

6

Investigating Historical-Structural Injustices

6.1 INTRODUCTION

The starting point for investigating historical abuses has tended to be denial from state and church authorities of wrongdoing or the need to investigate.¹ The cover-up of offences and high levels of trust in religious institutions and individuals also further delayed meaningful investigations.² As a result, inquiries into historical abuses have often only occurred several decades after the alleged harms took place.³ A range of inquiry mechanisms have been used in response to campaigns to examine historical abuses. Scott Prasser defines a public inquiry as ‘a non-permanent, discrete and independent organisational unit appointed by the executive government with clear publicly stated terms of reference’.⁴ Public inquiries have a long heritage, across a variety of all legal traditions.⁵ The British public inquiry practice remains particularly influential across common law legal systems,⁶ where a royal commission or tribunal of inquiry remains the most significant, as it possesses legal powers of investigation and compulsion of evidence and testimony but prohibits evidence to be

¹ Anne-Marie McAlinden, ‘An Inconvenient Truth: Barriers to Truth Recovery in the Aftermath of Institutional Child Abuse in Ireland’ (2013) 33 *Legal Studies* 189, 192.

² Commission of Investigation, *Report by Commission of Investigation into Catholic Archdiocese of Dublin* (Department of Justice, Equality and Law Reform 2009) para 1.24; ‘Report of the Grand Jury, In Re County Investigating Grand Jury, MISC. NO. 03-00-239, (C. P. Philadelphia, 2003)’ 2.

³ Kathleen Daly, *Redressing Institutional Abuse of Children* (Palgrave Macmillan UK 2014) 105–6.

⁴ Scott Prasser, *Royal Commissions and Public Inquiries in Australia* (LexisNexis Butterworths 2006) 22.

⁵ Jason Beer and others (eds), *Public Inquiries* (Oxford University Press 2011) 1–31.

⁶ Katie Wright, ‘Remaking Collective Knowledge: An Analysis of the Complex and Multiple Effects of Inquiries into Historical Institutional Child Abuse’ (2017) 74 *Child Abuse & Neglect* 10, 11–12.

used in subsequent legal proceedings.⁷ A tribunal of inquiry has been employed in the United Kingdom, a tribunal or commission of inquiry in the Republic of Ireland, and a royal commission in Australia and Canada. In the United States, grand jury investigations have functioned as inquiries regarding clerical sexual abuse in a number of US states.⁸ In contrast, non-statutory or informal mechanisms of inquiry, whether run by state or church entities, ‘depend on the cooperation of witnesses and the organisations under investigation’, rather than relying on coercive legislative powers.⁹ Beyond traditional public inquiry models, the Canadian Truth and Reconciliation Commission demonstrates the potential for a Truth and Reconciliation Commission (TRC) in the spectrum of potential inquiries for historical abuses. Regrettably, there remains no academic consensus on the definition of a truth (and reconciliation) commission.¹⁰ The United Nations defines truth commissions as ‘official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years’.¹¹ Kim Stanton suggests truth commissions are specialised public inquiries, with an emphasis on symbolic acknowledgement of wrongdoing and a function to educate the public about past injustices.¹² The terminology is not determinative. Ring and Gleeson describe the Irish Commission to Inquire into Child Abuse and the Australian Royal Commission into Institutional Responses to Child Abuse as truth commissions.¹³ Non-recent abuse has been addressed across at least ninety inquiries in the jurisdictions considered in this book, outlined in Appendix 1. A selection of these will inform this chapter’s analysis.

Inquiries can gather individual victim-survivor testimony, develop systematic and thematic data about the past, identify individuals and groups responsible,

⁷ Scott Prasser, ‘Royal Commissions in Australia: When Should Governments Appoint Them?’ (2006) 65 *Australian Journal of Public Administration* 28, 32.

⁸ Timothy D Lytton, *Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse* (Harvard University Press 2008) 130–1.

⁹ Shurlee Swain, Katie Wright and Johanna Sköld, ‘Conceptualising and Categorising Child Abuse Inquiries: From Damage Control to Foregrounding Survivor Testimony’ (2018) 31(3) *Journal of Historical Sociology* 282, 284.

¹⁰ Jeremy Sarkin, ‘Redesigning the Definition a Truth Commission, but Also Designing a Forward-Looking Non-Prescriptive Definition to Make Them Potentially More Successful’ (2018) 19 *Human Rights Review* 349, 351.

¹¹ United Nations Security Council. ‘Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (3 Aug 2004) *S/2004/616*, 4.

¹² Kim Stanton, ‘Intransigent Injustice: Truth, Reconciliation and the Missing Women Inquiry in Canada’ (2013) 1 *Transitional Justice Review* 59, 62.

¹³ 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* 109, 111.

and offer recommendations.¹⁴ This chapter argues that inquiries are best understood as raising expectations that the testimony of victim-survivors will be validated, acknowledged, and used to address historical abuses through other transitional justice mechanisms. If those expectations are not met, then inquiries represent a mere ritual contestation of power.¹⁵ Section 6.2 considers the potential impact of inquiries across the four dimensions of power. Sections 6.3–6.5 consider the application of these dimensions across the inputs, processes, and outputs of an inquiry, reflecting its cycle as a non-permanent and episodic mechanism. Section 6.6 concludes by considering the potential for inquiries to affect unjust power relationships and national and religious myths.

6.2 ASSESSING INQUIRIES

This chapter will assess public inquiries into historical abuses across the four dimensions of power and emotion established in Part I of the book. First, survivors could anticipate several episodic exercises of power as agency with inquiries, such as having their statement taken in confidential and/or public hearings, and engagement in the design and practice of the inquiry. The provision of individual testimony and engagement with inquiries may also perform a therapeutic function for survivors.¹⁶ However, existing studies of inquiries and truth commissions show survivor ambivalence about participation and the provision of testimony,¹⁷ with some instances of short-lived benefit,¹⁸ and others of harm to survivors from participation.¹⁹ Strong claims about an emotional or psychological benefit to testifying remain unsustainable.²⁰

¹⁴ 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff, A/HRC/24/42' para 51.

¹⁵ Georges Balandier, *Political Anthropology* (1st American ed, Pantheon Books 1970) 41.

¹⁶ Brandon Hamber, Dineo Nageng and Gabriel O'Malley, "'Telling It Like It Is . . .': Understanding the Truth and Reconciliation Commission from the Perspective of Survivors' (2000) 26 *Psychology in Society* (PINS) 18.

¹⁷ Merryl Lawry-White, 'The Reparative Effect of Truth Seeking in Transitional Justice' (2015) 64 *International and Comparative Law Quarterly* 141, 166; Brandon Hamber, *Transforming Societies after Political Violence: Truth, Reconciliation, and Mental Health* (Springer 2009); David Mendeloff, 'Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice' (2009) 31 *Human Rights Quarterly* 592.

¹⁸ Fiona C Ross, 'On Having Voice and Being Heard: Some After-Effects of Testifying Before the South African Truth and Reconciliation Commission' (2003) 3 *Anthropological Theory* 325.

¹⁹ Karen Brounéus, 'Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts' (2008) 39 *Security Dialogue* 55, 71.

²⁰ Susanne Karstedt, 'The Emotion Dynamics of Transitional Justice: An Emotion Sharing Perspective' (2016) 8 *Emotion Review* 50, 53.

Second, the structure of inquiries can impact on the empowerment and emotional experience of victim-survivors. Inquiries are often ‘characterised by formality, legality and a closed system of communication dominated by legal professionals’.²¹ 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. In addition, Greer and McLoughlin suggest that inquiries may represent an elaborate delaying tactic from governments, involving high costs and complex procedures and a timespan that may outlast the government that has established it, or give a sitting government several years to ‘mitigate its own responsibility and accountability’.²² Moreover, Swain, Wright, and Sköld note a common issue for public inquiries across these types is that they cannot implement their own proposals but instead merely make recommendations to government.²³ As a result, implementing inquiry recommendations is both a structural limitation on an inquiry’s power and another opportunity for episodic and interactive use of power between victim-survivors and government and officials responsible for implementation. Without effective implementation of recommendations, it may be that the ‘desire for truth is not matched by the willingness to live with its consequences in contemporary societies’.²⁴

Third, inquiries may also be sites of epistemic justice or injustice. Inquiries may recognise survivors as knowers and experts in their own experience and acknowledge the truth and validity of their claims.²⁵ In contrast, inquiries may function to silence and not learn from victim-survivors’ truth claims.²⁶ The power to classify individuals,²⁷ which was the basis of the othering inherent in historical abuses, remains present in inquiries, and may categorise some individuals as survivors, deny that status to others, or deem survivors and their testimony credible or choose not to believe it or disregard it. For Sonali

²¹ Anne-Marie McAlinden and Bronwyn Naylor, ‘Reframing Public Inquiries as “Procedural Justice” for Victims of Institutional Child Abuse: Towards a Hybrid Model of Justice’ (2016) 38 *Sydney Law Review* 277, 282.

