Transitional Justice and Ireland's Legacy of Historical Abuse

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I. Transitional Justice and Consolidated Democracies

This article evaluates the application of transitional justice to the context of historical abuse in peaceful, consolidated democracies, such as Ireland.[1] Examining Ireland's efforts at repairing its past, from a transitional justice perspective, reveals an unwillingness by Church and State authorities to embrace the necessity of fundamental social, legal and political transformation, required when addressing widespread and systemic historical abuse. Instead, this article agrees with George Balandier that the supreme ruse of power is to allow itself to be contested ritually in order to consolidate itself more effectively.[2] This article argues that in Irish efforts to address historical abuse, across a range of contexts, power remains out of the hands of victim-survivors and those traditionally marginalized in Irish society, as the State designs mechanisms and engages in practices that marginalise victim-survivors and risk creating new forms of harm and distress.

Ireland is not unique in addressing its national legacy of past violence. Although Ireland has engaged in several mechanisms to address historical abuses since the early 2000s, it has typically not employed the language or framework of transitional justice. It was only in 2017 that the Irish Minister for Children and Youth Affairs, Katherine Zappone, announced that she would initiate a 'transitional justice' approach to meet the needs of survivors of

[1] A consolidated democracy can be defined as one where no significant political groups seriously attempt to overthrow the democratic regime or secede from the state. See Juan J. Linz and Alfred C. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore: Johns Hopkins University Press, 1996), 5.

[2] Georges Balandier, *Political Anthropology*, 1st American ed. (New York: Pantheon Books, 1970), 41.

Mother and Baby Homes.[3] As a result, transitional justice forms only a small part of the explicit framework used by the Irish State to address its past. As a body of scholarship and comparative international best practice, however, transitional justice can be employed as a conceptual and legal tool to evaluate the entirety of how countries, such as Ireland, have addressed their legacy of past violence.

Transitional justice typically addresses how societies reckon with a legacy of gross violations of human rights, in the specific contexts of a transition from armed conflict or authoritarian rule to stable, peaceful liberal democracy.[4] It includes several discrete but interconnected "pillars": truth seeking (typically through truth and reconciliation commissions), accountability, reparation, reform and reconciliation.[5] Though a field of scholarship and practice dominated by law and lawyers, transitional justice discourse claims to institute an inter-disciplinary practice, with several ethical commitments to the manner in which justice is to be achieved: the process matters as much as the outcome.[6] To this end, a number of key ethical commitments have informed scholarship and practice in this area, that can be used to consider the application of transitional justice to Ireland. First a victim-survivor centred approach, recognising victim-survivors as legal and human rights-bearers and key participants in any decision affecting transitional justice, is central to international transitional justice policy for addressing widespread or systemic human rights abuses.[7] Second, each transitional justice mechanism is designed to complement

[3] Loughlin, ' Katherine Zappone: " We Will Find the Truth and Achieve Reconciliation " *Irish Examiner* 10 March 2017.
[4] Paige Arthur, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31, no. 2 (2009): 321–67, https://doi.org/10.1353/hrq.0.0069; Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), 215; Ruti G. Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16, no. 1 (2003): 69–94, https://doi.org/10.1093/acprof:oso/9780195394948.003.0004.
[5] "United Nations Security Council. Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2004/616). August, 3 2004.," n.d.
[6] Paul Gready and Simon Robins, "From Transitional to Transformative Justice: A New Agenda for Practice," *International Journal of Transitional Justice* 8, no. 3 (2014): 355–61, https://doi.org/10.1093/ijtj/iju013.
[7] Kieran McEvoy, "Beyond Legalism: Towards a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 34, no. 4 (2007): 411–40, https://doi.org/10.1111/j.1467-6478.2007.00399.x.

rather than compete with the others and is designed to form part of a single holistic process.[8] These elements of transitional justice should not be seen as an "either/or" but rather as a "both/and". Third, the process of transitional justice should not be seen as optional or discretionary, but rather as reflecting and embodying a State's legal commitments to its citizens in national and international human rights law.[9] This commitment to legal rights and obligations counteracts the risk that States frame addressing historical abuses as a matter merely of charity or political benevolence. However, a focus on law may also risk slipping into a legalistic and lawyer-led approach that provides only a perfunctory nod towards a victim-survivor led process. Instead, it remains essential to assess whether legal rights, materials and resources empower and support the interests and preferences of victim-survivors and advocates or are instead used as institutional means to silence and further marginalise.

Despite its rapid growth as a field, the effectiveness of transitional justice is often challenged, with suggestions that it remains "faith based rather than fact based",[10] as a result of limited empirical measurement of its success in achieving the stated goals of the field. [11] In addition, transitional justice remains subject to several justifiable critiques, such as mirroring the de-prioritisation of socio-economic rights in mainstream human rights discourse.[12] Other critiques suggest that transitional justice practice retains a significantly non-sensitive, gender-blind approach with a result that women are typically disadvantaged

[8] Alexander L. Boraine, "Transitional Justiec: A Holistic Interpretation," *Journal of International Affairs* 60, no. 1 (2006): 17–27; "Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff A/HRC/21/46," 2016, paras. 22–27.
[9] Kai Ambos, "The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC," in *Building a Future on Peace and Justice*, ed. Kai Ambos, Judith Large, and Marieke Wierda (Berlin, Heidelberg: Springer Berlin Heidelberg, 2009), 19–103.
[10] Thoms, Ron and Paris, 'State-Level Effects of Transitional Justice: What Do We Know?' (2010) 4 International Journal of Transitional Justice 329.
[11] Hugo Van der Merwe, Victoria Baxter, and Audrey Chapman, eds., *Assessing the Impact of Transitional Justice: Challenge for Empirical Research* (Washington, D.C: United States Institute of Peace, 2009).
[12] Gready and Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 International Journal of Transitional Justice 339.

and de-prioritised in the provision of testimony, accountability and prosecution strategies, and access to effective remedies and redress.[13] Nonetheless, transitional justice scholarship remains a highly self-reflective and self-critical area, in which subsequent approaches seek to re-imagine and re-invigorate the concept and practice.[14] Simon Robins and Paul Gready prefer the concept of *transformative justice* "defined as transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level."[15] Dáire McGill positions transformative justice "at the radical end of a transitional justice continuum" and concludes it has thus far worked to diagnose problems and remains in need of a constructive or practical dimension.[16] A transformative justice approach thus has the potential to strongly align with the principle expressed by many activists: "nothing about us without us", but perhaps remains in need for explicit alternative practices and examples.

In recent years, transitional justice scholarship and practice has extended beyond its paradigmatic context of post-conflict or post-authoritarian societies to consider other large scale or systematic human rights abuses in peaceful consolidated democracies, in contexts such as Canada and Australia.[17] This expansion demonstrates the shared logic of

[13] Campbell, 'The Gender of Transitional Justice: Law, Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia' (2007) 1 International Journal of Transitional Justice 411.
[14] Turner, *Violence, Law and the Impossibility of Transitional Justice* (1st ed, Routledge 2017).
[15] Gready and Robins, "From Transitional to Transformative Justice," 2014, 340.
[16] Dáire McGill, "'Post-Conflict' Reconstruction, the Crimes of the Powerful and Transitional Justice," *State Crime Journal* 6, no. 1 (2017): 80.
[17] Dustin N. Sharp, "Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition," *International Journal of Transitional Justice* 9, no. 1 (2015): 150–69, https://doi.org/10.1093/ijtj/iju021; R. L. Nagy, "The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission," *International Journal of Transitional Justice* 7, no. 1 (March 1, 2013): 52–73, https://doi.org/10.1093/ijtj/ijs034; Fionnuala Ni Aolain and Colm Campbell, "The Paradox of Transition in Conflicted Democracies," *Human Rights Quarterly* 27, no. 1 (2005): 172–213, https://doi.org/10.1353/hrq.2005.0001; Kim Stanton, "Canada's Truth and Reconciliation Commission: Settling the Past?," *International Indigenous Policy Journal* 2, no. 3 (August 2011): 1–18, https://doi.org/10.18584/iipj.2011.2.3.2.

