



## Reframing Public Inquiries as 'Procedural Justice' for Victims of Institutional Child Abuse: Towards a Hybrid Model of Justice

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

**Published in:**  
Sydney Law Review

**Document Version:**  
Publisher's PDF, also known as Version of record

**Queen's University Belfast - Research Portal:**  
[Link to publication record in Queen's University Belfast Research Portal](#)

**Publisher rights**  
© 2016 Sydney Law Review and authors.

**General rights**  
Copyright for the publications made accessible via the Queen's University Belfast Research Portal is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

**Take down policy**  
The Research Portal is Queen's institutional repository that provides access to Queen's research output. Every effort has been made to ensure that content in the Research Portal does not infringe any person's rights, or applicable UK laws. If you discover content in the Research Portal that you believe breaches copyright or violates any law, please contact [openaccess@qub.ac.uk](mailto:openaccess@qub.ac.uk).

# *Reframing Public Inquiries as 'Procedural Justice' for Victims of Institutional Child Abuse: Towards a Hybrid Model of Justice*

Anne-Marie McAlinden\* and Bronwyn Naylor†

---

## *Abstract*

As the number of high profile cases of institutional child abuse mounts internationally, and the demands of victims for justice are heard, State responses have ranged from prosecution, apology, and compensation schemes, to truth commissions or public inquiries. Drawing on the examples of Australia and Northern Ireland as two jurisdictions with a recent and ongoing history of statutory inquiries into institutional child abuse, this article utilises the restorative justice paradigm to critically evaluate the strengths and limitations of the inquiry framework in providing 'justice' for victims. The article critically explores the normative and pragmatic implications of a hybrid model as a more effective route to procedural justice. It suggests that an appropriately designed restorative pathway may enhance the legitimacy and utility of the public inquiry model for victims chiefly by improving offender accountability and 'voice' for victims. The article concludes by offering some thoughts on the broader implications for other jurisdictions in responding to large-scale historical abuses and seeking to come to terms with the legacy of institutional child abuse.

## **I Introduction**

### **A *A Hybrid Approach***

Since at least the 1990s, institutional child abuse by the clergy, in particular members of Catholic religious orders,<sup>1</sup> has impacted in a range of jurisdictions including the United States ('US'),<sup>2</sup> Canada,<sup>3</sup> the Netherlands,<sup>4</sup> England and

---

\* Professor of Law and Director of Research, School of Law, Queen's University Belfast, Belfast, United Kingdom.

† Associate Professor and Deputy Director Castan Centre for Human Rights Law, Faculty of Law, Monash University, Melbourne, Australia.

<sup>1</sup> Institutional abuse, however, is by no means confined to this particular religious context. See, eg, Patrick Parkinson, Kim Oats and Amanda Jayakody, 'Study of Reported Sexual Abuse in the Anglican Church' (Report, Anglican Church, May 2009) <<http://www.apo.org.au/research/study-reported-child-sexual-abuse-anglican-church>>.

<sup>2</sup> John Jay College of Criminal Justice, 'The Nature and Scope of the Problem of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950–2002' (Research Study, City

Wales,<sup>5</sup> and the Republic of Ireland.<sup>6</sup> Official responses to institutional child abuse have drawn from a range of reparative and legal frameworks. These have included political apologies on behalf of the State, the establishment of statutory compensation schemes, a small number of prosecutions of individual perpetrators, and the setting up of truth or investigatory commissions or inquiries. Collectively, such State responses to historic abuses have constituted an emerging interdisciplinary sub-field within the broader domain of transitional justice.<sup>7</sup> Australia and Canada, for example, have used a mixture of public apology, reparation, compensation and truth commission as responses to clerical sexual abuse as well as institutional child abuse against indigenous peoples.<sup>8</sup> In the US, victims have sought redress via the civil courts where many parishes have gone into bankruptcy paying out large sums of victim compensation.<sup>9</sup> The dominant model for responding to institutional child sexual abuse in many jurisdictions, however, is the judge-led public inquiry, with the attendant possibility of subsequent prosecutions, compensation and public apology.

Many victims, however, have needs that are not met by the public inquiry process, which typically has more wide-reaching aims and objectives than addressing harm to individual victims.<sup>10</sup> In tandem with critiques of State justice more broadly,<sup>11</sup> the case for restorative justice as applied to institutional child abuse is founded on the failure of adversarial processes and the greater potential of

University of New York, February 2004); John Jay College of Criminal Justice, 'The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950–2010' (Report, City University of New York, May 2011).

<sup>3</sup> Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (2000).

<sup>4</sup> Wim Deetman et al, 'Sexual Abuse of Minors in the Roman Catholic Church' (Final Report, Commission of Inquiry, 2011). For a summary of the report in English, see <[http://www.onderzoekrck.nl/fileadmin/commissiedeetman/data/downloads/eindrapport/20111216/Samenvatting\\_eindrapport\\_Engelstalig.pdf](http://www.onderzoekrck.nl/fileadmin/commissiedeetman/data/downloads/eindrapport/20111216/Samenvatting_eindrapport_Engelstalig.pdf)>.

<sup>5</sup> Lord Nolan, 'A Programme for Action: Final Report of the Independent Review on Child Protection in the Catholic Church in England and Wales' (Report, Catholic Bishops' Conference of England and Wales, 2001) <<http://www.cathcom.org/mysharedaccounts/cumberlege/finalnolan1.htm>>.

<sup>6</sup> Commission to Inquire into Child Abuse, *Report of the Commission to Inquire into Child Abuse* (2009) <<http://www.childabusecommission.ie/>>.

<sup>7</sup> Johanna Sköld, 'Historical Abuse — A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Care Worldwide' (2013) 14(Supp 1) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 5; James Gallen, 'Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice' (2016) 10(2) *International Journal of Transitional Justice* 332 <<http://ijtj.oxfordjournals.org/content/early/2016/03/07/ijtj.ijw003>>.

<sup>8</sup> Jennifer J Lewellyn, 'Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR and Restorative Justice' (2002) 52(3) *University of Toronto Law Journal* 253; Rosemary Nagy and Robinder Kaur Sehdev, 'Introduction: Residential Schools and Decolonization' (2012) 27(1) *Canadian Journal of Law and Society* 67.

<sup>9</sup> See, eg, Tom Roberts, 'Milwaukee Eighth Diocese to File for Bankruptcy', *National Catholic Reporter* (online), 5 January 2011 <<https://www.ncronline.org/news/accountability/milwaukee-eighth-diocese-file-bankruptcy>>.

<sup>10</sup> Stephen Sedley, 'Public Inquiries: A Cure or a Disease?' (1989) 52(4) *Modern Law Review* 469; Geoffrey Howe, 'The Management of Public Inquiries' (1999) 70(3) *The Political Quarterly* 294; Iain Steele, 'Judging Judicial Inquiries' [2004] (4) *Public Law* 738.