²² Chris Greer and Eugene McLaughlin, ‘Theorizing Institutional Scandal and the Regulatory State’ (2017) 21 *Theoretical Criminology* 112, 126.

²³ Swain, Wright and Sköld (n 9) 286.

²⁴ Onur Bakiner, *Truth Commissions: Memory, Power, and Legitimacy* (University of Pennsylvania Press 2016) 224.

²⁵ Oz Frankel, ‘Vulnerable Populations, Social Investigations, and Epistemic Justice in Early Victorian Britain’ (2017) 7 *Oñati Socio-Legal Series* 261.

²⁶ Christine M Koggel, ‘Epistemic Injustice in a Settler Nation: Canada’s History of Erasing, Silencing, Marginalizing’ (2018) 14 *Journal of Global Ethics* 240.

²⁷ Stanley Cohen, *Visions of Social Control: Crime, Punishment, and Classification* (Polity Press/Blackwell 1985) 195.

Chakravarti, inquiries can potentially listen to and act on survivors' anger and demands for justice, but such anger may also remain ignored, unheard, or marginalised.²⁸ Michael Ure concurs that TRCs operate not only to legitimate emotions coming from injustice but also to enable the overcoming of these emotions, with the result that survivors may be encouraged or compelled to banish emotions that disrupt or resist this.²⁹

Fourth, inquiries may reach conclusions that shift a social ontology and challenge existing national and religious myths.³⁰ Onur Bakiner suggests that the historical context chapters in commissions' final reports can transform societal debate,³¹ particularly by giving voice to survivors and by reframing previously unacknowledged abuses as human rights violations.³² Others remain more sceptical. Adam Ashforth suggests that commissions of inquiry are 'theatre in which a central received "truth" of modern State power is ritually played out before a public audience'.³³ Balint et al suggest that while 'commissions of inquiry may indeed signify official acknowledgement of injustice . . . they also shut down the kind of conversations and fundamental reforms that would more adequately address the broader ideological, institutional, structural and governmental context in which they take place'.³⁴ Rolston and Scraton suggest that inquiries are intended 'to manage rather than resolve questions of governance'.³⁵ In doing so, inquiries may communicate the appropriate public emotion as a response to the inquiry findings, reflecting not only survivor emotional experiences but also the desired national, religious, or social emotional response.

Input, process, and output factors will be used to assess the extent to which historical abuse inquiries offered a meaningful and effective of investigation of

²⁸ Sonali Chakravarti, *Sing the Rage: Listening to Anger after Mass Violence* (The University of Chicago Press 2014) 19.

²⁹ Michael Ure, 'Post-Traumatic Societies: On Reconciliation, Justice and the Emotions' (2008) 11 *European Journal of Social Theory* 283, 285–7.

³⁰ Onur Bakiner, 'One Truth among Others? Truth Commissions' Struggle for Truth and Memory' (2015) 8 *Memory Studies* 345, 356.

³¹ Bakiner (n 30).

³² Onur Bakiner, *Truth Commissions: Memory, Power, and Legitimacy* (University of Pennsylvania Press 2016) 2.

³³ Adam Ashforth, 'Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms' (1990) 3 *Journal of Historical Sociology* 1, 9.

³⁴ Jennifer Balint, Julie Evans and Nesam McMillan, 'Justice Claims in Colonial Contexts: Commissions of Inquiry in Historical Perspective' (2016) 42 *Australian Feminist Law Journal* 75–77.

³⁵ Bill Rolston and Phil Scraton, 'In the Full Glare of English Politics' (2005) 45 *The British Journal of Criminology* 547, 553.

the past for victim-survivors and for society. These factors have been chosen to reflect the episodic journey of a non-permanent institution like a public inquiry. Each reflects sites of potential empowerment or limitation of power for victim-survivors, as well as sites of emotional lived experience. Finally, public inquiries in their public processes, final reports, and implementation of recommendations can affirm or significantly challenge national and religious myths.

6.3 INPUT MEASURES

6.3.1 *Voice and Advocacy*

In recent decades, investigations into historical abuse have been established after the efforts of individual victim-survivor narratives, grassroots movements, media investigations, the scrutiny of international human rights organisations, and the work of activists and academics.³⁶ In Ireland, the Magdalene Laundries inquiry was established only after successful submission from advocacy organisation Justice for Magdalenes to the UN Committee against Torture.³⁷ Public pressure has typically led to the establishment of inquiries only where governments conclude that the issue constitutes a crisis ‘too large, complex, or controversial to be handled through the usual political mechanisms’.³⁸ Nonetheless, state or church decisions to accede to such pressure can also be framed in their self-interest, with a desire to re-establish legitimacy.³⁹

Upon establishment, inquiries may engage with significant episodic interaction with survivors and advocacy groups. In Ireland, several inquiries reference consultation processes in their establishment and operation.⁴⁰ Advocacy organisation Justice for Magdalenes engaged in an extensive and sophisticated campaign throughout the Magdalene Laundries inquiry to shape its foundation, processes, and outcomes.⁴¹ Recently regarding the mother and baby

³⁶ Suellen Murray, *Supporting Adult Care-Leavers: International Good Practice* (Policy Press 2015) 195; Malin Arvidsson, ‘Contextualising Reparation Politics’ in Shurlee Swain and Johanna Sköld (eds), *Apologies and the Legacy of Abuse of Children in ‘Care’: International Perspectives* (Palgrave Macmillan 2015) 75; Brian Corby, Alan Doig and Vicky Roberts, ‘Inquiries into Child Abuse’ (1998) 20 *Journal of Social Welfare and Family Law* 377, 382.

³⁷ Claire McGettrick and others, *Ireland and the Magdalene Laundries: A Campaign for Justice* (I B Tauris & Company, Limited 2021) 72–5.

³⁸ Wright (n 6) 10.

³⁹ McAlinden (n 1) 213.

⁴⁰ ‘Report of the Ferns Inquiry’ (2005); ‘The Commission to Inquire into Child Abuse Report’ (Government Publications 2009).

⁴¹ McGettrick and others (n 37) 50–67.

home inquiry, the Clann project developed a shadow report and lobbied the inquiry extensively.⁴² In the United States, clerical abuse prosecutions and litigation, including grand jury investigations, resulted in the expansion of victim-survivor representative organisations such as Survivor Network of Those Abused by Priests (SNAP).⁴³ State and local level truth commissions sought to engage extensively with survivors.⁴⁴

In Canada, negotiators establishing the TRC on residential schools emphasised the need to focus on victims,⁴⁵ and the Commission was informed in its work by a formal survivors committee.⁴⁶ In establishing the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG inquiry), the government engaged in pre-inquiry consultation with thousands of stakeholders for a year, to define the inquiry terms of reference and engaged in an ongoing process with an Elders and Grandmothers Circle.⁴⁷ As a result, there was increased emphasis on the root causes of violence against women and girls and cultural violence in the final terms of reference.⁴⁸ In Australia, both the Bringing Them Home inquiry and the Royal Commission into Institutional Responses to Child Sexual Abuse were mandated to consult widely.

In the UK, the Independent Inquiry into Child Sexual Abuse (IICSA) established both a Victim-Survivors Consultative Panel and Victim and Survivors' Forum, with the former intended to guide the inquiry conduct and the latter as a site for survivors to be consulted and updated regularly on inquiry processes. In the Hart inquiry in Northern Ireland, victims achieved an extension to the Historical Institutional Abuse Inquiry (HIAI) timeframe

⁴² 'Clann Report: Principal Submissions to the Commission of Investigation into Mother and Baby Homes' (2018) <http://clannproject.org/wp-content/uploads/Clann-Submissions_Redacted-Public-Version-October-2018.pdf>.

⁴³ Lytton (n 8) 124.

⁴⁴ 'Beyond the Mandate: Continuing the Conversation Report of the Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission' (Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission 2015) 13.

⁴⁵ Kim Stanton, 'Canada's Truth and Reconciliation Commission: Settling the Past?' (2011) 2 *International Indigenous Policy Journal* 1, 5.

⁴⁶ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) 399.

⁴⁷ National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada), *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (Executive Summary)* (National Inquiry into Missing and Murdered Indigenous Women and Girls, 2019) 34–5.