requiring more than the ordinary criminal law to redress large scale human rights abuses regardless of context. Stephen Winter argues that redress activity undertaken in established democratic states can be seen as a form of transitional justice because public inquiries, State apologies and survivor compensation schemes aim to respond to the de-legitimation of the State as a result of past historical State violence.[18] Nicola Henry has argued that transitional justice may serve to provide a distinctive cohering or unifying function by bringing together discourses, academic disciplines and fields of practice, that seek to address large scale human rights abuse across different jurisdictions.[19] I have previously argued that transitional justice should operate as an evaluative and analytical framework for responding to a legacy of historical abuse across several peaceful consolidated democracies and in the context of historical abuses committed by institutional Christianity, especially the Roman Catholic Church.[20]

Transitional justice in Ireland has typically concerned addressing "the Troubles" on the island of Ireland.[21] It is a legitimate question to consider why transitional justice should extend in Ireland to the context of historical abuse by Church and State actors. As noted above, it is only in 2017 that Minister Zappone introduced the concept to Irish political discourse regarding Ireland's historical abuses in those contexts. Anne-Marie McAlinden suggests the 'regime change' that has been thrown up by Irish inquiries into institutional abuse of children is, a 'defining moment in Irish political and legal history' because it 'offers a unique opportunity to make a permanent break with the past' from an 'amorphous or

[18] S. Winter, "Towards a Unified Theory of Transitional Justice," *International Journal of Transitional Justice* 7, no. 2 (July 1, 2013): 224–44, https://doi.org/10.1093/ijtj/ijt004.
[19] N. Henry, "From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies," *International Journal of Transitional Justice* 9, no. 2 (July 1, 2015): 199–218, https://doi.org/10.1093/ijtj/ijv001.
[20] James Gallen, "Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice," *International Journal of Transitional Justice* 10, no. 2 (July 2016): 332–49, https://doi.org/10.1093/ijtj/ijw003.
[21] Catherine Turner, *Violence, Law and the Impossibility of Transitional Justice*, 1st ed (Abingdon, Oxon; New York, NY: Routledge, 2017).

undefined' relationship, to one of greater state control of church authority.[22] Balint, Evans and McMillan conceive transitional justice as a harm centric 'justice model',[23] which would contrast with a more traditional transitional justice model which would exclusively address post-armed conflict and post-authoritarian states. In particular, Balint et al's model contemplates the possibility of transitional justice responding to "structural harms", understood by Ratna Kapur as 'the institutional arrangements and structures [that] may be deeply implicated in the production of the violation or the harm in the first place'.[24] Such an approach could be extended to contexts such as Ireland, Canada or Australia, where significant structural violence also emerges outside of the context of armed conflict or authoritarian rule. Paul Gready suggests structural violence can be conceptually divided into three major pillars: social marginalization, political exclusion and economic exploitation.[25] The harms in the Irish context of historical abuses have been found to be widespread, endemic and profound and reflect each of the categories of structural violence indicated by Gready. Over 16,000 people received compensation from the Residential Institutions Redress Board scheme, which sought to compensate persons who, as children, were abused while resident in industrial schools, reformatories and other institutions subject to state regulation or inspection.[26] More than 1000 former pupils testifying with allegations of physical and sexual abuse to the Commission to Inquire into Child Abuse in residential schools. [27]

[22] Anne-Marie McAlinden, "An Inconvenient Truth: Barriers to Truth Recovery in the Aftermath of Institutional Child Abuse in Ireland," *Legal Studies* 33, no. 02 (June 2013): 189–214, https://doi.org/10.1111/j.1748-121X.2012.00243.x.
[23] J. Balint, J. Evans, and N. McMillan, "Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach," *International Journal of Transitional Justice* 8, no. 2 (July 1, 2014): 194–216, https://doi.org/10.1093/ijtj/iju004.
[24] Ratna Kapur, "Ratna Kapur, 'Normalizing Violence: Transitional Justice and the Gujarat Riots,' Columbia Journal of Gender and Law 15(3) (2006): 889.," *Columbia Journal of Gender and Law* 15, no. 3 (2006): 889.
[25] Paul Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond*, A GlassHouse Book (Abingdon: Routledge, 2011), 15.
[26] "Annual Report of The Residential Institutions Redress Board 2017," n.d.
[27] "The Commission to Inquire into Child Abuse Report" (Dublin: Government Publications, 2009).

Three state inquiries into allegations of child sexual abuse against priests in Irish dioceses - Ferns, Dublin and Cloyne - found significant numbers of allegations of child sexual abuse by priests in non-residential settings. [28] The full extent of clerical sexual abuse in Ireland likely remains unknown. The National Board for Safeguarding Children in the Catholic Church (NBSCC), established by the Catholic Church, has issued reports across all diocese and religious orders in Ireland. Between 1975 and 2014 there were 4406 allegations of child sexual abuse by priests reported to church authorities and Gardai (the Irish police force), according to NBSCC figures.[29] The overall figure of complaints is likely larger as not all complainants may have engaged with either the church authorities or the Gardai (police force).

Widespread systemic and profound historical abuses in Ireland have extended beyond child sexual abuse. At an absolute minimum, approximately 10,012 women are known to have been detained in a Magdalen Laundry from the foundation of the Irish State in 1922 until the closure of the last Laundry in 1996, though victim-survivor groups suggest these figures are underestimated.[30] Women detained in Magdalene Laundries were obliged to engage in forced labour. Unmarried mothers resident in maternity homes and county homes were also obliged to pay for the maintenance of their stay through unpaid manual labour.[31] According to currently available government statistics, at least 23,000 children were born into nine mother and baby homes between 1904 and 1996,[32] though the

[28] "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" (Dublin: Department of Justice, Equality and Law Reform, 2009); "Report of the Ferns Inquiry" (Dublin, Ireland, 2005); "Report into the Catholic Diocese of Cloyne" (Dublin: Department of Justice and Law Reform, 2011).
[29] Figures compiled annual reports from National Board for Safeguarding Children in the Catholic Church in Ireland, available at www.safeguarding.ie
[30] Maeve O'Rourke and James Smith, "Ireland's Magdalene Laundries: Confronting a History Not yet in the Past," in *A Century of Progress? Irish Women Reflect*, ed. Alan Hayes and Maire Meagher (Arlen House, 2016), 107–34.
[31] Lindsey Earner-Byrne, *Mother and Child: Maternity and Child Welfare in Dublin, 1922-60*, 2013, 189.
[32] Report of the Inter-Departmental Group on Mother and Baby Homes (2014), available at https://www.dcya.gov.ie/documents/publications/20140716InterdepartReportMothBabyHomes.pdf,14

ongoing Commission of Investigation into Mother and Baby Homes may reveal larger numbers. Similar institutions, county homes, operated until the 1960s and were funded and managed by the State, with some additional assistance from female religious congregations.[33] In 1966 there were 47 such homes.[34] There were around 300 private maternity homes in total registered under the 1934 Registration of Maternity Homes Act. The full extent of illegal adoption in Ireland remains unverified. To take an example of one element of adoption in Ireland, Mike Milotte presents data sourced from the Department of Foreign Affairs records from the late 1950s and identifies that 2100 children were sent for adoption to America between 1949 and 1973, in the absence of laws regulating adoption until 1952.[35] In addition, symphysiotomy is a surgical procedure designed to enlarge a woman's pelvis during childbirth by partially cutting the fibres which join the pubic bones at the front of the pelvis. It is estimated that 1,500 women were subjected to symphysiotomy during childbirth between 1944 and 1984, with significant numbers contesting that they were did not effectively consent or were aware at all of this procedure.[36]