<sup>11</sup> John Braithwaite and Kathleen Daly, 'Masculinities, Violence and Communitarian Control' in Tim Newburn and Elizabeth A Stanko (eds), *Just Boys Doing Business? Men, Masculinity and Crime* (Routledge, 1994) 189; Anne-Marie McAulinden, *The Shaming of Sexual Offenders: Risk, Retribution and Reintegration* (Hart, 2007).

restoration in addressing the needs of victims in more cases. The focus of this article is to explore the potential contribution of restorative principles to the public inquiry framework at a conceptual and operational level. Our core task is two-fold: (1) to critically analyse the benefits and limitations of the public inquiry framework in providing ‘justice’ for victims of institutional child abuse drawing on the experience of two jurisdictions that are currently in the midst of high profile statutory inquiries — Australia and Northern Ireland; and (2) more particularly, to propose a hybrid model of justice that incorporates a restorative avenue as a component of the inquiry process. We argue that a hybrid approach to procedural justice can be utilised to enhance the utility and legitimacy of public inquiries and improve the position of victims within the inquiry setting. While a restorative pathway cannot guarantee victims of mass crimes all of the outcomes they might seek, it can provide a broader range of outcomes than conventional justice processes in ensuring that victims perceive the proceedings as fair.

Advocating the need for a hybrid system of justice that encompasses elements of both restorative justice and the formal public inquiry rubric raises significant questions of law and procedure in terms of how such a holistic approach could work in practice. Of particular relevance is the challenging relationship between formal and informal justice systems, with restorative justice requiring additional protections and safeguards. Chief among these, and consistent with the United Nations’ *Basic Principles on the Use of Restorative Justice in Criminal Matters*,<sup>12</sup> are the careful selection of cases<sup>13</sup> and criteria for referral;<sup>14</sup> the consideration of power imbalances between the parties;<sup>15</sup> and fundamental procedural safeguards for the offender and the victim such as free and informed consent,<sup>16</sup> protection from future legal proceedings,<sup>17</sup> and the right to consult with legal counsel.<sup>18</sup> The pragmatic implications of achieving a synergy between the public inquiry and restorative paradigms and of addressing these normative principles will be returned to below.

## **B** *Definitions and the Comparative Approach*

To begin, however, we should define terms. The term ‘institutional child abuse’ may include three primary, yet interrelated, categories: abuses within institutional child care;<sup>19</sup> abuses by members of religious organisations;<sup>20</sup> and the forced removal of children from their families following which many suffered abuse and

---

<sup>12</sup> ESC Res 2002/12, UN ESCOR, 37<sup>th</sup> plen mtg, UN Doc E/Res/2002/12 (24 July 2002).

<sup>13</sup> *Ibid* cl 11.

<sup>14</sup> *Ibid* cl 12.

<sup>15</sup> *Ibid* cl 9.

<sup>16</sup> *Ibid* cls 13(a)–(c).

<sup>17</sup> *Ibid* cl 8.

<sup>18</sup> *Ibid* cl 13(a).

<sup>19</sup> Michael F Shaughnessy, ‘Institutional Child Abuse’ (1984) 6(4) *Children and Youth Services Review* 311; Bernard Gallagher, ‘The Extent and Nature of Known Cases of Institutional Child Sexual Abuse’ (2000) 30(4) *British Journal of Social Work* 795.

<sup>20</sup> Marie Keenan, *Child Sexual Abuse and the Catholic Church: Gender, Power and Organizational Culture* (Oxford University Press, 2011). See also, above n 2, n 4–6.

neglect while in institutional care.<sup>21</sup> Although the focus in Northern Ireland has predominantly been on the first two, Australia has experienced all three forms of institutional child abuse and resultant inquiries related to these. The common focus of recent inquiries in both jurisdictions, and this article, however, is a combination of the first two — abuses of children within residential care in primarily religious contexts encompassing physical, as well as sexual, abuse.

A range of well-rehearsed caveats underpin comparative legal scholarship, not least in terms of differences in legal frameworks and cultures, and socio-political ideologies.<sup>22</sup> Mindful of the need to abide by the ‘rules of inference’ in social scientific inquiry,<sup>23</sup> there are a number of reasons underlying our theoretical comparative approach and the choice of these particular case studies. First, the use of binary case studies is an established methodology in the area of comparative law,<sup>24</sup> including criminology and criminal justice.<sup>25</sup> In the vein of contemporary comparative law, this article adopts ‘an integrative approach’, rather than a purely contrastive one.<sup>26</sup> That is, the emphasis is placed on highlighting the cross-cultural relevance and similarities between jurisdictional responses, rather than normative differences. Second, as academics living, working and researching in these respective jurisdictions, the ongoing high profile commissions or inquiries present a timely juncture at which to examine the broader utility of this method as a response to institutional child abuse. Third, both are Anglo-centric common law jurisdictions that have had a troubled and contested past and where post-colonial politics and issues such as territoriality and political and/or sectarian conflict may present additional considerations for redress.<sup>27</sup> Beneath that macro-level politics, however, there are also emerging micro-level politics surrounding particular versions of victimhood related to historical institutional child abuse where inquiry ‘narratives’ are used to confront ‘amnesia’ about a forgotten past and to ‘re-imagine’ national identity.<sup>28</sup> Fourth, at the pragmatic level, there is also a shared history of institutional child abuse. By way of example, many ‘child migrants’ were transported to Australia from Northern Ireland between the mid-1940s and mid-1950s as part of UK Government policy where they were later

---

<sup>21</sup> Nagy and Kaur Sehdev, above n 8.

<sup>22</sup> Paul Roberts, ‘On Method: The Ascent of Comparative Criminal Justice’ (2002) 22(3) *Oxford Journal of Legal Studies* 539; David Nelken, ‘Comparing Criminal Justice’ in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (Oxford University Press, 4<sup>th</sup> ed, 2007) 139.

<sup>23</sup> Lee Epstein and Gary King, ‘The Rules of Inference’ (2002) 69(1) *University of Chicago Law Review* 1.

<sup>24</sup> See generally Ran Hirschl, ‘The Question of Case Selection in Comparative Constitutional Law’ (2005) 53(1) *American Journal of Comparative Law* 125.

<sup>25</sup> Dario Melossi, ‘The Cultural Embeddedness of Social Control: Reflections on the Comparison of Italian and North-American Cultures Concerning Punishment’ (2001) 5(4) *Theoretical Criminology* 403.

<sup>26</sup> Rudolf B Schlesinger, ‘Past and Future of Comparative Law’ (1995) 43(3) *American Journal of Comparative Law* 477.

