings that abuse took place in a specific institution, meant that survivors who came before the Investigation Committee of CICA were subject to cross-examination about their accounts of abuse on that issue.

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1 The Commissions of Investigation Act 2004.

2 Murphy et al, *Report by Commission of Investigation into Catholic Archdiocese of Dublin* (29 November 2009) Dublin: Stationery Office ('**the Dublin Archdiocese Report**'), Part 1, para [1.7].

10. The more serious the findings of wrongdoing that have to be made by an inquiry, the more likely it is that full procedural rights have to be afforded to persons accused of the wrongdoing, and this is particularly so before a tribunal. Although a commission has flexible processes available to it to determine such issues, it may decide that cross-examination is necessary to fairly dispose of accusations of wrongdoing. Although there are comments in the case law suggesting that it is open to a commission to make findings of serious wrongdoing without affording rights of cross-examination, it appears to be a matter of the degree of seriousness of the accusation, and there has been no case testing the limits of commissions' powers in this respect.

11. In CICA the question of whether sexual abuse had occurred was expressly one which the Commission was required to consider. While not empowered to make findings in relation to individual instances of abuse, CICA had an express remit to determine if sexual abuse occurred in named institutions. The role of the Investigation Committee under Commission to Inquire into Child Abuse Act 2000 ('the 2000 Act') was to inquire into the abuse of children in relevant institutions, and if satisfied that abuse had occurred, to determine the nature, causes, circumstances, and extent of such abuse. If the Investigation Committee found that abuse of children happened in a particular institution, it could name the institution and the person or persons who committed the abuse. It could also identify the people who were responsible for managing or supervising such an institution.

12. In this context CICA had decided that persons accused of being responsible for abuse were entitled to full procedural rights. The decision in the *Murray* case, discussed elsewhere in this Report, meant that representatives of the deceased and incapacitated members of the congregation and the representatives of the congregation itself were entitled to cross-examine witnesses.[3]

13. Because the Commission was charged with investigating specific allegations of abuse in institutions, the evidence of survivors was thoroughly tested at the private hearings of the Investigation Committee. The Commission acknowledged it 'was a daunting experience for a witness to come to the Phase II private hearings'.[4] The number of counsel, solicitors and respondents present meant there could be typically 20-25 people hearing the evidence heard in private. A proposal by the Commission to limit attendance of legal teams was rejected by the High Court, as discussed in the previous chapter.[5]

3 *Murray v Commission to Inquire into Child Abuse* [2004] 2 IR 222, at 304-5.

4 CICA report, Volume 1, Chapter 5, para [5.06].

5 *In Re Commission to Inquire into Child Abuse* [2002] 3 IR 459.

14. The Commission acknowledged that in challenging the evidence of complainants 'Some Congregations appeared more concerned with discrediting the complainant than with finding out what had happened in its institution'.[6]

(b) Findings solely related to handling of complaints

15. Where specific findings concerning whether abuse had occurred do not have to be made it is likely that lesser procedural rights will apply, which can greatly reduce cross-examination of survivors, or can at least reduce the areas of cross-examination permissible, particularly where the inquiry is conducted under a commission of investigation.

16. The inquiry also examines how those allegations and suspicions were handled in light of the scale and nature of same, what was known about them at the time, and what steps were taken to deal with the allegations, suspicions and concerns. This is set out in the inquiry's report, and the public are made aware of the information uncovered in the course of the inquiry.

17. The Ferns, Dublin Archdiocese, and Cloyne inquiries each involved investigations of the handling of allegations, concerns, and suspicions of abuse. This involved the inquiry hearing evidence from survivors as to the abuse complained of and from persons who raised concerns in relation to the possibility of such abuse in order to determine what concerns or suspicions of abuse would fairly be said to have existed at the time.

18. From the history of the Ferns, Dublin Archdiocese, and Cloyne reports, it is clear that notwithstanding their narrower remit, the scale and nature of abuse complained of is reflected in the inquiries' reports and the public came to understand the extent of clerical sexual abuse as a result of those reports. In each instance, while the findings made primarily related to the handling of allegations and suspicions of abuse, the scale of the numbers of people recounting their experiences and the similarities of the experiences recounted operated to make the public aware of the prevalence of child sexual abuse in the particular contexts examined.

(ii) Naming Alleged Abusers Will Trigger Stricter Procedural Rights

19. One of the difficulties faced in CICA and the Ferns, Dublin Archdiocese and Cloyne inquiries was seeking to balance the rights of, on the one hand, a large number of persons who made allegations of having been gravely harmed, who typically wished to be heard, believed, and offered some form of redress, with, on the other hand, the rights of the persons accused of serious wrongdoing.

6 CICA report, Volume 1, Chapter 5, para [5.28].

(a) Naming alleged abusers

20. Publicly naming an abuser typically triggers a more court-like procedure because constitutional protections require that when a serious allegation is made against an identifiable person, they have a right to minimum standards of fair procedures, as discussed in the previous chapter.

21. Generally, any process where survivors of child sexual abuse wish to have their abusers named publicly and findings made against them is likely to require that those survivors be cross-examined by lawyers representing the person against whom they make allegations of wrongdoing. This process can be very difficult for survivors because it will inevitably involve questioning the accuracy of survivor's testimony and the truthfulness of their evidence. When a witness gives evidence of events occurring many years previously, cross-examination will seek to undermine the accuracy of that witness's memory. It is not unusual for a witness to face cross-examination over a period of days by a number of barristers representing different parties.

22. As is apparent from the discussion in previous chapters, there have been occasions where non-statutory and statutory inquiries have named abusers without requiring cross-examination of the evidence of survivors:

- In the Ferns Inquiry, the bulk of living clerics accused of abuse were anonymised and referred to by letters of the Greek alphabet.
- The Dublin Archdiocese Commission concluded that it should examine every case in which the relevant priest had been convicted in the criminal courts, both on the basis of availability of documents and that 'issues such as confidentiality and damage to reputation or good name are less difficult in such cases'.[7] Ultimately, 10 of the 46 alleged abusers referred to in the report are named.
- In the Cloyne Inquiry, in contrast, all clerics, bar one, were anonymised in the report. Bishop Magee was named in circumstances where his identification was unavoidable given his position as a bishop.

23. In the CICA report, no persons responsible for abuse were ultimately named, however, the institutions concerned were named. The CICA Report noted that the fact that a very small number of persons would actually be named would give rise to inconsistency and would be fraught with difficulty. Under the amended legislation, persons convicted of one offence could be named in the report in relation to a separate allegation. It was ultimately decided not to identify individuals by name in respect of any alleged abuse.[8]

7 Murphy et al, 'Commission of investigation report into the Catholic Archdiocese of Dublin' (29 November 2009), p. 172.

8 CICA report, Volume 1, Chapter 5, paras [5.41]-[5.45].

(b) Naming those accused of mishandling complaints

24. The Ferns, Dublin Archdiocese, and Cloyne inquiries named all of the clerics accused of wrongdoing in handling of complaints. Such findings could reasonably be described as adversely affecting the good names and reputations of the individuals involved. However, it is clear from the reports in respect of these inquiries that they had records available to them and/or other evidence concerning the handling of allegations and suspicions of child sexual abuse, which entitled the inquiry to make the findings that they did.

25. It is unclear whether any of those who were found to have mishandled abuse allegations sought an opportunity to cross-examine any survivor or other person who may have given evidence against them. It does not appear, however, that the individuals concerned challenged the procedures of the inquiry.

26. An inquiry which focuses on the handling of allegations, concerns and suspicions of sexual abuse is not entirely immune to the potential legal difficulties discussed above. However, this type of inquiry is likely to be less adversarial in content, because it does not seek to make direct findings as to whether a particular person committed sexual abuse.

(iii) Use of sampling where large numbers of complainants come forward

27. In some inquiries, the scale of affected persons has meant that not every survivor of abuse that has come forward to the inquiry has been able to give evidence.

28. In the Ferns Inquiry, which was limited by geographical delineation, the Commission only received complaints against 21 priests that fell within their remit and therefore no sampling approach was required. Similarly, the Cloyne Inquiry investigated all 19 of the clerics against whom complaints had been received. Again, the geographical limits placed on the inquiry limited the number of complaints that were within remit, meaning that the sample size was too small to merit a sampling approach.

29. In contrast, in the Dublin Archdiocese report a sampling approach was taken, with 46 of 102 priests investigated. This narrowing of cases cannot strictly be described as sampling, in the sense of a representative or random sample, since it was decided to include all 11 priests who had been convicted of abuse since more information was available in such cases.

30. In CICA 1,712 persons initially opted to give evidence to the Investigation Committee. Pursuant to s. 12(1)(a) of the 2000 Act, the CICA Investigation Committee had a duty to provide an opportunity to each victim to recount their abuse and make submissions. It was estimated that for each person to give

evidence would take more than 4 years.[9] If such evidence was tested by cross-examination, the process of hearing evidence would be significantly longer. For this reason, CICA decided not to hear from every witness who wished to give evidence and to only hear evidence necessary for their report. This conclusion was also reached in view of the delay to the investigation of complaints which was being incurred as a result of the administrative burden on the Investigation Committee, the adversarial approach which had been taken by the respondents to complaints, the age profile of victims of institutional abuse, and the projected costs of legal representation (which was estimated to be approximately €175-200 million).[10]

31. This 'sampling' approach was criticised by survivors.[11] Following the amendment to the governing legislation, interviews were undertaken with those who were either not selected as part of a representative sample of witnesses heard in private hearings for their institutions or because no oral evidence at all was sought in respect of the institution they attended. The latter situation arose in relation to 2 Christian Brothers' schools where the institutions' systems of management and the nature of the complaints were very similar to the matters that had been investigated in other Christian Brothers' schools. Equally, very few hearings occurred in relation to a special school, Our Lady of Good Counsel, Lota because of the existence of 6 separate ongoing Garda investigations. In each instance, complainant witnesses were instead called for interview.[12]

32. In addition, certain special schools for deaf children were not included in full Investigation Committee hearings and 78 witnesses from these institutions were instead interviewed. Investigation of these institutions was carried out by way of analysis of documentary material.[13]

9 Judge Sean Ryan's Review into the working of the Commission to Inquire into Child Abuse (15 January 2004), para 4.3.

10 Report to the Government on the Review of the Laffoy Commission: Made pursuant to Government Decision SI180/20/10/0270B of 3 December 2002 (15 January 2004), p. 11.

11 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.

12 CICA report, Volume 1, Chapter 5, paras [5.07]-[5.08].

13 CICA report, Volume 1, Chapter 5, paras [5.09]-[5.12].

C. The Risk of Retraumatisation From Cross-Examination

(i) The Risk of Retraumatisation for Survivors

33. As discussed above, if a tribunal is utilised to investigate and make findings in respect of child sexual abuse, then persons potentially subject to such findings in such a forum would likely be entitled to the full range of *Re Haughey* fair procedures rights, including cross-examination of those making accusations against them, with few limitations.[14]

34. The nature of such cross-examination would be likely to be retraumatising, involving a thorough dissection of a survivor's memory, motivation, and credibility. When a witness gives evidence of events occurring many years previously, cross-examination will seek to undermine the accuracy of that witness's memory. It is not unusual for a witness to be cross-examined over a period of days by a number of different parties involved in the complaint.

35. Where evidence is given in public, this strengthens the requirement for an untrammelled right to cross-examine since a person's reputation may be severely damaged by the testimony of an accuser being given without the person subjected to criticism having an opportunity to interrogate that evidence and immediately state their defence to such criticism.

36. Restricting the subject matter of an inquiry to the handling of complaints of sexual abuse and/or the response to knowledge, suspicion or concern of sexual abuse would go some way to alleviating the difficulty for survivors in giving evidence in such a forum. The inquiry would not be required to make findings as to whether sexual abuse took place, but as to how complaints and suspicions were handled. In such circumstances the inquiry could limit the matters on which cross-examination would be permitted, depending on the nature of the issues arising.

(ii) Possibility of avoiding cross-examination of survivors

37. Overall, it seems that the likelihood of a full panoply of procedural rights, including cross-examination, being afforded to an individual who may be the subject of adverse comment by an inquiry is greater before a tribunal than before a commission.

14 *In re Haughey* [1971] IR 217, at 264.

(a) Restriction of cross-examination in commissions

38. In contrast with the more court-like procedures of tribunals, commissions of investigation pursuant to the 2004 Act were intended to have some latitude in determining what degree of fair procedures should be afforded to participants and those who may be the subject of negative comment.[15]

39. As one author has noted, the key feature of inquiries held under the 2004 Act is that 'the inquiry is held in private, although, naturally, the report would be published. The result of this is that there is much less damage to a person whose reputation was under investigation by such a Commission and, consequently, their *Re Haughey* rights are reduced'.[16]

40. As a consequence, the obligation to provide fair procedures need not necessarily involve granting a person who is potentially subject to negative findings a right to cross-examine. This point is reflected in Charleton J's *obiter* comments in *Shatter v Guerin* [2019] IESC 9:

> 24. Other models are available within this jurisdiction for investigating and publicly reporting on issues of major public concern. Within the context of the structures set up by the Commissions of Investigation Act 2004, the model to be followed by the chairman in deciding issues against people does not necessarily have to involve all of these *Haughey* rights. Instead of a trial involving multiple parties and ill-defined issues, each of whom might expect to be represented to the fullest level of public expense, **the purpose of the 2004 Act was to enable an inquiry to be conducted with witnesses attending and being examined by the commission but not, necessarily, by any party with an opposing factual stance. Once the chairperson of the inquiry is of the view that cross-examination is not necessary for a fair determination, the practice**, derived from the decision of the English Court of Appeal in In re Pergamon Press Ltd [1971] Ch 388, **is to send a draft of preliminary findings together with the material on which this is based to any person who may be criticised and to seek, and then consider, whatever comments followed.** (emphasis added)

15 Gerard Hogan, David Morgan and Paul Daly, *Administrative Law in Ireland*, (5th ed., 2019), [8-44].

16 David Gwyn Morgan 'Parliamentary Inquiries: The Context of the Joint Oireachtas Committee's Proposals' [2011] COLR, 10 p. 20.

41. In terms of determining the minimum of what a person so affected is entitled to in terms of fair procedures, Charleton J went on to specify that this entailed notice of the negative findings and a chance to comment prior to publication.[17] He further commented that:

> 29. **It is to be doubted that the full panoply of *Haughey* rights are necessary just because a negative comment impacting on the good name of a citizen may be made; even through a public inquiry**. The Oireachtas has determined, through passing the 2004 Act, that lesser strictures than those applicable to a public tribunal should apply to a commission of investigation, most usually held in private. It would be contrary to sense to extend the rights derived from the 1971 *Haughey* decision from tribunals of inquiry to commissions of investigation … (emphasis added)

42. In *Mooney v An Post* [1998] 4 IR 288, Barrington J, at 298, described 'the minimum' procedural rights that a person affected is entitled to as some notice of what might be described as 'the charge against him' and that such a person 'be given an opportunity to answer it and make submissions'.[18]

43. In *Kelly v Minister for Agriculture & Ors* [2021] 2 IR 624, at 697, Charleton J similarly commented, *obiter*, that '[a]n enquiry demands fair notice and a chance to comment. It does not … require more than that. Apart from his rights, there are other entitlements in play: chief among them is the duty of the public service to conduct enquiries as are necessary for good administration'. The inquiry referred to in that case was an investigation carried out pursuant to the civil service disciplinary code in respect of an employee of the department of agriculture. Charleton J described two types of public inquiry that may occur:[19]

> 12. … In *Shatter v Guerin*, comments are also made as to more complex forms of statutory enquiry where there are two models. One is based on interviewing witnesses, either privately or publicly, but only through direct questions on behalf of the commission or other tribunal and gathering materials and interviewing any supposed wrongdoers. A draft report is prepared and any materials supporting any findings of wrongdoing is given to the thought-to-be wrongdoers, giving them reasonable time to comment. The comments are then considered and a public report is issued. The other model is that of a public tribunal of enquiry, with those who may reasonably be thought to be capable of being severely criticised represented and

17 *Shatter v Guerin* [2019] IESC 9, para 26, citing Clarke J in *Atlantean v Minister for Communications and Natural Resources* [2007] IEHC 233.

18 Followed by Clarke J in *Atlantean v Minister for Communications and Natural Resources* [2007] IEHC 233.

19 [2021] 2 IR 624, 699.

participating by cross-examination and submission. That participation is sufficient and no draft report is first issued for comment by thought-to-be miscreants. The report simply comes out. But that takes an enormous amount of time, as between gathering materials, distributing all that is relevant, making an opening statement, doing public hearings and drafting an accurate report. It might be commented in this regard that, as in a court case, a witness's evidence may be rejected, even in trenchant terms, but that would give no right to be represented. **Rather, it is findings of public wrong, as in corruption, that give those potentially involved the entitlement to be represented. Even there, the draft report and individual enquiry model suffice on the current state of the law.** Thus, there may be two types of public enquiry. (emphasis added)

44. As set out below, in the context of tribunals, the extent of fair procedures is determined by factors, such as the nature of the allegation, whether the hearing is held in public, and the extent of a 'paper-trail', if any. Arguably, such factors would likely influence any challenge to a restriction on fair procedures before a commission, albeit in the context of the greater flexibility afforded to commissions under the 2004 Act.