⁴⁸ Colin Luoma, 'Closing the Cultural Rights Gap in Transitional Justice: Developments from Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls' (2021) 39 *Netherlands Quarterly of Human Rights* 30, 34.

from 1945 to 1922.⁴⁹ Lundy and Hamber suggest such consultation served to legitimate the inquiry ‘rather than fully address victim needs or shape the Inquiry in the way they wanted’.⁵⁰ Extensive victim-survivor consultation guided the subsequent Truth Recovery Panel process to inform the design of any inquiry into Magdalene Laundries and mother and baby homes in Northern Ireland.⁵¹ Consultation with survivors is likely to reflect the first dimension of power, as an interactive exercise of agency between state officials and survivors and advocates. A failure to consult survivor voices throughout an inquiry design, process, and outcomes is likely to serve as a site of epistemic injustice as survivors may feel unheard. However, even if repeated over time, without more profound changes it is unlikely to change the structure of state–survivor relationships.

6.3.2 Commissioners

Inquiries derive their legitimacy in part from their leaders’ moral authority and competence.⁵² The majority of historical abuse inquiries appointed experts, usually legal commissioners, and usually solely by executive government decision. This can have the effect of re-enforcing an inquiry as a site of perceived authority.⁵³ In Ireland, inquiry chairs and members have largely been judges, with no meaningful effort to include victim-survivor representatives or involve survivors in the selection of commissioners. The original Chair of the Commission to Inquire into Child Abuse (CICA), Justice Mary Laffoy, resigned in 2003, because of an alleged lack of government cooperation.⁵⁴

In Australia, the Royal Commission retained its six commissioners and its lead counsel, including a former child migrant and an Aboriginal child psychiatrist, reflecting significant stability and continuity over its operations.⁵⁵

⁴⁹ AR Hart and others, *Report of the Historical Institutional Abuse Inquiry* (2017) 4.

⁵⁰ Brandon Hamber and Patricia Lundy, ‘Lessons from Transitional Justice? Toward a New Framing of a Victim-Centered Approach in the Case of Historical Institutional Abuse’ (2020) 15 *Victims & Offenders* 744, 755.

⁵¹ Maeve O’Rourke, Philip Scraton and Deirdre Mahon, ‘Mother and Baby Institutions, Magdalene Laundries and Workhouses in Northern Ireland: Truth, Acknowledgement and Accountability’ (Truth Recovery Design Panel 2021).

⁵² Sarkin (n 10) 359.

⁵³ George Gilligan, ‘Official Inquiry, Truth and Criminal Justice’ in George Gilligan and John Pratt (eds), *Crime, Truth and Justice: Official Inquiry, Discourse, Knowledge* (Willan Publishing 2004) 18–19.

⁵⁴ Bruce Arnold, *The Irish Gulag: How the State Betrayed Its Innocent Children* (Gill & Macmillan 2009) 98–109; Gleeson and Ring (n 13) 117.

⁵⁵ Gleeson and Ring (n 13) 123.

The *Bringing Them Home* inquiry was led by human rights experts, with several Indigenous women appointed as co-commissioners and appointed an Indigenous Advisory Council with nationwide representation.⁵⁶ In the UK, IICSA saw three chairs and its lead counsel all resign by the end of 2016 amid much public criticism.⁵⁷ The Scottish Child Abuse inquiry faced similar challenges, including the resignation of its chair and inquiry panel.⁵⁸

The Canadian TRC appointed its three commissioners after a process of nomination from government, victim-survivor representative organisations, churches and Aboriginal organisations, and in consultation with the Assembly of First Nations but had two resignations within its first year.⁵⁹ The MMIWG inquiry appointed five commissioners after a pre-inquiry consultation identified the need for a majority of Indigenous women commissioners, expert in law and research.⁶⁰ Zvobgo and Posthumus note that US truth commissions have largely struggled to recruit members from diverse backgrounds, despite examining racial violence and injustice. Commissions in Maine and California are exceptional, with open application processes for the role of commissioners.⁶¹ The dominance of expert commissioners does not impugn the good faith of commissioners but rather reflects an unwillingness to cede power or authority from central state and expert structures to those historically marginalised. Efforts to involve victim-survivors in appointment processes could challenge existing power structures and pursue an emphasis on survivors' lived experience as a form of epistemic and ontological justice.

6.3.3 *Mandate*

Mandates can be assessed along a number of axes: temporal, geographical, and subject matter involved. Each axis can divide an inquiry from broader continuities of historical-structural injustices, but this is necessary to enable a feasible inquiry, especially if attempting a forensic style analysis. First, among

⁵⁶ Meredith Wilkie (ed), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission 1997) 16–17.

⁵⁷ 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, 224.

⁵⁸ Wright (n 6) 17.

⁵⁹ Truth and Reconciliation Commission of Canada (n 46) 399.

⁶⁰ Luoma (n 48) 35.

⁶¹ Daniel Posthumus and Kelebogile Zvobgo, 'Democratizing Truth: An Analysis of Truth Commissions in the United States' (2021) 15(3) *International Journal of Transitional Justice* 510, 528.

the longest temporal scopes are the Canadian TRC (1883–1996) and the ongoing Scottish Child Abuse inquiry (from within living memory until 2015).

Other inquiries have incorporated assessment of both non-recent and contemporary forms of harm. This is especially valuable as it can demonstrate the continuities and reproductions of historical-structural injustices. The UK IICSA inquiry and Canadian MMIWG inquiry could examine both non-recent and contemporary abuse. In Australia, the Victoria Child Abuse inquiry, Bringing Them Home report, and the Royal Commission into Institutional Responses to Child Abuse examined both historical and contemporary abuse.⁶² Gleeson and Ring suggest as the Royal Commission investigations were not constrained to the past, the process demonstrated ‘institutional child sexual abuse is not a historical relic, thereby complicating the idea of transitioning from the past that “truth commissions” tend to uphold’.⁶³ Nonetheless, the focus of the Commission on sexual abuse was criticised for its exclusion of considering physical or emotional abuse in ‘care’ settings.⁶⁴

Second, several inquiries were geographically limited at sub-national levels, with regional inquiries in Australia, Canada, and the United States. The significant partisan political division in the US Congress and Senate informs the lack of national-level inquiries in recent years.⁶⁵ Sherrilyn Ifill notes sub-national commissions could be valuable in interrogating local and community level responsibility for lynching as a collective offence.⁶⁶ In Ireland, inquiries into diocesan child sexual abuse did not have a national mandate. The Holy See has not engaged in any public inquiry process regarding the global phenomenon of clerical sexual abuse, but instead national- and state-run inquiries pre-dominate the assessment of church child sex abuse. Only investigations into child migration have considered transnational dimensions of historical abuse in both Australia and Northern Irish inquiries.

Third, the subject mandates tend to be limited to specific forms of abuse, such as child sexual abuse or by institution involved. Some inquiries have limited their investigations to a sample of potentially widespread or systemic harms over several decades. In Ireland, sampling of allegations by CICA was heavily criticised by survivor groups as providing only a partial picture

⁶² Wilkie (n 56), Part 6 Contemporary Separations.

⁶³ Gleeson and Ring (n 13) 125.

⁶⁴ Frank Golding, ‘Sexual Abuse as the Core Transgression of Childhood Innocence: Unintended Consequences for Care Leavers’ (2018) 42 *Journal of Australian Studies* 191.

⁶⁵ Posthumus and Zvobgo (n 61) 528.

⁶⁶ Sherrilyn A Ifill, ‘Creating a Truth and Reconciliation Commission for Lynching’ (2003) 21 *Law and Inequality* 263.

of abuse.⁶⁷ The mandate of the McAleese inquiry was limited to the examination of state involvement in the operation of the laundries, excluding an assessment of individual behaviour or allegations.⁶⁸ Corby et al note that the majority of the contemporaneous investigations of child abuse in the United Kingdom addressed the physical abuse of children only, with a shift in focus since the 1990s to also address sexual abuse.⁶⁹ The Scottish Child Abuse, the Northern Irish HIAI, and IICSA for England and Wales have addressed abuse in both secular and religious institutions.

The Canadian TRC examined physical sexual abuse and neglect in residential schools but did not have a mandate to address other and ongoing forms of harms to Indigenous peoples arising from settler colonialism. Luoma suggests this limitation enabled Canada to position wrongdoing against Indigenous peoples as a limited historical mistake.⁷⁰ In contrast, the mandate of the MMIWG inquiry extended to assessing the causes of all forms of violence against Indigenous women and girls in Canada, including its underlying social, economic, cultural, institutional, and historical causes.⁷¹ This enabled the inquiry to address ongoing, structural, and cultural harm in its settler colonial structure.⁷² Several abuses have not been officially investigated, such as slavery, Jim Crowera racially motivated violence in the United States, the legacy of the British Empire, a nationwide study of child sexual abuse in the United States, or the role of Magdalene Laundries in jurisdictions outside Ireland.