<sup>27</sup> See, eg, Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Ashgate, 2008); Jennifer Balint, Julie Evans and Nesam McMillan, ‘Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach’ (2014) 8(2) *International Journal of Transitional Justice* 194.

<sup>28</sup> Benedict Anderson, *Imagined Communities* (Verso, 1983).

placed in institutions and abused.<sup>29</sup> Some victims currently residing in Australia have given testimony to the Historical Institutional Abuse Inquiry in Northern Ireland as former residents of child care institutions in the province and their testimonies will also be shared with the ongoing Royal Commission in Australia.<sup>30</sup>

At the same time, however, while institutional child abuse has come to light as a contemporary societal problem in much the same way in both jurisdictions, there are also fundamentally different cultural lenses through which the issue has emerged. In brief, while Australia is a contemporary settled democracy, Northern Ireland is a paradigmatic transitional society seeking to countenance a history of armed conflict and serious political violence. Indeed, the legacy of the political and violent conflict in Northern Ireland undoubtedly makes the issues concerning child sexual abuse much more complex. Such cultural heterogeneity and the potential implications for both types of society seeking to move on from the legacy of institutional child abuse will be discussed further in the conclusion.

### C *Paradigms and Structure*

This analysis draws upon several distinct literatures. A number of contemporary scholars have critically examined the case for restorative justice as applied to gendered and sexualised violence<sup>31</sup> and with particular regard to clerical sexual abuse.<sup>32</sup> Although the precise definition and parameters of ‘restorative justice’ remain highly contested, the term is generally applied to non-adversarial processes between victims and offenders that aim to ‘restore’ both parties through ‘mediated encounters’ leading to the acknowledgement of harm and reparation by the offender.<sup>33</sup> The key agreed principles behind the paradigm include empowerment of all the parties affected by the offence (victim, offender and community); non-coercive participation and decision-making; and striking an appropriate balance between the multiple interests at stake.<sup>34</sup>

<sup>29</sup> Henry McDonald, ‘Northern Irish Children Sent to Australia were Sexually Abused, Inquiry Told’, *The Guardian* (online), 1 September 2014 <<https://www.theguardian.com/uk-news/2014/sep/01/northern-ireland-australian-orphanages-sexually-abused-inquiry>>.

<sup>30</sup> *Ibid.*

<sup>31</sup> Barbara Hudson, ‘Restorative Justice and Gendered Violence: Diversion or Effective Justice?’ (2002) 42(3) *British Journal of Criminology* 616; McAlinden, above n 11; Bronwyn Naylor, ‘Effective Justice for Victims of Sexual Assault: Taking Up the Debate on Alternative Pathways’ (2010) 33(3) *University of New South Wales Law Journal* 662.

<sup>32</sup> Theo Gavrielides and Dale Coker, ‘Restoring Faith: Resolving the Catholic Church’s Sexual Scandals through Restorative Justice (Working Paper I)’ (2005) 8(4) *Contemporary Justice Review* 345; Douglas E Noll and Linda Harvey, ‘Restorative Mediation: The Application of Restorative Justice Practice and Philosophy to Clergy Sexual Abuse Cases’ (2008) 17(3–4) *Journal of Child Sexual Abuse* 377.

<sup>33</sup> The extensive literature cannot be canvassed here, but see, eg, Daniel W Van Ness and Karen Heetderks Strong, *Restoring Justice* (Anderson Publishing, 1997); Dennis Sullivan and Larry Tiffit (eds), *Handbook of Restorative Justice* (Routledge, 2006); Howard Zehr, ‘Doing Justice, Healing Trauma: The Role of Restorative Justice in Peacebuilding’ (2008) 1(1) *South Asian Journal of Peacebuilding* 1.

<sup>34</sup> Adam Crawford, ‘Salient Themes Towards a Victim Perspective and the Limitations of Restorative Justice: Some Concluding Comments’ in Adam Crawford and Jo Goodey (eds), *Integrating a Victim Perspective within Criminal Justice* (Ashgate, 2000).

Others have examined the public inquiry method as a means of affecting deep-rooted *institutional* change more generally,<sup>35</sup> as well as with specific regard to the aftermath of institutional clergy abuse.<sup>36</sup> Such perspectives, however, have failed to consider how restorative narratives could fit within or relate to dominant legal paradigms, including public inquiries, as well as the prospects of the inquiry model in achieving justice and change for *victims* specifically. This article addresses these lacunas within the respective literatures. As Garland has contended, restorative justice has tended to operate at the margins of formal justice, particularly where serious forms of offending are concerned, ‘without much changing the overall balance of the system’.<sup>37</sup> This article seeks to counter this tendency by critically examining the use of restorative justice within the public inquiry framework as a mainstream justice response in areas of high public controversy. A broader literature has questioned the utility and overuse of the public inquiry model as a ‘front-and-centre’ political response to contemporary social crises.<sup>38</sup> This analysis also extends these debates by critically examining the merits of the public inquiry model as a response to historical institutional child abuse.

Restorative justice is presented here as a means of countering what we regard as the failings of public inquiries as the principal legal framework for addressing institutional child abuse. As discussed further below, selectivity in the sampling of cases for public inquiry often results in a much narrower legal construction of victimhood. Furthermore, for those victims who do participate, such proceedings are often ‘characterised by formality, legality and a closed system of communication dominated by legal professionals’.<sup>39</sup> The extrajudicial features of restorative approaches may serve to neutralise the psychological or emotional trauma of adversarial legal processes for victims.<sup>40</sup> Restorative processes may also help to address what has been termed the ‘new dimension of victimization’<sup>41</sup> relating to a distinctive range of psychological, emotional and other harms experienced by victims of clerical abuse in particular.

What has been termed the ‘unique betrayal’ experienced by such victims relates to the religious or spiritual dimension of the offending stemming from a violation of faith, identity, human dignity and trust that State-controlled resolution

---

<sup>35</sup> Steele, above n 10; Phil Scraton, ‘From Deceit to Disclosure: The Politics of Official Inquiries in the United Kingdom’ in George Gilligan and John Pratt (eds), *Crime, Truth and Justice: Official Inquiry, Discourse, Knowledge* (Willan Publishing, 2004) 46.

<sup>36</sup> Anne-Marie McAlinden, ‘An Inconvenient Truth: Barriers to Truth Recovery in the Aftermath of Institutional Child Abuse in Ireland’ (2013) 33(2) *Legal Studies* 189.

<sup>37</sup> David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001) 104.

<sup>38</sup> Sedley, above n 10; Steele, above n 10.

