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Abstract:

Inquiries are commonly perceived to be a panacea for public accountability: when something has gone very wrong, an inquiry is the best mechanism available to hold those responsible to account. This perception ignores the fact that those an inquiry ought to be holding to account – those in power – are the ones who decide whether to establish an inquiry, set the terms of reference and implement its final recommendations. With reference to public accountability discourse and the recent public inquiry into the Earthquake Commission, this paper traverses the need to re-frame our understanding of an inquiry as a 'cultural therapist'. Their status and public participatory process leverages legitimacy and catharsis like no other public accountability mechanism. This, it is argued, is the unique value of an inquiry.

Keywords:
inquiry; public accountability; the Earthquake Commission; accountability mechanism

I Introduction *5*

II Inquiry Framework *7*

A Definition and classification 7

B Process under the Inquiries Act 2013 10

C Subject-matter 10

III Public accountability framework *11*

A Democratic control 12

B Integrity 12

C Improvement 13

D Legitimacy 13

E Catharsis 14

IV Dual purpose? *14*

A Answerability of past conduct and future behaviour 15

B Cultural therapist 16

C Behind closed doors: blame avoidance, suppression and negotiation 17

1 Establishment and blame avoidance 17

2 Process and suppression 19

3 Final report – a negotiated paradox 20

D Re-assessing answerability 21

V The value-add of inquiries as an accountability mechanism *22*

A Continuum of inquiries 23

B Other bodies 25

1 Parliamentary officers 25

2 The courts 25

3 Parliament 26

C Enriching the accountability regime 27

VI Public inquiry into the EQC *29*

A Establishment of the inquiry into the EQC 30

1 Background and context 30

2 Terms of Reference 32

B Process of the inquiry 33

C Key findings and recommendations of the final report 34

D Comparative frameworks of analysis 35

1 The inquiry as a check on the executive 35

2 The inquiry as a cultural therapist 38

VII Conclusion – ripe fruit for the picking *40*

VIII Bibliography *43*

A Cases 43

B Legislation and Orders 43

C Government Publications 43

D Press releases 45

E Books and Chapters in Books 45
F Journal Articles 45
G Reports, papers and dissertations 46
H Newspaper Articles 46
I Websites 47
J International materials 48
K Other Materials 48

I Introduction

> If public inquiries are to be known by their fruits, and if their proper fruits are reforms and improvements in law and practice, there is probably not a great deal to be said for them.[1]

New Zealand has long been fascinated with inquiries, despite a multiplicity of other more efficient public accountability mechanisms within the New Zealand constitutional framework. When something goes very wrong, be it a natural disaster, crisis, or administrative failure, public calls for an inquiry will very often follow. Inquiries are rarely established and carry high status. Such status is coupled with a process predicated on public participation and an outcome discerned as independent from those in power, rendering a public accountability mechanism perceived by the population to be like no other. In similar common law jurisdictions – the United Kingdom, Australia and Canada – a similar fixation exists. There must, then, be something to be said for their persistent ubiquity.

Literature from New Zealand, and the comparative jurisdictions listed above, suggests two broad functions of inquiries. The primary function is as a check on executive action, a tool to facilitate answerability of past conduct and consideration of future behaviour. This encompasses a layperson's understanding of public accountability mechanisms. The second is less understood as falling within public accountability functions: inquiries are a "cultural therapist".[2] in that they allay public concerns and restore public confidence in the government.

The problem is, however, that perception is not reality. The public paints inquiries as a body which sits at arm's length from the government. Yet the government holds the power to establish inquiries and sets their parameters through dictation of the terms of reference. An inquiry's ability to direct blame at the executive and the government, to check on their actions, can hardly be considered impartial. The process is marred by political considerations.

A good illustration of these issues is the recent public inquiry into the Earthquake Commission's management of claims following the Christchurch earthquakes.[3] (the EQC

[1] Stephen Sedley "Public Inquiries: A Cure or a Disease?" (1989) 52 MlR 469 at 469.
[2] R A MacDonald "The Commission of Inquiry in the Perspective of Administrative law" (1980) 18 Alberta LR 366 at 391.
[3] Public Inquiry into the Earthquake Commission *Report of the Public Inquiry into the Earthquake Commission* (March 2020) (the final report).

inquiry). The inquiry was established only after the Labour Party guaranteed it as part of their election manifesto. This was despite calls for an inquiry continuing for over four years under a National-led Government, who had ample information that there were systemic problems. If inquiries are unable to be extricated from the body they are reviewing, as this paper argues, the value of inquiries within New Zealand's public accountability regime seems precarious.

Accountability discourse suggests five functions of public accountability: democratic control, integrity, improvement, legitimacy and catharsis. Despite perception that an inquiry leverages all five, the political taint in an inquiry's lifetime means deficiencies result: the review of power, prevention of the abuse of power and encouragement of better practice can be subverted through process. It does not follow from such analysis, however, that inquiries are thus a defective public accountability mechanism. Public perception, despite being mis-founded, is highly powerful. If justice is seen to be done, many citizens will feel it has in fact been done, irrespective of substantive outcomes. Mere establishment of an inquiry achieves legitimacy through its powerful pacifying effect on the public, which restores and promotes citizens' confidence in government. And the publicness of the process is paradigmatic catharsis: an inquiry sits and listens to members of the public air their grievances.

Inquiries, then, are an effective public accountability mechanism but for reasons different than perhaps commonly understood. While fallacious to suggest inquiries consistently act as an independent check on the executive, their role as a 'cultural therapist' regularly leverages legitimacy and catharsis. And this is the unique value of an inquiry. Prior to the establishment of the EQC inquiry, a minimum of 59 reviews of the organisation had already been carried out. Despite this, calls for an inquiry continued. That no other body is *seen* to be as effective in certain situations is powerful. Following establishment, the public participatory process implemented by the EQC inquiry acknowledged trauma. Over 16 months, thousands submitted to the EQC inquiry and hundreds attended public forums. For those affected, the inquiry created a space specifically designated to hear their story.

This paper traverses the need to re-frame the inquiry as an effective accountability mechanism due to the unique characteristics of reassurance and status. While the perception that inquiries are effective in the more ordinarily understood sense – through democratic control, integrity and improvement they act as a check on executive power – is fallacious, their ability to achieve catharsis and legitimacy means they are nevertheless a valuable public accountability

mechanism. The first two parts of the paper provide necessary background. A basic framework is first set out, detailing processes under the Inquiries Act 2013 and common subject-matter inquired into. As the paper assesses inquiries as a public accountability mechanism, an accountability framework is set out, primarily with reference to the work of Mark Bovens and the five functions of accountability. This accountability framework is then considered in conjunction with the two broad functions identified in literature: inquiries as a mechanism to check executive power, facilitating answerability on past conduct and future behaviour, and as a cultural therapist. It is suggested that democratic control, integrity and improvement are achieved through the primary – and commonly held – purpose of inquiries, whereas legitimacy and catharsis are achieved through the symbolic cultural therapist purpose. A closer look at the inherently political nature of the process reveals the fallacy of this primary purpose. When inquiries act as a check on the executive, they fail to consistently leverage key public accountability functions. Their value appears problematic.

However, the *raison d'etre* of inquiries is therapeutic. With reference to other bodies in New Zealand's accountability regime and to the EQC inquiry, this added-value of inquiries is revealed. The unique characteristics are able to attain catharsis and legitimacy like no other public accountability mechanism. This finding facilitates a better understanding of when and how inquiries ought to be used: in traumatic situations, with ample time given to develop an informed public participatory process. However, inquiries are not, and should not be considered, a panacea for accountability.

II Inquiry Framework

A Definition and classification

Inquiries are a legislative entity, established under the Inquiries Act 2013 (the Act). The Act streamlined previous law,[4] implementing an overarching framework for three types of inquiries: Royal Commissions, public inquiries, and governmental inquiries. The first is constituted by the Governor-General under Letters Patent; the second by the Governor-General under s 6; and the third by any Minister under s 6.

[4] Previous law was set out in The Commissions of Inquiry Act 1908. The Inquiries Act 2013 did not, however, address inquiries able to be established under specific statute, standing committees, parliamentary select committees and tribunals.

An initial issue to address at the outset of this paper is definition: when referring to 'inquiries', the paper is referring to all three types of inquiries available under the Act. However, there are some differences between the three. The Act replaced ministerial inquiries, which were inquiries which operated outside the statutory framework, with governmental inquiries.[5] As ministerial inquiries did not have a statutory basis, they lacked any formal powers. The Law Commission noted their efficiency when dealing with more specific issues, thus recommended they be incorporated into the Act with the same power as public inquiries.[6] The only difference now between governmental inquiries and the latter two inquiries is that the reports of governmental inquiries are not required to be tabled in Parliament or be made public.[7] While governmental inquiries usually deal with "smaller and more immediate issues where a quick and authoritative answer is required from an independent inquirer",[8] they can be given a longer mandate, deal with significant issues, and receive submissions from interested parties. For example, the Government Inquiry into Mental Health and Addiction received over 5200 submissions, taking 11 months between process and final report.[9] In practice, then, government inquiries do not diverge significantly from public inquiries and Royal Commissions.

Usually, however, public inquiries and Royal Commissions will be established to deal with those "particularly significant or wide-reaching issues that are of high-level concern to the public".[10] The difference between the public inquiries and Royal Commissions is largely a matter of semantics.[11] Certainly, there were valid policy reasons for retaining them under the Act, in particular regarding public perception that Royal Commissions are reserved for the most serious matters of public importance.[12] But this is not always true: both the Cave Creek inquiry and the 'Wine-box' inquiry, significant matters of public concern, were commissions

[5] Inquiries Act 2013, s 6 and Department of Internal Affairs *Inquiries Bill – Report prepared for the Government Administration Committee* (October 2009) at [14]–[15] (DIA Departmental report).
[6] Law Commission *A New Inquiries Act* (NZLC R102, 2008) at [2.26].
[7] Inquiries Act 2013, s 12. See also: DIA Departmental report, above n 5, at [47]. This was because a key aspect of the appeal in establishing a ministerial inquiry was that the reports did not have to be made public. However, it should be acknowledged that while not required to be made public, such reports are nevertheless usually available to the public.
[8] Cabinet Office *Cabinet Manuel 2017* at [4.85]; NZLC R102, above n 6, at [2.29].
[9] Government Inquiry into Mental Health and Addiction *He Ara Oranga – Report of the Government Inquiry into Mental Health and Addiction* (November 2018) at 27.
[10] NZLC R102, above n 6, at [2.29].
[11] Law Commission *The Role of Public Inquiries* (NZLC IP1, 2007) at [94] and Alan Simpson "New Zealand's Experience with Royal Commissions and Commissions of Inquiry" (2007) 59 Political Science 7 at 8.
[12] DIA Departmental report, above n 5, at [30]. See also, Cabinet Manuel, above n 8, at [4.81]–[4.85].

of inquiry.[13] Aside from being established through a different mechanism, the Act makes clear there is no difference in purpose, functions and procedures between the two.[14] Consequently, references to 'public inquiries' includes both public inquiries and Royal Commissions, established either under Letters Patent or s 6(2), whereas 'governmental inquiries' only refers to those established under s 6(3).