6.3.4 *Powers*

Historical abuse inquiries have typically had limited, if any, powers to compel evidence, witnesses, and testimony. The powers that are assigned to investigations may also inhibit or preclude the use of gathered evidence in criminal or civil cases, with use immunity present in the approach of several jurisdictions. Inquiries are often prohibited from naming any individual accused of abuse unless the identity ‘has already been established through legal proceedings, by admission or by public disclosure by that individual’.⁷³ In Ireland,

⁶⁷ Gleeson and Ring (n 13) 118.

⁶⁸ ‘Report of the Inter-Departmental Committee to Establish the Facts of State Involvement with the Magdalen Laundries’ (Department of Justice 2013) chapter 2, para 4–14.

⁶⁹ Corby, Doig and Roberts (n 36) 383.

⁷⁰ Luoma (n 48) 45.

⁷¹ *ibid* 44.

⁷² *ibid* 45.

⁷³ Matt James, ‘A Carnival of Truth? Knowledge, Ignorance and the Canadian Truth and Reconciliation Commission’ (2012) 6 *International Journal of Transitional Justice* 182, 190.

religious orders challenged the potential naming of offenders in CICA,⁷⁴ with the result that in its final report, even convicted abusers were given a pseudonym.⁷⁵ This outcome frustrated Irish victims, who viewed it as the continued protection of perpetrators.⁷⁶ The limitations on naming alleged perpetrators in truth commissions are usually in contexts where the threat of reversion to violence is plausible. Matt James notes that the Canadian context lacks any such comparable considerations that would make such a proscription justifiable.⁷⁷ In contrast, the Australian Royal Commission had a wide range of powers, including the power to compel the production of documents, and require witnesses to answer questions, even those that might incriminate them and to refer matters to the police and other authorities, even though its evidence is inadmissible in civil and criminal trials. Limited inquiry powers reflect their political nature, framed by law but limited by design in potential legal consequences.

6.4 PROCESSES

Most inquiries engage in independent research; in statement taking from victim-survivors and representatives of institutions, states, and churches; in public hearings to stimulate public debate and awareness of the topic of the inquiry; and in thematic analysis of cross-cutting and structural issues.

6.4.1 Statement Taking

Victim-survivor testimony is the defining feature of institutional abuse inquiries⁷⁸ and is a key opportunity for survivor agency in the inquiry. It is also a site where significant emotion may be experienced, with high risks of re-traumatisation.⁷⁹ Katie Wright has argued that the Bringing Them Home and Lost Innocents and Forgotten Australian inquiries treated survivor testimony and emotional experiences well, as survivors welcomed the opportunity to have

⁷⁴ *Michael Murray v Commission to Inquire into Child Abuse [2003] High Court of Ireland 2003 1998P (17 October 2003) (Abbott I)*.

⁷⁵ Gleeson and Ring (n 13) 118.

⁷⁶ Arnold (n 54) 296–312.

⁷⁷ James (n 73) 190.

⁷⁸ Wright (n 6) 16.

⁷⁹ Matthew Colton, 'Victimization, Care and Justice: Reflections on the Experiences of Victims/Survivors Involved in Large-Scale Historical Investigations of Child Sexual Abuse in Residential Institutions' (2002) 32 *British Journal of Social Work* 541.

their voices heard.⁸⁰ She notes: ‘A psychologically infused therapeutic ethos legitimised the experience of trauma and provided a framework and a language for understanding and explaining the ongoing and often intergenerational legacies of childhood abuse and neglect’.⁸¹ The Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA) approach to survivor testimony was informed by an ‘empathetic trauma-informed approach that drew on contemporary understandings of psychological injury’.⁸² In addition, its private hearings provided rich but confidential qualitative research from survivors enabling a more accurate account of abuse experienced by survivors and offering a basis for better future prevention.⁸³ This aligned with the stated wish of many survivors to tell the Commission about their ideas for policy and social change.⁸⁴ The RCIRCSA also curated a ‘Message to Australia’, asking survivors to describe what they wanted Australian society to know about their experience and the need for change. 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 re-traumatisation.⁸⁵

The Canadian TRC dedicated a volume of its report, *Survivors Speak*, to testimony of former residents, including experiences of abuse.⁸⁶ Koggel affirms the value and potential of the approach taken by the TRC and its report: ‘Sharing, remembering, and legitimizing Indigenous collective interpretative resources are steps in addressing ethical loneliness as moral and political abandonment. Another step is epistemological and political: understanding and addressing both testimonial and hermeneutical injustices that come from not being heard’.⁸⁷ In contrast, Ronald Niezen suggests that the TRC essentialised individual survivor experiences to create a master narrative that emphasised loss and suffering, but also a positive story of healing.⁸⁸

⁸⁰ Katie Wright, ‘Challenging Institutional Denial: Psychological Discourse, Therapeutic Culture and Public Inquiries’ (2018) 42 *Journal of Australian Studies* 177.

⁸¹ *ibid* 187.

⁸² *ibid* 188.

⁸³ Salter (n 57) 222.

⁸⁴ *ibid*.

⁸⁵ Gleeson and Ring (n 13) 127.

⁸⁶ Truth and Reconciliation Commission of Canada, *The Survivors Speak: A Report of the Truth and Reconciliation Commission of Canada* (2015) 153–64.

⁸⁷ Koggel (n 26) 250–1.

⁸⁸ Ronald Niezen, *Truth and Indignation: Canada’s Truth and Reconciliation Commission on Indian Residential Schools* (University of Toronto Press 2017) 68.

In terms of emotions, Anne-Marie Reynaud concurs that the TRC discouraged survivor anger and emphasised survivor health and healing.⁸⁹

In Ireland, Carol Brennan concludes that the Irish state harmed victim-survivors,⁹⁰ by disabling ownership of the process and compelling compliance with a purportedly therapeutic model.⁹¹ 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 institution’.⁹² Pembroke concludes that CICA should have integrated greater survivor participation into its investigations, especially recognising survivors’ stated desire for accountability and prosecutions of abusers.⁹³ 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.⁹⁴ 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’.⁹⁵

The recent Mother and Baby Homes Commission operated with an Investigative and Confidential Committee. The Confidential Committee report itself undermines the credibility of victim-survivor testimony, suggesting it was in part contaminated by media coverage and some witnesses were ‘clearly incorrect’.⁹⁶ A survivor who recorded their engagement with the Confidential Committee was able to evidence multiple instances where her statement had been inaccurately included in the report.⁹⁷ The Commission’s final report

⁸⁹ Anne-Marie Reynaud, *Emotions, Remembering and Feeling Better: Dealing with the Indian Residential Schools Settlement Agreement in Canada* (Verlag 2017) 245.

⁹⁰ 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) 56.

⁹¹ *ibid.* 64.

⁹² 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 *Contemporary Justice Review* 43, 51.

⁹³ *ibid.* 56–7.

⁹⁴ McGettrick and others (n 37) 87.

⁹⁵ Máiréad Enright and Sinéad Ring, ‘State Legal Responses to Historical Institutional Abuse: Shame, Sovereignty, and Epistemic Injustice’ (2020) 55 *Éire-Ireland* 68, 88.

⁹⁶ Commission of Investigation into Mother and Baby Homes, Final Report, Confidential Committee Report, (Official Publications 2021) 12.

⁹⁷ Catriona Crowe, ‘The Commission and the Survivors’ <<https://thedublinreview.com/article/the-commission-and-the-survivors/>>.

made several findings contrary to the stated lived experience of survivors. For instance, the Commission ‘found very little evidence that children were forcibly taken from their mothers; it accepts that the mothers did not have much choice but that is not the same as “forced” adoption’.⁹⁸ As a result, the report was rejected with significant criticism in the national media, and by advocacy organisations and victim-survivors.⁹⁹ The Commission contrasted strongly with the civil society Clann report, which provides a constitutional and human rights analysis of the abuses documented by survivors in their written statements,¹⁰⁰ such as gender and socio-economic discrimination, stigma, racism, forced adoption, illegal adoptions, arbitrary detention, forced labour, physical and psychological abuse, punishments, neglect, and the deaths of infants in mother and baby homes and related institutions.¹⁰¹

Similarly, in the UK, Colton et al’s survey of survivors who had given evidence before early inquiries found a high level of dissatisfaction, with participants perceiving the investigations as driven by ‘the requirements of the criminal justice system, with the needs of victims/survivors and their families accorded second priority’.¹⁰² Corby et al note the adversarial nature of traditional governmental inquiries as quasi-judicial in nature, with the cross-examination of witnesses despite their potential vulnerabilities or traumatisation.¹⁰³ Regarding the Hart inquiry, Patricia Lundy has noted the challenging and damaging experiences of survivors in giving testimony.¹⁰⁴ Hamber and Lundy note that more than half of the victims interviewed thought the private testimony given to that inquiry’s Acknowledgment Forum was a positive experience where they were believed and acknowledged, though a sizeable number felt exposed or vulnerable after attending the forum.¹⁰⁵ It remains to be seen whether the ongoing IICSA and Scottish Child Abuse inquiries will provide a better experience in the eyes of survivors. It is expected survivors will be heard from and listened to in a modern inquiry. However, in providing testimony, victim-survivors may legitimate an inquiry

⁹⁸ Commission of Investigation into Mother and Baby Homes, Final Report, Recommendations (Official Publications 2021) 9

⁹⁹ Elaine Loughlin, ‘Regina Doherty: “Cold” Mother and Baby Home Report Must Be Independently Reviewed’ *Irish Examiner* (Cork, 17 January 2021).