<sup>39</sup> Jonathan Doak and Louise Taylor, ‘Hearing the Voice of Victims and Offenders: The Role of Emotions in Criminal Sentencing’ (2013) 64(1) *Northern Ireland Legal Quarterly* 25, 45.

<sup>40</sup> Diana L Grimes, ‘Practice What You Preach: How Restorative Justice Could Solve the Judicial Problems in Clergy Sexual Abuse Cases’ (2006) 63(4) *Washington and Lee Law Review* 1693, 1711–12.

<sup>41</sup> Theo Gavrielides, ‘Clergy Child Sexual Abuse and the Restorative Justice Dialogue’ (2013) 55(4) *Journal of Church and State* 617, 622–8.

processes are ill-equipped to address.<sup>42</sup> This is not to minimise the impact of abuse on victims of child sexual abuse in a range of other intra-familial and quasi-intra familial settings, such as within family homes and schools, which are also typically predicated on implicit and unconditional trust. However, it is the ‘violation of meaning’ or ‘a sacred ... worldview’<sup>43</sup> and the breach of trust and power by perpetrators who represent both their God and their Church for victims within institutionalised religious settings that arguably extend the range of ‘harms’ and particularise the suffering of such victims.

While acknowledging the fundamentally different justice paradigms employed by informal restorative processes and public inquiries as part of the apparatus of formal State justice,<sup>44</sup> we argue that the public inquiry model may address some of the ‘account-making’ elements deemed necessary for the restoration or healing of victims (chiefly in terms of providing an authoritative record of events).<sup>45</sup> It is more limited, however, in its capacity to deliver other forms of redress for victims including apology, forgiveness and procedural justice. A key element of restoration is securing ‘procedural justice’ for both victims and offenders, where there is focus on building trust and legitimacy in the fairness of the process<sup>46</sup> and in securing therapeutic benefits for victims.

The structure of the article is as follows: Part II briefly examines what is meant by ‘justice’ for victims and what victims of institutional child abuse want from justice processes. Part III provides a critical overview of public inquiries as a response to institutional child abuse, including those in Northern Ireland and Australia. Part IV examines key elements of the restorative paradigm and its use with clerical sexual abuse. Part V considers the opportunities, challenges and limitations of combining these justice paradigms. Finally, the article concludes by evaluating the implications for restorative justice discourses more broadly in seeking to address large-scale abuses, as well as the lessons for other jurisdictions seeking to come to terms with the legacy of institutional child abuse.

## II ‘Justice’ for Victims of Institutional Child Abuse

A useful starting point is to examine what is meant by ‘justice’ more broadly for victims of institutional child abuse. In this respect, several scholars have examined what victims of sexual assault in general want from the justice system. Many victims want public denunciation of the harm suffered and punishment for the

---

<sup>42</sup> Joseph J Guido, ‘A Unique Betrayal: Clergy Sexual Abuse in the Context of the Catholic Religious Tradition’ (2008) 17(3–4) *Journal of Child Sexual Abuse* 255.

<sup>43</sup> Ibid 255. See also Kenneth I Pargament, Nichole A Murray-Swank and Annette Mahoney, ‘Problem and Solution: The Spiritual Dimension of Clergy Sexual Abuse and Its Impact on Survivors’ (2008) 17(3–4) *Journal of Child Sexual Abuse* 397.

<sup>44</sup> Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, 1990).

<sup>45</sup> Natalia Josephine Blecher, ‘Sorry Justice: Apology in Australian Family Group Conferencing’ (2011) 18(1) *Psychiatry, Psychology and Law* 95; Jonathan Doak, ‘Honing the Stone: Refining Restorative Justice as a Vehicle for Emotional Redress’ (2011) 14(4) *Contemporary Justice Review* 439.

<sup>46</sup> Tom R Tyler et al, ‘Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders’ Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment’ (2007) 41(3) *Law & Society Review* 553.



offender.<sup>47</sup> Other victims, however, seek a broader range of outcomes than can be provided by conventional justice processes including public acknowledgement of the harm they have suffered, by both the offender and the community;<sup>48</sup> a genuine voice and some control over the process;<sup>49</sup> mechanisms of genuine accountability,<sup>50</sup> including an apology from the perpetrator and compensation or reparation;<sup>51</sup> preventing the recurrence of the abuse;<sup>52</sup> and forgiveness and reconciliation with offenders.<sup>53</sup>

Other studies have also explored what victims of clerical sexual abuse specifically want from justice processes.<sup>54</sup> Victims of such crimes seek, among other things, full disclosure; face-to-face encounters with church authorities to hear them take responsibility for wrongdoing; offender remorse and accountability; offender appreciation of the impact of the abuse on their lives; victim empowerment and a role in the justice process; rebalancing of power; an independent investigation of the facts; validation of their suffering, and support by the State and the Church; and stopping the abuse by the individual and by the institution for current and future victims. Given the diversity in what victims want in terms of justice, there is arguably a need for greater flexibility within justice responses. While a restorative process cannot guarantee victims of mass crimes the full range of options they might seek, its incorporation might go some way towards ensuring that victims of institutional child abuse perceive the inquiry proceedings as fair. It is our contention that some of these outcomes are achievable within an appropriately modified inquiry framework that incorporates restorative elements, although the potential for others is less certain and more limited.

‘Procedural justice’ is generally taken to refer to the procedures and decisions that help shape and inform an outcome, and the impact that this has on how fairly participants feel they have been treated and whether their needs have been met.<sup>55</sup> Procedural justice for victims of institutional child abuse has been presented as a potential means of incorporating a number of core benefits for victims. Daly, for example, in her recent work on institutional child abuse in Australia and Canada,<sup>56</sup> drawing on the work of Tyler,<sup>57</sup> identifies ‘justice’ for

---

<sup>47</sup> Hudson, above n 31; Martin Wright, ‘The Court as Last Resort’ (2002) 42(3) *British Journal of Criminology* 654.

<sup>48</sup> J L Herman, ‘Justice from the Victim’s Perspective’ (2005) 11(5) *Violence Against Women* 571.

<sup>49</sup> Denise Lievore, ‘No Longer Silent: A Study of Women’s Help-Seeking Decisions and Service Responses to Sexual Assault’ (Report, Australian Institute of Criminology, June 2005).

<sup>50</sup> Marie Keenan, ‘Sexual Trauma and Abuse: Restorative and Transformative Possibilities?’ (Report, School of Applied Social Sciences, University College Dublin, 27 November 2014) ch 5.

<sup>51</sup> Naylor, above n 31.

<sup>52</sup> Bruce Feldthusen, Olena Hankivsky and Lorraine Greaves, ‘Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse’ (2000) 12(1) *Canadian Journal of Women and the Law* 66.

<sup>53</sup> Heather Strang and John Braithwaite (eds), *Restorative Justice: Philosophy to Practice* (Ashgate, 2000).