In essence, inquiries are *sui generis*. Very generally, inquiries are any body temporarily mandated by Government, on an ad hoc basis, to fact-find and arrive at recommendations.[15] Despite their ubiquity, any more specific definition is difficult. They do not fall neatly into traditional constitutional categorization and lack constitutional independence.[16] While established by and required to report to the executive, their relationship with the executive is undefined. How involved the executive is in the process can vary, as can executive implementation of recommendations.[17]

The highly contextual nature of inquiries means it is difficult to identify trends or generalize: inquiries can be established as a response to any matter of public importance and the terms of reference can be as specific, or ambiguous, as desired.[18] Prior attempts at dichotomist definition, in particular distinguishing between investigative and advisory inquiries, [19] was considered by the Law Commission to be inaccurate as inquiries often involve both functions.[20] Certainly, notions of independence and public participation are two important norms of the inquiry process, particularly regarding how the public perceives effectiveness of inquiries. But, as will be discussed in more detail below, neither are present consistently in practice.

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[13] NZLC IP1, above n 11, at [94].
[14] Section 6(1)(a).
[15] This definition is primarily based on Liora Salter "Two Contradictions in Inquiries" (1990) 12 Dal LJ 173 at 175; MacDonald, above n 2, at 369.
[16] NZLC R102, above n 6, at [2.4]
[17] NZLC IP1, above n 11, at [18].
[18] NZLC IP1, above n 11, at [15].
[19] See, for example, Kenneth Keith "Commissions of Inquiry: Some Thoughts from New Zealand" in Allan Manson and David Mullan (eds) *Commissions of Inquiry: Praise or Reappraise* (Toronto, Irwin Law, 2003) 168 and Law Reform Commission of Canada *Advisory and Investigatory Commissions: Report 13* (1979).
[20] NZLC IP1, above n 11, at [112]; Salter, above n 15, at 176.

B Process under the Inquiries Act 2013

The Act sets out an overarching process for inquiries. When establishing the inquiry, the subject matter, inquiry members and terms of reference must be notified.[21] Terms of reference set out the basic parameters for the inquiry. Emphasis is primarily on matters of substance, but specific procedural direction can also be given.[22] If no specific procedural direction is given, the inquiry is able to regulate its procedure as it sees fit.[23] The Act does not set out requirements for who ought to be appointed, but past practice suggests it is often those with legal experience.[24] In the case of public inquiries, there is a common trend of appointing retired or current judicial officers as the chair.[25]

Once established, an inquiry has the power to require production of evidence, to compel evidence and to take evidence on oath.[26] While inquiries have the power to make findings of fault and recommendations in relation to that fault, they cannot make findings on the civil, criminal or disciplinary liability of any person.[27]

As is evident by the broad-brush approach of the Act, inquiries are distinctively context-specific and flexible. Beyond the Act, much is left to the inquiry itself. Terms of reference are "tailored to the issue" at hand, but the inquiry often controls its own process and approach.[28]

C Subject matter

Inquiries are confined predominantly to crisis situations: That is, in "high magnitude, low probability" events[29] – a major disaster, fatal event, significant public sector failure which caused loss of public confidence in the institution, or even a combination of these – inquiries are perceived as an important and independent mechanism that will "seek answers and allay public concerns".[30] For example, the Public Enquiry into the Earthquake Commission was established to allay the significant public confidence lost in the EQC following their handling

[21] Section 7.
[22] Inquiries Act 2013, s 7(4); Cabinet Manuel, above n 8, at [4.102].
[23] Cabinet Manuel, above n 8, at [4.88].
[24] Cabinet Manuel, above n 8, at [4.106].
[25] NZLC R102, above n 6, at [1.7]; Keith, above n 19, at 167.
[26] Inquiries Act 2012, ss 19, 20, 22 and 23.
[27] Inquiries Act 2013, s 11.
[28] NZLC IP1, above n 11, at [51].
[29] Dominic Elliot and Martina Macdonald "Public Inquiry: Panacea or Placebo" (2002) 10 *Journal of Contingencies and Crisis Management* 14 at 14.
[30] NZLC R102, above n 6, at [2.11].

of claims after the Christchurch earthquakes.[31] Other recent examples include the Royal Commission of Inquiry into the Attack on Christchurch Mosques on 15 March 2019, the most significant terrorist attack in New Zealand history,[32] and the Royal Commission of Inquiry into Abuse in Care, to address historical systemic failure in state-based care.[33]

Historically, prior to the establishment of specific statutory investigative entities, inquiries were used in response to a wide range of issues.[34] To a name a few, inquiries have been established in relation to criminal justice complaints; railway, marine, mining and aircraft disasters; medical complaints and treatment of patients; land ownership; constitutional issues; electoral and national governance issues; matters of industry; and social policy development.[35]

III Public accountability framework

This paper questions the value of an inquiry as a mechanism for public accountability. Thus, the concept of public accountability needs definition. Accountability can be a "conceptual umbrella".[36] Accountability can be used in modern parlance to cover, and used interchangeably with, a variety of distinct concepts, such as "transparency, equity, democracy, efficiency, responsiveness, responsibility and integrity".[37] In this broad definition, accountability is an evaluative and contestable concept.[38] Here, accountability is intended as an analytical concept. This is defined by Mark Bovens as:[39]

> … a relationship between an actor and a form, in which the actor has an obligation to explain and justify his or her conduct, the forum can pose questions and pass judgment and the actor may face consequences.

[31] Department of Prime Minister and Cabinet *Terms of Reference: Public Inquiry into the Earthquake Commission* (November 2018) (EQC Terms of Reference).
[32] Royal Commission of Inquiry into the Attack on Christchurch Mosques on 15 March 2019 Order 2019.
[33] Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Order 2018.
[34] For a complete list, see *A Checklist: New Zealand Royal Commissions, Commissions and Committees of Inquiry, 1864–1981* (Wellington: New Zealand Library Association Professional Division, 1981).
[35] For a fuller discussion of these, see Keith, above n 19.
[36] Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13(4) ELJ 447 at 449 (Conceptual Framework).
[37] Conceptual Framework, above n 36, at 449–450.
[38] Conceptual Framework, above n 36, at 450.
[39] Conceptual Framework, above n 36, at 450.

Public accountability adds to this definition by requiring an element of "openness": "[t]he account giving is done in public".[40] Public accountability is a "*sine que non* for democratic governance" as it facilitates citizens monitoring the actions of political representatives, Cabinet ministers and civil servants.[41] When assessing a particular arrangement – such as here, with inquiries – the function of accountability shapes adequacy of the particular mechanism.[42] Mark Bovens posits five main functions: democratic control, integrity, improvement, legitimacy and catharsis. These functions will briefly be outlined in order to consider their relationship to the uses of inquiries.

A Democratic control

The "first and foremost" function of public accountability is democratic control.[43] In modern democratic society, power can be conceptualised as a chain of relationships: citizens, as "the primary principals in a democracy, have transferred their sovereignty to popular representatives" who, in turn, have transferred primary decision-making power to Ministers, who, in turn, have delegated execution of these powers to the public service.[44] Each link in the "principal–agent" chain wants to ensure the control of "delegated public tasks by calling the agent to account", thus an effective public accountability mechanism would monitor executive use of delegated power and ensure such use is a reflection of the wishes of the principal.[45] Citizens occupy the end of the chain, and pass judgment via the ballot box.[46] Public accountability "is an essential condition of the democratic process, as it provides the people's representation and the voters with the information needed for judging the propriety and effectiveness of the conduct of the government."[47]

B Integrity

The integrity function suggests public accountability ought to prevent corruption and abuse of power.[48] Accountability facilitates "checks and balances": visible and powerful offices, such

[40] Mark Bovens, "Public Accountability" in Ferlie, E., Lynn Jr., L. E., and Pollitt, C. (eds) The Oxford Handbook of Public Management (Oxford University Press, Oxford, 2007) 182 at [8.1.1] (Public Accountability).
[41] Public Accountability, above n 40, at [8.1.1]
[42] Conceptual Framework, above n 36, 462.
[43] Public Accountability, above n 40, at [8.5.1].
[44] Conceptual Framework, above n 36, at 463.
[45] Conceptual Framework, above n 36, at 463.
[46] Conceptual Framework, above n 36, at 463.
[47] Conceptual Framework, above n 36, at 463.
[48] Conceptual Framework, above n 36, at 463.

as the judiciary, are critical in ensuring a "dynamic equilibrium" and "good governance".[49] Thus, an effective public accountability mechanism would ensure adequate investigatory powers to interrogate the integrity of the relevant body, punish accordingly and deter others from acting in such a way.[50] Public accountability provides "overseers … with essential information to trace administrative abuses".[51]

C Improvement

Public accountability fosters "individual or institutional learning … [n]orms are reproduced, internalized and, where necessary, adjusted through accountability."[52] Past behaviour is scrutinised to ensure behaviour improves.[53] The possibility of sanctions should they fail to perform obliges public actors to encourage engaging in better or more efficient ways to conduct themselves.[54] The public aspect of the mechanism "teaches others in similar positions what is expected of them, what works and what does not."[55] An effective learning accountability mechanism must be able to investigate into behavior to consider whether it is appropriate, and provide an objective space for feedback and implementing change.

D Legitimacy

The above perspectives reflect the three main functions of accountability as identified by Bovens. However, Bovens also notes that "[b]ehind these three perspectives lurks a far bigger, more abstract concern of accountability … accountability … can help to ensure that the legitimacy of governance remains intact or is increased."[56] Partly as a consequence of these three perspectives, but also partly because processes of public accountability mean public actors are "given the opportunity to explain and justify their intentions", "citizens and interest groups can pose questions and offer their opinion", meaning citizens' confidence in government is promoted.[57] The public is reassured that government is operating how it ought to be.