45. The fact that the inquiries in Ferns, the Dublin Archdiocese, and Cloyne were held in private, with a large degree of documentary evidence, and concerned only the handling of allegations and suspicions of child sexual abuse, as opposed to findings of whether abuse occurred, likely supported less formality in the procedures of those inquiries. In general, it does not appear that cross-examination of survivors by potentially affected parties was a prominent feature of such inquiries.

46. Inquiries established under the Commissions of Investigation Act 2004 have heard evidence in private with more limited cross-examination. For example, the Commission of Investigation (Response to complaints or allegations of child sexual abuse made against Bill Kenneally and related matters) has heard from survivors in private while also holding public sessions of evidence in respect of the evidence of Mr Kenneally and others, such as members of the Gardaí. The commission is not concerned with the substance of Mr Kenneally's actions (which have led to his conviction for sexual abuse), but with how the abuse was handled. Notably, in giving his evidence, Mr Kenneally complained that he had not been given transcripts of survivors' evidence to the commission, which was given in private, and that he was not given the chance to cross-examine them.[20] However, the commission confirmed that he was not entitled to such procedural rights.

20 Orla O'Donnell, 'Concern Kenneally retracting evidence brought by defence in 2016, says Chair' *RTE* https://www.rte.ie/news/ireland/2024/0313/1437695-kenneally-commission/.

47. A commission of investigation under the 2004 Act which is held primarily in private has a broad discretion as to how the procedural rights of the alleged wrongdoers are to be given effect to. The most likely area where such rights may be restricted is in relation to cross-examination. The *dicta* of Charleton J set out above, if followed, would suggest that even in cases of serious wrongdoing, constitutional procedural rights may be lawfully restricted, so long as the minimum right to notice of an allegation (in the form of a draft report) and a chance to comment is observed.

48. On the other hand, CICA, while not a commission of investigation, but an inquiry operating under bespoke legislation with no equivalent to the 2004 Act's procedural provisions, afforded full procedural rights to alleged wrongdoers if they were at risk of being named as responsible for abuse of children. This meant that survivors had to be cross-examined on their evidence of abuse, albeit that that cross-examination was held in private and not in public session. As mentioned above, despite this, because of the number of parties involved, the experience of survivors giving evidence before the Investigative Committee of CICA was described as 'daunting'.[21]

49. Despite the possibility of restricting such fair procedure rights, it is notable, that there are very few cases challenging the procedures adopted by a commission under the 2004 Act.

(b) Limited restriction of cross-examination in tribunals

50. There are some circumstances where a tribunal can apply a lesser or more limited standard of procedural rights. The High Court has stated that in determining the extent of procedural rights applicable:

> … the court should have regard to a number of factors including
>
> (a) the nature and type of the statutory function which the decision-maker is carrying out;
>
> (b) the statutory framework within which the function is carried out; and
>
> (c) the possible detriment that an applicant might suffer arising from the alleged failure [to afford the procedural rights].[22]

51. The Supreme Court has further stated that the requirements of natural justice will vary depending on the gravity of what is alleged, whether or not personal responsibility is to be established, whether there is a 'paper trail' or other body of uncontradicted evidence or corroboration available, whether the inquiry sits in public or in private, and other matters.[23]

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21 CICA Investigation Committee Report Vol. I, Chapter 5, para 5.06.

22 In *JRH v Minister for Justice, Equality and Law Reform* [2009] 4 IR 474, at para 12, per Feeney J.

23 *O'Callaghan v Mahon* [2006] 2 IR 32, 62

52. However, a right to cross-examination in the defence of an individual's constitutional rights particularly arises where:[24]

(i) the tribunal was dealing with grave allegations against an individual, which, if true, would constitute a breach of the criminal law, and thus were a clear and obvious attack on his good name,

(ii) there was little or nothing by way of a paper trail or corroboration,

(iii) there was immediate and extensive media coverage of allegations made against the individual and

(iv) the evidence against the person largely turned on the testimony of one witness, so that the personal credibility of that witness was a vital factor.

53. It is possible for a tribunal to impose some restrictions on cross-examination. For example, in *O'Brien v Moriarty* the Supreme Court held that it was consistent with fair procedures for a tribunal to impose restrictions on the time allowed for cross-examination and on the matters on which cross-examination would be permitted.[25]

54. It is difficult to see how a lesser form of procedural rights could apply where a tribunal is tasked with investigating such a serious matter as the sexual abuse of children and, if findings are to be made that an individual is responsible for child sexual abuse, what is alleged is a grave criminal offence. Indeed, in respect of more recently-made allegations, those accused of mishandling complaints may also be guilty of a criminal offence pursuant to the Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012 ('**the 2012 Act**'), discussed elsewhere in this Report. The 2012 Act creates an offence where a person who has knowledge or belief that an offence against a child has been committed, and who has information of material assistance in apprehending or prosecuting the person responsible, fails without reasonable excuse to inform An Garda Síochána. However, the offence only applies to information that a person acquires, receives, or becomes aware of after the passing of the 2012 Act.[26]

55. It may be possible that one or more of the procedural rights identified in *Re Haughey* would not apply, or apply only in a diluted or lesser form, depending on the task the tribunal is asked to carry out, and the other factors identified above, such as the extent of documentary evidence. However, some degree of cross-examination of survivors appears likely if a tribunal is utilised as the mode of inquiry.

24 ibid.

25 [2016] IESC 36.

26 The Criminal Justice (withholding of Information on Offences against Children and Vulnerable Persons) Act 2012, s. 2(2).

D. Victim-Centred Reforms of the Criminal Justice System

56. A number of survivors in the Survivor Engagement process who had been involved in civil or criminal proceedings concerning their experiences of historical child sexual abuse felt that the legal system needed reform to make it more accessible and appropriate for victims of crime. Some reform of the criminal justice system in this regard has been underway in recent years. This section looks at certain of these reforms in so far as they may impact survivors of historical sexual abuse.

57. Legislation, discussed hereunder, has conferred statutory rights on victims of crime. In addition, two reports have made extensive recommendations about reforms of the criminal justice system and in particular measures to protect vulnerable witnesses in both the investigation and prosecution of sexual crimes. The Garda Inspectorate Report, *Responding to Child Sexual Abuse, A follow up Review from the Garda Inspectorate* (December 2017) made 24 recommendations, which were the subject of four progress reports of an interagency implementation group (the '**Implementation Group**') chaired by Caroline Biggs SC.[27] The Report of the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences (2020) ('**the O'Malley Report**') made numerous recommendations and was followed by an implementation report.[28]

(i) Statutory Rights of Victims of Crime

58. The Criminal Justice (Victims of Crime Act) 2017 ('**the 2017 Act**') provides for a number of entitlements of victims of crime, including the survivors of historical sexual abuse offences. The relevant entitlements for a victim of crime, include:

(i) The right to have information on a wide range of matters, including procedures for making a complaint, the role of the victim in the criminal process, and the victim's entitlement to various services at the first point of contact with An Garda Síochána.

(ii) The right to be kept informed of the progress of the investigation and any criminal proceedings that follow;

(iii) The right to request information about any significant developments in the investigation, about key prosecution decisions, (in the event of a conviction) about the date of sentencing and of any appeal arising from the conviction, and other matters;

27 These reports were designed to outline the level of implementation of the recommendations in the Report. Additionally, the Implementation Group proposed several clarifications and modifications, largely to do with feasibility concerns, to the GIR's recommendations.

28 Department of Justice, 'Supporting a Victim's Journey: A plan to help victims and vulnerable witnesses in sexual violence cases' (28 October 2021) available at https://www.gov.ie/en/publication/bb42e-supporting-a-victims-journey/.

(iv) The right to request a review of a decision not to prosecute;

(v) The right to request information about any sentence imposed on the offender, or temporary release for the offender and the conditions attaching to same, and any escape from custody by the offender.

59. An Garda Siochana must carry out an assessment during an investigation, in order to identify any protection needs of the victim including whether, due to their special vulnerability to secondary victimisation, intimidation, or retaliation, the victim might benefit from special measures during the investigation and in any later criminal proceedings.

60. During the court process, a court has a general power to exclude the public, any portion of the public or a particular member of the public (except officers of the court and *bona fide* representatives of the press), in any proceedings relating to a criminal offence if the court is satisfied that the nature or circumstances of the case are such that there is a need to protect a victim from secondary and repeat victimisation, intimidation or retaliation, and that it would not be contrary to the interests of justice to do so.

(a) Current Protections during Criminal Proceedings

61. There are a number of particular protections for victims of crime in the context of criminal prosecutions:

- Right to anonymity: once a person is charged with a sexual assault offence the victim may not be publicly identified, except in the very limited circumstances set out in s. 7 of the Criminal Law (Rape) Act 1981. Anonymity applies irrespective of the outcome of a trial. A person charged with a rape offence is also entitled to anonymity unless convicted of the offence.
- Exclusion of public: in any proceedings for certain sexual offences including rape, aggravated sexual assault, and incest, the court must exclude from the court all persons except officers of the court, persons directly concerned in the proceedings, *bona fide* representatives of the press, and such other persons as the judge may in his or her discretion permit to remain.
- Victim impact evidence: when imposing sentence for a sexual offence (or for certain other offences), a court must take account of the impact of the offence on the victim and may receive evidence or submissions in that regard. A court must hear evidence from the victim about the impact of the offence if the victim wishes to give such evidence.

(ii) Practical Supports for Victims of Crime

(a) Garda Reforms

62. A number of the key recommendations of the Garda Inspectorate and O'Malley Report have been implemented as follows:

- Specialist units across each Garda division specifically trained to investigate and prevent sexual offences, known as Divisional Protective Service Units ('DPSUs'), have been established across each Garda division.[29] This includes training to conduct interviews with suspects and take statements from adult victims of child sexual abuse. The existence of these units ensures more effective child protection arrangements in all areas.[30]
- The training programme for the DPSU includes training for interviewing of suspects and the taking of statements from witnesses in child sexual abuse cases.[31]
- Special interview suites have been set up for vulnerable victims. The number and geographical spread of special interview suites throughout the State is to be reviewed every three years in order to ensure that all vulnerable victims have reasonably convenient access to such a suite.[32]

63. Other recommendations are in the process of being implemented:

- A joint working protocol, developed by An Garda Síochána and Tusla, is currently being reviewed to enable both organisations to move to a standard operating procedure for conducting joint interviewing of child victims.
- Changes have been made to An Garda Síochána's policy of not approaching child abuse victims as part of a third-party referral (including clerical sexual abuse cases) who are initially unwilling to make a complaint. However, these changes have not yet been fully implemented and are being kept under review.[33]

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29 There are 27 DPSUs with approximately 320 personnel with bespoke training on matters such as investigating sexual crime, child protection, investigating domestic violence, online child exploitation and sex offender management.

30 This was the view of the Biggs implementation group, considering the Garda Inspectorate Report (2017) recommendation that An Garda Síochána and TUSLA establish local teams to ensure more effective child protection. See: spreadsheet Appended to Fourth Implementation Group Report.

31 The Garda Inspectorate Report 2017, recommendation 3.5. The recommendation was that training to take statements from witnesses in child sex abuse cases be included in the detective training programme. The recommendation was accepted with the modification that only detectives of DPSU's would conduct such interviews.

32 The *Supporting a Victim's Journey* report commits An Garda Síochána to doing this every three years. Department of Justice, 'Supporting a Victim's Journey: A plan to help victims and vulnerable witnesses in sexual violence cases' (28 October 2021), p. 6, available at https://www.gov.ie/en/publication/bb42e-supporting-a-victims-journey/.

33 The Garda Inspectorate Report 2017, recommendation 3.3.

- A recommendation that An Garda Síochána develop PULSE recording practices that clearly identify child sexual abuse incidents has not yet been fully implemented.

64. In addition, a recommendation that An Garda Síochána conduct a review of PULSE incident categories to ensure that all offences of a sexual nature are recorded in a single sexual offence category and issue clear national directions on the correct recording of sexual offences is not yet implemented.[34]

(b) Training for Judges and lawyers[35]

65. The Judicial Council, the Bar of Ireland, and the Law Society of Ireland are examining their training and Continuing Professional Development ('CPD') processes in order to provide special training to all judges presiding over criminal trials for sexual offences and for all lawyers appearing in such trials to equip them with an understanding of the experience of victims of sexual crime. The training will also address the questioning of witnesses who are especially vulnerable by virtue of their youth or disability.

66. The feasibility of permitting the Director of Public Prosecutions, and other public bodies responsible for briefing professional lawyers in sexual offence trials, to request a list of solicitors and barristers who have undergone such specialist training is being examined.

(c) Court Familiarisation

67. The Director of Public Prosecutions, in collaboration with An Garda Síochána runs a witness familiarisation systems for victims of serious sexual offences. A professional member of the DPP's staff meets with the victim to explain the court process, and to visit a courtroom in advance of the trial if desired.[36] Additional funding to extend this service to all victims of sexual crimes around the country has been secured.

68. In the Criminal Courts of Justice ('CCJ') and some other court venues around the country, a voluntary service, V-SAC (Victim Support at Court) provides support to victims of serious sexual offences by accompanying victims and witnesses to court.[37]

34 ibid, recommendation 3.1 & 3.2.

35 Set out in summary form at p.130 of the O'Malley Report.

36 O'Malley Report, pp. 94 to 95.

37 ibid, p. 95.

69. It is hoped that the above reforms, and proposed reforms, will help to make the criminal justice system more accessible and victim-centred for survivors of historical sexual abuse.

E Conclusion

70. The issues that an inquiry has to decide clearly impact how adversarial it is likely to be, and this in turn, has an influence on the likely duration of the inquiry. Charging an inquiry with making findings of serious wrongdoing, equating with criminal offences, is likely to result in a highly adversarial approach in defence of the accusations of wrongdoing. This in turn leads to a real risk of retraumatisation.

71. It is clear that a model of inquiry which has rules and procedures that are more court-like and adversarial is one where cross-examination of survivors is more likely to occur. The commission of investigation model allows for greater procedural flexibility than the tribunal of inquiry model in this regard, as it permits a commission to decide what the extent of procedural rights should be, including whether cross-examination is permitted. A commission may, of course, decide that cross-examination is required to fairly decide an issue before it, but it has greater flexibility to decide that issue and to provide for alternatives to cross-examination than a tribunal.

72. The recent legislative and practical reforms aimed at taking into account the impact of court proceedings on victims of crime are instructive when considering what steps a future inquiry might take to support victims. These themes will be returned to in the conclusion of this Report.

Chapter 17:
International Inquiries into Child Sexual Abuse

A. Introduction

1. In recent years, an increasing number of countries have set up public inquires to investigate historical child abuse, particularly from the 1990s onwards.[1]
2. It has been observed that the focus of most government inquiries into historical child abuse has been on abuse in residential care.[2] However, some more recent major inquiries, such as the Australian Royal Commission and the UK Independent Inquiry into Child Sexual Abuse have had a much broader focus, encompassing child sexual abuse in a variety of settings, including in schools.
3. In recent times, it would appear that the Irish model of inquiry, and particularly the model of the Commission to Inquire into Child Abuse ("CICA") has proven influential. CICA was a particular inspiration for the Australian Royal Commission into Institutional Responses to Child Sexual Abuse of 2013–2017, as well as for Swedish inquiries.[3]
4. This chapter will consider the process, powers, and methodology of a number of inquiries internationally that have investigated child sexual abuse in schools, whether exclusively or more often as part of a broader scope of the inquiry.[4] In particular, this chapter will consider public inquiries in Australia, the United Kingdom, and in Canada, namely:
    (i) The Australian Royal Commission into Institutional Responses to Child Sexual Abuse;
    (ii) The UK Independent Inquiry into Child Sexual Abuse;
    (iii) The Northern Ireland Historical Institutional Abuse Inquiry;
    (iv) The Scottish Child Abuse Inquiry, and;
    (v) The Truth and Reconciliation Commission of Canada.

1 Gleeson and Ring, 'Confronting the past and changing the future? Public inquiries into institutional child abuse, Ireland and Australia' (2021) 29(1) *Griffith Law Review*, 109.

2 Katie Wright 'Remaking Collective Knowledge- An Analysis of the Complex and Multiple Effects of Inquiries into Historical Institutional Child Abuse' 74 *Child Abuse and Neglect* 10.

3 Johanna Sköld, 'The truth about abuse?: A comparative approach to inquiry narratives on historical institutional child abuse', 2016, *History of Education*, (45), 4, 492-509.

4 Only a small number of inquiries have investigated abuse solely in schools, and fewer still have focussed solely on sexual abuse in schools.

B. Australian Royal Commission into Institutional Responses to Child Sexual Abuse

5. The Australian Royal Commission into Institutional Responses to Child Sexual Abuse (the '**Royal Commission**') was established partially by way of a response to outcry among survivors in Australia following the publication of the Ryan Report in Ireland, including the possibility that certain priests were relocated to Australia where they committed further abuse.