<sup>54</sup> See, eg, Jennifer M Balboni and Donna M Bishop, ‘Transformative Justice: Survivor Perspectives on Clergy Sexual Abuse Litigation’ (2010) 13(2) *Contemporary Justice Review* 133.

<sup>55</sup> See, eg, E Allan Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988).

<sup>56</sup> Kathleen Daly, *Redressing Institutional Abuse of Children* (Palgrave Macmillan, 2014).

<sup>57</sup> Lind and Tyler, above n 55; Tom R Tyler, *Why People Obey the Law* (Yale University Press, 1990).

such victims as containing ‘elements of procedural justice’.<sup>58</sup> She proposes a set of five ‘justice interests’: ‘participation, voice, validation, vindication, and offender accountability’.<sup>59</sup> Procedural justice has merit in not only assisting victims in pursuing these legitimate interests within formal legal processes,<sup>60</sup> but as a means of alleviating secondary victimisation<sup>61</sup> and affirming victims’ voices and dignity in the proceedings.<sup>62</sup> Previous research has identified procedural justice as the optimal mode of redress for victims of institutional abuse. However, it has stopped short of examining questions of praxis, and the normative and conceptual implications of how such a model would fit within the public inquiry process as the dominant legal paradigm, as this article seeks to do.

There is a dearth of research on victims of institutional child abuse, but further empirical support for the need to question current orthodoxies and think more creatively in addressing the needs of victims for procedural justice outside legalistic variants of justice comes from a number of recent studies conducted with victims of sexual crime in the Republic of Ireland and Australia. In the Republic of Ireland, where there has been a recent history of public inquiries into clerical sexual abuse, research has highlighted ‘significant gaps in current justice provision’ and ‘the need for additional justice mechanisms for victims of sexual crime’ and the attendant ‘transformative possibilities’ of restorative justice.<sup>63</sup> In particular, victims of sexual trauma, including victims of clerical abuse, voiced the need to come face-to-face with their perpetrators in order, to put questions to them and gain greater understanding about why the abuse happened, and to facilitate ‘healing’ and genuine offender accountability.<sup>64</sup> Similarly, in the Australian context, recent doctoral research by Courtin has established that victims of Catholic clergy sexual abuse want: acknowledgement of the victim’s truth; the Church hierarchy to tell the truth about what it knew and how it responded; accountability of the Church hierarchy, especially for concealing the crimes; monetary compensation; criminal accountability of the perpetrator; an effective apology; counselling and other services; and, finally, prevention of further clergy abuse.<sup>65</sup>

As noted above, it is important to acknowledge, however, the fundamentally different ideologies and goals of public inquiries, as an instrument of formal justice, and more informal restorative processes as a means of responding to disputes and addressing blame.<sup>66</sup> As Hoyle and Young contend, there are

---

<sup>58</sup> Daly, above n 56, 117–18.

<sup>59</sup> *Ibid* 117.

<sup>60</sup> Lind and Tyler, above n 55.

<sup>61</sup> See, eg, Jim Parsons and Tiffany Bergin, ‘The Impact of Criminal Justice Involvement on Victims’ Mental Health’ (2010) 23(2) *Journal of Traumatic Stress* 182.

<sup>62</sup> See also *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 40<sup>th</sup> sess, 96<sup>th</sup> plen mtg, UN Doc A/RES/40/34 (29 November 1985) annex art 6(b).

<sup>63</sup> Keenan, above n 50, 4.

<sup>64</sup> *Ibid* ch 5.

<sup>65</sup> Judith Edwina Courtin, *Sexual Assault and the Catholic Church: Are Victims Finding Justice?* (PhD Thesis, Monash University, 2015) ch 3.

<sup>66</sup> Randy E Barnett, ‘Restitution: A New Paradigm of Criminal Justice’ in Gerry Johnstone (ed), *A Restorative Justice Reader: Texts, Sources, Context* (Willan Publishing, 2003) 46; Zehr, above n 44.

‘undeniably tensions created by attempts to graft restorative justice on to established systems of ... justice’.<sup>67</sup> In essence, while the focus of public inquiries is on adjudication and establishing fault or responsibility for particular acts or omissions, restorative justice as a process is not about fact-finding for the determination of guilt, but rather reparation in the aftermath of harm and devising an appropriate response to admitted behaviour.<sup>68</sup> Mindful of such tensions and challenges, our analysis will also seek to draw out the shared goals of public inquiries and restorative programmes, principally in terms of victim catharsis and offender accountability.

### III Public Inquiries as a Response to Institutional Child Abuse

The emergence of institutional child abuse as a contemporary societal problem came about in much the same way in Northern Ireland and Australia — via an incremental process of individual cases, media scrutiny and an ensuing public outcry. In this section, we provide a brief overview of the main inquiries in Northern Ireland and Australia followed by a critical examination of the limitations of public inquiries as a response to institutional child abuse and in addressing the needs of victims in particular.

#### A Northern Ireland and the Republic of Ireland

The emerging crisis of historical institutional child abuse in Northern Ireland has been preceded, and to a certain extent precipitated by, a chain of recent high-profile inquiries into the handling of institutional child abuse in the neighbouring Republic of Ireland.<sup>69</sup> Bertie Ahern, the then Taoiseach,<sup>70</sup> issued the first public political apology to victims of institutional child abuse on behalf of the Irish State in May 1999. The most high profile of the inquiries, the Commission to Inquire into Child Abuse (the ‘Ryan Commission’), was established soon after to investigate the treatment of children in residential institutions run by Catholic religious orders dating back to 1936.<sup>71</sup> The Residential Institutions Redress Board was also set up as a compensation scheme for victims of institutional abuse.<sup>72</sup> The Ryan Commission had two key components: an ‘Investigation Committee’ that

<sup>67</sup> Carolyn Hoyle and Richard Young, ‘Restorative Justice: Assessing the Prospects and Pitfalls’ in Mike McConville and Geoffrey Wilson (eds), *The Handbook of the Criminal Justice Process* (Oxford University Press, 2002) 525, 546.

<sup>68</sup> *Ibid* 525.

<sup>69</sup> Francis D Murphy, Helen Buckley and Laraine Joyce, ‘The Ferns Report’ (Report, Ferns Inquiry, 2005); Commission of Investigation into the Catholic Archdiocese of Dublin, *Report* (2009); Commission of Investigation into the Catholic Diocese of Cloyne, *Report* (2011); Inter-Departmental Committee to Establish the Facts of State Involvement with the Magdalen Laundries, Government of Ireland, *Report of the Inter-Departmental Committee to Establish the Facts of State Involvement with the Magdalen Laundries* (2013). There is also an ongoing Commission of Investigation into Mother and Baby Homes.