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[49] Conceptual Framework, above n 36, at 463.
[50] Conceptual Framework, above n 36, at 463.
[51] Public Accountability, above n 40, at [8.5.1].
[52] Public Accountability, above n 40, at [8.5.1].
[53] Conceptual Framework, above n 36, at 463.
[54] Conceptual Framework, above n 36, at 464.
[55] Conceptual Framework, above n 36, at 464.
[56] Conceptual Framework, above n 36, at 464.
[57] Conceptual Framework, above n 36, at 464.

E Catharsis

Lastly, accountability mechanisms can "offer a platform for the victims to voice their grievances and for the real or reputed perpetrators to account for themselves and to justify or excuse their conduct" which enables acceptance and reconciliation with the crisis.[58] These "processes of public account giving … have an important ritual, purifying function – they can help to provide catharsis."[59] As inquiries deal often with public disaster or crises, the function of catharsis is particularly relevant for the purposes of this paper.

IV Dual purpose?

Inquiries, as evidenced through their historical use, can be used to respond to a spectrum of crises. Consequently, there may be a number of motivations or purposes depending on the context.[60] Discursive frameworks suggest two broad purposes: inquiries act as a check on executive action, a tool facilitating answerability of previous action and future conduct of public actors, and as a "cultural therapist" in reassuring the public.[61]

Both purposes illustrate the primacy of inquiries as a mechanism of public accountability. An inquiry creates an open forum where members of the executive are obliged to explain and justify their conduct to the inquiry. The inquiry can ask questions, some informed by public opinion. The report summarises the inquiry's opinion on the issues, and consequences may be faced in the form of legislative or policy changes and public response to the report.

In order to assess the effectiveness of this process, both purposes will be analysed with reference to the five functions outlined above. While it is difficult to neatly conceptualise the functions, it is argued that the purpose of inquiries, as a tool for executive answerability, is adequate when assessed against all Bovens' three main functions. The purpose of an inquiry as a cultural therapist primarily facilitates catharsis, as well as giving rise to legitimacy. As this purpose of inquiries is psychological, it is difficult to argue that this purpose leverages any of the three main functions. This suggests, on first glance, that this purpose is thus secondary.

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[58] Conceptual Framework, above n 36, at 464.
[59] Conceptual Framework, above n 36, at 464.
[60] NZLC R102, above n 6, at [2.1].
[61] MacDonald, above n 2, at 394.

A Answerability of past conduct and future behaviour

Usually, in order for an inquiry to be established, there is an initial perception that actions were not taken as they ought to have been. Somewhere in the event, either shortcomings in prevention[62] actually causing the crisis, or in the response,[63] mistakes were made. The ability to inquire into actions of the executive fulfils the more observable functions of accountability: democratic control, integrity and improvement.

As inquiries are established for a "clear purpose and are resourced for fulfilling that purpose … [and] have protections and powers that give them teeth", they can provide a comprehensive account of what happened, especially in contentious or unclear events.[64] Moreover, because "inquiries are not tied to the constraints of a legislative or executive timetable, they are able to devote sufficient time to mulling over difficult points".[65] This intensified investigatory ability provides the relevant principal–agent relationships "with the necessary inputs for judging the fairness, effectiveness, and efficiency of governance".[66] Inquiries are a mechanism for the legislature to "control the exercise of the transferred powers".[67] Most importantly, the public aspect of inquiries, and the fact the reports are usually made public, means citizens are able to judge the performance of the public actors at the ballot box.

The comprehensive review of executive action also enhances the integrity of the executive. Incompetent or inappropriate decision-making is investigated, ensuring better governance. Inquiries possess a range of powers under the Act to compel witnesses and gather evidence.[68] The knowledge that such a mechanism exists – where officials may be required to explain their behavior to an independent, powerful body who can make compelling recommendations – assumes deterrence: officials will refrain from "misusing their delegated powers" in times of crises, as they are aware of the possibility of explaining themselves before an inquiry and the possibility of punishment.[69] While inquiries cannot make findings of civil or criminal liability, and following the Erebus Royal Commission saga,[70] inquiries have been more cautious in their

[62] Such as the Royal Commission into the Christchurch Mosque Shootings, above n 32.
[63] Such as the EQC inquiry, above n 3.
[64] NZLC IP1, above n 11, at [22].
[65] Macdonald, above n 2, at 371.
[66] Conceptual framework, above n 36, at 462.
[67] Conceptual framework, above n 36, at 462.
[68] Inquiries Act 2013, ss 20–23.
[69] Conceptual framework, above n 36, at 462.
[70] The infamous finding of Mahon J's report that Air New Zealand had presented an "orchestrated litany of lies" (among other allegations) following the disaster led to successful judicial review claim on the grounds of natural

criticism, in particular avoiding making any allegations of guilt,[71] they can still be condemning of inappropriate behavior.

Third, a major aspect of inquiries is the emphasis on learning and improvement: by having the resources to comprehensively fact-find, an inquiry is often well-positioned to make recommendations as to future behaviour and prevent recurrence of past mistakes.[72] This, in turns, provides better-functioning, more desirable exercises of power.

B Cultural therapist

Inquiries serve a "legitimate socio-psychological role" through their establishment and process.[73] Catharsis is primarily achieved through the process of public participation, viewed as a key aspect of inquiries.[74] Inquiries are often held in public and take public submissions.[75] Those who participate in the process can accept what has happened and begin to reconcile themselves with their trauma. This, in turn, has the effect of rendering the conclusions of the inquiry acceptable to those who participated in the process.[76]

Legitimacy is leveraged through this public perception: establishing an inquiry indicates to the public the government is concerned with, and addressing, the issue.[77] The perceived independence, impartiality and authority creates a "symbolic reassurance":[78] a public inquiry facilitates a "rational, calm, reasoned form of decision-making", which reassures the public the correct solution, independent and outside political considerations, will be arrived at.[79] In particular, the appointment of well-known legal figures – judges and senior lawyers – "offers

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justice, and Mahon J's resignation from the bench. See: Peter Mahon *Royal Commission to Inquire Into and Report Upon the Crash on Mount Erebus, Antarctica, of a DC-10 Aircraft operated by Air New Zealand Limited* (1981); and *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon (No 2)* [1981] 1 NZLR 618 (CA), [1983] NZLR 662 (PC).

[71] NZLC IP1, above n 11, at [103].

[72] House of Commons Public Administration Select Committee *Government by Inquiry: Volume 1* (The Stationery Office Limited, London, 2005) at 10; and Mark Eliot "Ombudsmen, Tribunals, Inquiries: Re-Fashioning Accountability Beyond the Courts" (Research paper, University of Cambridge Faculty of Law, August 2012) at 17.

[73] Macdonald, above n 2, at 394.

[74] MacDonald, above n 2, at 371; Salter, above n 15, at 174; Ontario Law Reform Commission *Report on Public Inquiries* (Ontario Law Reform Commission, Toronto, 1992) at 217; and NZLC IP1, above n 11, at [41]–[42].

[75] There is, however, no requirement in law for them to do so: NZLC IP1, above n 11, at [53].

[76] MacDonald, above n 2, at 371.

[77] NZLC R102, above n 6, at [2.2].

[78] House of Commons Public Administration Select Committee, above n 72, at [42].

[79] Scott Prasser "Public Inquiries in Australia: An overview" (185) 44 Australian Jnl of Public Administration 1 at 8.

a seal of credibility".[80] This further reinforces the legitimation function: their perceived high status and independence mean their final report is often considered as the correct articulation of events because it was written by reputable people.[81] Thus, citizen confidence in the government is restored because an objective finding has been made and is accessible to all.

C Behind closed doors: blame avoidance, suppression and negotiation

Discussion of inquiries has, so far in this paper, assessed their value normatively. That is, if inquiries operate how they ought to the Act creates the power to establish an objective, independent process with public input, which is able to provide valuable findings to the legislature. This is certainly how they *appear* to operate to the public. The problem, however, is that both procedurally and substantively inquiries do not operate how they ought to operate. The process is plagued by political considerations, unseen by citizens. These, in turn, corrupt substantive outcomes reached. On closer glance, the primary purpose of inquiries, as a check on the executive and a tool for answerability, falls short when assessed against the functions of democratic control, integrity and learning. This is a problem because it undermines the ability of an inquiry to carry out its primary purpose consistent with the functions of public accountability. This section argues an inquiry's ability to require the executive to explain their actions and change their behavior can be eroded by political influence. Democratic control is manipulated, subverting the objective pursuit of integrity and learning.

This argument does not intend to undermine the value of inquiries as a cultural therapist. Catharsis and legitimacy, in this context, are symbolic: the mere perception of an inquiry is enough to restore public confidence. As will be discussed in more detail in the next section, symbolism is not intended to carry a negative connotation. It is used to emphasise the ease in which an inquiry can allay concern, a characteristic which is unaffected by the discussion below.

1 Establishment and blame avoidance

Public perception would suggest that an inquiry will be established if there has been a major crisis. However, past practice reveals the inaccuracy of this statement. For example, no inquiry

[80] Sedley, above n 1, at 472.
[81] George Gilligan, "Royal Commissions of Inquiry" (2002) 35 *The Australian and New Zealand Journal of Criminology* 289 at 294.

has been appointed into any aspect of the Government response to the current Covid-19 pandemic, or the White Island / Whakaari explosion. To suggest, then, the public has a 'right' to an inquiry following a crisis event would be fallacious. [82]

Inevitably, the decision to establish an inquiry, select commissioners, define terms of reference, is "inherently political". [83] As political, it is often not the occurrence of a crisis that causes their establishment, nor concern for the public. Mere establishment of an inquiry can have the effect of "absorb[ing] and still[ing] controversy", [84] "mollifying the public" [85] or, perhaps more cynically, "taking the heat off" the government. [86] In this sense, inquires can be a "highly visible" tool for the government, and can be instrumental in response to public backlash. [87]

The rhetoric of blame, knowing when to deny blame or when to merely avoid blame, can also be a relevant consideration in establishing an inquiry. [88] Blame avoidance theory suggests that at least some voters employ retrospective voting on the notion of 'negativity bias': there is a greater likelihood a voter will notice and act on grievances, than a voter who will act on the basis of their improved state. [89] This means that politicians are primarily motived by a desire to avoid blame for unpopular actions, as opposed to seeking credit for popular actions.