It is in this context of significant numbers and forms of harms, that transitional justice concepts can operate as a useful tool to evaluate the existing Irish practice that addresses historical abuse. Ireland's record in addressing historical abuse has been criticised before several United Nations bodies as recently as March 2017. For, instance, the Committee on the Elimination of Discrimination against Women noted that despite an inter-departmental Committee to establish the facts of State involvement in Magdalene Laundries, Ireland had "failed to establish an independent, thorough and effective investigation, in line with international standards, into all allegations of abuse, ill-treatment or neglect of women and

[33] ibid
[34] Response to Parliamentary Question: Dáil Éireann - Volume 220 - 17 February, 1966
[35] Mike Milotte, *Banished Babies: The Secret History of Ireland's Baby Export Business*, Updated and expanded ed (Dublin: New Island Books, 2012).
[36] Marie O'Connor, *Bodily Harm: Symphysiotomy and Pubiotomy in Ireland, 1944-92* (Dublin, Ireland: Evertype, 2011).

children in the Magdalen Laundries in order to establish the role of the State and the church in the perpetration of the alleged violations".[37] It went on to note that no effort has been made to establish an independent investigation to identify, prosecute and punish the perpetrators who performed the medical procedure of symphysiotomy without the consent of women" and continued that "the scope of the terms of reference for the Commission of Investigation into Mother and Baby Homes and Certain Related Matters is narrow such that it does not cover all homes and analogous institutions, and therefore may not address the whole spectrum of abuses perpetrated against women and girls."

Ireland has thus engaged in considerable time energy and resources in addressing its legacy of historical abuses arising in State and church institutions and involving church representatives. In responding to these harms, a range of actors including national legislatures, criminal and civil justice systems, mental health and social welfare agencies and victim/survivor interest and advocacy groups have all been involved to date. However, no overarching framework has been employed to address the range of moral, legal, spiritual, policy and psychological issues relevant to historical abuse. [38] A transitional justice approach offers the means for an overarching, comprehensive and coherent evaluation of a victim-survivor centred approach to responding to legacies of historical abuse. In so doing, a transitional justice approach can draw not only on academic theory, international policy, but also the comparative practices of other jurisdictions addressing gross violations of human rights. A transitional justice approach also provides guidance towards legal and policy alternatives to the existing Irish practice across the areas of investigation through public inquiries, legal accountability, redress and compensation and State apologies. It is hoped by evaluating Ireland's approach through the lens of

[37] United Nations Committee for the Elimination of Discrimination against Women, Concluding Observations on the combined sixth and seventh periodic reports of Ireland CEDAW/C/IRL/CO/6-7
[38] Kathleen Daly, "Conceptualising Responses to Institutional Abuse of Children," *Current Issues in Criminal Justice* 26, no. 1 (2014): 18.

transitional justice, across the four "pillars" of transitional justice: investigation, accountability, reparations and reconciliation - lessons can be learned for present and future attempts to address the abusive elements of our past.

II. Investigation

To address a violent past meaningfully, to know what happened, who was responsible and what should be done, it is necessary to establish the truth about past wrongdoing. Several states including Ireland have chosen public inquiries as the mechanism to establish the truth regarding historical abuses.[39] McAlinden and Naylor note that public inquiries are typically chosen "to address a range of State — or State-supported — harms, chiefly because of their organisational and 'curative properties' as a form of scandal management."[40] Ireland's initial examination of its past focused on abuse in industrial and reformatory schools in the Commission to Investigate Child Abuse, which was established in 2000 and reported in 2009.[41] A series of investigations into child sexual abuse in non-residential clerical settings followed across the dioceses of Ferns, Dublin, and Cloyne, reporting in 2005, 2009, 2011 respectively. Ireland's inquiries have expanded to establish inquiries into non-sexual forms of historical abuse, particularly involving institutionalisation in Magdalene Laundries, which reported in 2013,[42] and in Mother and Baby Homes, due to report in 2020. Across these institutions a range of human rights abuses occurred and are alleged, including rape, sexual violence, physical violence, illegal adoptions, forced labour and arbitrary detention.

[39] Shurlee Swain, Katie Wright, and Johanna Sköld, "Conceptualising and Categorising Child Abuse Inquiries: From Damage Control to Foregrounding Survivor Testimony," *Journal of Historical Sociology*, October 18, 2017, https://doi.org/10.1111/johs.12176.
[40] Anne-Marie McAlinden and Bronwyn Naylor, "Reframing Public Inquiries as 'Procedural Justice' for Victims of Institutional Child Abuse: Towards a Hybrid Model of Justice," *Sydney Law Review* 38 (2016): 291.
[41] "The Commission to Inquire into Child Abuse Report" (Dublin: Government Publications, 2009).
[42] "Report of the Inter-Departmental Committee to Establish the Facts of State Involvement with the Magdalen Laundries," 2013.

Ireland has employed both a tribunal of inquiry style model (The Commission to Investigate Child Abuse), a related model of commission of inquiry with an alternative composition of powers (Murphy, Cloyne, Ferns, Mother and Baby Homes) and non-statutory inquiries established by both church and State (McAleese inquiry into Magdalene laundries, symphysiotomy inquires, and Catholic church child protection audits). No inquiry has examined the relationship between different forms of coercive institutional confinement (such as pathways between an industrial school, Magdalene laundry and mother and baby home) or has examined the shared social and structural conditions which gave rise to the extent of Irish historical abuses or the conditions where they were ignored and unaddressed politically and socially for decades. The most recent inquiries, for Magdalene laundries, Mother and Baby Homes and the surgical procedure symphysiotomy, all primarily affected women and girls, but failed to address the nature and persistence of patriarchal social norms that influenced the establishment and operation of these institutions and practices.

These inquiries contrast significantly with best practice of truth and reconciliation commissions as part of a broader programme of transitional justice. Truth and reconciliation commissions form a key part of transitional justice practice since the 1980s.[43] 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."[44] Despite truth commissions offering a more comprehensive model of investigation, both commissions of inquiry and truth commissions present risks to victim-survivors. Adam Ashforth suggests that commissions of inquiry are "theatre in which a central received 'truth' of modern State power is ritually played out

[43] Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed. (New York: Routledge, 2011).
[44] "United Nations Security Council. Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2004/616). August, 3 2004."

before a public audience."[45] I believe this ritual contestation of power is played out in Irish public inquiries into historical abuse. To illustrate this, I use examine the practices of Irish inquiries across several factors. I employ the input to commissions (victim-survivor consultation, mandate, commissioners, resources), the processes (statement taking and public hearings) and the outputs (reports and impact), to compare Irish inquiries to the practices of truth seeking and truth commissions in transitional justice. These factors reflect an increasing convergence of best practices and soft law norms regarding investigation into gross violations of human rights and can be applied to the Irish context in evaluating Irish practice through a transitional justice lens.

Inputs: Victim-Survivor Consultation: Best practice in transitional justice seeks to guarantee that the design, process and outcome of transitional justice mechanisms and processes involve consistent consultation and collaboration with victim-survivors and their families. As Simon Robins suggests "an awareness of the centrality of victims/survivors and their needs to the whole process drives it."[46] Victim-survivor engagement is seen as essential to the legitimacy and effectiveness of the enterprise.[47] The Irish experience of such engagement is limited and inconsistent at best. While emergent victim advocacy groups were involved in the establishment of the Commission to Inquire into Child Abuse and consulted throughout the Ferns Inquiry,[48] there was limited evidence of consultation in the reports of the Murphy, Cloyne and McAleese investigations. The Harding Clarke report into symphysiotomy was critical of "intense" publicity and activism leading to the

[45] Adam Ashforth, "Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms," *Journal of Historical Sociology* 3, no. 1 (March 1990): 9, https://doi.org/10.1111/j.1467-6443.1990.tb00143.x.
[46] Simon Robins, "Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal," *International Journal of Transitional Justice* 5, no. 1 (2011): 75–98, https://doi.org/10.1093/ijtj/ijq027.
[47] "United Nations Office of the High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States: National Consultations on Transitional Justice HR/PUB/09/2," n.d.
[48] "Report of the Ferns Inquiry," 3–5; "Ryan Report," vol. 1, para. 26.

establishment of the scheme.[49] The adoption by the Department of Children and Youth Affairs of an explicitly transitional justice approach to addressing the needs of Mother and Baby survivors prompted subsequent consultations and the establishment of a Collaborative Forum with victim-survivors,[50] but has not led to any public, substantive changes in the ongoing practices of the Commission of Investigation and was undermined by the Department's failure to publish the Collaborative Forum's first report.[51] Ireland's approach to victim-survivor engagement misses the opportunity to frame its response to historical abuses as a pivotal, whole of government, moment where the State treats re-imagines how it engages its citizens and demonstrates awareness that the purpose of seeking to address historical abuses includes the empowerment and recognition of the needs of victim-survivors.