6. The Royal Commission was influenced by the methodology of CICA, and in particular adopted the sampling methodology utilised by CICA – where cases were chosen based on a review of documentation – and survivor testimony was subject to cross-examination. However, contemporary media reports criticised CICA for its anonymisation of abusers and the lack of recommendations for further prosecutions and sought a different approach for an Australian inquiry.[5]

7. The Royal Commission was established in 2013 with a mandate both to examine how Australian institutions responded to sexual abuse of children and to make recommendations for the future as to what institutions and the Government should do to alleviate the impact of child sexual abuse.

8. Its focus was solely on sexual abuse, in contrast with previous inquiries in Australia that had considered abuse more broadly. However, the inquiry investigated a very broad range of institutions, including not only residential care, but also a range of state, faith-based, non-government and non-profit organizations, such as churches, schools, hospitals, and sport clubs.[6]

9. Its terms of reference were forward looking in outlook.[7] It was required to 'inquire into institutional responses to allegations and incidents of child sexual abuse and related matters' and 'in particular' to examine what governments and institutions 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'.

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5 Gleeson and Ring, 'Confronting the past and changing the future? Public inquiries into institutional child abuse, Ireland and Australia' (2021) 29(1) *Griffith Law Review* 109.

6 See Wright, Swain and McPhillips, 'The Australian Royal Commission into Institutional Responses to Child Sexual Abuse' (2017) 74 *Child Abuse and Neglect* 1-9.

7 Royal Commission into Institutional Responses to Child Sexual Abuse, Terms of Reference, available at https://www.childabuseroyalcommission.gov.au/terms-reference.

10. Notably, the Royal Commission made liberal use of its express statutory power to refer evidence or information that potentially disclosed criminal offences to police and law enforcement.[8] Over 2,000 cases were referred to the police, with a number of cases resulting in prosecutions.[9]

11. The Royal Commission conducted its work through a mixture of private sessions, public hearings, and a research and policy programme. As an initial information gathering exercise, survivors were invited to call or write to the Commission about their experience. The Commission set up a call centre for this purpose, which received over 39,000 calls over the course of its work. It also received over 20,000 pieces of correspondence.[10]

12. Those who made contact with the Royal Commission were then further invited to contribute to either a private or public hearing, or to give a written account of their experiences. They were also informed of the availability of a free legal advice service, called 'knowmore', which was established specifically to cater to the needs of persons who were either giving information or considering giving information to the Royal Commission.[11] This provided legal advice on matters such as witness protections, the availability of other forms of action or redress, and the effect of confidentiality agreements in past proceedings.[12]

(i) Private sessions

13. The Royal Commission also provided for the use of private sessions, similar to the Confidential Committee of CICA, which enabled survivors to tell their stories without being subject to cross-examination. Private sessions did not follow a rigid structure: Attendees were given the opportunity to share their experiences, the impact of the abuse and trauma on their lives, and their suggestions for better protecting children in the future.[13]

8 Pursuant to s 6P of the Royal Commissions Act 1902.

9 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017), Vol. 1, p. 25.

10 ibid, p. 23.

11 Royal Commission into Institutional Responses to Child Sexual Abuse, Practice Guideline 1 ('the Practice Guideline'), p. 2.

12 ibid.

13 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017), Vol. 1 at p. 28.

14. The Royal Commissions Act 1902 was amended to provide that a private session is not a hearing of the Royal Commission, and that a person who appears at a private session is not a witness before the Royal Commission or considered to be giving evidence. As a result, survivors who participated in private sessions were not required to take an oath or affirmation and were not subject to cross-examination. While information gathered in private sessions informed the Royal Commission and its work, the Act required that information gathered at a private session that identified a natural person could only be included in a report or recommendation if it was 'de-identified'.[14] Material from the private sessions was largely contained in its own dedicated volume of the report, Volume 5. The Royal Commission held around 8,000 private sessions.

15. Notwithstanding the restrictions on the manner in which information gleaned from private sessions could be used, the Commission described private sessions as 'the primary way for the Commissioners to listen to survivors' experiences of child sexual abuse in institutional contexts'.[15]

16. The Commission noted that it sought to hold a private session as soon as possible after initial contact from a survivor, though it noted that in practice, due to the huge demand, it was often more than a year until this took place.

17. Private hearings were conducted across the country, with Commissioners travelling to different cities, towns and remote areas to conduct them. Some private sessions were held in prisons. Sessions usually lasted one hour and survivors were entitled to have a support person with them. Survivors were also phoned by a counsellor within one week of having attended.[16] Private sessions were adapted to meet the needs of particular individuals, whether children, people with disabilities or ethnic minorities.[17]

18. At the immediate conclusion of the private session, survivors were offered the opportunity to talk to a Royal Commission counsellor. Survivors were also provided with a personal thank you card signed by the Chair of the Royal Commission. They also received a booklet describing what they could expect in the weeks and months following a private session, including the feelings commonly experienced by survivors following contributing to a private session. This booklet also described how the Royal Commission would use the information provided at the private session, including how it would be de-identified. Survivors were also invited to contribute to a book, 'Message to Australia'. This book was to contain short descriptions of

14 Royal Commission Act 1902, Section 60J.

15 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017), Vol. 5, p. 33.

16 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017), p. 36.

17 ibid.

survivors' experiences and recommendations for making the future safer for all children. The Message to Australia book is now housed, for posterity, at the National Library of Australia.

19. Private sessions were recorded and a transcript made to assist the Commission. This transcript was made available to the survivors, but not to other participants in the process.[18] Survivors spoke positively of the experience of attending private sessions.[19]

20. The Commission said that the information gathered in private sessions 'informed our investigations, public hearings, and the development of Royal Commission recommendations.' [20]

21. Practice Guideline 1 provided for a procedure by which certain information gathered at private sessions could be relied upon by the Commission, but it is unclear if it was ever used.[21]

(ii) Public hearings

22. The public hearings of the Royal Commission took the same "sampling" approach used by CICA, whereby a selection or sample of institutions were chosen for in-depth investigation by the Commission.[22] The Final Report of the Royal Commission outlined the selection methodology, noting that it looked at factors such as the number of allegations in the institution and the number of witnesses and documents available.[23]

23. The hearings were held in 11 different locations across Australia, over the course of 444 hearing days, with evidence given by 1,302 witnesses.[24] Witnesses were entitled to the cost of travel expenses and the expense of legal representation for appearing at a public hearing. The Commission also guaranteed that special arrangements could be made for giving evidence where necessary, including giving evidence via video link or from a specially designed room on the Commission's premises.[25]

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18 Practice Guideline 1, para. 39.

19 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017), Vol. 1, p. 29.

20 ibid.

21 Practice Guideline 1, para. 74.

22 The sampling methodology is discussed by Gleeson and Ring, 'Confronting the past and changing the future? Public inquiries into institutional child abuse, Ireland and Australia' (2021) 29(1) *Griffith Law Review* 109.

23 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017), Vol. 1, p. 36.

24 ibid, p. 34.

25 Practice Guideline 1, para. 49.

24. The Commission published a programme of hearings and then invited applications for 'Leave to Appear' from affected persons. This would generally be granted when an applicant:[26]

(i) has been summoned to give evidence;

(ii) is an institution, or is a representative of an institution, that is subject to the inquiry to be undertaken;

(iii) may be the subject of an adverse allegation.

25. In the event of granting leave to appear, the Commission had the power to make that leave subject to various conditions, including limiting the particular topics or issues upon which the person may examine or cross-examine or imposing time limits upon examination and cross-examination.[27] Of the 913 applications for leave to appear, 703 were granted.[28] Parties with leave to appear at a hearing could apply for other witnesses to be called. They generally had to supply a signed statement that explained what evidence the witness would give.[29]

(iii) Conduct of hearings

26. In addition to being examined by counsel assisting the Royal Commission, the witness could be examined or cross-examined by or on behalf of a party with sufficient interest to do so. Prior to determining whether or not they had sufficient interest, the Commission could ask the party to:

(ii) identify the purpose of the examination;

(ii) set out the issues to be canvassed;

(iii) state whether a contrary affirmative case is to be made, and if so the details of that case including providing a signed statement of evidence advancing material contrary to the evidence of that witness.

27. The public hearings were livestreamed online. It has been noted that this was an essential feature of the public education objective of the Commission.[30]

26 ibid.

27 Practice Guideline 1, para. 49.

28 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017), Vol. 1, at p. 37.

29 ibid, p. 38.

30 Wright, Swain and McPhillips, 'The Australian Royal Commission into Institutional Responses to Child Sexual Abuse' (2017) 74 *Child Abuse and Neglect* 1-9, 3.

28. After each public hearing, counsel assisting the Royal Commission produced written submissions setting out the evidence and the findings available to the Commission based on that evidence. The submissions were also provided to those with leave to appear and those who were at risk of an adverse finding, giving them a right to make written submissions in reply. The Royal Commission applied the civil standard of proof, which in Australia is the standard of 'reasonable satisfaction'.[31]

29. The public hearings formed the basis of 'case study reports', which made findings in relation to the responses of particular institutions to sexual abuse.

30. Notably, individuals accused of wrongdoing or abuse were named only where they had previously been convicted of an offence or if they were deceased. 35 case study reports in relation to particular institutions were published.

31. In addition, the Royal Commission held final 'review hearings' towards the end of its work, in which it invited institutions that had been investigated at an earlier stage to update the Commission as to progress made in updating their policies and practices in respect of child protection.

(iv) Research

32. The Royal Commission also undertook an extensive research and policy programme. The breadth of this programme has been described as a 'distinctive and unprecedented feature of the Royal Commission'.[32]

(v) Final Report

33. The Royal Commission produced a report in 17 volumes, which made recommendations under various headings such as; 'Understanding Child Sexual Abuse in Institutional Contexts' and 'Redress and Civil Litigation'. An important recommendation of the report was that there be established a monetary redress scheme. The Report particularly emphasised how sexual abuse of children was endemic in Australian society and amounted a national tragedy.

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31 The standard of "reasonable satisfaction" is based on the principles outlined in the judgment of Dixon J. in *Briginshaw v Briginshaw* (1938) 60 CLR 336, at 362-3.

32 Wright, Swain and McPhillips, 'The Australian Royal Commission into Institutional Responses to Child Sexual Abuse' (2017) 74 *Child Abuse and Neglect* 1-9, 4.

34. It appears that the work of the Royal Commission was broadly well received.[33] Wright et al describe the Royal Commission as 'one of Australia's most highly regarded and successful public inquiries, having developed a model for investigation of institutional abuse that has shaped the approach of other inquiries internationally'.[34]

(vi) Redress

35. Under the National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018, awards are determined by the type of abuse. A fixed amount of $70,000 (roughly €42,200) was allocated to recognise penetrative sexual abuse.[35] Additional fixed amounts can be awarded to recognise the impact of the abuse, any non-sexual abuse, institutional vulnerability of applicants and, in the case of penetrative abuse, the extreme circumstances of the abuse.[36]

(vii) Reaction

36. Approaches to survivor participation in the Royal Commission, have been met with positive academic commentary.[37] One author described the approach to survivor testimony as informed by an 'empathetic trauma-informed approach that drew on contemporary understandings of psychological injury'.[38] Others praised the private hearings as providing rich qualitative research from survivors that could offer a basis for better future prevention,[39] and thus aligned with the stated wish of many survivors to tell the Commission about their ideas for policy and social change.[40] However, Gleeson and Ring note that multiple prior Australian inquiries had the result that limited numbers of Aboriginal people provided testimony in the belief that they had already provided testimony to the State and wanted to avoid the risk of retraumatisation.[41]

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33 Gleeson and Ring, 'Confronting the past and changing the future? Public inquiries into institutional child abuse, Ireland and Australia' (2021) 29(1) *Griffith Law Review* 109, 129.

34 Wright, Swain and McPhillips, 'The Australian Royal Commission into Institutional Responses to Child Sexual Abuse' (2017) 74 *Child Abuse and Neglect* 1-9, 5.

35 National Redress Scheme for Institutional Child Sexual Abuse Assessment Framework 2018, section 5.

36 A table designating varying amounts from $5,000 to $70,000 in this regard is set out at section 5 of the Framework: https://www.legislation.gov.au/F2018L00969/latest/text.

37 Katie Wright, 'Challenging Institutional Denial: Psychological Discourse, Therapeutic Culture and Public Inquiries' (2018) 42 *Journal of Australian Studies* 177.

38 ibid, p. 188.

39 Michael Salter, 'The Transitional Space of Public Inquiries: The Case of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse' (2020) 53 *Australian & New Zealand Journal of Criminology* 213 at 222.

40 ibid.

41 Kate Gleeson and Sinéad Ring, 'Confronting the Past and Changing the Future? Public Inquiries into Institutional Child Abuse, Ireland and Australia' (2020) 29 *Griffith Law Review* at 19.

C. The Independent Inquiry into Child Sexual Abuse (England and Wales)

37. The Independent Inquiry into Child Sexual Abuse ('IICSA'), established under the Inquiries Act 2005, investigated child sexual abuse in a wide variety of different contexts and settings in England and Wales. It was established in 2014 in response to the revelations of child sexual abuse perpetrated by the broadcaster Jimmy Saville.

38. The Inquiry operated separate investigations into child sexual abuse in different settings and institutions across England and Wales. One of its investigations focused on child sexual abuse in residential schools, a final report in respect of which was published in March 2022.[42] The scope of the investigation was to 'investigate the nature and extent of, and institutional responses to, child sexual abuse in residential schools'. Unlike the Australian Royal Commission, or CICA, the inquiry was not concerned solely with historical abuse, but also considered current or ongoing risks to children. In particular, the investigation placed emphasis on making recommendations for improving child safeguarding in schools going forward.

39. The Inquiry took place in two phases: In Phase 1, the investigation considered two types of residential school: residential specialist music schools and residential special schools (for children with special educational needs). These schools were selected because pupils faced heightened risks of child sexual abuse in these settings. Phase 2 concerned mainstream boarding schools where one or more staff members had been convicted of an offence of child sexual abuse in relation to a pupil.

40. Individuals contacted the Inquiry with concerns about over 160 schools. A sampling approach was taken and 13 schools in total were selected for investigation, 12 in England and 1 in Wales. The investigation of those 13 schools were intended to 'provide examples of common safeguarding issues which can arise in a particular educational setting, as well as examples of poor practice or illustrations of limitations within the wider safeguarding system'.[43] The Phase 1 and Phase 2 hearings were each heard over a 2-week period just over one year apart.[44]

41. The Investigation also undertook or commissioned research into child sexual abuse in residential schools, which it published by way of two reports.[45]

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42 Independent Inquiry into Child Sexual Abuse, *The residential schools investigation: Investigation Report* (March 2022).

43 Independent Inquiry into Child Sexual Abuse, *The residential schools investigation: Investigation Report* (March 2022), p. 19.

44 Independent Inquiry into Child Sexual Abuse, *The residential schools investigation: Investigation Report* (March 2022). p. 19, 20.

45 Independent Inquiry into Child Sexual Abuse, *Child sexual abuse in residential schools: A literature review* (2018).

42. The Independent Inquiry also established a Victim-Survivors Consultative Panel ('VSCP'), which was set up to provide advice to the Inquiry and offer guidance across all areas of the Inquiry's work. Many of the VSCP members were activists, who had been involved in raising awareness of victims and survivors' needs from before the Inquiry was established.[46]

(i) Procedures and methodology

43. As a statutory inquiry established pursuant to the Inquiries Act 2005, the procedures and methodology adopted by the inquiry were largely determined by that Act and the associated Inquiry Rules 2006 made thereunder.

44. The Chairman of an inquiry is granted extensive powers to determine the procedure before an inquiry pursuant to section 17 of the 2005 Act, subject only to the Inquiry Rules, as well a requirement to act fairly and to make procedures likely to save costs. Under section 21 of the 2005 Act, the Chairman can compel the production of documents and the attendance of witnesses.

45. In relation to witnesses, pursuant to Rule 9 of the 2006 Rules, the inquiry must first send the witness a request for a written statement. Depending on the process adopted by the inquiry, these statements can either be delivered to the inquiry by the witness themselves or it can be taken by the inquiry in the course of an interview.

46. While not expressly provided for in the Act or in the Rules, it appears that it is common for inquiries to put a witness support service in place for the duration of its work, including at interview and during the course of evidence.[47]

47. Generally, only counsel to the inquiry, or the inquiry chair or panel, is entitled to put questions to the witness during the hearing,[48] but other parties may apply to the Chair for permission to do so.

48. Certain witnesses or other persons involved in the inquiry are designated as "Core Participants". These can be individuals or organisations that have a particularly close connection with the work of an inquiry. A designated core participant might include persons who had a direct or significant role in the events described or might be subject to criticism in a report of the inquiry.[49]

49. Core Participants have the right to appoint a legal representative, are likely to receive advance notice of evidence, have the right to propose questions for Counsel to the Inquiry to ask witnesses, may apply to ask questions of a witness, and have the right to make opening and closing statements.[50]

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46 https://www.iicsa.org.uk/victims-and-survivors/victims-and-survivors-consultative-panel.html.