The appointment of an inquiry, then, acknowledges that there is a problem while leaving open the question of responsibility. [90] Certainly, both short-term and long-term risks result. First, by acknowledging there is a problem a risk is created in that the government can no longer justify their actions, to claim it was right, or at least inevitable, to act in the way the government did. [91] Second, while the government does have full control over who sits on the inquiry, appointing an inquiry nevertheless involves "surrendering at least a measure of control over the

[82] Sedley, above n 1, at 470.
[83] Gilligan, above n 81, at 295.
[84] Sedley, above n 1, at 478–479.
[85] NZLC IP1, above n 11, at [44].
[86] Janis Goldie "Morals, process and political scandals: The discursive role of the royal commission in the Somalia affair in Canada" (PhD Dissertation, University of Calgary, 2009) at 43.
[87] NZLC IP1, above n 11, at [41]; MacDonald, above n 2, at 387; Gilligan, above n 81, at 294.
[88] Raanan Sulitzeanu-Kenan, "Reflection in the Shadow of Blame: When Do Politicians Appoint Commissions of Inquiry?" (2010) 40 *British Journal of Political Science* 613 at 614.
[89] Sulitzeanu-Kenan, above n 88, at 618; and R Kent Weaver "The Politics of Blame Avoidance" (1986) 6 *Journal of Public Policy* 371 at 372.
[90] Sulitzeanu-Kenan, above n 88, at 619.
[91] Sulitzeanu-Kenan, above n 88, at 619.

investigative process".[92] Thus, there is a long-term risk that the inquiry's report will be critical.[93]

However, such risks can be mitigated through governmental powers of establishment. If, as suggested, an inquiry is primarily established to avoid blame, the process of that inquiry is inevitably colored by this. First, governments dictate what inquiries can investigate. The extent of loss acknowledged can be minimized through limited terms of reference.[94] If blame is likely to be directed at the government, the government can subtly manipulate the terms of reference to avoid certain embarrassing matters, or narrowly define the scope of the inquiry, so it can only look at a specific issue(s), or a specific actor(s), within the crisis.[95] Second, timing is critical. If blame is likely to be directed away from those actually in office at the time, these risks are, of course, significantly lessened. That is, a government facing heat for a particular issue will be willing to respond to public pressure to establish an inquiry if it mainly, or at least in part, occurred under a previous government.[96] This is because the public will remember the acknowledgement of the problem, but the blame itself will not be directed primarily at those in power. As will be discussed in more detail below, this was part of the reasoning into the EQC Public Inquiry: a Labour-led government airing grievance of actions taken under a National-led Government. Hence, a government can appear to be acting to pursue positive change but have in fact only established the process insofar as to avoid negativity bias at the ballot-box: the voter remembers only the actions not done, as opposed to positive reform made.

2 Process and suppression

Following establishment, an inquiry is usually perceived to conduct its investigatory process at arms-length from government. It begins the task at hand and operations continue much as before in the legislature, executive and judiciary. However, the very nature of an inquiry's task has a "suppressant effect" on the other branches of government: court proceedings on relevant matters are either adjourned or pre-empted, any investigation by the legislature or select committees are suspended and "the executive itself is relieved of responsibility for taking immediate action on any topic under inquiry."[97]

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[92] Sulitzeanu-Kenan, above n 88, at 620.
[93] Sulitzeanu-Kenan, above n 88, at 619.
[94] Sulitzeanu-Kenan, above n 88, at 620.
[95] Goldie, above n 86, at 45.
[96] Sulitzeanu-Kenan, above n 88, at 620.
[97] MacDonald, above n 2, at 387.

Instead, the establishment of an inquiry has the effect of replacing "one volatile critical audience (the media, the opposition and the public) with a much slower-moving and predictable audience – the inquiry".[98] Inquiries can act as stalling mechanisms, "creating the impression that solutions are being found until the event slips from the public consciousness".[99] Government is insulated from the pressure to act as no decisions can be made until the inquiry process is complete.[100] This has the flow-on effect that if the public see an inquiry has been established, they are then unlikely to pursue other avenues of redress.[101]

3 Final report – a negotiated paradox

An inquiry's final report is "merely an expression of its opinion".[102] As a final report can only make recommendations, the shortcomings in this part of an inquiry process are more overt: a fundamental paradox of an inquiry is that it is commissioned to fact-find, and make recommendations where things have gone wrong, yet the government is free to do what they want with such findings and recommendations. The public is induced to divert "its attention from the primary decision-making segments of a government to a body which has no power to effect change or take action".[103]

But less obvious is that inherent to an inquiry is a "classic situation of self-censorship".[104] While an inquiry is often free to choose their own process, and part of this will often include the ability for the public to make their own submissions on the issue, an inquiry's report is not written in public view. In this private part of process, "another party joins the table": "[t]he government to whom the final report is addressed becomes a silent member of the negotiating team."[105] Ultimately, for an inquiry to be of any utility, those in power must be persuaded to implement its recommendations. This appeal to the 'silent partner' "serves to limit and constrain what the inquiry report will contain and the scope of the recommendations it will make".[106] Thus, while public submissions can result in "radical" debate in criticism and

[98] Sulitzeanu-Kenan, above n 88, at 618.
[99] Goldie, above n 86, at 45.
[100] MacDonald, above n 2, at 387.
[101] MacDonald, above n 2, at 388.
[102] *Peters v Davison* [1999] 2 NZLR 164 (CA) at 171.
[103] MacDonald, above n 2, at 387.
[104] Salter, above n 15, at 183.
[105] Salter, above n 15, at 183.
[106] Salter, above n 15, at 183.

desirability of government action, the final report is confined to a "reformist" paradigm.[107] Moreover, public submissions are "disassociated" from their original context and used instead to pursue the negotiated position.[108]

D Re-assessing answerability

The primary purpose of inquires ought to be re-assessed in light of these considerations. Such a re-assessment suggests that inquiries, when considering their purpose as a tool for answerability, are *not* particularly effective accountability mechanisms as they fall short against democratic control, integrity and improvement. When an inquiry is acting in this capacity, public accountability deficiencies result.

The democratic control function places emphasis on the citizens at the end of the chain, who have delegated the ultimate power to rule.[109] However, political considerations are determinative, in particular blame avoidance theory and the manipulation of terms of reference and timing. This suggests that the democratic control function is undermined by the malleability of the process. Those in power know the benefit of the inquiry and can use it to their advantage. If this is the case, citizens' reliance on accurate information regarding the effectiveness of the conduct of government is undermined.

The integrity function places emphasis on protection against corruption and abuse of power.[110] However, as political considerations dictate establishment, it would be very unlikely in cases of severe misconduct by those in government that is not publicly known that an inquiry would be established. That a threat of an inquiry would deter such behaviour is fallacious. More significantly, the suppressant effect of an inquiry can inhibit other public accountability mechanisms which do reinforce integrity. That is, an inquiry can undermine the system of checks and balances, and put a stalling mechanism in its place.

Last, the learning perspective is undermined by the "reformist" paradigm of the recommendations.[111] To be sure, recommendations made in most inquiries are likely to

[107] Salter, above n 15, at 183.
[108] Salter, above n 15, at 183.
[109] Public Accountability, above n 40, at [8.1.1].
[110] Conceptual Framework, above n 36, at 463.
[111] Salter, above n 15, at 183.

improve behaviour or performance in some way. But they will only ever get so far: due to the need to appease the government, incremental change will only ever be implemented. If more radical recommendations were to be made, which would make significant in-roads towards improvement, they can, of course, be simply ignored.[112]

V The value-add of inquiries as an accountability mechanism

If, as suggested in the previous section, the function of inquiries as facilitating answerability falls short when assessed against public accountability functions, the value of inquiries as an accountability mechanism seems precarious. However, in this section, it is argued that despite the shortcomings, inquiries are nevertheless valuable due to their inimitable cultural therapist purpose. As a purpose predicated on perception, inquiries *are* an effective public accountability mechanism in that they reinforce legitimacy and leverage catharsis, despite the deficiencies in democratic control, integrity and improvement.

That this is a unique purpose is illustrated with reference to other public accountability mechanisms within New Zealand's constitutional system. This section, through analysis of these other public accountability mechanisms, suggests different accountability mechanisms carry different value within New Zealand's accountability regime. Following a disaster or crisis, multiple levers of accountability should be pulled to ensure a comprehensive outcome. Other mechanisms can be more suitable to more specific subject-matter and more efficient. However, they lack the key ingredient of status. It suggests that an inquiry can be one useful lever due to the therapeutic effect it has for the public. This finding helps to facilitate understanding of when inquiries should be established and how to maximise this value. The symbolic weight of an inquiry, the fact no other mechanism can reassure and restore public confidence quite like an inquiry, can is why "there is no doubt … that as a mechanism, [inquiries] must be retained".[113]

[112] There exists no quantitative analysis of how often inquiry recommendations are implemented or ignored, but secondary sources from comparable overseas jurisdiction suggests it is relatively commonplace. Unfortunately, such an analysis is largely outside the scope of this paper. For a discussion in the Canadian context, see Jeffrey Stutz "What gets done and why: implementing the recommendations of public inquiries" (2008) 51 *Canadian Public Administration* 501.
[113] NZLC R102, above n 6, at [2.12].

A Continuum of inquiries

A "continuum of inquiries and investigations are available to government".[114] Inquiries, as in those established under the Act, are only one of many. Permanent statutory commissions, such as the State Services Commission, the Office of the Ombudsman, the Office of the Auditor-General, the Law Commission and the Health and Disability Commission are able to investigate a wide range of problems, complaints and events.[115] Moreover, 62 Acts set up investigative entities which derive powers established under the former Commissions of Inquiry Act 1908.[116] That is, many specific statutory bodies exist that possess identical powers to inquiries. Last, there are inquiries within government departments: chief executives of government agencies can institute their own internal reviews into departmental issues.[117]

As other bodies fulfil the same function as inquiries, the specificity of which means they are more adept to deal with matters that fall into their area of expertise, it is well-accepted that if an alternative mechanism exists, an inquiry ought not to be established as a *first* response.[118] This, of course, does not affect the use of an inquiry once other mechanisms have been exhausted. To be sure, the growth of other bodies with such inquisitorial function has resulted in a decline in the use of inquiries. In the 20th century, the average number of inquiries per decade was 15.7.[119] Between 1947 and 1980, an average of three to four commissions a year were held.[120] They were "part of the regular machinery of government".[121] In the Law Commission report, this number had dropped radically: between 1984 and 2007 only nine were established.[122] However, since the establishment of the Act, inquiries have had something of a renaissance, with 11 established since 2013.[123] This jump in numbers is in part because governmental inquiries are now being recorded as part of the total number of inquiries, whereas previously there was no central record kept of ministerial inquiries. Recent usage nevertheless reflects a willingness to establish inquiries, something which has not been seen for some time.