Inputs: Commissioners: The commissioners of public inquiries serve as symbols and public faces of complex bureaucratic processes. In transitional justice practice, there has been an effort to include victim-survivors and representatives of civil society as commissioners, rather than purely expert, selection of the commissioners, who are tasked with leading the investigation process.[52] In contrast and while not impugning good character, the majority of appointments to historical abuse inquiries in Ireland involved expert, usually legal commissioners, to head the processes, and usually solely by executive government decision. This approach misses the opportunity to meaningfully collaborate with victim-survivor communities and civil society, to increase the perception of publicity, transparency and fairness involved in public inquiry investigations. In particular, victim-survivors were not consulted on the suitability of appointments, or on the potential to

[49] ibid, 97
[50] Mother and Baby Home Collaborative Forum https://www.dcya.gov.ie/docs/Mother-and-Baby-Home-Collaborative-Forum/4667.htm (last visited 17-09-19)
[51] Conall O'Fahartha, "Forum Members Dismayed by Refusal to Publish Mother and Baby Homes Report in Full," *Irish Examiner*, April 16, 2019.
[52] "United Nations Office of the High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States: Truth Commissions HR/PUB/06/1," n.d., 14.

include international expertise or victim-survivor representation.

Inputs: Mandate: Ireland's approach to commissions' mandates fails to attempt to capture the full range and depth of historical abuses, or their causes and contexts. Several commissions (Mother and Baby Homes, Murphy, Ferns and Cloyne) have adopted sampling of potential institutions or complaints rather than a comprehensive account and concerned themselves with the handling of allegations rather than evaluating the truth of those allegations.[53] The Ryan Commission has been criticised for its failure to emphasise the nature and extent of State involvement in abuse.[54] 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 allegations of abuse or legal responsibility of religious orders. Its terms of reference were never widely publicised. Though we await the final report, the Mother and Baby Home Commission of Investigation has been criticized by victim-survivor groups as excluding private maternity homes, illegal adoption and only a representative sample of county homes.[55]

In addition to these limitations to individual mandates, several issues relevant to historical abuse remain unexamined through official inquiry, most notably, Ireland's network of psychiatric hospitals and the entire system of Ireland's forced adoptions, outside of institutions such as Mother and Baby Homes, remain unaddressed. Mandate limitations are familiar in transitional justice but for reasons that do not apply to Ireland. Early truth and reconciliation commissions (TRCs) operated in the context of ongoing political repression and violence, rendering a public comprehensive commission unviable – these

[53] "Murphy Report," paras. 11.1-11.11.
[54] Bruce Arnold, *The Irish Gulag: How the State Betrayed Its Innocent Children* (Dublin: Gill & Macmillan, 2009), 249–56.
[55] Commission of Investigation (Mother and Baby Homes and Certain Related Matters) Order 2015 S.I. No. 57 of 2015

concerns are not present in Ireland, where the limitations of mandate can only be explained by a limited political will to examine the past, especially State responsibility, and associated financial cost.

Inputs: Resources: In Ireland, there has been an uneven expenditure and resourcing of public inquiries. The cost of the Ryan commission and concurrent tribunals of inquiry unrelated to historical abuse seems to have resulted in a desire among government officials for a more cost efficient approach, especially after the global financial crisis in 2008. For example, in 2011, the Public Accounts Committee reviewed the experience of Tribunals of Inquiry and endorsed the recommendation for the terms of reference of inquiries to be tightly drawn and that new lines of inquiry should be limited.[56] The administrative costs of operating public inquiries have typically shrunk over time, though the ongoing Mother and Baby Home investigations is likely to change this trend. The Commission of Investigation into Child Abuse cost approximately €86 million.[57] The Murphy inquiry estimated a cost of €3.6 million, with 1.9 million for Cloyne and 1.9 million for Ferns. The McAleese inquiry cost a mere €11,000.[58] The current Commission of Investigation into Mother and Baby Homes is estimated to cost at least €21.5m.[59] Cost minimisation features highly and explicitly as a motivating factor in government reports on inquiry design for both symphysiotomy and mother and baby homes.[60]

[56] Public Accounts Committee, *Third Interim Report on the Procurement of Legal Services by Public Bodies,* (Dublin: Dail Eireann, 2011) 25
[57] *Comptroller and Auditor General, Special Report 96 - Cost of Child Abuse Inquiry and Redress* (2017)
[58] Enda Kenny. leaders questions: Wednesday 6th Feb 2013
[59] http://www.mbhcoi.ie/MBH.nsf/page/Terms%20of%20Reference-en
[60] Yvonne Murphy, "Independent Review Of Issues Relating to Symphysiotomy" (Department of Health, 2014), 31; "Report of the Inter-Departmental Group on Mother and Baby Homes" (Department of Children and Youth Affairs, 2014), 28–31.

Processes: Statement Taking: The testimony of victim-survivors is the defining feature of institutional abuse inquiries in the current era.[61] However, while this process may be cathartic for some, for other victims-survivors it may be distressing or re-traumatising.[62] In the Ryan Commission, victims had to decide whether to approach either the Investigation Committee or the Confidential Committee.[63] The Investigation Committee had the task to "receive evidence under oath and to make findings of fact upon the civil burden of proof."[64] The Confidential Committee was intended to serve a private therapeutic function where victim-survivors were aided by witness support officers; whether this was therapeutic remains largely unassessed.[65] Carol Brennan concludes that the failures of the Irish state in its duty of care for children may have, unwittingly or carelessly, been replicated in its attempts to acknowledge and remedy the situation,[66] by disabling victim-survivor ownership of the process, which disavowed their needs for retribution, compelling them to comply with a purported therapeutic model.[67] It also remains unclear how the Murphy, Cloyne and Ferns commissions affected victim-survivors who provided testimony or otherwise engaged with their processes. The McAleese committee regarding the Magdalene Laundries exacerbated the discriminatory and gendered forms of harm experienced of victim-survivors of the Laundries, describing their testimony as "stories"

[61] Katie Wright, "Remaking Collective Knowledge: An Analysis of the Complex and Multiple Effects of Inquiries into Historical Institutional Child Abuse," *Child Abuse & Neglect* 74 (December 2017): 16, https://doi.org/10.1016/j.chiabu.2017.08.028.
[62] M. 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," *British Journal of Social Work* 32, no. 5 (August 1, 2002): 541–51, https://doi.org/10.1093/bjsw/32.5.541.
[63] Carol Brennan, "Trials and Contestations: Ireland's Ryan Commission," in *Apologies and the Legacy of Children in "Care@: International Perspectives*, ed. Shurlee Swain and Johanna Sköld (Palgrave Macmillan UK, 2015), 64.
[64] Carol Brennan, "Facing What Cannot Be Changed: The Irish Experience of Confronting Institutional Child Abuse," *Journal of Social Welfare and Family Law* 29, no. 3–4 (January 2008): 250, https://doi.org/10.1080/09649060701752265.
[65] But see 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," *Contemporary Justice Review* 22, no. 1 (January 2, 2019): 43–59, https://doi.org/10.1080/10282580.2019.1576130.
[66] Brennan, 56.
[67] Brennan, 64.

and that of religious orders as evidence.[68] Claire McGettrick of Justice for Magdalenes describes the manner in which the Committee interviewed survivors of the Laundries:

> "Initially, the committee didn't even want to speak to women in person, but we fought for that. The women gave their testimony verbally and then we were given very little notice of a second meeting where we were to look at the format of the initial testimony. Instead, the women were brought in one by one for a meeting with the commission where they asked repeated questions. Their overall impression was that they were being checked to ensure that their memories were correct. The women came out of those meetings very quiet and subdued. None of them, none of us, had been expecting for them to be questioned like that."[69]

The Mother and Baby Home Commission replicates the dual structure of the Ryan Commission and evidence to date suggests a lack of concern for victim-survivors. For instance, the ongoing Commission is refusing to give survivors or family members of the deceased any of the following: (1) the transcript of their own testimony to the Commission; (2) any personal records that the Commission holds relating to them or their family members even if deceased; (3) any access to the documents or other evidence that it is considering.[70] The statement taking process is a primary way in which victim-survivors experience the State's investigation. A lack of care as to how victim-survivors experience providing testimony risks the perception that statement taking is effectively to only legitimate the inquiry process, without empowering or promoting the voices of those who suffered historical abuses. This approach risks forming a new form of harm if reaching level of re-traumatisation.

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[68] "McAleese Report," vol. 19 Conditions, para. 7.
[69] Claire McGettrick, Interviews lacked transparency, available at http://clericalwhispers.blogspot.ie/2013/02/interviews-lacked-transparency-say.html last visited 10-01-2018
[70] Conall O'Fahartha, "Commission Says They Are Prohibited from Telling Surviving Family Members about Burial Locations," *Irish Examiner*, April 19, 2019.

Processes: Public Hearings: The Ryan Commission remains unique in the Irish context as being the only inquiry to hold public hearings. The Commission of Investigation Act 2004, which governs the Murphy, Cloyne inquires and the ongoing Mother and Baby Homes inquiry has the power to hold public hearings, but each of these commissions have declined to hold exercise this power. The failure to hold public inquiries is often framed in terms of confidentiality, concern for vulnerable persons, and the potential defamatory nature of allegations made against alleged perpetrators and institutions. None of these concerns are unique to historical abuse inquiries or to Ireland: Canada, Australia and the United Kingdom have all managed public hearings into historical abuse. This represents another missed opportunity for the public scrutiny of those responsible for abusive institutions and public affirmation and acknowledgment of the rights and suffering of victim-survivors.

Outputs: Report: In transitional justice, a truth commission's final report will serve as its most enduring legacy.[71] Though the Irish report have detailed significant amounts of harm in institutions and by church officials, the nature of drafting Irish reports has inhibited the potential impact of this legacy. Regarding the Ryan Report, Sköld notes the reports on each institution are structured around the alleged abuse and the alleged perpetrators, and are dealt with case by case in a more or less judicial manner,[72] though failed to name alleged perpetrators after a legal challenge by a religious order.[73] McAlinden and Naylor note that this approach was problematic: "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.

[71] "Office of the High Commissioner for Human Rights (OHCHR) E/CN.4/2006/91 on the Right to Truth," n.d.
[72] Johanna Sköld, "The Truth about Abuse? A Comparative Approach to Inquiry Narratives on Historical Institutional Child Abuse," *History of Education* 45, no. 4 (July 3, 2016): 501, https://doi.org/10.1080/0046760X.2016.1177607.
[73] Michael Murray v Commission to Inquire into Child Abuse [2003] High Court of Ireland 2003 1998P (17 October 2003) (Abbott J). (n.d.).

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."[74]

The Harding-Clarke report into symphysiotomy failed to document the testimony of women subjected to the procedure. The McAleese report, claiming limitations arising due to its mandate, did not issue recommendations regarding accountability, responsibility or criminality.[75] The report emphasised that harm experienced in the Laundries compared favourably to harm experienced in industrial schools and in diocesan settings.[76] Mairead Enright critiques the report's findings, suggesting it "consists of disjointed quotations from anonymised women, selected apparently at random. The women are allowed scant quotations in which to share their stories. This is in contrast to, for instance, the long passages of quotation from identified benign male authority figures later in the chapter".[77] The existence of two oral history projects counters the minimisation of harm and lived experience of survivors in the presentation of the McAleese report.[78]

In the context of these inquiries and their processes, there are significant gaps in the investigations into historical abuse in Ireland to date: a fully mandated inquiry into Magdalene laundries, illegal adoptions, psychiatric hospitals, to name some, remains outstanding. A more public process, that involves public hearings including thematic or cross-cutting areas, such as gender, class or race, would be a significant shift from the

[74] McAlinden and Naylor, "Reframing Public Inquiries as 'Procedural Justice' for Victims of Institutional Child Abuse: Towards a Hybrid Model of Justice," 287.
[75] "McAleese Report," vol. 2 Mandate, para. 27.
[76] Report of the Inter-Departmental Committee to establish the facts of State involvement with the Magdalen Laundries (Dublin: Department of Justice 2013), Introduction, 18
[77]Mairead Enright, Critiquing the McAleese report, http://humanrights.ie/economic-rights/critiquing-the-mcaleese-report/ last visited 10-01-18
[78] Katherine O'Donnell, Sinead Pembroke and Claire McGettrick. (2013) Magdalene Institutions: Recording an Oral and Archival History. Government of Ireland Collaborative Research Project, Irish Research Council; Waterford Memories, available at https://www.waterfordmemories.com/recordings

processes adopted under the Commission of Investigation Act or State-led internal processes. The facilitation of some restorative justice mechanism, with the ability of victim-survivors to meet State and religious representatives responsible for their alleged harm or institutionalisation would offer a significant change in practice that may better meet the needs of victim-survivors, based on comparative practices of truth and reconciliation commissions.[79] Any such mechanism should be driven by the preferences of victim-survivors and their representatives in any restorative justice process.

Critically, there is considerable data and information gathered by existing inquiries, but the archives of relevant religious orders, State archives and records, and the archives of existing inquiries that remain closed to victim-survivors, academics or the public. The State's attitude towards victim-survivors accessing information related to historical abuse inquiries affirms the nature of the inquiries as a ritual contestation of power, and not a meaningful empowerment or support to survivors. The Retention of Records Bill 2019 proposes to seal and withhold entirely from public inspection for no less than 75 years all records of the Commission to Inquire into Child Abuse, Residential Institutions Redress Board, and Residential Institutions Redress Review Committee. A majority of survivors surveyed have objected to this approach, "seen by some as a violation of their rights to their own stories, by others as excessive, while a smaller number who spoke about it expressed relief." [80] The Bill is also opposed by Catriona Crowe, former head of special projects at the National Archives of Ireland, who argues "There is no reasonable argument for setting them aside in the case of these particular records, which will be extraordinary

[79] Robert Nathaniel Kraft, *Violent Accounts: Understanding the Psychology of Perpetrators through South Africa's Truth and Reconciliation Commission*, Qualitative Studies in Psychology (New York ; London: New York University Press, 2014); For the potential of restorative justice to address sexual abuse in the Irish context see Marie Keenan, Dublin University College, and School of Applied Social Science, *Sexual Trauma and Abuse: Restorative and Transformative Possibilities?*, 2014.