<sup>70</sup> The Head of Government or Prime Minister of the Republic of Ireland.

<sup>71</sup> See *Commission to Inquire into Child Abuse Act 2000* (Ireland) and *Commission to Inquire into Child Abuse (Amendment) Act 2005* (Ireland).

<sup>72</sup> See *Residential Institutions Redress Act 2002* (Ireland).

heard the personal testimonies of those who had been abused in public hearings, and a 'Confidential Committee' that allowed for the giving of such evidence in private. Its five-volume report, which took nine years to produce, highlighted the fact that the abuse of children (physical, sexual, emotional and neglect), and the failure of Church and State authorities to adequately respond to the problem, was *systemic* in Irish child care institutions.<sup>73</sup>

In the aftermath of the Ryan Commission Report, however, criticisms began to emerge and many victims were left wanting in terms of 'justice'.<sup>74</sup> In particular, the aspirations of providing an authoritative record of events and holding perpetrators to account had not been realised. It has been argued, for example, that the legal architecture of such inquiries, including the exigencies of the Church–State relationship in Ireland, is not conducive to 'truth recovery' or the search for justice in the public accounting of the past.<sup>75</sup> There were a number of institutional and structural factors that limited the extent to which such an inquiry could deliver justice and be truly cognisant of the needs of victims. These can be distilled to two main lines of critique that relate broadly to victim and offender participation.

First, selectivity in the sampling of cases meant that the Commission reported not on all allegations of abuse, but only on institutions with the largest number of complaints. Focusing on a limited number of exemplary cases tends to individualise narratives of victimhood and obscure broader patterns of victimisation. A narrow legal construction of victimhood and focus on selected testimonies also tends to create 'hierarchies of pain'<sup>76</sup> by excluding particular accounts of victimhood and subordinating the experiences of some victims.<sup>77</sup> Moreover, the singular focus on the direct victims of institutional abuse also fails to acknowledge secondary and tertiary victims, including the families of victims, as well as the wider faith community. Second, there were a number of legal challenges to the existence of the Commission by religious orders, as a result of which many abusers were not named publicly, but were dealt with anonymously.<sup>78</sup> The failure to publicly identify abusers, due to pending prosecutions in some cases, was a particular concern of victims, many of whom expressed their frustration that those responsible were being protected, while their harm and suffering was not fully acknowledged.<sup>79</sup> As a judge-led model with a statutory remit, the Ryan Commission model, however, continues to be highly influential on the governments of other jurisdictions, including Northern Ireland and Australia, and on victims in particular, in conceiving of an ideological and legal framework to deal with historic institutional child abuse.

---

<sup>73</sup> Commission to Inquire into Child Abuse, above n 6, vol 4 [6.09]–[6.18].

<sup>74</sup> Anecdotal conversations between one of the authors and lawyers and victims' groups (2010–12). See also Bruce Arnold, *The Irish Gulag: How the State Betrayed Its Innocent Children* (Gill & Macmillan, 2009) 249–56; Tony Flannery (ed), *Responding to the Ryan Report* (Columba Press, 2009).

<sup>75</sup> McAlinden, above n 36.

<sup>76</sup> Daly, above n 56, 179–80.

<sup>77</sup> See, eg, in the context of the South African Truth and Reconciliation Commission: Brandon Hamber and Richard A Wilson, 'Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies' (2002) 1(1) *Journal of Human Rights* 35.

<sup>78</sup> See *Michael Murray v Commission to Inquire into Child Abuse* [2003] High Court of Ireland 2003 1998P (17 October 2003) (Abbott J).

<sup>79</sup> Arnold, above n 74, 296–312; McAlinden, above n 36.

In Northern Ireland, perhaps the most high profile case to date is the ‘Kincora scandal’, which involved the systematic abuse of boys through vice rings and prostitution in Kincora hostel in East Belfast over several decades.<sup>80</sup> The case is being reopened following the establishment of the Historical Institutional Abuse Inquiry. In the aftermath of the publication of the Ryan Commission Report in May 2009, survivors of historical institutional child abuse in Northern Ireland began campaigning for an independent judge-led inquiry. Following a one-year extension, this ongoing inquiry will take place over the course of three-and-a-half years (reporting in January 2017) and is being led by Sir Anthony Hart, a retired High Court judge. The terms of reference of the inquiry — which encompasses, but is not limited to, religious institutions — include an examination of whether there were systemic failings by institutions or the State in their duties towards children in their care between 1922 and 1995.<sup>81</sup>

In adopting a similar format to the Ryan Commission, the inquiry has two main components: the ‘Acknowledgement Forum’, which will listen to the experiences of those who were children in residential institutions; and the ‘Investigative Panel’, which will investigate the way in which children were treated in such institutions during those dates. Criticisms have emerged as to the narrow scope of the inquiry and lack of adequate support and redress mechanisms for victims.<sup>82</sup> As Lawry-White has argued more broadly, citing Herman, ‘although the truth seeking process *can* have a healing effect’, there is a danger that for some victims, testifying to a truth commission, in the words of Herman, “‘opens them up and leaves them with nowhere to go’”.<sup>83</sup> These arguments underscore the need for broader and longer term assistance for victims, beyond the lifetime of the inquiry process that better meets the nuances and complexities of victim experience.

## B *Australia*

In Australia, there has been a proliferation of public inquiries into institutional child abuse centred on three intersecting themes: abuses in institutional care, abuses by members of religious orders, and the forced removal of children from their families.<sup>84</sup> An ongoing issue at the federal level has been the recognition of the harm done by government policy under which Indigenous children were

<sup>80</sup> Committee of Inquiry into Children’s Homes and Hostels, *Report of the Committee of Inquiry into Children’s Homes and Hostels* (Her Majesty’s Stationery Office, 1985).

<sup>81</sup> As set out by the First Minister and Deputy First Minister of Northern Ireland in a written statement to the Northern Ireland Assembly on 18 October 2012. See also the *Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013* (NI) c 2.

<sup>82</sup> Victims have requested, for example, that the Northern Ireland Executive widen the inquiry in order to identify more perpetrators, offer increased forms of support for victims and establish interim statutory compensation schemes: see, eg, Chris Moore, ‘What Northern Ireland is REALLY Offering Child Abuse Survivors’, *The Detail* (online), 5 October 2011 <<http://www.thedetail.tv/articles/what-northern-ireland-is-really-offering-child-abuse-survivors>>; ‘Northern Ireland Historical Abuse Victims Issue Plea for Compensation’, *The Belfast Telegraph* (online), 17 May 2016 <<http://www.belfasttelegraph.co.uk/news/northern-ireland/northern-ireland-historical-abuse-victims-issue-plea-for-compensation-34721002.html>>.