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[114] NZLC IP1, above n 11, at [4].
[115] NZLC IP1, above n 11, at [27].
[116] Inquiries Act, sch 1.
[117] NZLC IP1, above n 11, at [84].
[118] NZLC IP1, above n 11, at [60]; Cabinet Manuel, above n 8, at [4.115].
[119] Simpson, above n 11, at 9.
[120] NZLC IP1, above n 11, at [53].
[121] Tony Black "Commissions of Inquiry" (1980) 19 NZLJ 425 in NZLC IP1, above n 11, at [53].
[122] NZLC IP1, above n 11, at [53].
[123] See: Department of Internal Affairs "Public and Government Inquiries" <https://www.dia.govt.nz/Public-and-Government-Inquiries>. The jump in numbers is in part due to the fact governmental inquiries are now being recorded, and form part of that number. Previously, there was no central record of ministerial inquiries.

There is also an issue of efficiency. Inquiries are notorious in their consumption of resource time, thus other mechanisms are usually more cost effective.[124] For example, the 'Wine-Box' inquiry cost in excess of $10 million.[125] This is because inquiries often generate a very long process. Each inquiry, as a new entity, requires significant start-up costs and time to establish administrative matters. Then there is the sheer scale of investigation, in particular receiving submissions from the public, which often means timeframes have to be extended.[126] Inquiries can adopt formal, legalistic processes, such as holding formal proceedings, which can take longer than expected.[127] Sometimes outside influences, such as judicial review proceedings, can also interfere.[128] However, cost does need to be considered in context. Timeframes are often overly ambitious to begin with, so extension is not necessarily a negative indication. Other bodies can also carry significant hidden costs, whereas costs of inquiries are more upfront. Last, the implementation of recommendations made by inquiries can make future savings.[129] Arguably, the issues with inquiry cost have been mitigated by the flexibility emphasised through the Act, and the Law Commission emphasizing a systemic shift away from formalities.[130]

Despite the existence of more efficient investigatory mechanisms, inquiries are persistently perceived to be more effective. This is due to two significant points of difference between an inquiry and other investigative bodies: perception of status, in particular independence, and public participation. First, those bodies set up under a specific statute, and most of the standing commissions, are considered to be less independent. This is due to their permanence: at the conclusion of any given investigation, such bodies continue to co-exist within the executive. In comparison, as inquiries are established and disestablished solely for a specific purpose, the public perceives "a greater impression of independence".[131] Second, there is the importance of public participation. Certainly, inquiries established under specific statute, or by standing commissions, sometimes undertake public consultation as part of their investigation. But public participation, as discussed above, is considered a key aspect of the inquiry process. Much of the investigatory aspect of an inquiry's process usually takes place, to some degree, in the

[124] NZLC R102, above n 6, at [1.18].
[125] NZLC R102, above n 6, at [1.19].
[126] See, for example, Operation Burnham: Inquiry into Operation Burnham "Questions and answers" <https://operationburnham.inquiry.govt.nz/about-the-inquiry/questions-and-answers/>
[127] NZLC R102, above n 6, at [1.21].
[128] NZLC IP1, above n 11, at [57]. See, for example, *Peters v Davison*, above n 102.
[129] NZLC R102, above n 6, at [1.20].
[130] NZLC R102, above n 6, at [1.22].
[131] NZLC IP1, above n 11, at [27]–[28].

public realm. Moreover, as inquiries are a relatively rare occurrence and reserved only for major matters, they have a higher profile. Thus, their establishment is often comprehensively reported in New Zealand media, which in turn notifies the public of the ability to participate and can "encourage people to make submissions where otherwise they would not".[132] Scarcity creates a "unique" creature of public participation.[133]

B Other bodies

1 Parliamentary officers

As independence is a definitive aspect in the roles of Auditor-General and the Ombudsman, the distinctions noted above with respect to other types of inquiries are less explicit in the case of the parliamentary officers. However, a difference arises with respect to investigatory scope: both the Auditor-General and the Ombudsman investigate issues predominately through "the prism of individual complaints".[134] While both "can and do look at the bigger picture with a view to facilitating lesson-learning", the starting point is usually the individual.[135] This means they often do not engage broad public participation, thus are unable to comment on structural or systemic shortcomings like an inquiry is able to do.[136] There is also the issue of status. Similarly to inquiries established under a specific statute or by standing commissions, parliamentary officers simply do not carry the same prestige as inquiries do. Consequently, parliamentary officers do not comparably facilitate such categorical symbolic reassurance.

2 The courts

While inquiries and courts can share similar characteristics, particularly in respect to the historical tendency of inquiries to conduct formal proceedings, they operate within significantly different parameters. The courts, particularly when exercising their judicial review function are, of course, a fundamental mechanism of accountability within New Zealand's constitutional structure. The court is able to review the exercise of any power or right to do anything, be it conferred under statute, constitution or other instrument of incorporation, rules or bylaws of a body corporate.[137] Jurisdiction is broad. However, adjudication processes

[132] NZLC IP1, above n 11, at [42].
[133] MacDonald, above n 2, at 367.
[134] Eliot, above n 72, at 17.
[135] Eliot, above n 72, at 17.
[136] NZLC IP1, above n 11, at [19].
[137] Judicial Review Procedure Act 2016, s 5.

require a pre-existing law to be applied, facts to be found by interested parties and the presumption of a conclusion.[138] Necessary to the process is the limitation of the law in respect to the individual interest.[139] The judicial process also tends to assign blame by "fragment[ing] issues".[140]

Inquiries are more flexible in both process and substance. Procedurally, inquiries can pick and choose which process is best suited to the context. They can adopt the "objective and orderly forum of a proceeding which the world can watch but in which nobody speaks unless spoken to" but escape the "constrictions of … procedure which makes litigation an inapt solution".[141] Substantively, inquiries have resources to find their own facts, thus are more likely to present a complete picture of events; can occupy the "sensitive area" where law meets policy, a strict no-go zone for the court; can judge administrative action far wider than just applicable law; and examine matters for the benefit of the public as a whole.[142] Consequently, an inquiry "enables a broader examination of social causes and conditions".[143]

3 Parliament

One of Parliament's primary functions is as the "grand inquest of the nation".[144] The 13 select committees – all appointed a particular portfolio – are able to initiate inquiries into any matter that falls within the subject matter of their portfolio, or the House of Representatives may refer a matter for inquiry.[145] The difficulty with select committees, when considering their effectiveness in relation to inquiries, is the perceived complete lack of independence and public participation. While the existence of a Mixed Member Proportion electoral system in New Zealand reduces some of the partisan issues present elsewhere,[146] the membership of select committee inquiries nevertheless shares considerable overlap with the executive – Ministers – thus, in some situations, too entangled with those whose conduct they need to assess.

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[138] MacDonald, above n 2, at 371.
[139] Eliot, above n 72, at 17.
[140] Robert Centa and Patrick Macklam, "Securing Accountability through Commissions of Inquiry: A Role for the Law Commission of Canada" (2001) 39 *Osgoode Hall Law Journal* 119 at 120.
[141] Sedley, above n 1, at 470.
[142] Eliot, above n 72, at 17; Sedley, above n 1, at 469.
[143] Centa and Macklam, above n 140, at 121.
[144] H M Clokie and J W Robinson *Royal Commissions of Inquiry: The Significance of Investigations in British Politics* (Octagon books, New York, 1969) at 3.
[145] Standing Orders of the House of the Representatives 2017, SO 190(2); and Cabinet Manuel, above n 8, at [4.117]–[4.119].
[146] NZLC IP1, above n 11, at [75].

Moreover, there are issues of resourcing. Parliament itself is too preoccupied with "transient political considerations to undertake serious and lengthy analysis".[147] Select committees are "ill-equipped to undertake the sort of large-scale evidence gathering that is often necessary in order for an inquiry to be conducted in meaningful depth."[148] For major crisis situations, then, not only are the Parliamentary select committees inadequate to allay public concern, but probably unlikely to have the resources for comprehensive inquiry.

C Enriching the accountability regime

The multiplicity of different mechanisms that exist to inquire into a particular event give rise to an accountability regime: "a coherent complex set" of institutionalised accountability arrangements and more *ad hoc* accountability relationships.[149] Such mechanisms ought not to be considered as operating in isolation, but within a system of "interconnected, standardized forms of accountability … consist[ing] of various formal arrangements and informal practices and relations."[150] No single measure, within a regime, is intended to exclusively fulfil functions of accountability.[151] Often, when something has gone wrong, multiple mechanisms are established.

Consider, for example, the Pike River mine disaster. In November 2010, an underground explosion at the mine killed 29 men. Three subsequent explosions meant re-entry would be too risky, and the bodies have still not been recovered. A month after the explosions, in December, a Royal Commission was established to report on what happened – the causes of explosion, loss of life, health and safety management practices, and systemic industry issues – and what should be done to prevent future tragedies.[152] But, as noted by the Commission, other investigations had occurred, or were concurrently occurring. The relevant department, the Department of Labour, had already conducted a departmental inquiry and released a report.[153] The Police were conducting criminal investigations into the mis-management of the mine.[154]

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[147] Clokie and Robinson, above n 144, at 3.
[148] Eliot, above n 72, at 18.
[149] Conceptual framework, above n 36, at 14.
[150] Conceptual framework, above n 36, at 14.
[151] Paul Finn "Public trust and public accountability" (1993) 65 *The Australian Quarterly* 50 at 52.
[152] "About the Pike River Royal Commission" (29 November 2010) Pike River Royal Commission <http://pikeriver.royalcommission.govt.nz/About-theCommission>.
[153] Department of Labour Pike *River Mine Tragedy 19 November 2010 Investigation Report* (2011).
[154] Royal Commission on the *Pike River Coal Mine Tragedy Royal Commission on the Pike River Coal Mine Tragedy – Volume 1* (October 2012) at 2.