¹⁰⁰ ‘Clann Report: Principal Submissions to the Commission of Investigation into Mother and Baby Homes’ (n 42).

¹⁰¹ *ibid* 7–8; 108–17.

¹⁰² Colton (n 79) 545.

¹⁰³ Corby, Doig and Roberts (n 36) 386.

¹⁰⁴ Patricia Lundy, ‘“I Just Want Justice”: The Impact of Historical Institutional Child-Abuse Inquiries from the Survivor’s Perspective’ (2020) 55 *Éire-Ireland* 252.

¹⁰⁵ Hamber and Lundy (n 50) 753–4.

that nonetheless does not validate their testimony or provide any meaningful healing or therapeutic function for survivors. Although Australia and Canada demonstrate evidence of good practice, other jurisdictions reflect mixed or damaging results. Engagement with public inquiries thus presents a risky process for victim-survivors.

6.4.2 *Public Hearings*

Several inquiries hold public hearings as part of an investigative process. The Ryan Commission remains the only Irish inquiry to hold public hearings. In the United States, grand jury investigations have typically not provided for public hearings. The Australian Forde inquiry justified the exclusive use of private hearings due to the risk of prejudicing contemporary litigation and criminal proceedings.¹⁰⁶ The RCIRCSA held several public hearings, assessed on ‘whether or not the hearing would advance an understanding of systemic issues and provide an opportunity to learn from previous mistakes’.¹⁰⁷ Individuals who could be adversely affected by evidence were entitled to respond. The Canadian TRC, MMIWG inquiry, and UK IICSA inquiry have held extensive public hearings. The TRC engaged in 7 national events and held 238 days of local hearings in 72 communities across Canada.¹⁰⁸ At the MMIWG inquiry, 468 family members and survivors of violence shared their experiences and recommendations at 15 community hearings.¹⁰⁹ To date, IICSA has held 325 days of public hearings. The Hart inquiry’s public hearings were criticised by survivors as intimidating, victimising and creating the feeling they were on trial.¹¹⁰ Public hearings represented a site of epistemic injustice, with survivors unable to exercise control over procedures and believing that they ‘struggled to be heard’.¹¹¹ Public access to testimonies through these hearings was disempowering for the survivors involved.¹¹²

¹⁰⁶ Commission of Inquiry into Abuse of Children in Queensland Institutions, ‘Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions’ (Department of Families, Youth and Community Care, Brisbane 1999) iii.

¹⁰⁷ Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (Royal Commission into Institutional Responses to Child Sexual Abuse 2017) Vol. 16, 3.

¹⁰⁸ Truth and Reconciliation Commission of Canada (n 46) 25.

¹⁰⁹ National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) (n 47) 49.

¹¹⁰ Hamber and Lundy (n 50) 755.

¹¹¹ *ibid* 757.

¹¹² *ibid* 758.

6.4.3 *Role of Alleged Perpetrators*

Although victim-centred, inquiries may also offer a space to hear from alleged perpetrators and responsible institutions, though this has been limited in practice. Hamber and Lundy note that some survivors were concerned and intimidated by the presence of alleged perpetrators, members of institutions, and religious orders at the HIA inquiry in Northern Ireland.¹¹³ In the Greensboro Truth Commission in the United States, many felt that the failure of more perpetrators to participate or disclose details about law enforcement complicity in the attack hindered a broader reconciliation in the community.¹¹⁴ In Canada, TRC Commissioner Marie Wilson noted that the absence of those who represented the institutions responsible for the crimes in the activities of the Commission was a source of a sense of injustice and incompleteness for survivors.¹¹⁵ Ronald Niezen contends perpetrators are abstracted and reified in inquiries: ‘they are abstract (perceived as inhuman), represent the overall harm and, once labelled, are excluded from “truth telling” because their identification as perpetrators denies their legitimate speech’. In his view, this makes the origins of mass crimes more difficult to identify, excluding ‘the institutional and policy driven sources of that suffering and the people who acted on them, sometimes in the belief that they were doing good’.¹¹⁶

6.5 OUTCOMES

6.5.1 *Findings*

An inquiry’s final report will serve as its most enduring legacy. Sköld notes that despite diverse national contexts, informants have told similar stories regarding

¹¹³ *ibid* 755.

¹¹⁴ David Androff, ‘“To Not Hate”: Reconciliation among Victims of Violence and Participants of the Greensboro Truth and Reconciliation Commission’ (2010) 13 *Contemporary Justice Review* 269, 272.

¹¹⁵ Marie Wilson, ‘The Truth and Reconciliation Commission of Canada’ in Wilton Littlechild and Elsa Stamatopoulou (eds), *Indigenous Peoples’ Access to Justice, Including Truth and Reconciliation Processes* (Columbia University Press 2014) 135.

¹¹⁶ Ronald Niezen, ‘Human Rights As Therapy: The Healing Paradigms of Transitional Justice’ in Danielle Celestine and Alexandre Lefebvre (eds), *The Subject of Human Rights* (Stanford University Press 2020) 169–71.

physical violence, emotional violation, sexual abuse, exploitation, and neglect in the twentieth century.¹¹⁷ Wright concurs that ‘inquiry after inquiry has found that care did not meet either the legal or professional standards of the day, that physical and sexual abuse was common, and that neglect and psychological and emotional abuse were pervasive’.¹¹⁸ Several inquiries recognise a widespread scale of abuse, particularly child sex abuse, but were unable to offer a comprehensive quantum of its scale.¹¹⁹

Multiple inquiries affirmed that complaints of wrongdoing were often ignored, accusers condemned, and perpetrators protected or moved between institutions or churches.¹²⁰ Numerous inquiries demonstrate that state and church authorities often knew or should have known about abuses but failed to create or implement any meaningful oversight of staff or protection of detained women and children.¹²¹

In Ireland, CICA found that physical, sexual, and emotional abuse was endemic and pervasive in industrial and reformatory schools, and found poverty as a driver for children’s entry into the school system.¹²² It recognised the significant and ongoing impact of abuse and institutionalisation on the lives of survivors.¹²³ However, Gleeson and Ring note the report did not

¹¹⁷ Johanna Sköld, ‘Historical Abuse – A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Care Worldwide’ (2013) 14 *Journal of Scandinavian Studies in Criminology and Crime Prevention* 5, 7.

¹¹⁸ Wright (n 6) 16.

¹¹⁹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Preface and Executive Summary* (Royal Commission into Institutional Responses to Child Sexual Abuse 2017) 6; ‘The Commission to Inquire into Child Abuse Report’ (n 40), Executive Summary, 21; Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada Volume 1, Part 1* (2015) 570; National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) (n 47) 3.

¹²⁰ Royal Commission into Institutional Responses to Child Sexual Abuse (n 107) vol. 16, 26; Her Majesty’s Inspectorate of Constabulary, ‘“Mistakes Were Made” HMIC’s Review into Allegations and Intelligence Material Concerning Jimmy Savile between 1964 and 2012’ (HMIC 2013) 18.

¹²¹ Truth and Reconciliation Commission of Canada (n 46) 105–10; ‘The Commission to Inquire into Child Abuse Report’ (n 40), Executive Summary, 21; ‘Report of the Grand Jury (Pennsylvania)’ (Office of the Attorney General 2018) 1; John Jay College of Criminal Justice and Catholic Church (eds), *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States, 1950–2002: A Research Study Conducted by the John Jay College of Criminal Justice, the City University of New York: For the United States Conference of Catholic Bishops* (United States Conference of Catholic Bishops 2004) 2, 6.

¹²² ‘The Commission to Inquire into Child Abuse Report’ (n 40) vol. 2, 21; vol. 3, 107; Executive Summary, 21.