47 Mitchell et al, *The Practical Guide to Public Inquiries* (Hart Publishing, 2020), p. 185.

48 Inquiry Rules 2006, Rule 10(1).

49 Inquiry Rules 2006, Rule 5.

50 Inquiry Rules 2006, Rules 6,10, and 11.

(ii) Ability to make findings

50. The power of an inquiry in the United Kingdom to make findings that are critical of named individuals are not subject to the same constitutional constraints that exist in this jurisdiction. Indeed, it has been suggested, following the judgment of Lawton LJ. in *Maxwell v Department of Trade and Industry* [1974] QB 523, that the report of a public inquiry is akin to the speech of a Minister in Parliament.[51]

51. It should also be noted that section 2 of the 2005 Act provides that, while an inquiry has no power to determine civil or criminal liability, it is, at the same time, 'not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes'.[52]

52. However, there is a well-established duty on an Inquiry to act fairly, including in the preparation of its report, and in particular where it may result in adverse finding against an individual. The Royal Commission on Tribunals of Inquiry ('the Salmon Report') identified 6 'cardinal principles' to govern the conduct of inquiry proceedings, which are not dissimilar to the content of *Re Haughey* rights.

53. In addition, it is an express statutory requirement for the Inquiry to send a warning letter to any person who may be the subject of criticism by the Inquiry in its report and to give them reasonable opportunity to respond to the warning letter.[53]

54. However, notwithstanding the similarity of the governing principles, it would appear that, in practice Inquiries in England & Wales are significantly less constrained in their ability to make findings in respect of individuals, partially due to the deferential standards of review adopted by the British courts in hearing judicial reviews of inquiries. For example, in *Elaine Decoulos v The Leveson Inquiry*,[54] the High Court refused a challenge to a refusal to designate the applicant as a "Core Participant" stating that 'the only basis upon which this court can interfere is on the basis of an error of law such as, for example, a breach of the requirement of fairness within the rules or a decision which is outwith the bounds of reasonable conclusion'.[55]

51 Louis Blom-Cooper QC, *Public Inquiries* (Hart Publishing, 2017) p. 107-108.

52 Section 2(2) of the Inquiries Act 2005. Louis Blom-Cooper QC, 'Freedom of expression in public inquiry reports' (2014) *Public Law* 2.

53 Rule 13 of the Inquiry Rules 2006.

54 [2011] EWHC 3214 (Admin).

55 ibid, para. 5.

55. It would appear that the Independent Inquiry's Investigation into Residential Schools was assisted in adopting a more efficient process, with only a limited number of public hearings, by reason of that fact that it largely only considered responses to child sexual abuse where the perpetrator had already been convicted of criminal offences.[56] Thus, the locus of scrutiny of the inquiry was very firmly on the responses to allegations and systems of child safeguarding rather than on establishing particular instances of child sexual abuse.

(iii) The Truth Project

56. In addition to its investigative work, the Independent Inquiry established 'The Truth Project' to hear from and record the experience of survivors and the effect of sexual abuse on their lives.[57] The work of the Truth Project closely resembles the work of the private sessions of the Australian Royal Commission.

57. The Truth Project allowed victims and survivors to share their experience with the Inquiry in a in a confidential and informal setting.

58. After submitting an expression of interest online, a representative would contact survivors to discuss how they wished to make their contribution. Victims and survivors were able to attend private sessions in person or via telephone, submit a written account or submit an audio recording of their experiences. They were also entitled to share drawings or creative writing that communicated their experiences. In the majority of cases, participants opted to share their experiences in person, at a private session.[58] The Inquiry facilitated a private session at a location convenience to the survivor, and also reimbursed all reasonable travel expenses, including those of two companions.

59. The Inquiry offered support services to survivors before, during and after their contribution to the Truth Project. Private sessions in the Truth Project were conducted by trained facilitators, who had backgrounds working with victim and survivor groups.[59]

60. The report of the Truth Project recounted the experiences of victims and survivors, including the effect of the abuse on them at the time and in their later life, the institutional responses to the abuse, and the adequacy of support services in assisting them in dealing with their trauma. It did so on an anonymised basis, and without making any findings in relation to particular instances of abuse.

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56 The report notes at p. 1 that it examined schools 'in which staff had been convicted of the sexual abuse of pupils, or in which serious safeguarding concerns had arisen.'

57 Independent Inquiry Into Child Sexual Abuse, Victim and survivor voices from The Truth Project (October 2017), available at https://www.iicsa.org.uk/document/victim-and-survivor-voices-truth-project.html.

58 ibid. p. 29.

59 Independent Inquiry Into Child Sexual Abuse, Victim and survivor voices from The Truth Project (October 2017), p. 35.

(iv) Redress

61. The IICSA made a recommendation that a redress scheme should be set up in its Final Report in October 2022. The Inquiry recommended a two-tier system, based on a fixed flat-rate recognition payment with the option to apply for a second-tier payment for victims who provide more details and evidence (including medical evidence where necessary).

62. Controversially, the IICSA recommended that first-tier payments should be 'at a modest level' and payments should be lower than the sums that would be recovered were civil litigation pursued because 'awards made by the scheme are intended to acknowledge the experiences of victims and survivors, not provide compensation akin to that achievable through a civil claim, which will still remain open for applicants to pursue'.[60]

63. The IICSA further recommended that any redress scheme be state-funded, but that contributions from non-State institutions should be encouraged by the government maintaining a list of institutions from which they seek contributions, and publishing a list of those which contribute or, if necessary, fail to contribute.[61]

64. However, at present, while the UK government has confirmed that there will be a redress scheme,[62] no timescale has been given as to when this will occur.

D. Northern Ireland Historical Institutional Abuse Inquiry

65. Northern Ireland's Historical Institutional Abuse Inquiry ('HIAI') reported its findings in January 2017, and was chaired by Anthony Hart.[63]

66. The HIAI's remit was to investigate sexual, physical and emotional abuse, neglect and unacceptable practices that took place in residential institutions for children (other than schools) between 1922 and 1995.

(i) Methodology

67. Overall, some 333 victims gave evidence to the HIAI's public statutory inquiry with 246 victims giving evidence in person and 87 victims giving evidence by submitting witness statements.[64]

60 Report of the Independent Inquiry into Child Sexual Abuse, II, I.7, para 106.

61 ibid, II, I.7, para 124.

62 https://www.gov.uk/government/news/child-sexual-abuse-redress-scheme-to-be-established.

63 Anthony Hart, David Lane, and Geraldine Doherty, Report of the Historical Institutional Abuse Inquiry (Vol. 1):The Inquiry into Historical Institutional Abuse, 1922 to 1995 (Northern Ireland: The Executive Office, 2017) ('**HIAI Report**')

64 HIAI Report, pp. 6–10.

68. The Terms of Reference required it to identify whether there were systemic failings on the part of institution which provided residential accommodation and took decisions about and made provision for the day-to-day care of children under 18 between 1922 and 1995.

69. In general, the Inquiry sought to avoid reaching conclusions of fact in relation to specific acts or identifiable individuals where it was possible to arrive at conclusions as to systemic failings without identifying an individual or a specific incident. In its report, the Inquiry gave the example that, if ten individuals alleged that one person assaulted them in some way, and if the Inquiry was satisfied that some of those allegations were credible then it was unnecessary for it to specify which of the accounts were reliable and which were not.[65] However, in some cases the Inquiry had to identify whether a specific individual committed abuse in order to determine whether or not there was a systemic failing. In such cases, the Inquiry had to reach a view as to whether or not those events occurred in order to determine whether or not there was a systemic failing by an individual or an institution.[66]

70. A sampling of institutions was considered, with 22 institutions were examined in public hearings by a statutory inquiry.[67] Abuse by Father Brendan Smyth of the Norbertine Order and the operation of the Child Migrant Scheme was also investigated. While applicants had made allegations of some form of abuse in respect of 65 institutions, only 22 were investigated in public hearings, and a further 6 were the subject of targeted paper investigations. The remaining 37 institutions that were each the subject of allegations by at most two applicants were not considered on the basis that such consideration would not further the Inquiry's understanding of the nature and extent of the abuse and of the systemic failings that allowed abuse to happen, within all the types of homes and institutions within its remit.[68]

71. The Inquiry sought to address survivor concerns by limiting 'unnecessary' cross-examination, and instead providing for the 'testing' of evidence by lawyers for the Hart Inquiry, on the basis that the inquiry would explicitly be inquisitorial rather than adversarial.[69] As part of this process the legal representatives of core participants and individuals asked the Inquiry Counsel to put additional points to each witness rather than cross-examining directly. The Report acknowledged that this process of testing evidence was nonetheless difficult for survivors:[70]

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65 HIAI Report, p. 17.

66 ibid.

67 It investigated 11 voluntary homes run by Catholic religious orders or other bodies such as Barnardo's, 6 Training Schools and other juvenile justice sector institutions; and 5 state-run residential institutions.

68 ibid, p. 21.

69 ibid, p. 12.

70 ibid.

Some applicants found it very difficult to accept that this process necessarily involved the views of institutions or individuals being put to them and their then being asked to comment upon whatever contrary view was being put forward.

72. Witnesses and alleged abusers were not named in the vast majority of cases. Core participants and relevant witnesses were made aware of the identity of the person to whom the designation was given so that they could respond to what that person was saying as necessary. A minority of individuals waived their anonymity.

73. The Inquiry held 223 days of hearings at Banbridge Courthouse, almost all of which were held in public. 18 hearings in 2014 and 2015 took the form of closed hearings to avoid prejudice to criminal trials that were imminent at that time. Witness Support Officers (WSOs) were appointed to act as the point of contact for individual applicants with the Inquiry. Counsellors were available in the chamber for those who needed immediate assistance when giving evidence.[71]

74. After the public hearings each institution or individual who was subject to a criticism in the draft report was sent a Warning Letter and invited to respond by a certain date. The responses were then considered by the Inquiry panel and the draft amended if necessary.[72]

(ii) The Acknowledgment Forum

75. In attempting to achieve a victim-centred approach, the HIAI established an Acknowledgment Forum, similar to CICA's Confidential Committee, which sought to provide 'an opportunity for victims and survivors to recount their experiences on a confidential basis'.[73] The Forum was private, confidential and had therapeutic aspirations seeking to hear testimony and accept without challenge.

76. Some 428 victims contributed to the Acknowledgement Forum.[74] Panel members almost always sat in teams of two, and their role was to enable applicants to the Acknowledgement Forum to describe their experiences in a completely confidential setting. Where necessary panel members asked questions in order to help applicants to describe their experiences.

71 HIAI Report, p. 11.
72 ibid, p. 33.
73 HIAI Report, p. 5.
74 HIAI Report, pp. 6–10.

77. While the Acknowledgement Forum was never intended to be used as a vehicle for gathering evidence for civil proceedings, litigation arose in relation to applications from survivors for access to their transcripts in order to gather evidence for civil proceedings. The Inquiry declined to produce such transcripts and its position was upheld by the High Court, and on appeal by the Court of Appeal in *LP's Application* [2014] NICA 67.

(iii) Findings

78. The HIAI report recommended that survivors be provided with a range of measures, including compensation, an apology, a memorial, specialist care, and assistance (counselling and social support, for example, with housing and education) and for the establishment of a Commissioner for Survivors of Institutional Childhood Abuse (COSICA).[75] Notably, survivors were ambivalent about a public monument: the report notes that many victims did not want 'to be reminded of their experiences as children in residential institutions'.[76] The HIAI report instead recommended a memorial be erected at the local parliament to 'remind legislators and others of what many children experienced in residential homes'.[77]

(iv) Redress

79. The Historical Institutional Abuse Redress Board was set up pursuant to the Historical Institutional Abuse (Northern Ireland) Act 2019. Applications will be considered by paper determination by a three-person panel consisting of a judicial member and two non-judicial members from a health and social care background. Those who had provided evidence to the Inquiry were not required to provide any further evidence with their application for redress unless they wished to do so. Applications were primarily decided on paper but in exceptional circumstances, the panel could direct that an oral hearing could take place.

80. The Redress Board panel could decide to make a standard payment of £10,000 or an enhanced payment, based on the severity of the matters in a survivor's application, of up to a maximum of £80,000.

81. The Victims and Survivors Service (VSS) was established to provide dedicated and specialist long term support and services to survivors of Historical Institutional Abuse (HIA). The VSS was available to support survivors in preparing applications to the Redress Board.

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75 ibid, pp. 227–256.

76 ibid, p. 43.

77 ibid.

82. In an October 2023 press release, the Redress Board stated that it had received over 4,035 applications and made award determinations totalling some £77 million.[78]

83. On 11 March 2022 a number of Government Ministers offered a public apology to victims and survivors of historical institutional abuse. The apology was followed by statements from each of the institutions where systemic failings were found in the Hart Report: De La Salle Order, Sisters of Nazareth, Good Shepherd Sisters, Sisters of St. Louis, Barnardos and Irish Church Missions.

(v) Survivor Experience

84. Empirical research[79] has been conducted with the assistance of 43 survivors who participated in the Historical Institutional Abuse Inquiry.

85. The 43 survivors interviewed in the HIAI research study had all both participated in the Acknowledgement Forum and publicly given evidence to the statutory inquiry.

(a) The Acknowledgement Forum

86. Over half of the 43 participants in the HIAI research project said that it was a positive experience.[80] Survivors in the HIAI research project reported that they valued the space to recount their experience, to be listened to and believed. It met their need to be listened to, without judgment or challenge.[81] The majority found it gave them acknowledgment and a voice, with 39% saying it was helpful to them.[82]

78 'Awareness Campaign for Victims and Survivors of Historical Institutional Abuse' https://www.executiveoffice-ni.gov.uk/news/awareness-campaign-victims-and-survivors-historical-institutional-abuse-1.

79 This research is recorded in several articles: Brandon Hamber & Patricia Lundy 'Lessons from Transitional Justice? Toward a New Framing of a Victim-Centered Approach in the Case of Historical Institutional Abuse' (2020) *Victims & Offenders: An International Journal of Evidence-based Research, Policy, and Practice*, 15(6), 744-770 and Patricia Lundy '"I Just Want Justice": The Impact of Historical Institutional Child-Abuse Inquiries from the Survivor's Perspective' *Eire-Ireland*, Volume 55, Numbers 1 & 2, Spring/Summer 2020, pp. 252-278.

80 Hamber and Lundy, p. 753. This mirrors the finding in CICA's report that the majority of those who participated in the Confidential Committee found the process positive and helpful.

81 Hamber and Lundy, p. 753.

82 ibid.

87. However, only 18% said that their experience before the Acknowledgment Forum was healing or cathartic.[83] 39% said that they felt exposed and vulnerable and experienced longer term psychological consequences after attending the Acknowledgment Forum.[84] Some victims reported that practical matters such as receiving their testimony in the form of a written statement in the post to their home was a source of further difficulty.[85]

88. There were mixed views as to the adequacy of support provided during and after giving testimony to the Acknowledgment Forum, with 29% saying the support was adequate, and 37% saying it was not.[86]

(b) The Inquiry

89. The 43 survivors interviewed in the HIAI study criticised the inquiry's public hearings as intimidating, victimising, and as having created the feeling that the survivors were on trial.[87] They point to survivors' inability to exercise control over procedures and state that they 'struggled to be heard'.[88]

90. It is notable that these criticisms arose despite the fact procedures were put in place to limit cross examination based on survivor concerns. Even though the inquiry had stated that public hearings would 'not be conducted like a trial', and there would be 'no cross-examination of witnesses',[89] a significant number of survivors regarded the process as adversarial (39%).[90] 37% said they struggled to be heard and were not allowed to tell their story in their own way, that it was what the inquiry wanted to ask, and not what they wanted to say.

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83 ibid.

84 ibid, p. 753-754.

85 ibid, 754. The authors quote the following statement in this respect: 'A lot of our guys would have gone more or less secretly … and then a letter arrives in your post box with 15 pages or whatever … So someone is going to have to go off on their own and read through their statement word for word – and that's a point of vulnerability' [Int: M 5, Nov 2015].

86 ibid, p. 754.

87 Brandon Hamber & Patricia Lundy 'Lessons from Transitional Justice? Toward a New Framing of a Victim-Centered Approach in the Case of Historical Institutional Abuse' (2020) *Victims & Offenders: An International Journal of Evidence-based Research, Policy, and Practice*, 15(6), 744-770, 755.

88 ibid, p. 755.

89 Anthony Hart, 'Remarks at the Third Public Session of the HIAI Inquiry' (speech, Ramada Encore Hotel, St. Anne's Square, Belfast, 4 Sept. 2013), p. 12, https://www.hiainquiry.org/sites/hiainquiry/files/media-files/chairman_s_address_130904_low_res.pdf, archived at https://perma.cc/466G-TB3K.

90 Patricia Lundy '"I Just Want Justice": The Impact of Historical Institutional Child-Abuse Inquiries from the Survivor's Perspective' (2020) *Eire-Ireland*, Vol. 55, Numbers 1 & 2, 252-278, 268.