And pursuit of public accountability did not end after the Royal Commission released its final report: an independent Health & Safety Taskforce was established in 2012, which made further recommendations regarding the Government's role in managing health and safety;[155] in 2016 a Parliamentary select committee – the Commerce Committee – inquired into, and consequently stopped, the new owners of the mine from sealing it and preventing re-entry;[156] a number of Ombudsman reports have been written;[157] and the recently established Pike River recovery agency – tasked with the job of re-entering the mine – is required to report weekly to WorkSafe, and annually to Parliament.[158] Part of this is the nature of the event: the fact the bodies are still unrecovered means, with respect to re-entering the mine, consequences are ongoing. However, part of this reflects ordinary practice. When a crisis occurs, multiple levers of accountability are pulled. Some simultaneously, some over a period of time. An inquiry's report is unlikely to be the first say on the issue, nor the last. Such multiplicity of response enables accountability across a range of different sites, which ensures a comprehensive outcome.

The different accountability arrangements and relationships utilized following the Pike River disaster illustrates that there exists more than one body able to fulfil similar functions is desirable. No single measure can act in isolation due to the complexities – multiple bodies and multiple causes are at play – when something has gone very wrong. Certainly, in the crisis context, inquiries form an essential part of this regime due to the specialized nature of their establishment. Inquiries are able to draw a comprehensive outline through their ability to explore issues in wider terms and in more depth, and the ad hoc temporary nature enables a view "from a perspective that differs from those necessarily adopted by the other accountability institutions".[159] Findings of an inquiry often reinforce the need for change, and can

[155] Independent Taskforce on Workplace Health and Safety *The Report of the Independent Taskforce on Workplace Health and Safety* (April 2013).
[156] See Joanne Carroll "Parliament select committee to investigate Pike River reentry" *Stuff* (online ed, New Zealand, 20 December 2016).
[157] See for example, Beverly Wakeham *Ombudsman case note request for Information about the Pike River Mine under the Official Information Act* (August 2011).
[158] Pike River Recovery Agency "Frequently asked questions" (updated 6 August 2020) <https://www.pikeriverrecovery.govt.nz/background/faq/>
[159] Eliot, above n 72, at 17.

institutionalise different accountability arrangements.[160] Inquiries, then, add value as they "contribute to the diversity of, and so enrich, the accountability system".[161]

More relevant for the purposes of this paper, however, is the value in their unparalleled status. When other public accountability mechanisms are failing to appease the public, even if they are in fact achieving substantive accountability, an inquiry is able to fill this gap. That there is a narrower basis for inquiries than once existed has only served to reinforce this status: rarity – like any scarce commodity – gives rise to a notion of value. Following a major event, when something has gone very wrong, often the first response will be a demand for an inquiry.[162] No other body is *seen* to be as effective, therefore no other body has a similar therapeutic effect in such situations. And, as will be illustrated in the next section, it is this distinct form of reassurance through which inquiries consistently leverage legitimacy and catharsis. That is why, despite accountability deficiencies, they are an effective public accountability mechanism.

VI Public inquiry into the EQC

Inquiries, as established by the Government, are inevitably a political creature. The fact political considerations feed into the process does not mean, however, that inquiries are ultimately a perfunctory tool in New Zealand's tool-box. Rather, it is helpful to consider how these political considerations shape public understanding of what inquiries ought to achieve.

This paper has argued that currently public perception suggests inquiries bear two fruits: primarily inquiries act as a check on the executive, requiring answerability of conduct, and second, inquiries act as a cultural therapist because of their reassuring effect on the public. A broad overview of populist discourse would suggest the primary purpose dominates understanding: the core rationale of an inquiry's establishment is the creation of an independent space where executive action is closely scrutinized. Comparatively, there is little conscious

[160] The findings of the Pike River Royal Commission, together with those of the Independent Taskforce on Health and Safety made a number of changes to the Health & Safety regime in New Zealand, including the establishment of a specialist body (WorkSafe).
[161] Eliot, above n 72, at 17.
[162] Consider, for example (in response to the Covid-19 pandemic): Murray Kirkness "Covid 19 coronavirus crisis demands a Royal Commission of Inquiry" *New Zealand Herald* (online ed, 30 May 2020); and Alexander Gillespie "Covid analysis: Why did NZ's quarantine system break down" *New Zealand Herald* (online ed, 19 June 2020).

articulation of inquiries as a cultural therapist. It can, then, be framed as an incidental purpose. This perception, is, as already discussed, mis-founded: inquiries are too moored to the executive to consistently ensure independent scrutiny. The secondary purpose is, in fact, the value-add of inquiries: no other body fulfils the same psychological role in New Zealand's accountability regime.

This re-framing of an inquiry's purpose – what they ought to be understood as being able to achieve consistently – can be illustrated with reference to the recent public inquiry into the EQC. When assessed against the democratic control, integrity and improvement functions, deficiencies are revealed. This is not to suggest that every inquiry will present such deficiencies, but rather that deficiencies may possibly be present in any given inquiry in relation to establishment, process and final report. This undermines inquiries *always* being an effective accountability mechanism when used as a check on executive action.

However, what the EQC inquiry emphasises is the importance of the public participatory process. Catharsis and legitimacy can be achieved every time if the process is afforded significant public emphasis. There is much less risk of accountability deficiencies in this respect. Therefore, the catharsis and legitimacy that arises out of an inquiry's role as a cultural therapist ought to be understood as the *raison d'etre* of inquiries. This has two consequences. First, the perception of independence and objectivity is mis-founded. The public perception of inquiries as a fix-it-all mechanism, as a panacea of accountability, ought to change. Second, the emphasis on public participation in inquiries – spending time to communicate with those affected and develop a robust process – is one that should be fostered in order to give effect to the proper purpose.

A Establishment of the inquiry into the EQC

1 Background and context

The EQC, established under the Earthquake Commission Act 1993, is a crown entity tasked with the purposes of providing natural disaster insurance for residential property (including contents, dwellings and land); administering the Natural Disaster Fund; and funding the research and education into, and reducing the impact of, natural disasters.[163] The EQC is

[163] Earthquake Commission Act 1993, s 5.

funded through a levy from private insurance: when an individual pays for private insurance, a part of this goes to the Natural Disaster fund.[164]

Insurance is a complex market, which, for the purposes of this paper, is unnecessary to describe in detail. To simplify: the insurance sector in New Zealand is made up by EQC and other private insurers. EQC provides insurance cover for residential properties who are privately insured against fire, up to a cap, for damage sustained from natural disaster.[165] For damage over that cap, private insurers top up payments in accordance with individual insurance policies.[166]

From September 2010 to December 2011, Christchurch suffered a sequence of major earthquakes. Significant loss of human life, wide-spread destruction of building and extensive liquefaction ensued. The EQC became increasingly overwhelmed by the unprecedented amount of claims.[167] While they had preparations in place for a major disaster, planning had proceeded on the basis it would be a single event which would result in, at the very maximum, 150,000 claims.[168] The Christchurch earthquakes were a complex series of destructive incidents, and over 460,000 claims were lodged with the EQC, which were made up by over 760,000 sub claims relating to homes, contents and land.[169] Moreover, these claims sometimes consisted of unprecedented damage, and / or damage from multiple earthquakes.[170] Prior to the Christchurch earthquakes, EQC usually handled 4,000 – 5,000 claims annually.[171]

Unsurprisingly, EQC were under-resourced. Claims took months to process, with many overlooked, followed by inaccurate assessments of damage and a systemically flawed repairs programme.[172] This left thousands in sub-standard housing for over nine years.[173] Despite multiple findings, from as early as 2012, that EQC handling of claims had been problematic,[174]

[164] The final report, above n 3, at 47.
[165] The final report, above n 3, at 47.
[166] The final report, above n 3, at 48.
[167] The final report, above n 3, at 3.
[168] The final report, above n 3, at 96.
[169] The final report, above n 3, at 44.
[170] The final report, above n 3, at 100.
[171] The final report, above n 3, at 85.
[172] The final report, above n 3, at 4.
[173]The final report, above n 3, at 4.
[174] See, for example, Ben Heather "EQC claims management criticised" *Stuff* (online ed, 2 January 2012).

and ongoing pleas from the public for an inquiry,[175] including a 3000-signature petition in 2016, the National-led Government denied there was any contributory aspect of mismanagement by EQC. From the government's perspective, complaints were "overegged" and the repair programme was an "outstanding success".[176] The Labour-led opposition were, however, firm in their support for an inquiry – considering there were systemic issues and an inquiry would help facilitate certainty for affected claimants[177] – and promised to establish one if they were elected.[178]

2 Terms of Reference

The (now Labour-led) Government established a public inquiry under s 6(2) of the Inquiries Act on the 12 November 2018,[179] chaired by the Honourable Dame Silvia Cartwright.[180] The purpose of the inquiry was "to ensure that lessons are learnt from these past experiences and that the … [EQC] has the appropriate policies and operating structures in place for improved operational practices in the future."[181] Scope primarily focussed on EQC operational practices prior, during and after the Christchurch earthquakes, in particular ascertaining claimants' experience of EQC practices.[182] The terms of reference noted that since the Canterbury earthquakes, the EQC has had to deal with a number of events, including earthquakes in Seddon, Eketahuna and Kaikoura, and flooding in Seddon.[183] Over the course of these events, the Commission's practices had evolved significantly.[184] The inquiry was asked to also consider the effectiveness of this new approach and future strategies for improvement.[185]

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[175] See, for example, Chris Barclay "Royal commission for earthquake repairs unnecessary, Brownlee says" *Stuff* (online ed, 11 September 2015); and Jack Fletcher "Rally for royal commission into Canterbury earthquake repairs" *Stuff* (online ed, 8 April 2016).
[176] Sally Murphy "We suspect there are systemic failings" *Radio New Zealand* (online ed, 8 April 2016).
[177] New Zealand Labour Party "New Documents confirm EQC inquiry needed" (press release, 26 June 2017); and Jamie Small "Nearly half of EQC managed repair owners concerned about repair quality" *Stuff* (online ed, 7 June 2017).
[178] Hon Dr Megan Woods "Dame Silvia Cartwright to lead Public Inquiry into the EQC" (press release, 13 November 2018).
[179] EQC Terms of Reference, above n 31.
[180] Cartwright is a prominent former High Court judge, who in 1988, headed an inquiry into Cervical cancer treatment, famously resulting in the 'Cartwright report' which heralded significant change in female health.
[181] EQC Terms of Reference, above n 31, at 2.
[182] EQC Terms of Reference, above n 31, at 2.
[183] EQC Terms of Reference, above n 31, at 1.
[184] EQC Terms of Reference, above n 31, at 1.
[185] EQC Terms of Reference, above n 31, at 2.

Beyond some minor exclusions of scope,[186] deciding what the concrete contours of the inquiry's parameters were to be was left largely to the discretion of the inquiry.