<sup>83</sup> Meryll Lawry-White, ‘The Reparative Effect of Truth Seeking in Transitional Justice’ (2015) 64(1) *International and Comparative Law Quarterly* 141, 166 (emphasis in original).

<sup>84</sup> For a recent overview, see Daly, above n 56, ch 2.

removed from their parents and placed with white families or in institutions, producing what has been called ‘the Stolen Generation’. A 1997 national inquiry called for an apology, and for compensation for victims.<sup>85</sup> After a change of government, a public statement of apology was made by the newly elected Labor Prime Minister, Kevin Rudd, on 13 February 2008, a moment regarded by many as pivotal in Australia’s history.<sup>86</sup>

A second strand of federal senate inquiries, and a second formal apology,<sup>87</sup> arose from two waves of removal of children into institutional care. One was the forced migration of abandoned or destitute British ‘child migrants’ to the colonies, beginning in the early 20<sup>th</sup> century, many of whom were brought to remote institutions in Australia as cheap labour, and suffered abuse and neglect.<sup>88</sup> The other was the placing of significant numbers of Australian children in institutional care for a variety of reasons including being orphaned, social hardship and forced removal from their mothers primarily because the mothers were unmarried.<sup>89</sup>

Beyond these national postcolonial narratives of victimhood, however, a further wave of accounts about the past have emerged in parallel at State level in relation to the abuse of children in institutional, particularly church-based, settings.<sup>90</sup> One of the most notable of these inquiries was the ‘Forde Commission’,<sup>91</sup> established by the Queensland Government in 1998, whose recommendations were followed up in 2012.<sup>92</sup> More recently, in April 2012 the Victorian Government established a cross-party parliamentary *Inquiry into the Handling of Child Abuse by Religious and Other Organisations*. While victim groups were delighted at the official recognition of their claims, there were public criticisms of the chosen mode of response. In particular, the Parliamentary Committee had a small number of members, none expert in the area, and was given a short timeline for reporting. The terms of reference were broad, covering ‘religious and other non-government organisations’, and required a report on a

---

<sup>85</sup> See National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, ‘Bringing Them Home’ (Report, Human Rights and Equal Opportunity Commission, April 1997).

<sup>86</sup> See Danielle Celermajer, *The Sins of the Nation and the Ritual of Apologies* (Cambridge University Press, 2009).

<sup>87</sup> Prime Minister Kevin Rudd, ‘Apology to the Forgotten Australians and Former Child Migrants’ (Speech delivered at Great Hall, Parliament House, Canberra, 16 November 2009) <<http://pandora.nla.gov.au/pan/110625/20091116-1801/www.pm.gov.au/node/6321.html>>.

<sup>88</sup> See Senate Community Affairs References Committee, Parliament of Australia, *Lost Innocents: Righting the Record — Report on Child Migration* (2001).

<sup>89</sup> See Senate Community Affairs References Committee, Parliament of Australia, *Forgotten Australians: A Report on Australians who Experienced Institutional or Out-of-Home Care as Children* (2004). For further analysis, see Joanna Penglase, *Orphans of the Living* (Freemantle Press, 2007).

<sup>90</sup> See, eg, New South Wales, Royal Commission into the New South Wales Police Service, *Report* (1997) (‘Wood Royal Commission’); South Australia, Commission of Inquiry into Children in State Care, *Report* (2008) (‘Mullighan Commission’); New South Wales, Special Commission of Inquiry into Matters Relating to the Police Investigation of Certain Child Sexual Abuse Allegations in the Catholic Diocese of Maitland-Newcastle, *Report* (2014).

<sup>91</sup> Leneen Forde, ‘The Commission of Inquiry into Abuse of Children in Queensland Institutions’ (Final Report, Commission of Inquiry, 31 May 1999).

<sup>92</sup> See the final reports of the Queensland Child Protection Commission of Inquiry: State of Queensland, *Queensland Child Protection Commission of Inquiry* <<http://www.childprotectioninquiry.qld.gov.au/>>.

range of issues including whether there were ‘systemic practices’ in the organisations that prevented or discouraged reporting of abuse and any changes to law or practices to prevent future criminal abuse.<sup>93</sup> The Committee held its last public hearing on 27 May 2013 and the report of the inquiry was published in November 2013.<sup>94</sup> While the report made a number of recommendations including alternative pathways for redress, primarily in the form of a compensatory scheme and independent redress to replace the Catholic Church’s internal systems, these were not situated within a restorative framework.

Finally, in December 2012 the then Prime Minister, Julia Gillard, announced the establishment of a national Royal Commission into Institutional Responses to Child Sexual Abuse to investigate sexual abuse in a range of institutions including, but not limited to, the Catholic Church.<sup>95</sup> The six-member Royal Commission is headed by a judge, the Hon Justice Peter McClellan. The wide terms of reference,<sup>96</sup> and the resulting volume of cases,<sup>97</sup> have meant that the reporting date has recently been extended from December 2015 to December 2017, with an estimated total cost of over A\$500 million.<sup>98</sup> The inquiry, established under the *Royal Commissions Act 1902* (Cth), has extensive powers of investigation. Similar in constitution to the Ryan Commission in the Republic of Ireland, provision is made for making a submission in a recorded private meeting with one Commissioner, not on oath, as well as for sworn evidence by selected participants at public hearings. By its terms of reference, the Commission is to provide people ‘directly or indirectly affected’ with opportunities to share their experiences, to focus on systemic issues in recommendations, and to make appropriate referrals (eg for prosecution) in individual cases.<sup>99</sup>

At the time of writing, with the inquiries in both jurisdictions ongoing it remains to be seen what their respective outcomes will be. The lessons already emerging, however, from these and previous inquiries are clear in terms of their potential limitations in meeting the needs of victims. Unlike the Northern Ireland Inquiry, which is limited in its terms of reference to investigating whether there were institutional failings,<sup>100</sup> the Australian Royal Commission is able to refer

<sup>93</sup> See Victoria, *Victoria Government Gazette*, No S 125, 17 April 2012 <<http://www.gazette.vic.gov.au/gazette/Gazettes2012/GG2012S125.pdf>>.

<sup>94</sup> Family and Community Development Committee, Parliament of Victoria, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* (2013).

<sup>95</sup> The Commission can investigate ‘any private, public or non-government organisation that is, or was in the past, involved with children’: Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *About Us* <<https://www.childabuseroyalcommission.gov.au/about-us>>.

<sup>96</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Terms of Reference* <<https://www.childabuseroyalcommission.gov.au/about-us/terms-of-reference>>.