[80] Barbara Walshe and Catherine O'Connell, "Consultations with Survivors of Institutional Abuse on Themes and Issues to Be Addressed by a Survivor Led Consultation Group," July 2019, 16, https://www.education.ie/en/Publications/Education-Reports/consultations-with-survivors-of-institutional-abuse-on-themes-and-issues-to-be-addressed-by-a-survivor-led-consultation-group.pdf.

sources for scholars in the years ahead. The department's action opens the gate for future restricted access to any records the State may not wish citizens to see." [81]

In addition, The Department of An Taoiseach insists that it is holding the archive of the McAleese report 'for safe keeping' and 'not for the purposes of the Freedom of Information Act'.[82] The State's strategy of constraining access to information related to potential historical abuses extends to its proposals regarding reform of access to adoption information. The Adoption (Information and Tracing) Bill 2016 proposes to seal all adoption and 'informal care arrangement' records and to provide individuals instead with statements written by TUSLA social workers summarising non-identifying information taken from their file. This has met with stiff resistance from adopted people and natural mothers. The report of the Collaborative Forum on Mother and Baby Homes, quoted in national media, argues: "The "unstated and hidden objective" of the Government's planned legislation to grant adopted people basic information and tracing rights is to "prevent access" to personal records."[83]

There is thus potential value which might be added if there was to be an Irish Truth and Reconciliation Commission that is designed in a manner to complement existing inquiries across institutional forms of abuse, clerical sexual abuse and illegal adoptions, in part through the centralization, digitisation and analysis of administrative and personal records. This would overcome the tendency towards a representative sample approach that we have seen in several commissions to date (Murphy, Cloyne and Mother and Baby Homes). However, State practices in addressing the past seem keen to manage scandal, reduce cost and avoid recognition of State liability where possible, especially through retaining

[81] Conall O'Fahartha, "Abuse Survivors Concern over Plan to Seal Records," *Irish Examiner*, August 16, 2019.
[82] Conall O'Fahartha, "'No Plans' to Open Committee Archive on Magdalene Laundries," *Irish Examiner*, September 8, 2018.
[83] Conall O'Fahartha, "Adoption Bill 'Aims to Prevent Access' to Files," *Irish Examiner*, June 15, 2019.

control of official narratives regarding historical abuses and control of access to personal information related to abusive contexts.

III. Accountability

Accountability is a central organising principle of international human rights law, international criminal law and transitional justice, principally understood to entail investigation, prosecution and conviction of perpetrators of gross violations of human rights, especially genocide, war crimes, and crimes against humanity.[84] Successfully prosecuting historical abuse offences, especially sexual offences, remains deeply challenging, despite a raft of legislative and procedural changes to rape laws and procedures across jurisdictions globally.[85] Some transitional justice scholars maintain that, due to the overwhelming scale and complexity of mass atrocity and number of potential defendants, the purpose of such prosecutions cannot support the traditional goals of criminal law associated with isolated cases of harm.[86] The vast majority of perpetrators of widespread or systemic crime typically remain without prosecution or conviction. [87] Instead accountability must privilege the symbolic and communicative power of holding perpetrators responsible, to frame moral wrongdoing as crimes, as legal harms and as violations of rights. Shuman and McCall Smith suggest that a failure to punish a historic crime sends a message that this wrong is one about which society is indifferent.[88] However, if the State only prosecutes selectively, it creates silence regarding

[84] Steven R. Ratner, Jason S. Abrams, and James L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 3rd ed (Oxford ; New York: Oxford University Press, 2009).
[85] Clare McGlynn and Vanessa Munro, *Rethinking Rape Law: International and Comparative Perspectives* (Abingdon: Routledge, 2011).
[86] Miriam J. Aukerman, "Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice," *Harvard Human Rights Journal* 15 (2002): 39–97.
[87] William Schabas, "The Rwanda Case: Sometimes It's Impossible," in *Post-Conflict Justice*, ed. M Cherif Bassiouni (Transnational Publishers, 2002), 499–522.
[88] Daniel W. Shuman and Alexander McCall Smith, *Justice and the Prosecution of Old Crimes: Balancing Legal, Psychological, and Moral Concerns*, 1st ed, The Law and Public Policy (Washington, DC: American Psychological Association, 2000), 27–28.

accountability for other historical wrongdoings, which can be distressful for victim-survivors and create the image for wider society that such offences are acceptable, or do not warrant prosecution because they occurred in the past. In recognition of the challenging nature of criminal justice, recent transitional justice practice and literature seeks to incorporate victim-survivor ownership and participation of accountability mechanisms.[89] However, the evidence in support of the therapeutic role played by the criminal prosecution and conviction for victim-survivors remains extremely limited and may be undermined by the additional trauma imposed on victims who testify as part of the prosecution.[90]

Ireland has offered limited criminal accountability for historical abuse, although the Murphy Report into clerical sexual abuse in the Dublin archdiocese considered that the police investigation was "an effective, co-ordinated and comprehensive inquiry."[91] Between 1975 and 2014 there were 4406 allegations of child sexual abuse by priests reported to church authorities and Gardai, the Irish police force, across Ireland. These allegations relate to abuse in non-residential settings, and were subject to State investigation in only a subset of dioceses nationally – Ferns, Cloyne and Dublin. It resulted in 95 criminal convictions, based on a compilation of figures from the church-run National Board for Safeguarding Children in the Catholic Church. [92] The overall and most recent figure of allegations and convictions is likely larger as not all complainants may engage the church authorities or the police. Only 11 criminal cases were forwarded to the Director of Public Prosecutions

[89] "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Adopted and Proclaimed by United Nations General Assembly Resolution 60/147 of 16 December 2005" (n.d.).
[90] Judith Lewis Herman, "The Mental Health of Crime Victims: Impact of Legal Intervention," *Journal of Traumatic Stress* 16, no. 2 (April 2003): 159–66, https://doi.org/10.1023/A:1022847223135.
[91] "Murphy Report," para. 5.43.
[92] Figures compiled annual reports from National Board for Safeguarding Children in the Catholic Church in Ireland, available at www.safeguarding.ie

based on the Ryan report regarding abuse in industrial and reformatory schools.[93] There have been no recent criminal prosecutions related to Magdalene laundries, Mother and Baby Homes, illegal adoptions, or symphysiotomy.[94] The Irish criminal law experience confirms the fragmentary and partial nature of the legal process at framing and conveying responsibility for historical abuse. The challenges in successfully prosecuting historical cases are considerable, yet other jurisdictions seem to have significantly greater success in pursuing accountability as a result of inquiries into historical abuse. The Australian Royal Commission into Institutional Responses to Child Sexual Abuse, for example, referred over 2000 matters to authorities including the police.[95]

In addition, there have been limited opportunities for civil litigation in Ireland. It was not until February 2017, in *Hickey v McGowan* that the Irish Supreme Court adopted position that enabled religious orders to be held vicariously liable for sexual abuse by one of their members. The Court held the Marist Order of Brothers, an unincorporated association, vicariously liable for the sexual abuse perpetrated by a member of the Order in the context of primary education.[96] Judge O'Donnell observed that "once it is accepted there can be vicarious liability of acts of abuse, a religious order (or its members) may be vicariously liable for acts of abuse which are sufficiently closely connected to the object and mission of the order."[97] In particular, he noted that liability without fault arose where a "defendant creates, or permits and often benefits from, a situation which carries with it the risk of injury or the wrongdoing by others." On this account, it is fair to impose liability on those who choose a general activity of value to them, which creates or exacerbates attendant risks.[98]

[93] "Committee against Torture, Concluding Observations on Ireland CAT/C/IRL/CO/1," n.d., para. 20.
[94] Mike Milotte, "Adoption Controversy: Only One Person Was Ever Charged over Bogus Birth Certificates," *The Irish Times*, June 1, 2018.
[95] https://www.childabuseroyalcommission.gov.au/
[96] Hickey v McGowan [2017] IESC 6; [2017] I.L.R.M. 293 (n.d.); _____, "Vicarious Liability and Historical Abuse: A Critical Analysis of Hickey v McGowan," *Irish Jurist* 58 (2017): 184–92.
[97] [2017] IESC 6 at para. 38.
[98] [2017] IESC 6 at para. 41.