B Process of the inquiry

From the outset, the inquiry emphasised the importance of public participation and the inquisitorial (as opposed to adversarial) and informal nature of the process. This was, of course, in part due to the requirement of ascertaining claimant experience, but was amplified through the ideal of the inquiry to ensure anyone who wished to participate would "feel comfortable and able to take part" and to engage in "people-friendly ways".[187] The inquiry was also emphatic that the purpose was not to find fault, or apportion blame, but to learn lessons and adjust practice accordingly.[188]

A Community Reference Group was established by the inquiry – made up of community leaders, advocates and claimants – to design the public process, and ensure it was accessible and appropriate for anyone who wished to participate.[189] Over the course of the inquiry, the Community Reference Group provided feedback to the inquiry on their management of the process.[190]

The inquiry received 973 written submissions,[191] held 18 public forums,[192] had multiple more formal interviews with key stakeholders (the EQC, Fletchers, private insurers, Māori leaders, local council),[193] and had 417 social media comments.[194] These avenues were also extensively publicized prior and during their operation.[195] They also placed emphasis on acknowledging

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[186] The inquiry was not to determine any question of civil, criminal or disciplinary liability; structural arrangements for central or local government; the funding structure of the EQC; claim resolution or the re-opening of any claims; any cases currently subject to dispute proceedings; legal precedents; insurance contract law or any issue related to the EQC statute: EQC Terms of Reference, above n 31, at 3.
[187] Public Inquiry into the Earthquake Commission *What we heard: Summary of feedback from the inquiry's public engagement* (March 2020) at 186 (the companion document).
[188] See Liz McDonald "EQC inquiry will not be fault-finding says head Dame Silvia Cartwright" *Stuff* (online ed, 30 November 2018).
[189] Public Inquiry into the Earthquake Commission *Terms of Reference for a Community Reference Group, to support the inquiry into the EQC* (January 2019).
[190] The final report, above n 3, at 1.
[191] The companion document, above n 187, at 188.
[192] The companion document, above n 187, at 188.
[193] The companion document, above n 187, at 188.
[194] The companion document, above n 187, at 188.
[195] The companion document, above n 187, at 187.

the difficulty or upsetting nature of these settings: a professional wellbeing advisory service was present at all public forums, as was information about other help available to claimants.[196]

C Key findings and recommendations of the final report

The inquiry published a comprehensive 245-page final report, accompanied by a document summarizing submissions received in April 2020,[197] four months later than expected because of the "volume of information" received.[198] While the finer details of the report are not necessary for the argument this paper is making, a number of key findings and recommendations are helpful to show the extent of the truth in the claims of systemic maladministration. To summarise, EQC were "poorly prepared" and "ill-equipped" for disaster of such a scale and significantly under-resourced, which resulted in Cantabrians developing a "deep mistrust" of government.[199] Claim management practice was inefficient and impersonal, resulting in an unreasonably long turnaround period and many claims missed entirely,[200] further exacerbated by an inadequate and antiquated data and information management system.[201] Inaccurate damage assessment, in particular wide-spread under-valuing of damage; and the unusual decision to manage the residential repair program led to thousands of "botched repairs" and re-repairs.[202] Mismanagement of claimant relations were further frustrated through poor communication and a lack of accessible dispute resolution mechanisms.[203]

The inquiry recommended a number of findings in response, directed at both the Government and EQC. The recommendations place a particular emphasis on clarifying EQC's role, expectations, relationships and powers,[204] adjusting operational practice to emphasize consistency and accuracy,[205] and implement better information, planning and dispute

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[196] The companion document, above n 187, at 186.
[197] Hon Grant Robertson and Hon Dr Megan Woods "Inquiry report into the EQC released" (Press release, 9 April 2020).
[198] Interview with Dame Silvia Cartwright, Chair of the Inquiry (Logan Church, Checkpoint, Radio New Zealand, 10 July 2019).
[199] The final report, above n 3, at 17.
[200] The final report, above n 3, at 16.
[201] The final report, above n 3, at 17.
[202] The final report, above n 3, at 14.
[203] The final report, above n 3, at 16–17.
[204] The final report, above n 3, at 25–26.
[205] The final report, above n 3, at 28.

resolution systems.[206] In particular, the report recommended significant planning to be afforded towards considering whether the EQC was the appropriate body to carry out a managed repair programme, or whether some other body should be established.[207]

D Comparative frameworks of analysis

1 The inquiry as a check on the executive

If we frame the inquiry as leveraging democratic control, integrity and / or improvement, the EQC inquiry falls short. The lead-up to the establishment of the EQC inquiry, in particular the refusal by the National-led government to hold an inquiry, illustrates the inherent shortcomings discussed earlier: the illusion of inquiries as independent and their malleability as a political tool.

Clearly, something had gone wrong in the Christchurch recovery. This was evident from very early on. The final inquiry report notes, at a minimum, 59 reviews of the EQC occurring before the inquiry, commissioned either by the government or by the EQC.[208] While some of these are standard reviews (such as appearing before the Finance and Expenditure Committee) others, occurring as early as 2012, note very similar problems to what the inquiry found. In 2012, an external consultancy report, commissioned by the EQC, noted extensive shortcomings in EQC's response.[209] The Auditor-General reported, in 2013, on concerns regarding quality issues in the repair programme.[210] Also in 2013, the Chief Ombudsman and Privacy Commission reported on EQC's failure to fulfil its obligations under the Official Information Act and the mounting dissatisfaction among the public,[211] the Human Rights Commissioner reported on the human rights issues inherent in EQC practices,[212] and the State Services Commissioner reported on the reliability of EQC customer satisfaction surveys.[213] In 2015,

[206] The final report, above n 3, at 33 and 37.
[207] The final report, above n 3, at 30–31.
[208] The final report, above n 3, at 89.
[209] Martin, Jenkins & Associates Limited *EQC's Response to Canterbury Events: Lessons Learned* (March 2012).
[210] Lyn Provost *Earthquake Commission: Managing the Canterbury Home Repair Programme* (Office of the Auditor-General, October 2013).
[211] Beverly Wakem and Marie Shroff *Information fault lines – Accessing EQC Information in Canterbury* (Joint report of the Chief Ombudsman and the Privacy Commissioner into the Earthquake Commission's handling of information requests in Canterbury) (October 2013).
[212] Human Rights Commission *Monitoring Human Rights in the Canterbury Earthquake Recovery* (December, 2013).
[213] State Services Commission *Independent Review of the Earthquake Commission's Customer Satisfaction Survey* (December 2013).

the Treasury reviewed the scheme of the EQC Act, noting particular shortfalls around role clarification and expectations.[214] And, in 2018, an independent Ministerial Advisor prepared a report recommending changes to improve handling of remaining Christchurch claims.[215] Moreover, between the beginning of January 2010, and the end of May 2019, the EQC received more than 51,000 complaints, 96% of which related to Canterbury claims.[216]

As already discussed, (and will be discussed further below) inquiries are usually only one lever pulled of many. But a slightly different point is being made here: how confounding it is that the National-led Government continued to firmly deny that nothing significant had gone wrong, despite a plethora of reviews suggesting otherwise. Herein lies the paradox of inquiries: the power to establish them is very often with those who are ultimately responsible or have at least contributed to the error.

Blame avoidance theory is in action. The minister responsible for Earthquake Recovery at the time, Hon Gerry Brownlee MP, vehemently denied any wrongdoing, in particular the suggestion that the National-led government had driven EQC to cut their resources and costs. Mr Brownlee firmly held there was no need for an inquiry and, in any event, it would find in his favour.[217] Perhaps unsurprisingly, the inquiry implicated the Government in its final report: EQC were notably under-resourced, and a lack of clarification on the role and expectations of EQC at the time contributed to the mismanagement of the repair programme.[218] It is arguable, then, that here, the rhetoric of blame – politicians place more value on avoiding blame than implementing positive change – holds true. If an inquiry had been established, it would have provided a more concrete basis for acknowledging systemic problems in fact existed. Thus, by denying the need for an inquiry and by avoiding establishing one, the Government could frame complaints as those in the minority, single and isolated events. To be sure, some citizens acted on their own negativity bias – that is, if they had experienced the shortcomings of EQC personally – but the Government arguably avoided widespread damage through the pretence of it being a non-issue.[219]

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[214] The Treasury *Discussion Document – New Zealand's Future Natural Disaster Insurance Scheme: Proposed Changes to the EQC Act 1993* (July 2015).
[215] Christine Stevenson *Report of the Independent Ministerial Advisor to the Minister Responsible for the Earthquake Commission* (April 2018).
[216] The final report, above n 3, at 109.
[217] "Nats didn't scrimp on EQC costs, says Brownlee" *Radio New Zealand* (7 April 2018).
[218] The final report, above n 3, at 31.
[219] While the National party vote dropped in all Christchurch electorates, some of these were insignificant and National still won many electorates, as well as retaining their seats in those electorates: Electoral Commission

Moreover, also illustrated in process is the malleability of democratic control. Labour utilized citizen demand for an inquiry to their advantage. For Labour, the promise to establish an inquiry was a 'highly visible tool'. They could secure votes without needing to do anything aside from set up an inquiry, knowing that any blame would be directed at the previous government. It was a promise that would bring benefit entirely without risk.

The final report also reveals inherent shortcomings in an inquiry's ability to leverage integrity through *who* the EQC inquiry could hold to account. With respect to EQC as an entity, they were very engaged in the process – making multiple submissions, meeting with the inquiry Chair on several occasions – and fully welcomed the report, publicly acknowledging their shortcomings.[220] EQC had, however, formally apologized to affected claimants prior to the inquiry's report being published.[221] Therefore, in terms of integrity, the relevant body had already publicly acknowledged its own failings and public condemnation had already punished them. If public accountability is to ensure integrity is investigated, the inquiry's final report could be argued as merely reaffirming (albeit in more detail) actions already known by many and accepted by the perpetrator.

There is also very little in the report that criticizes the decisions of those in power at the time, or explicitly notes that different decisions by the Government with respect to resource and direction could have resulted in a different course of events. The inquiry was never intended to be fault-finding. But a – very – key actor in these crises situations, the iteration of government in power at the time, has avoided having to justify their conduct, or explain their reasons.[222] The Canterbury Home Repair Programme is now projected to cost 10 times the original $60 million estimation made in 2016 by Mr. Brownlee. A traditional constitution convention invoked following such shortcomings, individual ministerial responsibility, is irrelevant if the

"New Zealand 2017 General Election – Official Results" https://www.electionresults.govt.nz/electionresults_2017/.