91. A number of survivors stated that it felt as if they were the ones 'on trial',[91] and that giving oral testimony proved 'emotional and stressful for participants'.[92] In addition to having to relive the trauma of childhood, the experience proved traumatic for survivors because of the way in which evidence was given – generally being required to provide yes or no answers to specific questions asked by counsel for the inquiry.[93] Survivors thus felt they were not allowed to give their evidence and had little opportunity to outline their narrative.[94]

92. Other features which rendered the experience traumatising for survivors – features which are very much linked to the giving of evidence – included a disconnect between survivors' expectations of giving evidence and the reality of that process,[95] and a lack of preparation as to what giving evidence would actually involve.[96]

93. One particularly problematic example of this was the late disclosure of sensitive material to survivors, with survivors frequently finding out sensitive information about themselves while giving – or just prior to giving – evidence in the court room setting.[97] It appears that the inquiry's counsel usually prepared survivors on the day they gave evidence, one to two hours in advance. The actual documents providing background information about them gathered by the inquiry were not made available – either in advance of the consultation or for the oral hearings.[98]

94. The HIAI's rationale for this short notice was that advance warning could prove 'difficult' or 'hurtful' for survivors; However, Lundy is critical of this approach, pointing to an example of a survivor who learned of his birth mother's loving efforts to reach him in an institution only when her letter was presented as evidence at the inquiry.[99]

95. While the HIAI acknowledged how upsetting testifying could be and made witness-support officers and a representative from counselling services available, nonetheless half of those interviewed said that 'more victim support was needed' and some had strong criticism of the adequacy of the available support.[100]

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91 ibid.

92 ibid, p. 269.

93 ibid, p. 266.

94 ibid.

95 ibid.

96 ibid, p. 267.

97 Patricia Lundy '"I Just Want Justice": The Impact of Historical Institutional Child-Abuse Inquiries from the Survivor's Perspective' (2020) *Eire-Ireland*, Vol. 55, Numbers 1 & 2, 252-278, pp. 269 – 270.

98 ibid, p. 270.

99 ibid, p. 270.

100 ibid, p.267.

96. The location of the tribunal, in a largely Protestant area, was an issue for a number of survivors.[101] Overall, 29% described the setting and environment as 'inappropriate and intimidating'. In this regard, some cited the presence of alleged perpetrators, members of institutions and religious orders in close proximity to victims in coffee and waiting room areas, and in public hearings.[102]

97. The desire to have a public record of survivor stories, which is often a feature supported by survivors in furtherance of public education, in some instances led to survivors being inadvertently identified by family members from the details of their accounts. The following quote illustrates the after-effect of testimony for one HIAI participant:[103]

> I was talking to my son … in the middle of the conversation he says "yeah – I read your statement. It's on-line". I didn't know all the statements I'd written are on the HIA website. Cause obviously I'd been promised high level anonymity – and obviously my name wasn't on it; but there was enough little bits of information in it for him to be able to go through them all and find mine … So I did feel a bit vulnerable … [Int: M/Nov 2016]

E. The Scottish Child Abuse Inquiry

98. The Scottish Child Abuse Inquiry ('SCAI') was established in October 2015 with a broad remit to inquire into the abuse[104] of children in care in Scotland within 'living memory', and up to 17 December 2014. The Inquiry is ongoing at the time of writing.

(i) Methodology

99. SCAI was established under the Inquiries Act 2005, and as such its procedures bear a good deal of similarity to the procedures of the UK Independent Inquiry into Child Sexual Abuse (IICSA).

101 Brandon Hamber & Patricia Lundy 'Lessons from Transitional Justice? Toward a New Framing of a Victim-Centered Approach in the Case of Historical Institutional Abuse' (2020) *Victims & Offenders: An International Journal of Evidence-based Research, Policy, and Practice*, 15(6), 744-770, p. 755.

102 ibid.

103 Brandon Hamber & Patricia Lundy 'Lessons from Transitional Justice? Toward a New Framing of a Victim-Centered Approach in the Case of Historical Institutional Abuse' (2020) *Victims & Offenders: An International Journal of Evidence-based Research, Policy, and Practice*, 15(6), 744-770, p. 757.

104 Abuse for the purposes of the Inquiry is defined as physical or sexual abuse, including associated psychological or emotional abuse. See https://www.childabuseinquiry.scot/terms-reference.

100. However, the relevant rules for the inquiry are contained in a separate Inquiries (Scotland) Rules 2007. The Scottish Inquiry also appears not to have made significant use of private sessions, as were used extensively in the Truth Project of the IICSA, and have proceeded primarily on the basis of investigation complemented with a number of public hearings.[105] It also has an extensive research element, seemingly in part because of the express direction in its terms of reference that it make recommendations for changes in policy and, if necessary, legislation.

101. The Inquiry has conducted its work through a large number of separate investigations into abuse in particular institutions, or types of institution. For example, Phase 1 examined evidence relating to residential child care establishments run by Catholic Orders. Phase 2 continued to examine evidence relating to residential child care establishments run by Catholic Orders. This phase resumed with a case study about residential child care establishments run by the Sisters of Nazareth. The Inquiry is currently in Phase 9, and has considered issues such as abuse in boarding schools and abuse in residential institutions for young offenders.

102. Initially, SCAI was chaired by Susan O'Brien QC, but Ms O'Brien resigned in 2016.[106] Since July 2016, SCAI has been chaired by Lady Smith.

103. The Inquiry describes its work as first involving an investigation stage, in which it examines a broad range of complaints against different institutions. It then selects certain institutions or settings as 'case studies'. Case studies are then further examined by way of public hearings. Lady Smith has stated that the purpose of a sampling approach is to avoid the Inquiry being 'unduly prolonged', and that she seeks to 'identify particular institutions and matters that are representative of the issues being explored by SCAI'.[107]

104. The procedures at the public hearings for such case studies very closely mirror the Inquiry Rules 2006, applicable in England and Wales. In particular, the Rules provide for the designation of particular witnesses as 'Core Participants', and provide for the appointment of recognised legal representatives of witnesses.

105. The Inquiry may first send written requests for evidence to any person, asking either for a written statement of evidence, or for the production of evidence.[108] Persons may also be asked to attend at interview, from which the Inquiry team will draft a written statement, which they can then approve.[109]

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105 Occasional reference is made in the interim reports to the taking of statements at private session, but it appears that the majority of the evidence is taken from evidence at public hearing.

106 The Guardian, '*Chair of Scottish abuse inquiry quits over 'government interference''* (4 July 2016).

107 SCAI, Case Study no. 9: Volume 1, The provision of residential care in boarding schools for children at Loretto School, Musselburgh, between 1945 and 2021 at p. ix.

108 Rule 8 of the 2007 Rules.

109 Factsheet – for witnesses in the Scottish Child Abuse Inquiry ("SCAI") who are the subject of allegations of abuse, available at https://www.childabuseinquiry.scot/procedure/factsheet-witnesses-who-are-subject-allegations.

106. The Chairman can also require the production of a written statement or any other document.[110] A person who is required to give evidence will be sent a formal notice with a list of general questions, which tend to be the same questions asked of all witnesses involved with the same case study and will contain details of the allegations against the witness and seek a response from them.[111]

107. Persons giving evidence at an oral hearing of the Inquiry may only be asked questions by the Inquiry panel, counsel to the Inquiry or their own legal representative. Legal representatives for other witnesses, including core participants, must seek the permission of the Chairman in order to put questions to a witness.[112] Witnesses are supported by a witness support team, and can claim back the expenses of their attendance at the hearing. A witness can also apply to the Inquiry for assistance in paying the fees of a legal representative to assist them.[113]

(ii) Findings to date

108. Following public hearings, 11 case studies have been presented to date.[114] In such interim reports, as well as in any final report as may be published, the Chairman makes findings on the basis of the civil standard of proof, namely on the balance of probabilities.

109. Like the IICSA, the Chairman of the SCAI is similarly unconstrained in making findings of actual wrongdoing, including of physical and sexual abuse, in respect of named persons.[115] However, Lady Smith has emphasised that under her terms of reference her 'task is not to make findings about whether any particular individual was guilty of or responsible for the abuse of children'.[116] However, in practice it appears that many persons in respect of whom findings of serious wrongdoing were made were either dead or had already been convicted of offences relating to the

110 Pursuant to section 21 of the 2005 Act.

111 ibid.

112 Rule 9 of the 2007 Rules.

113 SCAI Factsheet – Legal representation, available at https://www.childabuseinquiry.scot/procedure/factsheet-legal-representation.

114 Case Study interim reports are available at https://www.childabuseinquiry.scot/evidence-library?keywords=&op=submit&evidence-type=75&sort=asc.

115 See section 2(1) of the 2005 Act; *Maxwell v Department of Trade and Industry* [1974] QB 523.

116 'Comments from Lady Smith on the first day of Phase 2 of hearings regarding the prohibition of disclosure or publication of the identities of anonymous applicants and alleged abusers' (11 December 2017) https://www.childabuseinquiry.scot/news/respecting-anonymity-witnesses-comments-lady-smith-first-day-phase-2-hearings-regarding.

abuse of children, or both.[117] The Inquiry is, similarly to the IICSA, under an obligation to send warning letters to persons who are likely to be the subject of criticism in a report or interim report.[118]

110. The Chairman has also made a General Restriction Order, prohibiting the publication of any evidence likely to identify complainants. A similar prohibition is in place in respect of persons subject to abuse allegations before the publication of the report of the Inquiry, unless that person had already been convicted of abusing a child in care.[119]

(iii) Research

111. The Inquiry also has a significant research component and has published a number of research reports by external academics to date, covering a range of issues.

112. The SCAI also held "roundtables" with experts and stakeholders in different areas of child protection, with a view to informing recommendations as to best practice in protection of children going forward.[120]

(iv) Redress

113. In addition to the SCAI, survivors of abuse in Scotland may apply to the recently established Redress Scotland for compensation.[121] The Scheme compensates people abused in residential care settings before 1 December 2004 who were under the age of 18 at the time. Prior to the establishment of the statutory scheme, the Scottish Government operated an *ad hoc* compensation scheme to compensate victims of abuse who were terminally ill and might not live to see the statutory scheme.[122]

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117 See e.g. Case Study no.4, The provision of residential care for children in Scotland by the Christian Brothers between 1953 and 1983 at St Ninian's Residential Care Home, Falkland, Fife available at https://www.childabuseinquiry.scot/evidence/case-study-findings-christian-brothers.

118 Rule 12(7) of the 2007 Rules.

119 SCAI, 'Respecting anonymity of witnesses', available at https://www.childabuseinquiry.scot/news/respecting-anonymity-witnesses-comments-lady-smith-first-day-phase-2-hearings-regarding.

120 https://www.childabuseinquiry.scot/roundtables.

121 Redress Scotland was established by the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021.

122 BBC News, 'Over £4m paid out to child abuse survivors' (28 July 2020), available at https://www.bbc.com/news/uk-scotland-53566232.

114. The eligibility requirements are that the person was abused while they were a child and resident in a 'relevant care setting' in Scotland.[123] Abuse is defined in section 19 as including sexual, physical, and emotional abuse and abuse which takes the form of neglect.

115. When applying for redress, a survivor must specify whether he or she wishes to apply for a fixed rate payment or an individually assessed payment. In order to receive the fixed rate payment, the applicant need only satisfy the decision-making panel that he or she was resident in a relevant care setting in the relevant period and does not need to give evidence of the abuse suffered. The fixed rate payment is set at £10,000.

116. Alternatively, a survivor can also opt for an individually assessed payment. In such an application, the applicant must similarly satisfy the decision-making panel that he or she was resident in a relevant care setting in the relevant period, but must also give evidence of the nature, severity, frequency and duration of the abuse suffered.[124]

117. On consideration of these factors, the decision-making panel makes an award along 5 levels, up to a maximum of £100,000:[125]

Redress Payment Level 1	Redress Payment Level 2	Redress Payment Level 3	Redress Payment Level 4	Redress Payment Level 5
£20,000	£40,000	£60,000	£80,000	£100,000

118. An applicant can seek a review of a decision not to award redress, or of the amount of redress awarded. An applicant who wishes to accept an offer of redress from Redress Scotland, on review or at first instance, must sign a waiver agreeing to abandon any ongoing civil proceedings and commit not to bring any further civil proceedings in respect of the abuse suffered.[126] The Scheme had, as of March 2023, paid out £20.1 million to 404 applicants.[127]

123 In certain limited circumstances, a next of kin of a person abused while in residential care can apply for a redress payment, namely where the victim of abuse died after having applied for a redress payment. See section 24 of the 2021 Act.

124 Redress For Survivors (Historical Child Abuse In Care) (Scotland) Act 2021: statutory guidance – assessment framework available at https://www.gov.scot/publications/redress-survivors-historical-child-abuse-care-scotland-act-2021-statutory-guidance-assessment-framework/.

125 Redress For Survivors (Historical Child Abuse In Care) (Scotland) Act 2021: statutory guidance – assessment framework available at https://www.gov.scot/publications/redress-survivors-historical-child-abuse-care-scotland-act-2021-statutory-guidance-assessment-framework/. This guidance provides further detail on the types and extent of abuse that will justify a payment at each of Level 1, 2 ,3, 4 and 5.

126 Section 46 of the 2021 Act.

127 Scottish Government, 'Redress Scheme Payments' available at https://www.gov.scot/news/redress-scheme-payments/.

(v) Criticism and controversy surrounding the SCAI and Redress Scotland

119. The SCAI and the Redress Scheme have been beset by criticism and controversy for a number of years. Criticisms have included the scope of the inquiry, alleged Government interference, as well as delays and rising costs.[128] The Redress Scheme in particular has been criticised for the 'paltry' figures available, particularly the fixed rate payment.[129]

120. In the beginning, the SCAI was criticised for being unduly narrow in remit, insofar as it only considered abuse in residential settings, which the Inquiry defended, noting that its remit was comparatively speaking quite broad.[130]

121. There has also been controversy about alleged Government interference in the inquiry, which caused one inquiry panel member to resign.[131] Shortly thereafter, the Inquiry Chair, Susan O'Brien QC also resigned, similarly alleging Government interference, albeit her resignation came amid a separate controversy.

122. In relation to the Redress Scheme, some survivors said they found the experience retraumatising, and that there were unacceptable delays in the process.[132] In particular, it appears that the decision-making panels have taken quite a long time to return decisions on entitlement to compensation, with some survivors waiting 10 or 11 months for a decision.[133]

128 The Times, Child abuse inquiry costs soar as concern raised over compensation panel fees (26 July 2021) at https://www.thetimes.co.uk/article/child-abuse-inquiry-costs-soar-amid-row-over-fees-clmkzbq29.

129 The Daily Record, 'Sex abuse survivors rage as inquiry judge pockets £2m while victims awarded £10k' (17 July 2023), available at https://www.dailyrecord.co.uk/news/scottish-news/sex-abuse-survivors-rage-inquiry-30481077.

130 BBC News, 'Child abuse inquiry: Angela Constance defends remit' (10 February 2016) https://www.bbc.com/news/uk-scotland-35535524.

131 Quoted in BBC News, Panel member quits 'doomed' Scottish Child Abuse Inquiry (28 June 2016), available at https://www.bbc.com/news/uk-scotland-scotland-politics-36650261.

132 BBC News, 'Child abuse survivors lose faith in redress payment scheme' (16 November 2022), available at https://www.bbc.com/news/uk-scotland-63648390.

133 ibid.

F. The Canadian Truth And Reconciliation Commission

123. The Canadian Truth and Reconciliation Commission considered abuse, including but not limited to sexual abuse, suffered by indigenous children in so called Indian Residential Schools, which were run in large part by churches, with the assistance of Government funding.[134] These so-called residential schools were, in the Commission's words:

> … an education system in name only for much of its existence. These residential schools were created for the purpose of separating Aboriginal children from their families, in order to minimize and weaken family ties and cultural linkages, and to indoctrinate children into a new culture — the culture of the legally dominant Euro-Christian Canadian society.[135]

124. Some 150,000 children were estimated to have been taken from their families and placed in Indian Residential Schools as part of a project of forced assimilation, and as the Commission found, a policy of cultural genocide. The Commission's work was thus intertwined with the deep colonial legacy of the Canadian State, and not solely focussed on the individual abuses suffered by children at these schools. Indeed, the very fact of being forced to attend such schools at all amounted to a terrible injustice.

125. The Truth and Reconciliation Commission of Canada ('TRC') was established in 2008 under the terms of the Indian Residential Schools Settlement Agreement ('IRSSA'). The IRSSA provided approximately $5 billion for compensation, commemoration, healing, and for the establishment of the TRC.

126. It has been argued that one of the primary roles of the TRC was an educative one, particularly in light of the ignorance of many Canadians of the existence of the Indian Residential Schools system.[136] The decision to frame the Commission as one of 'truth and reconciliation' drew criticism from some quarters as simply accepting and enshrining colonial oppression of aboriginal peoples, without providing justice and redress.[137] This criticism drew upon traditional critiques of truth commissions as

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134 David B. MacDonald, 'Canada's Truth and Reconciliation Commission Assessing, Context, Process and Critiques' (2021) 29(1) *Griffith Law Review* 150, 152.

135 Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), Preface, p. v.

136 Anna Cook, 'Recognizing Settler Ignorance in the Canadian Truth and Reconciliation Commission' (2018) 4(4) Art. 6 *Feminist Philosophy Quarterly* 4.