¹²³ *ibid* 5, chapter 3.

investigate the state's responsibility for its lack of effective regulation of industrial schools or its failure to protect children despite evidence of abuse.¹²⁴ Ring and Enright conclude: 'By subjecting victim-survivors to damaging processes, by substituting partial official histories for their testimony, and by censoring access to the archives of the bodies created to learn from the past, the state has co-opted victim-survivors' primary source of power: their unique knowledge of Ireland's recent history of institutional abuse of children and women'.¹²⁵ In Northern Ireland, the Hart inquiry found 'evidence of systemic failings' in homes and other residential institutions run by the state, local authorities, churches, and charities, with 'evidence of sexual, physical and emotional abuse, neglect and unacceptable practices'.¹²⁶ In general, victims welcomed the report and its findings.¹²⁷

In settler democracies, the finding of whether abuses against Indigenous peoples constituted genocide remains highly controversial. The Maine Wabanaki TRC report concluded that cultural genocide was ongoing due to the disproportionate and unequal treatment of Native children in the welfare system in Maine since the 1960s, in a context of institutional racism in state systems, historical trauma among Native peoples, and ongoing contestation over Native sovereignty and jurisdiction.¹²⁸

The Australian Bringing Them Home report concluded that '[t]he policy of forcible removal of children from Indigenous Australians to other groups for the purpose of raising them separately from and ignorant of their culture and people could properly be labelled "genocidal" in breach of binding international law'.¹²⁹ However, the report is criticised for not including a broader finding of genocide.¹³⁰ It considered violations of native title rights as collective or individual property rights, or the right to inhabit traditional lands.¹³¹ The Australian government criticised the validity and methodology of the report,

¹²⁴ Gleeson and Ring (n 13) 119.

¹²⁵ Enright and Ring (n 95) 87.

¹²⁶ Hart and others (n 49) 8–42.

¹²⁷ Hamber and Lundy (n 50) 752.

¹²⁸ 'Beyond the Mandate: Continuing the Conversation Report of the Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission' (n 44) 64.

¹²⁹ Wilkie (n 56) 239.

¹³⁰ Mark McMillan and Sophie Rigney, 'Race, Reconciliation, and Justice in Australia: From Denial to Acknowledgment' (2018) 41 *Ethnic and Racial Studies* 759, 767.

¹³¹ Wilkie (n 56) 178.

claiming that it overestimated the number of Aboriginal children removed from their homes.¹³² Conservative historians rejected its finding of genocide.¹³³

The Canadian TRC found that the establishment and operation of residential schools were a central element of a policy of assimilation of Aboriginal peoples and was best described as ‘cultural genocide’, meaning the destruction of those structures and practices that allow the group to continue as a group.¹³⁴ This approach may have been designed to avoid a legal debate about the application of the UN Convention on Genocide, distracting from an emphasis on survivor experience.¹³⁵ Although scholars had been drawing links between residential schools and the broader project of settler colonialism as a form of genocide before this finding,¹³⁶ Woolford and Benvenuto suggest that in prior scholarly or popular understandings, genocide may have been reduced to group destruction as a form of mass murder.¹³⁷ They express concern that examining genocide on pre-existing and national terms will lose much of the nuance in the different regional and international forms of harm.¹³⁸

In contrast, the MMIWG inquiry concluded that the systemic violence it documented amounts to an ongoing, race-based genocide against Indigenous peoples, especially against women, girls, and 2SLGBTQQIA individuals.¹³⁹ In addition, it documented a range of violations of Indigenous cultural rights, such as the seizure of traditional lands; expropriation of cultural property; forcible removal of Indigenous children from their families; and suppression of Indigenous histories, myths, and cultures.¹⁴⁰ Luoma values this approach rather than relegating cultural rights violations to an inquiry’s historical context alone.¹⁴¹ The supplemental legal report to the MMIWG

¹³² Michael Tager, ‘Apologies to Indigenous Peoples in Comparative Perspective’ (2014) 5 *International Indigenous Policy Journal* 1, 6–7.

¹³³ Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law and Indigenous People* (UNSW Press 2008) 118.

¹³⁴ Truth and Reconciliation Commission of Canada (n 46) 1.

¹³⁵ David B MacDonal, ‘Canada’s History Wars: Indigenous Genocide and Public Memory in the United States, Australia and Canada’ (2015) 17 *Journal of Genocide Research* 411.

¹³⁶ Andrew Woolford, ‘Ontological Destruction: Genocide and Canadian Aboriginal Peoples’ (2009) 4 *Genocide Studies and Prevention* 81; James W Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (2019).

¹³⁷ Andrew Woolford and Jeff Benvenuto, ‘Canada and Colonial Genocide’ (2015) 17 *Journal of Genocide Research* 373, 375.

¹³⁸ *ibid.*

¹³⁹ National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) (n 47) 50.

¹⁴⁰ *ibid.* 333.

¹⁴¹ Luoma (n 48) 47.

report understands genocide in Canada as both a direct act and a failure to prevent harms.¹⁴² Özsü notes that this approach extends beyond the Genocide Convention and enables a framing of genocide as spanning decades through processes of cultural and colonial destruction, rather than a paradigm of a brief intense period of mass murder alone.¹⁴³ Such an approach is more contentious than a conservative interpretation of genocide but is one that recognises the multiple forms of systematic violence in human history and present that have been designed to destroy peoples deemed ‘other’.

Several inquiries identify common causes of historical abuses. First, non-white races, Indigenous peoples, women, and children were deemed inferior and othered through discriminatory, racist, patriarchal attitudes.¹⁴⁴ The US Kerner Commission noted the trend in mid-twentieth-century United States towards reproducing white supremacy and structural inequality: ‘Our nation is moving toward two societies, one black, one white – separate and unequal’ and later ‘What white Americans have never fully understood – but what the Negro can never forget – is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.’¹⁴⁵ These were significant findings in 1968 from a mainstream and establishment inquiry.¹⁴⁶

Second, religious justifications amplified and framed historical abuses as salvation processes, for those deemed ‘other’.¹⁴⁷ Third, members of religious organisations enjoyed significant authority, trust, and respect during the period of historical abuse, leading to significant deference and limited

¹⁴² National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada), *A Legal Analysis of Genocide: Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (National Inquiry into Missing and Murdered Indigenous Women and Girls 2019).

¹⁴³ Umut Özsü, ‘Genocide as Fact and Form’ (2020) 22 *Journal of Genocide Research* 62, 67.

¹⁴⁴ Wilkie (n 56) 231–4; Australia and others, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (Commonwealth of Australia 2012) 24–8; The National Advisory Commission on Civil Disorders, *The Kerner Report* (2016 ed, Princeton University Press 2016) 112; Truth and Reconciliation Commission of Canada (n 46) 43–50; ‘Mother and Baby Homes Commission of Investigation Final Report’ (Government Publications 2021) Executive Summary, 1; Arnaud Winter, ‘The Report of the Archdiocesan Commission of Enquiry into Sexual Abuse of Children by Members of the Clergy’ (Archdiocese of St. John’s 1990) 93.

¹⁴⁵ The National Advisory Commission on Civil Disorders (n 144) 1.

¹⁴⁶ Steven M Gillon, *Separate and Unequal: The Kerner Commission and the Unraveling of American Liberalism* (1st ed, Basic Books 2018) 14.

¹⁴⁷ ‘Mother and Baby Homes Commission of Investigation Final Report’ (n 144) Executive Summary, 16; Wilkie (n 56) 23, 103; Truth and Reconciliation Commission of Canada (n 46) 43; Australia and others, *Lost Innocents: Righting the Record: Report on Child Migration* (Senate Community Affairs References Committee Secretariat 2001) 33–5.

oversight and inspections.¹⁴⁸ Fourth, several inquiries consider a significant cause of abuse to be a lack of effective governance and oversight to prevent abuse, in both secular and religious contexts.¹⁴⁹ Paul Michael Garrett notes that the implication of this finding may be that ‘problems could be rectified if a business model were adopted to promote better self-governance’.¹⁵⁰ Reoccurring findings that religious leadership relocated offenders and coerced victims into silence mean that it is impossible to maintain that abuse was exceptional but instead reflects the priority given to protecting the church’s reputation, above the best interests of the child.¹⁵¹ Several authors and inquiries suggest that these findings require interrogating the perception of clergy and religious as God’s representatives on earth,¹⁵² and the contribution of Christian theology to abuse,¹⁵³ particularly regarding sex, sexuality, and marriage.¹⁵⁴

In contrast, the US Causes and Context report noted that the increase in clerical abuse until the late 1970s and the sharp decline by 1985 could be attributed to ‘the rise in other types of “deviant” behavior, such as drug use and crime, as well as changes in social behavior, such as an increase in premarital sexual behavior and divorce’, and noted, remarkably, that, as features of religious life such as a male and celibate priesthood were constant during this period, they could not be causes of abuse.¹⁵⁵

¹⁴⁸ Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Law Commission of Canada 2000) 5; Commission of Inquiry into Abuse of Children in Queensland Institutions (n 106) 100.