[220] Sir Michael Cullen "EQC welcomes inquiry report" (Press release, 9 April 2020).

[221] The Earthquake Commission *Earthquake Commission's Annual Report 2018-19* (November 2019) at 2. See also: Conan Young "Commission's official apology for quake claims botch-up" *Radio New Zealand* (online ed, 13 November 2019).

[222] Moreover, Mr Brownlee considered the some of the findings "a little less than reasonable" and, in some respects, "wrong". See Michael Hayward "Inquiry finds EQC unprepared for Canterbury quake claims, says changes needed" (online ed, 10 April 2020).

responsible minister is no longer a minister.[223] As noted by submitters, there is still a strong feeling that "no-one has fallen on their sword or been held to account."[224]

In terms of the recommendations made by the EQC inquiry, the "reformist" paradigm is clear: recommendations are directed at legislative change, clearly defining the role of EQC in law. There is no suggestion of compensation, or implementing a system to fix all botched repairs, or further investigation to address actions of particular individuals, despite public submissions suggesting such options.[225] That is, nothing is suggested that would cost the government significant resource. Instead, any suggestions are targeted at regular machinery of government. This is not to suggest *no* improvement will come out of the inquiry's recommendations. If the government does enact suggested reform – as it is currently proposing to do – it is likely that a more efficient, better performing EQC will result. But the improvement function aims to teach others through the possibility of sanction. It is difficult to see how changes targeted at the specific EQC legislation will result in improvement across the public sector as a whole. It supposes improvement on a case-by-case analysis, after the misbehavior has occurred. However, if more radical recommendations had been made, such as any of those suggested above, a more explicit sanction likely to encourage better awareness and more efficient behaviour across the entirety of the public sector could be leveraged as the punishment is more severe.

2 The inquiry as a cultural therapist

As the above discussion around process emphasised, the subject matter of the inquiry was highly personal and emotionally charged. Such a significant, ongoing sequence of traumatic events had already put hundreds of thousands of Cantabrians in situations of distress and displacement. The subsequent EQC mismanagement of claims, in particular the widespread botched repairs, exacerbated these initial feelings and added in the significant dimension of financial stress. Moreover, many more who thought their problems resolved were then affected by unknowingly buying botched houses.[226] As at March 2020, there were 1557 open EQC

[223] That this cannot be invoked is not, it should be noted, always the case. For example, following the Pike River inquiry report, the Minister responsible resigned. See Hon Kate Wilkinson MP "Minister steps down after Pike River report" (Press release, 5 November 2012). But in situations where wrongdoing is less obvious, and those in power can deny any shortcomings, such as Mr Brownlee did, it is difficult to see how an inquiry report long after the fact is able to punish those at the top of the principal-agent chain effectively.
[224] The companion document, above n 187, at 150.
[225] The companion document, above n 187, at 146–150.
[226] See for example, Conan Young "Botched repairs still turning up in Christchurch" (online ed, 24 June 2020).

claims, 642 of which were new claims relating to repairs.[227] And as five years of Cantabrians calling for an inquiry hints, an inquiry was perceived as a mechanism that could find, and put in place solutions to fix these problems.

Thus, consideration of the EQC inquiry as a 'cultural therapist' is largely self-explanatory. The mere fact of establishment provided reassurance: what those affected had been asking for was given. This reassurance was further reinforced by appointing Dame Silvia Cartwright as chair and the time Cartwright spent – in public, with emphasis on the community – designing a comprehensive public process. That the inquiry could be seen working alongside those in the affected community allayed the concerns of others who had also been impacted.

This, in turn, leveraged legitimacy for the new Labour Government. Citizens could 'pose questions' and 'offer their opinion' to the inquiry, and could see the Government interacting with such views vis-à-vis the Government's response to the final report.[228] Those affected were reassured that the Government cared about what they had been through, and would act to ensure such incidents would not happen again. The Government, in simply establishing an inquiry, was therefore operating how it ought to be.

Moreover, the fact 59 previous reviews had occurred yet those affected still called for an inquiry also speaks volumes about the ability of an inquiry to confer legitimacy. Even if the existence of an inquiry is just a matter of perception – there was already a clear rhetoric of maladministration – that, in and of itself, is of value. Those affected would not have needed to look very far into any of those previous reports to have found affirmation of their concerns. Yet, an inquiry very clearly legitimises recognition in a way no other body can.

The process itself, and the emphasis on it being accessible for all, is paradigmatic catharsis. A familiar observation in the public discourse prior to the inquiry, and noted in the inquiry, is the "strong feeling from some residents in the greater Christchurch community that the voices of individuals and local communities have not been listened to sufficiently in post-earthquake recovery and regeneration responses."[229] To be sure, a large number of affected claimants did

[227] The Earthquake Commission "Canterbury Earthquakes" (15 May 2020) <https://www.eqc.govt.nz/canterbury#:~:text=In%20March%202020%20we%20opened,progress%20on%20our%20performance%20reports.>
[228] Hon Grant Robertson and Hon Dr Megan Woods, above n 197.
[229] The final report, above n 3, at 7.

not participate, considering it "not worthwhile or too uncomfortable … still too upsetting for them to recall difficult times post-disaster".[230] But for those who did participate, it was an opportunity to voice grievances and, for the first time, be heard while doing so. That this was a critical aspect of the inquiry is reflected in Dame Silvia's introduction in the *What we heard: summary of feedback* companion document:[231]

> I hope people feel they have been heard by the Inquiry and they find their voices reflected in this document. I found it humbling that people were willing to speak so candidly, to pour their hearts out to me, sometimes in tears or struggling to get the words out, and sometimes still angry.

The inquiry is illustrative of public accountability in the sense it created "the opportunity for penitence, reparation, and forgiveness" and provided a sense of closure, irrespective of the ongoing issues.[232] Although this is not necessarily public accountability ordinarily understood, academic discourse (as discussed in section III above) notes legitimacy and catharsis are key functions. That something is being seen to be done is just as valid a basis for public accountability as actual change.

VII Conclusion – ripe fruit for the picking

The fact that in the case of inquiries, it is mere process, as opposed to substantive outcomes, which leverages public accountability is critical in understanding an inquiry's value. It is the process which gives rise to the *sui generis* cultural therapist purpose. The superficiality with which inquiries are perceived is a unique thing. And it is this distinct perception that is both an inquiry's downfall and salvation.

On one hand, it is this superficiality that obfuscates the political taint inherent to an inquiry. In particular, the fundamental paradox that those who could be subject to blame by an inquiry are those who have the power to establish one. This has significant consequences on the inquiry across establishment, process and final report. To suggest that independence and impartiality are touchstones of an inquiry is fallacious. Consequently, the ability of an inquiry to act as a

[230] The final report, above n 3, at 7.
[231] The companion document, above n 187, at 1.
[232] Conceptual framework, above n 36, at 26.

check on the executive – to comprehensively inquire into their past behaviour and suggest future behaviour – does not consistently leverage public accountability. Analysing the inquiry as a functional mechanism to enforce democratic control, integrity or improvement reveals possible deficiencies across all three. As illustrated in the EQC inquiry, an inquiry will not necessarily be established when something has clearly gone wrong (such as was the case with EQC management of claims) but can be avoided, as was done by the National-led Government, or manipulated, as was done by the Labour-led Government. Process will not necessarily require those responsible actors to answer questions or explain their conduct. And the outcome will not necessarily facilitate improvement beyond the regular machinery of government, which is inadequate when considering institutional behaviour across the entirety of the public sector.

This is not to say democratic control, integrity or improvement can *never* be achieved through an inquiry. There will certainly be instances where, through an inquiry reviewing executive action, these will be leveraged. Rather, they are not a given in every single inquiry. Occurrence of them is not the value of an inquiry.

What that value of an inquiry is can be understood with reference to the other side of superficiality: it is the status an inquiry holds, which feeds into a public participatory process viewed as worthwhile participating in, that is able to consistently leverage public accountability. As discussion of inquiries within New Zealand's accountability regime emphasized, no other body is *seen* to be doing what an inquiry does. A minimum of 59 reviews noted EQC were failing to do their job yet calls for an inquiry continued. The status of an inquiry can be conceptualised as a type of meta-review, or even meta-recognition: if an inquiry is established in response to something, that thing must be of great importance. This is a very powerful tool of legitimacy: an inquiry has the ability to confer recognition, to reassure a group of people that things affecting them are failures of the state, and that the government acknowledges this.

Superficiality, however, does only go so far. In order for an inquiry to be an effective public accountability mechanism, it is also vital emphasis is placed on an effective public participatory process. The EQC inquiry was exemplary in this respect: the soothing of concern through establishment and a reputable chair, extent of engagement in and with the affected community, along with a corresponding awareness of sensitivity created a space where those affected *felt*

as if there was a relationship of public accountability. The fact, substantively, that there were deficiencies in that relationship – who the actors were, what questions could be asked and what consequences could be imposed – does not inhibit public accountability for the purposes of feeling their grievances aired.

What this paper asserts, then, is that inquiries are a valuable public accountability mechanism but not for the purpose usually considered. Currently, inquiries are called for whenever something appears to have gone wrong. They are viewed to be some kind of fix-it-all solution or as a panacea for accountability. But it is absurd to consider one mechanism as able to achieve all five functions of public accountability in isolation. Such mechanisms ought to work in unison, the unique aspect of each contributing to holding the relevant actors to account and ensuring better future behaviour. The primary benefit of an inquiry, what an inquiry is able to bring to any given crisis, is its role as a cultural therapist. In the EQC inquiry, public accountability was still achieved through the process, despite the deficiencies. By shifting our understanding of inquiries, of why inquiries are valuable, more consistency in their usage and process may be developed. Those in power may be able to better understand when they ought to be established, and those who constitute an inquiry may be able to better understand how they ought to be run. It is a very powerful thing to feel as if you are being listened to.

Thinking of inquiries in this way leads one to the conclusion that inquiries ought to be used in situations where there is trauma. Where citizens have suffered, have felt ignored and need a space to talk. Ample time should be given to develop how best to understand the issues. And while such a space should continue to be able to act through recommendations, to suggest legislative change or to note shortcomings in performance, the primary motivation for the process ought to be understood as it being a space to voice grievances and to feel someone is listening.

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The text of this paper (excluding table of contents, abstract, footnotes, and bibliography) comprises 11880 words.