137 Taiaiake Alfred argued that 'without massive restitution, including land, financial transfers and other forms of assistance to compensate for past harms and continuing injustices committed against our peoples, reconciliation would permanently enshrine colonial injustices and is itself a further injustice': Alfred, *Indigenous Pathways of Action and Freedom* (University of Toronto Press, 2005), p. 152.

tending to serve the interests of the societal elite in absolving itself of responsibility for the previous wrongdoing.[138]

127. However, it appears that the TRC itself took quite a broad understanding of reconciliation, including taking it to mean positive actions of redress where necessary.[139]

128. The Commission was established by the Federal Government pursuant to an Order in Council. Three Commissioners were appointed in 2008 but resigned shortly after being appointed. The Commissioners for the majority of the lifespan of the Commission were, Justice Murray Sinclair as Chair, Chief Wilton Littlechild and Dr Marie Wilson. An Indian Residential School Survivor Committee ('IRSCC'), comprised of members of the Aboriginal community, provided advice and support to the Commission.

129. Gallen compares the composition of the Commission favourably to the Irish approach. Gallen is critical of the Irish practice of only appointing lawyers to head commissions and tribunals, and points to the Canadian and Australian practice of including victims and/or human rights experts. However, he notes that this can create a somewhat unstable Board; the Canadian Truth and Reconciliation Commission had two resignations within its first year.[140]

130. The Commission was empowered to receive statements and documents from former students, their families, the wider community and all other interested participants. However, the Commission's process was explicitly informal and consent based. The Settlement Agreement provided that the Commission 'shall not hold formal hearings, nor act as a public inquiry, nor conduct a formal legal process' and that it 'shall not possess subpoena powers, and do not have powers to compel attendance or participation in any of its activities or events'.[141]

131. Schedule N, Article 2 (h) of the Agreement prevented anyone from naming names, or otherwise identifying people 'without the express consent of that individual, unless that information and/or the identity of the person so identified has already been established through legal proceedings, by admission, or by public disclosure by that individual'.

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138 Jay D. Aronson, 'The Strengths and Limitations of South Africa's Search for Apartheid-Era Missing Persons,' International Journal of Transitional Justice 5(2) (2011): 262., quoted in Matt James 'A Carnival of Truth? Knowledge, Ignorance and the Canadian Truth and Reconciliation Commission' (2012) 6(2) *International Journal of Transitional Justice* 1.

139 Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at p. 6-8.

140 James Gallen, *Transitional Justice and the Historical Abuses of Church and State* (Cambridge University Press, 2023), p. 143.

141 Schedule N to the Indian Residential Schools Settlement Agreement (IRSSA).

132. Accordingly, the Commission did not have the power to make any findings of misconduct or wrongdoing, or to recommend the bringing of civil or criminal proceedings, unless such a finding had already been established through legal proceedings.[142]

(i) Programme of works

133. In terms of its programme of works, the TRC was directed by its terms of reference to hold a series of both 'National Events' and 'Community Events', as well as a process of 'Statement Taking'. It was directed that these National Events should include the following common components:

(i) an opportunity for a sample number of former students and families to share their experiences;

(ii) an opportunity for some communities in the regions to share their experiences as they relate to the impacts on communities and to share insights from their community reconciliation processes;

(iii) an opportunity for participation and sharing of information and knowledge among former students, their families, communities, experts, church and government officials, institutions and the Canadian public;

(iv) ceremonial transfer of knowledge through the passing of individual statement transcripts or community reports/statements. The Commission shall recognize that ownership over IRS experiences rests with those affected by the Indian Residential School legacy;

(v) analysis of the short and long term legacy of the IRS system on individuals, communities, groups, institutions and Canadian society including the intergenerational impacts of the IRS system;

(vi) participation of high-level government and church officials;

(vii) health supports and trauma experts during and after the ceremony for all participants.

134. In addition to these National Events, the TRC was directed to hold 'Community Events' to be situated in the communities in which Indian Residential Schools were located, and to cater to the particular needs of those communities.[143]

142 ibid.

143 Schedule N to the Indian Residential Schools Settlement Agreement (IRSSA), para. 10(B).

135. The TRC hosted seven, four-day long, National Events as well as many more local and regional events across the country. The events hosted concerts and talent shows, which were intended to demonstrate the richness of Aboriginal culture, language, and artistic expression.[144] The National Events were also livestreamed on the TRC's website and on social media platforms.[145] Over 9,000 survivors registered to participate in the seven national events, roughly 155,000 persons attended, and the event livestreams attracted an additional estimated 93,350 concurrent views. [146]

136. The TRC also engaged in a process of 'Statement Gathering', as directed by its terms of reference. Statements were gathered at public Sharing Panels and Sharing Circles at National, Regional, and Community Events and at Commission hearings.

(ii) Final Report

137. In June 2015, the Commission concluded its work, holding a final event in Ottawa. The TRC published a final report summarising its findings entitled 'Honouring the Truth, Reconciling for the Future'. The TRC's mandate prohibited it from making findings of culpability, and as such it determined that it was not in a position to find Canada guilty of any criminal activities, notwithstanding the fact that there was evidence that the forcible transfer of Indigenous children violated the United Nations Genocide Convention. However, they did reach a finding that the Indian Residential School System amounted to a policy of 'cultural genocide'.[147]

138. The TRC reported 3,201 deaths in the schools from 1867 – 2000 mostly from malnourishment, tuberculosis and other diseases caused by poor living conditions,[148] though others have suggested the real number is likely much higher.[149] The Report also found that many children resident in the Indian Residential Schools were sexually and physically abused.

139. It also published a 20-page booklet containing 94 'Calls to Action' to 'redress the legacy of residential schools and advance the process of Canadian reconciliation'. The calls to action were divided into two categories: 'Legacy' and 'Reconciliation'.

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144 Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), p. 31.

145 ibid.

146 Matt James 'Changing the Subject- The TRC, Its National Events, and the Displacement of Substantive Reconciliation in Canadian Media Representations' (2018) 51(2) *Journal of Canadian Studies* 362.

147 Truth and Reconciliation Commission, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015), p. 1.

148 ibid, p. 92.

149 David B. MacDonald, 'Canada's Truth and Reconciliation Commission Assessing, Context, Process and Critiques' (2021) 29(1) *Griffith Law Review* 150, 162.

140. For example, under 'Legacy', the TRC recommended that the federal, provincial, and territorial governments review and amend their respective statutes of limitations to "ensure that they conform with the principle that governments and other entities cannot rely on limitation defences to defend legal actions of historical abuse brought by Aboriginal people." Under 'Reconciliation', for example, it was recommended that the Canadian governments include the history of Aboriginal Canadians on school curricula.

(iii) Redress

141. Prior to the establishment of the TRC, two forms of compensation were available to survivors of the Canadian indigenous schools programme. The first was the Common Experience Payment (the '**CEP**'), under which payments were made pursuant to a formula which compensated successful applicants based on a general loss of culture and language as a result of their removal from families and communities.[150] The second was an Independent Assessment Process (the '**IAP**') which was designed to compensate individuals for specific instances of abuse.[151]

142. 84% of IAP applications were accepted, with an average amount of approximately $91,000 being awarded.

(iv) Survivors' Experience

143. The National Centre for Truth and Reconciliation, published a report detailing survivor perspectives on the Indian Residential Schools Settlement Agreement, called *Lessons Learned: Survivor Perspectives*.[152] The report details a number of aspects that survivors found valuable about the work of the Commission, including the focus on truth-telling and forgiveness and supports provided to survivors. It also records the negative views of survivors regarding the process for claiming compensation payments.

150 David B. MacDonald, 'Canada's Truth and Reconciliation Commission Assessing, Context, Process and Critiques' (2021) 29(1) *Griffith Law Review* 150.

151 ibid.

152 Lessons Learned Survivors Perspectives Report, NCTR, 20 February 2020. https://nctr.ca/wp-content/uploads/2021/01/Lessons_learned_report_final_2020.pdf

144. The report was prepared based on engagement with approximately 250 survivors.[153] While the TRC occurred in quite a different context, it is of note that this a much larger representative sample than other comparable research into survivor experiences of such inquiries. The report listed the following as elements of the process that were identified as positive by survivors:

1. Truth-Telling and Forgiveness

   'First and foremost, the process of truth telling and forgiveness that was central to the Truth and Reconciliation Commission was seen as critical. As noted above, many Survivors described the opportunity to tell their own truth, and to have that truth heard and validated, as having positive impacts in their own lives, including in their relations with their families and communities.'

2. Cultural Elements

   'Cultural elements and protocols were well integrated into the TRC, contributing to its success. The Commissioners represented three distinct perspectives: Commissioner Wilton Littlechild is a Survivor himself, Chief Commissioner Murray Sinclair is an inter-generational Survivor and Commissioner Marie Wilson is a spouse of a Survivor. Furthermore, each of the Commissioners demonstrated a high degree of personal cultural awareness and competency.'

3. Supports

   'Dedicated, well-trained and well-equipped health supports were available to participants before, throughout and after the IAP and TRC hearings.'

4. Apology

   'Another positive element in the process was the fact that it was supported by an official apology made by the Prime Minister of Canada on behalf of the Government of Canada and the leaders of all political parties. This had a profound effect on the Survivors in terms of feeling believed and having their personal experiences validated. It was noted that this resulted in a monumental shift in the Canadian public consciousness from Survivors' experiences being discounted to being widely understood as part of Canada's history.'

153 ibid, p. 3.

5. Research

> 'A significant contribution to the quest for truth and reconciliation was the large amount of research completed by the Truth and Reconciliation through its mandate. This immense body of knowledge formed the foundation for its comprehensive final report including its Calls to Action. This research also informs all continuing measures meant to address the legacy of the residential school system, including the work of the NCTR, of Survivors themselves, and of broader educational efforts.'

145. The Report did also note however some of the challenges faced by survivors in the process, notably the risk of retraumatisation and revictimisation. The majority of these criticisms, particularly in relation to the potential for retraumatisation and revictimization, were directed at the compensation process, IAP, which as noted above was seen as unduly intrusive and demanding of survivors.

146. The IAP process was criticised for the manner in which 'compensation points' were 'awarded' for provable abuses, which resulted in a highly intrusive and sometimes retraumatising process.[154] As one survivor quoted in the *Lessons Learned* report said of the IAP:[155]

> For me, the invasiveness, persistence and depth of the questioning we were subjected to inside of our compensation hearings was obscene and did not need to occur to verify whether sexual or physical abuse had occurred. That day of my hearing, and the days that followed, were some of the worst days in my life second only to when my abuse actually occurred.

147. The negative experiences of survivors seeking compensation appears to have had a negative impact on willingness to participate with the later TRC. As one author notes:[156]

> A 2010 report by the Aboriginal Healing Foundation (based on interviews with 281 Survivors) revealed that 40 per cent found the CEP process emotionally and/or logistically difficult, and endured long wait times in seeking compensation.[157] A large proportion of Survivors did not have records to back up their compensation claims, because many records had either been lost or deliberately destroyed. They were, as the AHF noted, 'faced with the choice of

154 'Lessons Learned Survivors Perspectives Report', NCTR, 20 February 2020, p. 152.

155 'Lessons Learned Survivors Perspectives Report', NCTR, February 20, 2020.

156 David B. MacDonald, 'Canada's Truth and Reconciliation Commission Assessing, Context, Process and Critiques' (2021) 29(1) *Griffith Law Review* 150, 155-156.

157 Gewn Reimer, Amy Bombay, Lena Ellsworth, Sara Fryer, and Tricia Logan, 'The Indian Residential Schools Settlement Agreement's Common Experience Payment and Healing: A Qualitative Study Exploring Impacts on Recipients' (2010) The Aboriginal Healing Foundation at p.xiii available at http://www.ahf.ca/downloads/cep-2010-healing.pdf.

retelling their story and of trying to prove their years of attendance in the hope that the government would validate their experiences.'[158] Indeed, 'Survivors said they were made to feel like liars adding that it was not their fault that school records were lost,' since the government had destroyed the records when the schools were closed.[159] These experiences then had a knock on effect on Survivor interest to apply for further compensation, and their willingness to engage with the later TRC.

…

Another important point raised by the AHF was the retraumatisation of as many as one third of the surveyed Survivors, who reported 'negative emotions or traumatic flashbacks,' and reactions to their memories 'ranged from feelings of discomfort and loneliness to reactions of panic and depression, sometimes leading to self-destructive behaviours.

148. The *Lessons Learned* Report also noted some of the challenges faced by survivors in the TRC process, notably the risk of traumatisation and revictimisation. However, the majority of these criticisms were directed at the compensation process, IAP, which was seen as unduly intrusive and demanding of survivors.

149. The TRC process received praise for its Survivors Speak volume of its report, which created a 'master narrative' of the hurt and suffering endured by survivors.[160]

150. Mindful of the approach of the CEP and the IAP, which placed significant hurdles in the way of survivors securing compensation, the TRC was structured in a deliberately non-legalistic way. Thus, the features of Irish and Northern Irish inquiries which have met with criticism – formal, intimidating settings coupled with legalistic procedures – were mostly absent from the TRC's processes. And this seems to have been the key factor in rendering the TRC a less traumatising experience for survivors who engaged with it.

158 ibid.

159 ibid.

160 James Gallen, *Transitional Justice and the Historical Abuses of Church and State* (Cambridge University Press, 2023), p. 147.

G. Conclusions

151. The above examples of public inquiries, broadly defined, into child sexual abuse in schools demonstrates a variety of approaches that may be adopted. However, broadly speaking, the inquiries considered in this paper preferred an approach designed to educate the public about systemic abuse, to allow victims to tell their story, and to inform policy going forward. Inquiries have, by and large, not focussed on accountability for individual perpetrators, but rather on failures in institutional responses to child sexual abuse.

152. A consideration of the features of international tribunals is certainly instructive. However, it should be emphasised that the legal and constitutional context in which those inquiries have taken place is very different, and there may be certain features of international inquiries which would not be replicable in an Irish context.

Chapter 18:
Research on Survivors' Experiences of Inquiries

A. Introduction

1. The previous chapters considered the law in relation to fair procedures of persons facing accusations of wrongdoing before an inquiry and considered the experiences of a number of inquiries addressing clerical sexual abuse. This chapter looks at the research on survivors' experience of participation in sexual abuse inquiries.
2. One difficulty in assessing the impact on survivors of participation in previous Irish child sexual abuse inquiries is the limited media commentary and academic literature addressing the views and responses of survivors. Instead, almost universally, the predominant focus of discourse following the publication of an inquiry report was the report's broader societal impact, rather than on the views of the survivors themselves.
3. Moreover, while some research, discussed below, has been conducted in respect of the experience of survivors who were witnesses before the Commission to Inquire into Child Abuse ('CICA') and the Residential Institutions Redress Board ('RIRB'), there is considerably less material in respect of the experience of survivors in relation to the Ferns,[1] Dublin Archdiocese,[2] and Cloyne[3] inquiries. The published studies in relation to CICA and RIRB are based on very small sample groups.[4]
4. Similarly, a published study on the impact on survivors of participating in Northern Ireland's Historical Institutional Abuse Inquiry ('HIAI') was based on a study of some 43 survivors who gave evidence to the HIAI.[5] Given the sample sizes, some caution is therefore necessary in assessing these studies as representative of survivors' experience of those inquiries, let alone the wider experience of survivors in such contexts.
5. One author, remarking upon the dearth of research assessing the response of survivors to the various legal processes seeking to address institutional child abuse, commented that 'we have singularly failed to follow through in terms of measuring the medium and long-term response of victims to the various legal mechanism put in place to address their grievances'. [6] He further notes that a major study

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1 Murphy et al, The Ferns Report: presented to the Minister for Health and Children, (October 1995) Dublin: Stationery Office.

2 Murphy et al, Commission of Investigation Report into the Catholic Archdiocese of Dublin (July 2009) Dublin: Stationery Office.

3 Murphy et al, Report by Commission of Investigation into Catholic Diocese of Cloyne (December 2010) Dublin: Stationery Office.

4 Sinead Pembroke 'Historical institutional child abuse in Ireland: survivor perspectives on taking part in the Commission to Inquire into Child Abuse (CICA) and the redress scheme' (2019) 22(1) *Contemporary Justice Review* 43.

5 Patricia Lundy '"I Just Want Justice": The Impact of Historical Institutional Child-Abuse Inquiries from the Survivor's Perspective' 55 (1&2) *Eire-Ireland: An Interdisciplinary Journal of Irish Studies* 252.

6 Tom O'Malley, 'Responding to Institutional Abuse: The Law and Its Limits', in Tony Flannery (ed.) *Responding to the Ryan Report* (Columbia Press, 2009), pp. 103 -104.

conducted in Oxford in the early 1980's indicated that punishment and retribution did not rank highly on victims' order of priorities; 'Information and, to a lesser extent, compensation were far more important to them'.[7]

B. Negative Features of Public Inquiries Highlighted by Survivors

6. Research indicates that many survivors have found giving evidence to inquiries to be a very difficult experience. Research on the experience of 25 witnesses who gave evidence to CICA and the Redress Board found that the majority of those interviewed felt the inquiry process was retraumatising.[8]
7. Some research has been conducted with participants in CICA about their experience of participation, notably a study of 25 participants before CICA and the Redress Board.[9] While a sample of just 25 persons cannot claim to be fully representative in light of the thousands of persons who contributed to CICA's work, as the author of the study herself acknowledges,[10] nonetheless the perspectives related by survivors remain instructive, particularly in light of the dearth of research on survivor perspectives.
8. It appears that a number of survivors declined to participate in the study on the basis of the waiver they signed as part of the redress process, fearing participation in the study would breach the terms of that waiver.