¹⁴⁹ Royal Commission into Institutional Responses to Child Sexual Abuse (n 119) 13, 38, 41, 59; ‘Report by Commission of Investigation into the Handling by Church and State Authorities of Allegations and Suspicions of Child Abuse against Clerics of the Catholic Archdiocese of Dublin’ (n 2) 23; Truth and Reconciliation Commission of Canada (n 46) 4.

¹⁵⁰ Paul Michael Garrett, ‘A “Catastrophic, Inept, Self-Serving” Church? Re-Examining Three Reports on Child Abuse in the Republic of Ireland’ (2013) 24 *Journal of Progressive Human Services* 43, 46.

¹⁵¹ Daly (n 3) 54–5; ‘The Commission to Inquire into Child Abuse Report’ (n 40) 22 (Executive Summary); ‘Pennsylvania 40th Statewide Investigating Grand Jury, Final Report’ (2019) 3 <www.bishop-accountability.org/PA_40th_GJ/2019_12_16_Final_Redacted_PA_GJ_Report_and_Responses_008307.pdf>; Commission of Investigation (n 2) 16.

¹⁵² David Pilgrim, ‘Child Abuse in Irish Catholic Settings: A Non-Reductionist Account: Child Abuse in Irish Catholic Settings’ (2012) 21 *Child Abuse Review* 405, 408.

¹⁵³ Sheila Redmond, ‘Fear and Denial at the Crossroads? Where Is the History of the “Child Abuse Scandal” within the Roman Catholic Church?’ [2012] *Historical Papers: Canadian Society of Church History* 141, 146; ‘Report of the Ferns Inquiry’ (n 40) 36.

¹⁵⁴ Tracy J Trothen, *Shattering the Illusion: Child Sexual Abuse and Canadian Religious Institutions* (Wilfrid Laurier University Press 2012) 143.

¹⁵⁵ Karen J Terry, John Jay College of Criminal Justice and Catholic Church (eds), *The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950–2010: A Report Presented to the United States Conference of Catholic Bishops by the John Jay College Research Team* (USCCB Communications 2011) 3.

Finally, some inquiries directly address the impact of national myths as causes of historical-structural abuses. Despite its mandate on residential schools alone, the Canadian TRC expressly repudiates the myths of *terra nullius*, the Doctrine of Discovery, and civilising mission of imperial nations and Christian churches.¹⁵⁶ The Royal Commission on Aboriginal Peoples (RCAP) challenged the contradiction between benevolent Canadian peacemaker myths and the treatment of First Nations peoples: ‘while we assume the role of defender of human rights in the international community, we retain, in our conception of Canada’s origins and make-up, the remnants of colonial attitudes of cultural superiority that do violence to the Aboriginal peoples to whom they are directed’.¹⁵⁷

In Australia, the Royal Commission into Aboriginal Deaths in Custody noted historical mistreatment of Aboriginal people was predicated on a racist sense of white superiority,¹⁵⁸ while the Bringing Them Home report noted that Australia’s assimilation policies were based on the idea that there was nothing of value in Indigenous culture.¹⁵⁹ In the Lost Innocents reports on child migration, the desire to maintain links with Britain, to ensure a white Australia, and competition between Christian denominations to convert children inform the child migration and ‘rescue’ processes.¹⁶⁰ The Forced Adoption report notes the hostility of society to ‘individuals and families who did not fit the idealised family unit and the ‘right’ of all legitimate couples to have children’.¹⁶¹ The RCIRCSA noted the continuity and perennial nature of child sex abuse: ‘it is a mistake to assume that sexual abuse in institutions will not continue to occur in the future’.¹⁶²

In addressing these issues, an inquiry may hope to contribute to altering national identity and myths,¹⁶³ through changing public attitudes and aware-

¹⁵⁶ Truth and Reconciliation Commission of Canada (n 119) 24.

¹⁵⁷ ‘Report of the Royal Commission on Aboriginal Peoples’ (1996) 15.

¹⁵⁸ Elliott Johnston, ‘Royal Commission into Aboriginal Deaths in Custody’ (Commonwealth Government of Australia 1991) para 1.4.8-14, chapter 10 <www.austlii.edu.au/au/other/IndigLRes/rciadic/>.

¹⁵⁹ Wilkie (n 56) 27.

¹⁶⁰ Australia and others, *Lost Innocents* (n 147) paras 2.38; 2.50; 2.58; 2.117.

¹⁶¹ Australia and others, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (n 144) para 2.21.

¹⁶² Royal Commission into Institutional Responses to Child Sexual Abuse (n 119) 3.

¹⁶³ Sköld (n 117) 7.

ness.¹⁶⁴ However, Regan doubts the ability of a truth commission 'to act as a catalyst for social change and reconciliation' and may instead appropriate survivors' pain in voyeuristic and colonising ways.¹⁶⁵ Similarly, Chakravarti notes that although survivors may express intense emotions in engaging with inquiries, and may feel brief satisfaction when these emotions are validated, this remains 'a poor substitute for the change in material conditions necessary for justice'.¹⁶⁶ Instead the repudiation of ideas, no matter how damaging, is likely to need combining with material changes to the lives of victim-survivors and social structures to be an effective and legitimate form of social change.

6.5.2 Recommendations

If given a mandate to issue recommendations, inquiries have tended to recommend measures to address victim-survivor needs and to reform the relevant institutions or the state's regulation of an affected population. In Ireland, CICA issued ninety-nine recommendations, including a memorial for victim-survivors of residential school abuse¹⁶⁷ and the continuation of family tracing services for survivors of residential schools.¹⁶⁸ It recommended that religious orders consider how they debased their Christian ideals through tolerance of abuse and its cover-up.¹⁶⁹ Unique in Ireland in having explicit and independent recommendation, implementation, and monitoring powers, CICA confirmed in 2014 at its conclusion that ninety-four of ninety-nine recommendations had been implemented.¹⁷⁰ Other Irish inquiries into clerical sexual abuse (Ferns, Murphy, and Cloyne) did not issue recommendations due to mandate limitations. The McAleese inquiry into Magdalene Laundries led to a state apology and a redress scheme for victim-survivors, discussed in later chapters.

In England and Wales, both contemporary and historical abuse inquiries have made similar recommendations regarding safeguarding and pre-employment

¹⁶⁴ Wright (n 6) 19; Scott Prasser, 'Public Inquiries in Australia: An Overview' (1985) 44 *Australian Journal of Public Administration* 1, 7.

¹⁶⁵ Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (UBC Press 2010) 47.

¹⁶⁶ Chakravarti (n 28) 9.

¹⁶⁷ 'The Commission to Inquire into Child Abuse Report' (n 40) para 7.02.

¹⁶⁸ *ibid* 7.05.

¹⁶⁹ *ibid* 7.03.

¹⁷⁰ 'Ryan Report Implementation Plan: Fourth Progress Report' (Ryan Report Monitoring Group 2014).

vetting which have not always been implemented.¹⁷¹ Corby et al note that often the delay in issuing recommendations caused by a long inquiry process after the initial outbreak of a scandal can inhibit pressure for their implementation and reform.¹⁷² David Howe notes that public inquiries can often reflect a bureaucratic procedural response to a social crisis,¹⁷³ which can have a deadening effect on changing public attitudes and behaviour. In contrast, the Macpherson report examined the Metropolitan Police Service's (MPS) investigation of the 1993 racist murder of 18-year-old Stephen Lawrence by a group of five white men. The report concluded institutional racism was endemic in the MPS, and its seventy recommendations led to not only significant policy changes in British policing but also a major public debate about racism in Britain.¹⁷⁴ However, Lotem notes that the report confined its consideration of racism to the police, with the result that 'racism became a matter of communities and policing rather than historical continuities',¹⁷⁵ and missed the opportunity to frame these contemporary challenges as the reproduction of broader historical-structural issues. Given the single incident focus of the inquiry, this is perhaps not surprising.

In Australia, a review of the implementation of recommendations found that recommendations 'most likely to be implemented related to administrative systems, with those most likely to be fully or partially implemented pertaining to legislation'.¹⁷⁶ Four main factors emerged as barriers to implementation: 'practical constraints, organisational culture, structural constraints, and recommendations being too narrow or prescriptive'.¹⁷⁷ The recommendations of the Lost Innocents and Forgotten Australian reports were themselves subject to a separate report in 2009 assessing the progress of implementation,¹⁷⁸ noting at

¹⁷¹ Nigel Parton, 'From Maria Colwell to Victoria Climbié: Reflections on Public Inquiries into Child Abuse a Generation Apart' (2004) 13 *Child Abuse Review* 80.