The decision in *Hickey* may extend vicarious liability principally to unincorporated religious orders, whose degree of control and obedience is far more than what is required in an employment context, but may exclude other voluntary unincorporated associations. O'Donnell J. stressed "the mere fact of voluntary association may not create the type of intense relationship that justifies imposing vicarious liability in the case of a religious order".[99]

In other instances, the State has sought to limit the impact of accountability mechanisms. In *O'Keeffe v Ireland*, the European Court of Human Rights considered Ireland should have been aware of the risk of child sexual abuse in schools owned and managed by the Catholic Church and, given the State's limited role of financial support, there was ineffective legislative and policy protection for children against the risk of physical and sexual abuse.[100] Though Louise O'Keeffe successfully sued in Strasbourg, the State structured its response to the judgment to prevent other survivors from obtaining compensation. It established an ex-gratia compensation scheme, but applicants could only qualify for compensation if they could prove that their abuse occurred in the aftermath of a prior complaint made against their abuser. Conor O'Mahony notes: "This condition was effectively impossible to prove; and moreover, it was incompatible with the judgment in Ms O'Keeffe's case. Every single application to the scheme was rejected for failure to prove prior complaint."[101] An independent assessor appointed to review applications to the scheme, retired High Court judge Iarfhlaith O'Neill, ruled in June 2019 that the condition was "an inherent inversion of logic and a fundamental unfairness to applicants", and was "inconsistent with the core reasoning of the judgment of the ECtHR in the Louise O'Keeffe

[99] [2017] IESC 6 at para. 39.
[100] *O'Keeffe v Ireland 35810/09 Judgment 28 January 2014*
[101] Conor O'Mahony, "Stop Treating Abuse Victims with Contempt," *Irish Examiner*, July 10, 2019.

case".[102] Such an approach from the State reveals a fundamental unwillingness to cede to others, including the Strasbourg court, any say in how it addresses historical abuses.

In addition, historical cases are particularly affected by the limitation regime in civil litigation. The Irish limitation regime enables only a limited subset of victims and survivors of historical abuse to sue after three years from the cause of action. Litigants must show either there was unconscionable conduct on the part of the defendant under the Statute of Limitations Act 1957, or there was no reasonable prospect of discovering the injury arising from the historical abuse under the Statute of Limitations (Amendment) Act 1991. If the abuse concerned is sexual abuse, victims can overcome the limitation period where they can show they suffered a recognised psychiatric disability, which prevents them from initiating litigation, but not other forms of historical abuse, under the Statute of Limitations (Amendment) Act 2000. A key deficiency in the Irish regime is absence of a long stop provision akin to s33. of the English Limitation Act 1980, where courts have an equitable discretion to allow an action to proceed, having regard to the degree to which the limitation periods for personal injuries prejudice the plaintiff or defendant.[103] Ireland's legal system makes it exceptionally difficult, compared to other common law jurisdictions, to enable victim-survivors of historical abuse to pursue accountability. In addressing the challenges facing Australia's Stolen Generation[104], Pam O'Connor concludes "[l}tigation is a poor forum for judging the big picture of history.'[105] This insight appears equally true in the Irish context. Not only are there limited supports to the interests of victim-survivors in historical

[102] Iarfhlaith O'Neill, "Decision of the Independent Assessor Iarfhlaith O'Neill" (Dublin: Department of Education, June 2019), para. 46, https://www.education.ie/en/Learners/Information/Former-Residents-of-Industrial-Schools/ECHR-OKeeffe-v-Ireland/independent-assessment-process/okeeffe-v-ireland-decision-of-the-independent-assessor.pdf.
[103] _____, "Historical Abuse and the Statute of Limitations," *Statute Law Review* 39, no. 2 (June 6, 2018): 103–17, https://doi.org/10.1093/slr/hmw045.
[104] The Stolen Generation were the children of Australian Aboriginal and Torres Strait Islander descent who were removed from their families by the Australian Federal and State government agencies and church missions, under acts of their respective parliaments.
[105] Pam O'Connor, "History on Trial: Cubillo and Gunner v The Commonwealth of Australia," *Alternative Law Journal* 26 (2001): 30.

abuse accountability efforts, but as in mainstream transitional justice, trials and litigation maintain a narrative that historical abuse was exceptional, subject to limited and contested memories of victim-survivors. Civil accountability is also vigorously contested by State and church institutions in a system not designed to recognise the potential inequalities for victims-survivors as plaintiffs.[106] Accountability should form a necessary part of transitional justice, but in the Irish context, the legal opportunity for criminal and civil accountability are unduly narrow.

IV. Redress and Reconciliation

“Reparation" has been recognised as an umbrella term for different forms of redress, embracing related conceptions of restitution, rehabilitation, compensation and symbolic measures such as apologies or memorials.[107] While trials are a struggle against perpetrators and inquiries seek to benefit victim-survivors and society as a whole, reparations are the only measure designed to explicitly and primarily benefit victim-survivors.[108] Reparations represent an opportunity for those responsible for harm in the contexts of State and church to acknowledge and accept responsibility for wrongdoing, to engage in a process directly with victim-survivors that can acknowledge their fundamental human dignity, and seek through its operations to re-build trust and commitment to the rule of law. Unfortunately, the Irish approach to redress has been largely adversarial and risks re-traumatising victim-survivors.

[106] See Colin Smith in this issue.
[107] “United Nations Human Rights Committee, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant CCPR/C/21/Rev.1/Add. 1326 May 2004,” n.d., para. 16.
[108] United Nations Secretary General, Promotion of truth, justice, reparation and guarantees of non-recurrence A/69/518 para. 11.

The first and most significant redress scheme in Ireland is the Residential Institutions Redress Board.[109] In introducing the legislation in November 2001, following a proposal to include foster homes, orthopaedic hospitals and indeed Magdalen laundries within its terms, the Minister for Education urged against this and referred to the proposed legislation as "a proposal addressed to a particular set of circumstances, not as a vehicle for dealing with every injustice and abuse committed on children and young people in the past". [110] In contrast two primary motivations can be identified in establishing the scheme. First, government statements indicate a perceived urgency in responding to the needs of victim-survivors of historical abuse, given the delay in social and political acceptance of serious injustice. Second, the scheme was established in a context where "without a commitment by Government to establish such a scheme solicitors for persons who had applied to the Commission were adamant that their clients would not cooperate with the Commission until the matter had been decided upon."[111]

Gag orders on applicants discussing engagement with Residential Institutions Redress Board (RIRB) have made assessment of its work highly challenging.[112] Under section 28(6) of the RIRB Act 2002, a person shall not publish any information concerning an application or an award that refers to any other person or institution by name or which could reasonably lead to the identification of any other person or institution. The government agreed an indemnity with 18 Catholic Congregations in exchange for a contribution of €128 million. As of 2017 the total cost of RIRB exceeds €1.4 billion.[113] In 2017 the religious congregations challenged calls for their further contribution to the

[109] Residential Institutions Redress Act 2002
[110] "Opportunity Lost: An Investigation by the Ombudsman into the Administration of the Magdalene Restorative Justice Scheme" (Dublin: Office of the Ombudsman, 2017), 32.
[111] Evidence of Michael Woods (former Minister for Education), 24th June 2004 to the CICA
[112] But see 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," *Contemporary Justice Review* 22, no. 1 (January 2, 2019): 43–59, https://doi.org/10.1080/10282580.2019.1576130.
[113] Patsy McGarry, "Religious Congregations Indemnity Deal Was 'a Blank Cheque', Says Michael McDowell," *The Irish Times*, April 5, 2019.

State's scheme, stating; "The bill incurred by the Government for the redress fund is not a benchmark of the responsibility of any of the others who were involved, including the religious. It was a bill incurred by a Government and Dáil on their own legal and moral responsibility." [114] The operation of the Residential Institutions Statutory Fund Act (RISFB), popularly known as Caranua, has proved dysfunctional and unsatisfactory to victim-survivors. It received over 5,637 applications, but applicants, most of whom are elderly, complained about the long delays in the decision-making process and being treated with disrespect.[115] In March 2017, chief executive, Mary Higgins, said some survivors were damaged and "would never be happy". [116]

Since the 1990s compensation to victims of clerical child sexual abuse in non-residential settings also became a significant practice in Ireland.[117] The latest figures indicate the Dublin Archdiocese spent €12.m in 2017 and €14.1m in 2016.[118] However, it is hard to gather systemic data across the range of dioceses and religious congregations that settle cases. The lack of transparency in church settlement of clerical sexual abuse cases makes it difficult for survivors to compare settlements, share experiences of engaging with church authorities and lawyers and to gather a systemic picture of what abuse has been addressed and compensated.