7 ibid, O'Malley suggested that a similar study could usefully be undertaken in Ireland covering those victims of child sexual abuse who have been through *inter alia* the Redress Board and the Ryan Commission.

8 Sinead Pembroke 'Historical institutional child abuse in Ireland: survivor perspectives on taking part in the Commission to Inquire into Child Abuse (CICA) and the redress scheme', (2019) 22(1) *Contemporary Justice Review* 43-59.

9 Sinead Pembroke, 'Historical institutional child abuse in Ireland: survivor perspectives on taking part in the Commission to Inquire into Child Abuse (CICA) and the redress scheme' (2019) 22(1) *Contemporary Justice Review*, 43-59.

10 As Pembroke outlines: 'This study does not claim representativeness, as no controlled sampling procedures were put in place … The sample consisted of 19 men and six women.', p. 45.

(i) CICA

9. Pembroke summarised the perspectives of those interviewed about their participation in CICA as follows:[11]

> Many of the participants spoke about the benefits of exposing past abuses, for example how therapeutic telling their story was, and confronting those responsible for their abuse. For some survivors, such as Mark, giving evidence to the Commission was seen in a positive light because:
>
> > At the end of the hearing they said "we believe every word you said." That done me the world of good … I said I do not care about the money, I wanted to ask why they put me into the school … And that was my main reason for going to the redress board.
>
> However, the majority of survivors that were interviewed, felt the inquiry and redress process triggered feelings of shame and stigma in relation to their time in the institution. Rory expressed that:
>
> > I most times wished that it never ever came up, that there was never a redress board, that Bertie Ahern never apologised … I would have been much happier if the whole thing had been left as it was … and the more you rake it up, if somebody is talking about me saying he's been in an institution, the more times they do it the worse you get. It increases stigma.
>
> Thus, when the Commission and the Redress scheme were set up, Maire revealed that she did not apply for redress because she did not want to bring up that chapter of her life. Neil, who did apply for redress expressed that in hindsight, if he knew the emotional trauma that was involved in making an application, he never would have taken part.

11 Sinead Pembroke, 'Historical institutional child abuse in Ireland: survivor perspectives on taking part in the Commission to Inquire into Child Abuse (CICA) and the redress scheme' (2019) 22(1) *Contemporary Justice Review*, 43-59, 51- 52.

10. A majority of the survivors interviewed felt that the CICA did not deliver justice for survivors, whether framed as procedural justice or as retributive justice. Pembroke outlines that:[12]

> During the course of the interviews, many complained that the inquiry did not deliver justice. Justice was defined in retributive and procedural terms. Following years of campaigning to have their abuse investigated, it was often articulated that they hoped the inquiry and redress process would be an avenue for 'justice to prevail'. Survivors were critical of the lack of police investigations that led to prosecutions. This was articulated by John who said that 'the healing process is greatly hampered by the knowledge that many of the abusers who are still alive will never face prosecution'.
>
> …
>
> Consequently, the lack of retributive justice was a major disappointment for survivors interviewed for this study.

11. Pembroke further outlined a number of ways in which survivors felt that CICA failed them in delivering procedural justice:[13]

> Survivors also described a lack of procedural justice, and referred to the inquiry and redress process as lacking in impartiality and transparency in the proceedings. David pointed out that:
>
> > You did not have a proper tribunal televised to see what went on; the whole thing was smothered off. And that was what caused the problem in the first place; where the state and the church did not understand the boundaries. And this abuse went on then in between and obviously the same when they set up the redress board the same stuff, the same dynamic …

12 Sinead Pembroke, 'Historical institutional child abuse in Ireland: survivor perspectives on taking part in the Commission to Inquire into Child Abuse (CICA) and the redress scheme' (2019) 22(1) *Contemporary Justice Review*, 43-59 at p. 53.

13 ibid at p. 54.

12. Under this rubric, Pembroke further outlines a frustration on the part of survivors that abusers were not named in the final report:[14]

> In terms of procedural justice, another element that frustrated survivors, was that their abusers were not named. Following a high court action brought by the Christian Brothers, an amendment was made in 2005 to Section thirteen of the Commission to Inquire into Child Abuse Bill, to prevent the Investigation Committee from identifying a person it believed had committed abuse unless convicted by a court. This was identified by some participants, such as Alex, as having negative implications in the administration of justice and legal proceedings:
>
> > For me, not naming the abusers shows that nothing has changed; the attitude from the state towards us hasn't changed. That apology really meant nothing. As long as they (the religious orders) have money and powerful people behind them, they'll get away with it.

13. McAlinden and Naylor similarly reported, albeit on the basis of informal conversation with victims groups rather than quantitative research, a feeling among survivors that the CICA Report had failed to deliver justice:[15]

> In the aftermath of the Ryan Commission Report, however, criticisms began to emerge and many victims were left wanting in terms of 'justice'. In particular, the aspirations of providing an authoritative record of events and holding perpetrators to account had not been realised.

14. The authors go on to offer the following analysis of why the Report may have failed to meet the expectations of survivors:[16]

> There were a number of institutional and structural factors that limited the extent to which such an inquiry could deliver justice and be truly cognisant of the needs of victims. These can be distilled to two main lines of critique that relate broadly to victim and offender participation.

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14 Sinead Pembroke, 'Historical institutional child abuse in Ireland: survivor perspectives on taking part in the Commission to Inquire into Child Abuse (CICA) and the redress scheme' (2019) 22(1) *Contemporary Justice Review*, 43-59 at p. 55.

15 McAlinden, A-M., & Naylor, B. 'Reframing Public Inquiries as 'Procedural Justice' for Victims of Institutional Child Abuse: Towards a Hybrid Model of Justice' (2016) 38(3) *Sydney Law Review* 277-308, 297.

16 McAlinden, A-M., & Naylor, B. 'Reframing Public Inquiries as 'Procedural Justice' for Victims of Institutional Child Abuse: Towards a Hybrid Model of Justice' (2016) 38(3) *Sydney Law Review* 277-308, 297.

> First, selectivity in the sampling of cases meant that the Commission reported not on all allegations of abuse, but only on institutions with the largest number of complaints. Focusing on a limited number of exemplary cases tends to individualise narratives of victimhood and obscure broader patterns of victimisation. A narrow legal construction of victimhood and focus on selected testimonies also tends to create 'hierarchies of pain' by excluding particular accounts of victimhood and subordinating the experiences of some victims. Moreover, the singular focus on the direct victims of institutional abuse also fails to acknowledge secondary and tertiary victims, including the families of victims, as well as the wider faith community. Second, there were a number of legal challenges to the existence of the Commission by religious orders, as a result of which many abusers were not named publicly but were dealt with anonymously. The failure to publicly identify abusers, due to pending prosecutions in some cases, was a particular concern of victims, many of whom expressed their frustration that those responsible were being protected, while their harm and suffering was not fully acknowledged.

15. In a report in the Irish Examiner assessing the response of survivors to the Redress Board, a number of criticisms were also made of CICA. It was suggested that future inquiries should be 'non-adversarial' and that there should be accountability for perpetrators, and greater support for victims. The report noted that CICA did not hold individuals to account and that one victim responded: 'This is one of the first things that should have been done'. The report further notes the agreement of another victim with this:[17]

> Carmel agrees. She believes that any future redress mechanism must achieve clear aims: that it be non-adversarial, that there be "no secret deals", and that "people have to be held accountable".
>
> She believes a survivor who has already been through redress should be included. And, she says, counselling services need not only to be offered, but expanded, believing there is little point in having people who need access to treatment being plonked on lengthy waiting lists to be seen.

17 Irish Examiner, Focus on redress: 'Aftershocks' of residential abuse reverberate (27 June 2021).

16. The criticisms made of CICA by survivors are notable in light of the fact that it was intended, at least with respect to the work of the Confidential Committee, to be more victim-centred than other inquiries. As Gleeson and Ring observe, '[t]he core innovation was that the CICA was to have both therapeutic and investigative functions'.[18] Gleeson and Ring note that the therapeutic objective was to help survivors to 'overcome the lasting effects of abuse' by 'giv[ing] their account to an experienced and sympathetic forum'.[19]

(ii) Survivor Responses to the Ferns, Dublin Archdiocese and Cloyne Reports

17. There has been no research of survivors experiences of the Ferns, Dublin Archdiocese and Cloyne reports. There are some indications of how these inquiries were viewed after the publication of the reports by survivors.

18. Following the publication of the Ferns report Colm O'Gorman, a victim of abuse in Ferns, gave evidence to the Oireachtas Joint Committee on Health. Mr O'Gorman spoke in positive terms about the report, but emphasised the need to use the report as a springboard for further reforms in the area of child protection.[20] Mr O'Gorman particularly emphasised the need for a constitutional amendment in order to counterbalance the protection of the right to a good name of alleged abusers in the context of public inquiries such as Ferns.[21] At the same Committee hearing, Ms Therese Gaynor, a representative from One in Four, noted that the publication of the Ferns Report resulted in a dramatic increase of over 130% in people seeking counselling services from One in Four, and that they had suspended their waiting list in light of overwhelming demand in December 2005.[22]

18 Kate Gleeson & Sinéad Ring, 'Confronting the past and changing the future? Public inquiries into institutional child abuse, Ireland and Australia' (2020) 29(1) *Griffith Law Review* 109.

19 516 Dáil Debates Col 293.

20 Joint Committee on Health and Children debate – Thursday, 2 February 2006.

21 ibid.

22 ibid.

19. As regards the Dublin Archdiocese Inquiry, one survivor of child sexual abuse, who did not participate in the Commission, nonetheless described the value of the final report as follows:[23]

> The Murphy Report meant a great deal to me because it showed that survivors had been telling the truth, it was a vindication. We were not isolated cases – there was a pattern in the way so many child sexual abuse cases had been mishandled. It showed survivors were not angry people making false accusations, looking for money or out to destroy the church, but honest people deserving to be heard and shown respect …
>
> …
>
> The Murphy Report changed my life: it marked a point, more even than the day my abuser was convicted, where I could move forward and heal from the past.

20. Following, the Cloyne Report, the then Minister for Justice, Alan Shatter T.D., noted he had discussed the report with victims and described the impact of the report on victims in the following terms:[24]

> Last Wednesday I published the Cloyne report … On that occasion I said it was difficult to read the report and avoid despair. My feelings have been strengthened by the reactions of victims and their families in the week since the report was published. Sadly, some of the victims are no longer with us, but their families have spoken …
>
> …
>
> I acknowledge the contribution of Judge Yvonne Murphy and her colleagues on the commission of investigation. They have delivered a report of clarity and carried out their difficult task sensitively and meticulously. The victims had to relive painful memories and the commission members had to help them to relive these memories in the least distressing way possible, while at the same maintaining a professional approach. They succeeded admirably in doing this.

23 Marie Collins, 'What the Murphy Report Means to Me' (2013) Vol. 102, No. 408 *Studies: An Irish Quarterly Review*, p. 407.

24 Dáil Éireann debate – Wednesday, 20 Jul 2011, Vol. 739, No. 3.

21. The Irish Times reported the reaction of survivors to proposals after the publication of the report that there be mediated discussions between survivors and the church authorities. The article includes the following response of "Donelle", including her reaction to the report itself:[25]

> Part of me wants to confront them and tell them what I really feel – I read chapter nine again last night and what really freaks me out about them is that there is no sense of shock or horror or disgust on their part when they heard what Fr Ronat was doing.
>
> There was this sort of matter-of-fact acceptance – any normal person would have been outraged to learn that a priest was abusing children, but they just seemed to take it all in their stride – there was no sense of outrage that this was unacceptable, and that angers me still.

22. These fragmented accounts of survivor reactions taken from Dáil statements and reported survivor comments appear to indicate that the reports were broadly welcomed, with some reservations. However, in the absence of research of the kind carried out in relation to CICA and the RIRB, it would not be appropriate to attempt to draw any firm conclusions in this regard.

(iii) Residential Institutions Redress Board

23. In the research paper on responses to the CICA Report discussed above, Pembroke also outlined a number of serious criticisms made by survivors of the Redress Board process, noting that many survivors found the process to be significantly retraumatising:[26]

> … the redress scheme application procedure itself (writing a detailed statement, and an assessment by a psychologist in order to verify their trauma), resulted in psychological wounds being opened up after years of consignment to the deepest reaches of the mind. This had a negative effect on some survivors' personal lives and resulted in marital breakdowns. Jack had been married for 25 years and had never told his wife about his time in an Industrial school. Once he began the redress process this revived past traumas that he had put to the back of his mind, and he had to tell his wife. It was finding out that he had concealed this, which led to their marital break down.

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25 Barry Roche and Eoin Burke-Kennedy, 'Mixed reaction from Cloyne victims to meeting proposal' *The Irish Times* (21 December 2011).

26 Sinead Pembroke, 'Historical institutional child abuse in Ireland: survivor perspectives on taking part in the Commission to Inquire into Child Abuse (CICA) and the redress scheme' (2019) 22(1) *Contemporary Justice Review*, 43-59, 52.

24. The redress scheme employed individualised assessments to determine the amount of compensation to award each survivor who applied for redress. The more detail survivors could remember and divulge in their statement, the more points they could accrue. This meant that legal representatives really pressed upon survivors to conjure up traumatic memories from the distant past. Robert admitted:

> It was weird and disturbing having complete strangers grade the abuse I suffered. It was like opening a door to some memories that were closed for 40 years. It was like going into a very dark place where the memories were bad and it opened up bad memories I did not even know I had. The process was drawn out as well, which made it worse; it took five years from beginning to end.

25. A further frustration voiced by survivors was the role of lawyers in the process, including a perspective that lawyers benefitted from their suffering in recouping large legal fees:[27]

> … the majority of participants were dissatisfied with the legal profession's involvement in the redress scheme application. Even though the redress scheme did not force survivors to seek legal representation, it was encouraged. Certainly, the complex nature of the application meant that most survivors needed legal representation. Robert revealed that, 'I felt like I was just a number to my solicitor, and I was! I was one of hundreds of other survivors they were representing at the same time!'
>
> Many participants also felt that their solicitor had benefitted financially from their personal trauma.

26. Pembroke further noted survivors' views that the requirement to sign a "waiver" before accepting a settlement from the Redress Board was needlessly retraumatising:[28]

> This caused a lot of distress for survivors because as Kate articulated:
>
> > If I tell my story, I can end up going to jail again! The Irish state wants to put me away again! And they won't even put my abusers away!
> >
> > The waiver form had such a negative effect that four people pulled out from taking part in this study. Even though the waiver form cannot stop survivors from telling their story, this legal overture created a climate of confusion and fear, which contributed to secondary victimisation of survivors of Industrial and Reformatory schools.

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27 Sinead Pembroke, 'Historical institutional child abuse in Ireland: survivor perspectives on taking part in the Commission to Inquire into Child Abuse (CICA) and the redress scheme' (2019) 22(1) *Contemporary Justice Review*, 43-59, 52.

28 ibid at p. 53.

27. This echoes criticism of the Redress Board process reported by the Irish Examiner in an investigation in 2021. In that reporting, the scheme was criticised by some as offering what they described as 'dirt money',[29] and as failing to adequately listen to and vindicate their suffering. As one survivor put it:[30]

> I didn't go into them, but I felt like it was dirt money. I felt like I was in that place again, the institution again, the way I was being treated.

28. The phrase 'dirt money' was also used by a survivor by the name of Carmel:[31]

> It certainly brought comfort to some, but according to Carmel, not all. "People never felt they were believed", she says. "They felt they were dirty". Hence the description by some of the money received as "dirt money".

29. As is apparent from the above, the environment can prove very challenging for survivors seeking to have their voice and story heard. It is sometimes suggested that the process of giving evidence to inquiries or truth commissions can have a 'cathartic' effect for survivors,[32] but the evidence for this is disputed, with one commentator recently arguing that '[s]trong claims about an emotional or psychological benefit to testifying remain unsustainable'.[33]

30. The response of survivors to previous inquiries into child sexual abuse has not been uniform. Whilst many survivors indicated a sense of vindication and of finally being heard through the process, it is evident that for some this came at a personal cost. Gallen provides the following survey of the academic literature in this regard:[34]

> In Ireland, Carol Brennan concludes that the Irish state harmed victim survivors,[35] by disabling ownership of the process and compelling compliance with a purportedly therapeutic model.[36] Sinead Pembroke notes that the majority of survivors she interviewed felt CICA was non-transparent and 'triggered feelings of shame and stigma in relation to their time in the

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29 Irish Examiner, Focus on redress: 'Aftershocks' of residential abuse reverberate (27 June 2021).

30 ibid.

31 ibid.

32 B Hamber, 'The Burdens of Truth: An Evaluation of the Psychological Support Services and Initiatives Undertaken by the South African Truth and Reconciliation Commission' (1998) 55(1) *American Imago* 9, 18, quoted in Merryl Lawry-White, 'The Reparative Effect of Truth Seeking in Transitional Justice' (2015) 64 *International and Comparative Law Quarterly* 141.