¹⁷² Corby, Doig and Roberts (n 36) 387.

¹⁷³ David Howe, 'Child Abuse and the Bureaucratisation of Social Work' (1992) 40 *The Sociological Review* 491.

¹⁷⁴ Janet Foster, Tim Newburn and Anna Souhami, 'Assessing the Impact of the Stephen Lawrence Inquiry' (Home Office Research 2005) Home Office Research Study 294.

¹⁷⁵ Itay Lotem, *The Memory of Colonialism in Britain and France: The Sins of Silence* (Palgrave Macmillan 2021) 255.

¹⁷⁶ Parenting Research Centre and others, *Implementation of Recommendations Arising from Previous Inquiries of Relevance to the Royal Commission into Institutional Responses to Child Sexual Abuse* (Royal Commission into Institutional Responses to Child Sexual Abuse 2015) <www.childabuseroyalcommission.gov.au/policy-and-research/published-research/implementation-of-recommendations>

¹⁷⁷ *ibid.*

¹⁷⁸ Australia and others, *Lost Innocents and Forgotten Australians Revisited: Report on the Progress with the Implementation of the Recommendations of the Lost Innocents and Forgotten Australians Reports* (Commonwealth of Australia 2009).

best a limited and variable implementation across the Australian states and territories. The Royal Commission into Aboriginal Deaths in Custody made over 400 recommendations, implementation of which was monitored for five years, but despite this, Aboriginal deaths in custody have subsequently almost tripled in likelihood.¹⁷⁹ The RCIRCSA made 409 recommendations to government and institutions, regarding child protection, information sharing and record keeping, and support and therapeutic services for survivors, including eighty-four recommendations on redress. These recommendations led to the National Redress Scheme discussed in Chapter 8. The national government response accepts, or accepts in principle, 104 of these 122 recommendations with the remaining 18 recommendations listed as being ‘for further consideration’ or ‘noted’.¹⁸⁰

In Canada, the government tried to ignore the RCAP report and did not endorse any of its 440 recommendations on increased spending on housing, education, and training for First Nations peoples and enhanced sovereign status.¹⁸¹ The RCAP made several recommendations regarding investigation of treatment of Indigenous children in residential schools that have effectively if not directly been implemented through the Indian Residential Schools Settlement Agreement (IRSSA) and TRC processes. The TRC’s final report calls to action under two high-level headings: ‘legacy’ and ‘reconciliation’. Legacy addresses the consequences of colonialism, under the headings of child welfare, education, language and culture, health, and justice.¹⁸² ‘Reconciliation’, by contrast, includes fifty-two calls to action, ranging from the obligations arising under specific legal instruments to considering reconciliation as applied to museums, media, sport, and business, among others.¹⁸³ These are discussed further in Chapter 10. In Canada, Matt James suggests the TRC may have functioned to emphasise the personal benefit to survivors in participating, while minimising the potential for

¹⁷⁹ Inga Ting, ‘Policy Failure as Prisons Fill with Indigenous People’ *Sydney Morning Herald* (Sydney, 27 May 2013).

¹⁸⁰ ‘Australian Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse’ (Commonwealth Government of Australia 2018) v <www.childabuseroyalcommissionresponse.gov.au/sites/default/files/2019-05/Australian%20Government%20Response%20to%20the%20Royal%20Commission%20into%20Institutional%20Responses%20to%20Child%20Sexual%20Abuse%20-%20full%20version.PDF>.

¹⁸¹ Tager (n 132) 6–7.

¹⁸² Truth and Reconciliation Commission of Canada, *Canada’s Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 5* (McGill-Queen’s University Press 2015) 277–83.

¹⁸³ *ibid* 283–95.

the TRC to address ongoing systemic injustices affecting Indigenous peoples.¹⁸⁴ James asks whether a truth commission might amount to a ‘politics of distraction’, yet another exercise of ‘affirmative repair’ or ‘settler magic’ aimed at staving off demands for the restitution of stolen lands.¹⁸⁵ In contrast, Christine Koggel notes the potential of the Canadian TRC report to point beyond legal- and policy-specific recommendations: ‘What is significant about the TRC final report is that it reveals layers of relationships and the conditions for societal transformation that are missed when the account is presented from the perspective of the state and its laws and institutions’.¹⁸⁶

The MMIWG final report concludes with 231 ‘Calls for Justice’, human-rights-based recommendations to end and resolve the genocidal violence against Indigenous women, girls, and 2SLGBTQQIA individuals. However, to date, little progress has been made. The commissioners recently marked the one-year anniversary of the final report by decrying ‘deafening silence and unacceptable inaction from most governments’.¹⁸⁷

In the United States, the Kerner Commission issued recommendations which remain relevant for black Americans today: (1) an end to de facto segregation in housing, (2) affordable housing, (3) jobs creation, including in police departments, and (4) the expansion of social assistance programmes.¹⁸⁸ However, President Johnson ignored the Commission’s ambitious and costly recommendations,¹⁸⁹ in a context where he was seeking reelection and continuing to fight an expensive war in Vietnam.¹⁹⁰

6.6 CONCLUSION

Inquiries into historical abuse share a range of ambitious and challenging goals, ranging from the discovery of forensic individual accounts of truth, to the gathering of systematic data on abuse and its nature and patterns, to providing a therapeutic experience for victim-survivors, potentially challenging national and religious myths that justified abuses, and offering recommendations to

¹⁸⁴ Matt James, ‘A Carnival of Truth? Knowledge, Ignorance and the Canadian Truth and Reconciliation Commission’ (2012) 6 *International Journal of Transitional Justice* 182, 198.

¹⁸⁵ *ibid* 184.

¹⁸⁶ Koggel (n 26) 242.

¹⁸⁷ Ka’nehsí:io Deer, ‘1 Year Later, Little Progress on Quebec Response to MMIWG Report, Say Families and Advocates’ *Canadian Broadcasting Corporation* (Ottawa, 3 June 2020) <www.cbc.ca/news/indigenous/mmiwg-quebec-report-one-year-1.5595735>.

¹⁸⁸ The National Advisory Commission on Civil Disorders (n 144) 229–62.

¹⁸⁹ Posthumus and Zvobgo (n 61) 525.

¹⁹⁰ Gillon (n 146) 15.

materially change the lives of survivors and society. All of these goals are unevenly met in diverse national experiences, a product of not only the structure and implementation of their mandates but also the political will to pursue the fundamental changes recommended.

Most inquiries were capable of engaging with victim-survivors through testimony, consultation and through affirming and acknowledging, if only in part, survivor experiences of harm. However, the structure of inquiries limits their impacts in a number of respects. First, several inquiries have the effect of separating past harms from present forms of injustice affecting historically marginalised communities or descendants of victim-survivors. In contrast, the Australian Bringing Them Home and RCIRCSA inquiries, the Canadian TRC and MMIWG inquiries, and the UK IICSA inquiry all demonstrate the links between non-recent and contemporary harms. Second, most inquiries suffer from limited engagement from alleged perpetrators, both in person in the provision of testimony and in some instances through the refusal to cooperate in the provision of documentation. All inquiries are limited by design in being unable to implement their own recommendations. Ultimately the capacity for inquiries to impact public policy remains a question of political will and a key episodic contestation of power.

As sites for the construction of knowledge and potentially epistemic justice, some inquiries reflect the acknowledgement of survivors as experts in their own experiences and harm, most notably the Canadian TRC and MMIWG inquiries. In contrast, both the Magdalene Laundries and mother and baby home inquiries in Ireland challenge the veracity and weight to be given to survivor testimony and represent fresh epistemic injustices. Therapeutic claims remain unevenly tested empirically and are dependent on understanding the needs of victim-survivors across the range of mechanisms designed to address historical abuse.

Inquiries and their recommendations raise the expectations of victim-survivors for other elements of justice dealing with the past: including accountability, reparations, reform and apology, and acknowledgement. Any potential legitimisation of the state and church that authorises an inquiry may dissipate if its recommendations are not implemented and power is re-consolidated by existing actors and structures.

Finally, some inquiries in turn challenge existing national myths and forms of identity directly, especially the Canadian TRC and MMIWG inquiries. Others, such as the Irish CICA and US grand jury investigations into clerical abuse, have represented significant symbols of national challenge to prior denials of abuse. However, the Irish inquiries especially make any gains in national transition at the expense of harming and re-traumatising survivors.

Inquiries thus inevitably raise expectations across a range of dimensions of power and emotions and risk causing distress to survivors where those expectations are not met. In setting an agenda for addressing the past, inquiries remain a key but risky vehicle for bringing together survivor experience, documentation, and the potential for state acknowledgement and action to transform the meaning and contemporary consequences of historical-structural injustices.