In addition, on foot of the McAleese Report into Magdalene Laundries, Mr Justice Quirke, a High Court judge, was asked to provide a Report on the establishment and potential

[114] "An Oblate of Mary Immaculate, The Moral Challenge Posed to Religious about the Cost of Redress," March 21, 2017, 9, https://oblates.ie/wp-content/uploads/2017/03/The-moral-challenge-posed-to-religious-about-the-cost-of-redress-updated.pdf.
[115] "Caranua Annual Report 2016" (Dublin, 2016), 6; Christina Finn, "Caranua Boss Withdraws Comments in Which She Said Abuse Survivors Were 'Damaged,'" *The Journal.Ie*, April 14, 2017.
[116] Kitty Holland, "Caranua Chief Withdraws Comments Which Offended Abuse Victims," *The Irish Times*, April 20, 2017.
[117] "Murphy Report," para. 8.3.
[118] "Annual Financial Report Financial Year Ended 31 December 2017" (Charities of the Roman Catholic Archdiocese of Dublin, n.d.).

contents of an *ex gratia* Scheme and related matters for the benefit of those women who were admitted to and worked in the Magdalen Laundries.[119] In June 2013, the Irish Government accepted Judge Quirke's recommendation for an *ex-gratia* lump sum payment scheme for women affected. The Report concluded that the Magdalene women should be paid a minimum sum of €10,000 up to a maximum of €100,000, to reflect "work undertaken". Further recommendations included a memorial, payment equivalent to the State pension, and assistance to Magdalene women. Mr Justice Quirke recommended that, under the Scheme, Magdalene survivors should be 'put…in the position that they would have occupied had they acquired sufficient stamps to qualify for the State Contributory Pension'.[120] However, the State interpreted the start date for payments narrowly as the beginning of the scheme's operation rather than being back-dated to the women's pensionable age.[121] The Redress for Women Resident in Certain Institutions Act 2015 also provided the State shall make available health services to participants in the scheme without charge, including general medical practitioners, counselling services and physiotherapy. However, this Act did not provide for more extensive healthcare as recommended by Mr Justice Quirke. Instead, the services offered were "almost identical to an ordinary medical card – which the majority of the women resident in Ireland already hold."[122] In contrast to reformatory and industrial schools, the relevant religious institutions have refused to contribute to the compensation fund for victim-survivors. The Scheme also initially failed to include all relevant institutions associated with Magdalene Laundries, in particular An Grianán Training Centre, High Park, which formed part of St. Mary's Refuge

[119] "Report of Mr Justice Quirke on the Establishment of an Ex Gratia Scheme and Related Matters for the Benefit of Those Women Who Were Admitted to and Worked in the Magdalen Laundries (May 2013)," n.d.
[120] "Report of Mr Justice Quirke on the Establishment of an Ex Gratia Scheme and Related Matters for the Benefit of Those Women Who Were Admitted to and Worked in the Magdalen Laundries (May 2013)," n.d., 40.
[121] Maeve O'Rourke, "Justice For Magdalenes Research: NGO Submission to the UN Committee Against Torture in Respect of Ireland (for the Session July 2017)," n.d., para. 4.12.
[122] O'Rourke, para. 4.8.

in High Park, Drumcondra, Dublin.[123] Regarding this and similar institutions, the Office of the Ombudsman concluded "the actions of the Department in this regard constitute maladministration being actions based on erroneous or incomplete information and an undesirable administrative practice."[124] The finding of 'maladministration' was due to the Ombudsman's view (among other issues) that the Department adopted an unreasonably narrow interpretation of the admission criteria for the scheme (the words 'admitted to and worked in') crucially NOT that the Department should have added further institutions to the scheme. The Ombudsman found that the women who were on the rolls of these additional institutions should simply have been admitted to the scheme as it was given that they had been present and working in one of the Magdalene Laundries originally in the scheme.[125] In *MKL and DC v Minister for Justice and Equality,* two applicants sought and were granted judicial review of the decision to exclude their entry into the *ex gratia* scheme.[126] In the High Court, Judge White concluded that the Department of Justice and Equality did not apply fair procedures due to its failure to exchange any documentation that it was considering in dealing with the eligibility of the applicants for their consideration and comment.[127] The operation of this scheme demonstrates the pursuit by the State of the most narrow interpretation of eligibility or the content of redress, even where it results in subsequent expense in fighting legal challenge.

While Ireland has provided redress to victims of other forms of abuse, such redress is framed as "ex gratia" without admission of responsibility. Such compensation can be seen

[123] Office of the Ombudsman, *Opportunity Lost: An Investigation by the Ombudsman into the administration of the Magdalene Restorative Justice Scheme* (Dublin: Office of the Ombudsman 2017), 24-5
[124] ibid, 31
[125] "Opportunity Lost: An Investigation by the Ombudsman into the Administration of the Magdalene Restorative Justice Scheme" (Dublin: Office of the Ombudsman, 2017), 4.
[126] *MKL and DC v Minister for Justice and Equality* [2017] IEHC 389
[127] ibid, para. 38.

as “hush money” or “blood money” by victim-survivors.[128] Irish redress schemes have been criticised from international human rights bodies and national civil society organisations.[129] Annemarie Crean and Fionna Fox write: “within the remit of institutional child abuse there is a continual imbalance of power dynamics between victims and State, particularly visible through the State’s continued dismissal of victim’s concerns.”[130] Revisiting the 2002 indemnity that the State granted to religious orders for child sexual abuse seems more and more appropriate as further forms of abuse become publicly acknowledged. The inadequacy of money as a form of reparation in transitional justice is well recognised,[131] but the lack of willingness to empower and support victim-survivors as they seek to access redress critically undermines whatever potential value such schemes may have. Given these limitations of investigation, accountability, and redress it remains premature to discuss reform of Irish institutions or social and individual reconciliation. Although there have been two state apologies and apologies from several religious congregations related to industrial schools,[132] leadership of the Catholic church remains unwilling to apologise for covering up abuse or any responsibility for wrongdoing in Magdalene laundries or Mother and Baby Homes. Almost every opportunity to transform the relationship between victim-survivor and State and church institutions has been missed.

v. Conclusion

[128] Pablo de Greiff, ed., *The Handbook of Reparations* (Oxford; New York: Oxford University Press, 2006), 11.
[129] Committee on the Rights of the Child, Concluding Observations on Ireland, CRC/C/IRL/CO/3-4; Committee on Economic Social and Cultural Rights, Concluding Observation on Ireland, E/C.12/IRL/CO/3; Human Rights Committee, Concluding Observations on Ireland, CCPR/C/IRL/CO/4; Committee against Torture, Concluding Observations on Ireland CAT/C/IRL/CO/1
[130] Fionna Fox and Annmarie Crean, ‘Ryan Report Follow Up: Submission to the United Nations Committee Against Torture Session 61’ (Reclaiming Self 2017) 1.
[131] Pablo de Greiff, “Justice and Reparations,” in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006), 451–73.
[132] Anne-Marie McAlinden, “Apologies and Institutional Child Abuse” (Queens University Belfast, 2018).

Examining Ireland's attempts to address historical abuse from a transitional justice approach reveals that a consistent bureaucratic approach designed to retain State control of information, resources and reputation across the areas of investigation, accountability and redress. The Irish approach to each of these processes differ significantly from international best practice and actions undertaken in comparable jurisdictions. Ireland's historical abuses were profound, widespread and systemic. They warrant an equally profound, widespread and systemic reform of the way in which the State engages with victim-survivors, which embraces the challenge of transitioning from a State, church and society that marginalised, shamed and harmed those deemed "other", to one that meaningfully recognises, protects and promotes the dignity and value of all.