33 James Gallen, *Transitional Justice and the Historical Abuses of Church and State* (Cambridge University Press, 2023), p. 137.

34 ibid, p. 148.

35 Carol Brennan, 'Trials and Contestations: Ireland's Ryan Commission' in Shurlee Swain and Johanna Sköld (eds), *Apologies and the Legacy of Children in 'Care': International Perspectives* (Palgrave Macmillan UK 2015) p. 56.

36 Carol Brennan, 'Trials and Contestations: Ireland's Ryan Commission' in Shurlee Swain and Johanna Sköld (eds), *Apologies and the Legacy of Children in 'Care': International Perspectives* (Palgrave Macmillan UK 2015) p. 64.

institution'.[37] Pembroke concludes that CICA should have integrated greater survivor participation into its investigations, especially recognising survivors' stated desire for accountability and prosecutions of abusers.[38] After initially resisting hearing survivor testimony at all, the McAleese committee ultimately did so but exacerbated the gendered forms of harm experienced by victim-survivors of the laundries by challenging the veracity of victim-survivor testimony.[39] Máiréad Enright and Sinéad Ring emphasise that the state's mistreatment of the victim survivor as a source of knowledge amounts to a fresh form of epistemic injustice, reflecting both testimonial injustice in responding to historical abuse in manners that protect the state and hermeneutical injustice in "privileging the state's sovereign ways of knowing and determining historical injustice".[40]

31. However, it is necessary to again emphasise that these negative assessments arise in a context where there is a dearth of empirical data about the views of survivors on Irish child sexual abuse inquires and as such it is difficult to draw firm conclusions about overall experiences. The sample sizes of the empirical studies in relation to the CICA and the RIRB, in the context of the circa 17,000 survivors who went through those inquiry and redress processes, makes it particularly difficult to extrapolate from the experience of research participants.

32. Moreover, the precise effects of participation in inquiries will, inevitably, vary from circumstance to circumstance and context to context.

37 Sinead Pembroke 'Historical institutional child abuse in Ireland: survivor perspectives on taking part in the Commission to Inquire into Child Abuse (CICA) and the redress scheme' (2019) 22(1) *Contemporary Justice Review* 43, 51.

38 ibid, p. 56 – 57.

39 Claire McGettrick et al, *Ireland and the Magdalene Laundries: A Campaign for Justice* (I B Tauris & Company, Limited 2021) at 87.

40 Máiréad Enright and Sinéad Ring, 'State Legal Responses to Historical Institutional Abuse: Shame, Sovereignty, and Epistemic Injustice' (2020) 55 *Éire-Ireland* 68, 88.

C. Research on Survivor Experiences in Inquiries and Retraumatisation

33. Nonetheless, one theme that emerges from the academic literature in this area is the suggestion that, whatever the potential benefits for survivors of participating in public inquiries, such participation carries with it with risks of retraumatisation.[41] In terms of the experience of survivors in their engagement with such inquiries, Gallen concludes that '… existing studies of inquiries and truth commissions show survivor ambivalence about participation and the provision of testimony, with some instances of short-lived benefit, and others of harm to survivors from participation'.[42]

34. The opportunity to tell one's story is not always a rewarding experience. Having conducted interviews with HIAI participants in Northern Ireland, Lundy contends that:[43]

> … giving survivors the opportunity to tell their stories does not necessarily bring catharsis, for it may even retraumatize and on occasion hinder recovery. Research indicates that the psychological benefits of testimony are generally realized only when societal issues are addressed: uncovering truth, delivering justice, and making reparations.

35. The experience of inquiries such as CICA and the international inquiries studied suggest that in addition to the opportunity to participate in any inquiry, survivors need both meaningful redress for the harms they have suffered and meaningful accountability for the perpetrators of those harms. Keenan, McAlinden and Gallen have argued that inquiries often fail to 'recognise the abuses as human rights violations' and fail to address 'one of the most consistently expressed needs of victims/survivors, namely the need to discover: "Why? Why was I sent there? Why did it happen to me"?'[44]

41 James Gallen, *Transitional Justice and the Historical Abuses of Church and State,* (CUP 2023), at p. 150, notes that 'Engagement with public inquiries … presents a risky process for victim-survivors'.

42 ibid, p. 137.

43 Patricia Lundy '"I Just Want Justice": The Impact of Historical Institutional Child-Abuse Inquiries from the Survivor's Perspective' 55 (1&2) *Eire-Ireland: An Interdisciplinary Journal of Irish Studies* 252, 259.

44 Marie Keenan, Anne-Marie McAlinden, James Gallen, *Non-recent Institutional Abuses and Inquiries: Truth, Acknowledgement, Accountability and Procedural Justice* (Transforming Justice Project, June 2023), p. 28.

36. The literature suggests that retraumatisation of survivors through their participation in inquiries has the potential to arise in at least three different ways:

(i) First, testing of evidence in an adversarial manner may retraumatise survivors. As one commentator has argued, 'The legal scrutiny of evidence and testimony may cause frustration or distress for survivors seeking to have their lived experience believed and officially acknowledged, if it is challenged, misrepresented, or disbelieved'.[45]

(ii) Second, the potential disconnects between how survivors expect an inquiry to function and how it functions in practice may also have a traumatising effect. Thus, in the context of the HIAI in Northern Ireland, procedural matters such as the late provision of documents to witnesses were cited as a source of additional distress. Factors outside of the Inquiry's control, such as disconnect or delay between what an inquiry may recommend, and its implementation may also have a negative effect in survivors. For example, the lengthy delay in instituting recommendations such as the introduction in mandatory reporting[46] and the relatively modest redress programme recommended by the English and Wales inquiry was a source of survivor dissatisfaction with that process. In Northern Ireland, Sir Anthony Hart wrote to all party leaders at Stormont to voice his concern over the delay in bringing forward a promised redress scheme some 6 months after the publication of the HIAI report in 2017.[47] Equally, delays in processing applications for redress in Scotland have been criticised as a source of trauma to survivors.[48]

(iii) Third, classifying some individuals, and not others, as coming within the scope of a given inquiry can lead to retraumatisation.[49] As noted above, the CICA adopted a 'sampling' approach and did not examine every allegation which it received. Some authors have argued that this sampling approach 'excluded certain accounts of victimhood and subordinated the experiences of some survivors'.[50]

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45 James Gallen, *Transitional Justice and the Historical Abuses of Church and State,* (CUP 2023), at p. 138.

46 Haroon Siddique 'Survivors criticise 'abhorrent' failure to act on child sexual abuse inquiry' *The Guardian*, 5 February 2024, available at https://www.theguardian.com/uk-news/2024/feb/05/child-sexual-abuse-survivors-england-criticise-failure-make-reporting-mandatory.

47 'Child abuse inquiry chief demands victims' redress scheme implementation' *Belfast News Letter,* 13 June 2017, available at https://www.newsletter.co.uk/news/child-abuse-inquiry-chief-demands-victims-redress-scheme-implementation-1111988.

48 'Child abuse survivors lose faith in redress payment scheme' *BBC News*, 16 November 2022, available at https://www.bbc.com/news/uk-scotland-63648390.

49 James Gallen, *Transitional Justice and the Historical Abuses of Church and State,* (CUP 2023), at p. 138.

50 ibid at 11. See also Marie Keenan, Anne-Marie McAlinden, James Gallen, *Non-recent Institutional Abuses and Inquiries: Truth, Acknowledgement, Accountability and Procedural Justice* (Transforming Justice Project, June 2023), p. 21.

D. Research on Strategies to Limit Retraumatisation of Survivors

37. In assessing the research in this field, it is difficult to outline a definitive list of features of an inquiry that may avoid or minimise retraumatisation in light of the multi-faceted nature of sexual abuse and the range of different contexts in which it can arise. Each survivor's needs will inevitably be different, and it is difficult to identify a clear consensus on any point.[51]

38. However, some studies have set out the variation of what survivors say they want from accountability processes:[52] Victims of such crimes seek, among other things, full disclosure; face-to-face encounters with church authorities to hear them take responsibility for wrongdoing; offender remorse and accountability; offender appreciation of the impact of the abuse on their lives; victim empowerment and a role in the justice process; rebalancing of power; an independent investigation of the facts; validation of their suffering, and support by the State and the Church; and stopping the abuse by the individual and by the institution for current and future victims.[53]

39. McAlinden and Naylor note the deficiencies in the traditional model of public inquiry as virtually 'indistinguishable from the forensic tenor of court proceedings'.[54] They suggest that survivors often place a great deal of weight on the making of an apology by responsible actors, something that is also reflected in the survivors' reports from the Canadian Truth and Reconciliation Commission. While the sincerity of an apology may be open to doubt, they nonetheless suggest that apologies from State and Church actors can be a valuable aspect of the process.[55]

40. Another general conclusion that arises from a general review of such inquires is the need for clear communication and expectation management of survivors.[56]

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51 Patricia Lundy '"I Just Want Justice": The Impact of Historical Institutional Child-Abuse Inquiries from the Survivor's Perspective' 55 (1&2) *Eire-Ireland: An Interdisciplinary Journal of Irish Studies* 252, 259.

52 See, eg, Jennifer M Balboni and Donna M Bishop, 'Transformative Justice: Survivor Perspectives on Clergy Sexual Abuse Litigation' (2010) 13(2) *Contemporary Justice Review* 133.

53 McAlinden, A-M., & Naylor, B. 'Reframing Public Inquiries as 'Procedural Justice' for Victims of Institutional Child Abuse: Towards a Hybrid Model of Justice' (2016) 38(3) *Sydney Law Review* 277-308, 284.

54 ibid.

55 See Anne-Marie McAlinden, *Apologies and Institutional Child Abuse* (ESRI: Apologies, Abuse and Dealing with the Past Project, 2018) for discussion of the necessary elements of apologies in this context.

56 Daly, *Redressing Institutional Abuse of Children* (Routledge, 2014), p. 238.

41. It appears therefore that there are certain features which if incorporated into an inquiry can help mitigate the risk of retraumatisation of survivors. They are as follows:

(i) Acknowledgement and/or validation

42. The research in this field indicates that survivors of sexual abuse: '… want to have what happened to them recognised as wrong and so documented by the authorities'.[57] What precise form this acknowledgment or validation must take, however, is less certain. For one commentator it is as straightforward as: … an admission of the basic facts of the crime and acknowledgment of the harm'.[58] In Canada, the making of an official State apology was identified by survivors as having had 'a profound effect on the Survivors in terms of feeling believed and having their personal experiences validated'.[59]

43. Practical steps such as making interim findings at the end of each module in respect of individual institutions can provide a sense of acknowledgment and validation to those participating in what will inevitably be a lengthy process. This could be a source of encouragement to survivors waiting for their institution to be considered in circumstances where similar inquiries have taken some years to complete their work.

(ii) Giving survivors a voice

44. A number of academics have identified giving a 'voice' as a key justice need of survivors [60] and as an essential component of inquiries that can help to mitigate against retraumatisation concerns:[61]

> Affording a wider range of victims of institutional child abuse the opportunity to 'tell their story', has important cathartic benefits and is perhaps the single most important value of a victim-focused public inquiry process that aims to incorporate a restorative response to such offences.

57 Patricia Lundy '"I Just Want Justice": The Impact of Historical Institutional Child-Abuse Inquiries from the Survivor's Perspective' 55 (1&2) *Eire-Ireland: An Interdisciplinary Journal of Irish Studies* 252, 257.

58 Judith Lewis Herman, 'Justice from the Victim's Perspective' (2005) 11 *Violence Against Women* 571, 585.

59 National Centre for Truth and Reconciliation, *Lessons Learned: Survivor Perspectives* (2020), p. 16.

60 Patricia Lundy '"I Just Want Justice": The Impact of Historical Institutional Child-Abuse Inquiries from the Survivor's Perspective' 55 (1&2) *Eire-Ireland: An Interdisciplinary Journal of Irish Studies* 252, 266.

61 McAlinden, A-M., & Naylor, B. 'Reframing Public Inquiries as 'Procedural Justice' for Victims of Institutional Child Abuse: Towards a Hybrid Model of Justice' (2016) 38(3) *Sydney Law Review* 277-308, 298.

45. Associated with giving participants a 'voice' is the involvement of survivors in the inquiry process from an early stage. It has been suggested that this has been a common failing of previous inquiries in Ireland.[62]

(iii) Transparency

46. Conducting the inquiry in a transparent manner and giving participants sufficient information about what the inquiry is designed to do may also help to mitigate the risk of retraumatisation. As one commentator has highlighted, '[p]roviding adequate information and managing expectations are crucial to ensure that participants understand what the inquiry process involves and make informed choices about how they wish to deal with their needs for justice'.[63]

47. Regularly communicating ongoing work and interim findings in an accessible manner should be considered in this regard: The Scottish Child Abuse Inquiry has used a quarterly short newsletter to update survivors on progress made and what modules are being undertaken/will be considered next. They have also used short videos to communicate interim findings to survivors in a more easily accessible format.

(iv) Supports

48. A prominent feature of a number of inquiries in other jurisdictions has been the level of counselling and other supports available to survivors who engage with the public inquiry. For example, survivors in Canada reported that such supports were essential in order to counter-balance the risk of retraumatisation involved in participation.[64]

49. In terms of practical steps that could be taken, early counselling supports would be of benefit to survivors involved in an inquiry process. At key stages of the process, such as when survivors are preparing witness statements or giving evidence in person, survivors should have access to counsellors. This should include a follow up call from a counsellor to check how they are coping. This proactive approach to providing counselling services to persons participating in the inquiry process recognises that the process can be a source of trauma to survivors and seeks to intervene to support survivors as part of the inquiry process.

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62 Marie Keenan, Anne-Marie McAlinden, James Gallen, *Non-recent Institutional Abuses and Inquiries: Truth, Acknowledgement, Accountability and Procedural Justice* (Transforming Justice Project, June 2023), p. 10: 'On the island of Ireland, one overarching problem is that despite numerous separate inquiries/commissions of investigations into non-recent abuses and related issues, many inquiries do not adequately empower victims/survivors through processes that centre their voices and perspectives and promote meaningful participation.'

63 Patricia Lundy '"I Just Want Justice": The Impact of Historical Institutional Child-Abuse Inquiries from the Survivor's Perspective' 55 (1&2) *Eire-Ireland: An Interdisciplinary Journal of Irish Studies* 252, 266.

64 National Centre for Truth and Reconciliation, *Lessons Learned: Survivor Perspectives* (2020), p. 16.

E. Alternative Models of Inquiry: Confidential Committees

50. The Confidential Committee in CICA heard from survivors entirely in private, without lawyers in the room, and with very informal procedures.

51. It could not make any findings against an alleged perpetrator and was described as having an 'overwhelmingly therapeutic' purpose.[65] The 2000 Act was in fact amended to expressly state the requirement that, if the Commission was basing any finding on Confidential Committee evidence, it must have regard to the fact the evidence was untested and/or uncorroborated:[66]

> (4) In preparing its report, the Commission shall, in so far as any part of the report is based on evidence recorded by the Confidential Committee, have regard to the fact that that evidence received by that Committee could not be tested or challenged by any person and (if it be the case) was not corroborated.

52. One potential difficulty that arises where a Confidential Committee is run alongside a formal Investigative Committee is the need for clear communications with survivors on the limitations and consequences of a Confidential Committee process.

53. It is important to clearly set out the difference between an inquiry and a Confidential Committee process so that those who speak to a Confidential Committee, or its equivalent, are aware that they are choosing not to have their complaint investigated. They should clearly be informed that their testimony to the Confidential Committee will be anonymised so that they, the school that they attended and anyone they accuse of abuse or of mishandling allegations of abuse will not be identifiable in the report of the Confidential Committee. They should further be informed that the Inquiry will not be entitled to rely on their testimony to make findings concerning instances of abuse because their evidence was not tested.[67]

54. Survivors should be told that the procedures before an Investigative Committee, or the equivalent, will involve formal oral hearings at which evidence is given, and witnesses will be examined and cross-examined by lawyers.

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65 516 Dáil Debates Col 293.

66 Commission to Inquire into Child Abuse (Amendment) Act 2005, s 5(b).

67 Based on the CICA approach the Mother and Baby Home Commission adopted a two-track Investigative Committee and Confidential Committee. However, many survivors reported not being made aware of the possibility of giving evidence to the Investigative Committee. When the Commission's findings failed to reflect the evidence given by survivors to the Confidential Committee, survivors were highly critical of the Commission's approach. A Commission member, Mary Daly, later indicated that it did not feel that it could safely rely on the untested and unsworn evidence of survivors to the Confidential Committee as the basis for its findings: Mairead Enright, 'Flawed Mother and Baby report cannot be allowed to stand' *Irish Examiner* 4 June 2021 https://www.irishexaminer.com/opinion/commentanalysis/arid-40305245.html.

55. Where, as part of a sampling approach, formal evidence is not sought from certain survivors who go forward to have their complaints investigated, and they are instead directed towards a Confidential Committee to tell their stories, this must be explained to the survivors. They should be made aware of why their formal evidence is not being sought and given full information about the limitations of a Confidential Committee in terms of it not being permitted to make findings of abuse by in identifiable institutions so that they can decide whether they wish to go through that process.

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