<sup>97</sup> Barney Zwart, ‘Royal Commission into Child Abuse Swamped by Submissions’, *The Age* (online), 12 November 2013 <<http://www.theage.com.au/victoria/royal-commission-into-child-abuse-swamped-by-submissions-20131112-2xe5w.html>>. For details of the 44 case studies to date (at September 2016) see Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Case Studies* <<http://www.childabuseroyalcommission.gov.au/public-hearings/case-studies>>.

<sup>98</sup> ‘Australia to Extend Child Sex Inquiry by Two Years’, *The Straits Times* (online), 2 September 2014 <<http://www.straitstimes.com/asia/australianz/australia-to-extend-child-sex-inquiry-by-two-years>>.

<sup>99</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, above n 96.

<sup>100</sup> Northern Ireland, Historical Institutional Abuse Inquiry, *Terms of Reference* <<https://www.hiainquiry.org/terms-reference>>. There was also an undertaking, given on 22 April 2013 by the Director of Public Prosecutions, Barra McGrory QC, to Sir Anthony Hart that no

individual cases for prosecution.<sup>101</sup> However, while public accounting of the crimes may be providing acknowledgement and vindication for many victims, it is our contention that the legalistic and formal constraints on such processes mean that they risk falling short in providing ‘justice’ for individual victims and accountability for perpetrators.

### C *The Value and Limitations of Public Inquiries*

Public inquiries can take several forms, from the grandiose ‘Royal’ Commission or commission of inquiry to the departmental committee. A feature of common law jurisdictions, public inquiries represent a State-sponsored, independent and typically judicially chaired review of events, usually focused on a specific controversial occurrence, and so occur on an ad hoc basis.<sup>102</sup> Public inquiries, as an ‘instrument of government’<sup>103</sup> serve an important symbolic function. They have been a chosen strategy in many jurisdictions to address a range of State — or State-supported — harms, chiefly because of their organisational and ‘curative properties’<sup>104</sup> as a form of scandal management.<sup>105</sup>

At a broader level, within the United Kingdom (‘UK’) in particular, high profile tribunals of inquiry have been the vanguard of justice responses to a spectrum of public controversies since the 1990s. These have included, for example, those relating to the ‘conflict’ in Northern Ireland,<sup>106</sup> cases of serial murder,<sup>107</sup> child care and protection,<sup>108</sup> national tragedies,<sup>109</sup> medical negligence

---

evidence given to the Inquiry would be used in evidence against that individual in any criminal proceedings or relied upon for the purposes of deciding whether to bring such proceedings: Barra McGrory QC, *HIAI–DPP Letter of Undertaking* (22 April 2013) Historical Institutional Abuse Inquiry [3], <<https://www.hiainquiry.org/sites/hiainquiry/files/media-files/Public%20Prosecution%20Service%20-%20Undertaking.pdf>>.

<sup>101</sup> *Royal Commissions Act 1902* (Cth) s 6P; see Brad Ryan, ‘Child Abuse Royal Commission: Police ‘Under Pressure’ after 1,659 Cases Flagged for Investigation’, *ABC News* (online), 12 September 2016, <<http://www.abc.net.au/news/2016-09-12/child-sexual-abuse-royal-commission-refers-1659-cases-to-police/7834972>>. Section 6DD of the Act provides indemnity only for statements made by the individual in evidence before the Commission.

<sup>102</sup> See generally H W R Wade and C E Forsyth, *Administrative Law* (Oxford University Press, 11<sup>th</sup> ed, 2014) ch 24.

<sup>103</sup> Ronald E Wraith and G B Lamb, *Public Inquiries as an Instrument of Government* (Allen & Unwin, 1971).

<sup>104</sup> Sedley, above n 10, 479.

<sup>105</sup> Chris Greer and Eugene McLaughlin, ‘Theorizing Institutional Scandal and the Regulatory State’ (2016) *Theoretical Criminology* <<http://tcr.sagepub.com/content/early/2016/05/28/1362480616645648>>.

<sup>106</sup> See, eg, Lord Saville, *Report of the Bloody Sunday Inquiry*, House of Commons Paper No 29, Session 2010–11 (2010) <<http://webarchive.nationalarchives.gov.uk/20101103103930/http://report.bloody-sunday-inquiry.org/>>.

<sup>107</sup> See, eg, Lord Cullen, *The Public Inquiry into the Shootings at Dunblane Primary School on 13 March 1996*, Cm 3386 (1996). See also the Harold Shipman Inquiry, which released its six reports in various stages between 2002 and 2005: The Shipman Inquiry, *Reports* <<http://webarchive.nationalarchives.gov.uk/20090808154959/http://www.the-shipman-inquiry.org.uk/reports.asp>>.

<sup>108</sup> See, eg, Lord Laming, *The Victoria Climbié Inquiry: Report of an Inquiry by Lord Laming*, Cm 5730 (1996); Sir Michael Birchard, *The Birchard Inquiry Report*, House of Commons Paper No 653, Session 2003–04 (2004).

<sup>109</sup> See, eg, Lord Cullen, *The Ladbroke Rail Inquiry* (Health and Safety Commission, 2001).



and public health,<sup>110</sup> as well as institutional child abuse.<sup>111</sup> Indeed, public inquiries have a number of important societal benefits. Most notably, these include: public adjudication on allegations of systemic wrongdoing; providing victim access to other avenues to justice such as criminal prosecution or compensation schemes; and acting as a vehicle for law reform. As Delacorn has noted (writing in the Australian context), public inquiries that potentially highlight not only the commission of abuse, but also the collective denials, collusions and failures of State and quasi-State agencies, also have the capacity to re-establish public trust via the promotion of institutional accountability.<sup>112</sup>

One of the fundamental limitations of public inquiries, however, is the fact that they have paradoxical aims and potentially competing functions — they encompass both an inquisitorial and an adversarial component; and have elements of truth-telling, as well as apportioning blame with possible criminal sanctions. It is these fundamental tensions that lie at the heart of why organisations and individual offenders may not cooperate fully with inquiry processes. Consequently, they also help to explain why inquiries may fully serve neither victims' interests in terms of justice, nor the due process rights of offenders. In particular, public inquiries, as a response to the needs of victims, have inherent structural limitations that have been little considered. As discussed below, while public inquiries may deliver some elements deemed necessary for the validation of victims' interests and the restoration of dignity, namely in terms of providing an official account of events, they are more limited in their potential to deliver other forms of procedural justice that victims want such as giving 'voice' to victims and ensuring genuine offender accountability.

Writing in the aftermath of the Scott Inquiry<sup>113</sup> into the illegal export of arms to Iraq, Lord Howe suggested that a public inquiry has six distinct aims:

- (i) establishing the facts;
- (ii) learning from the past;
- (iii) catharsis or therapeutic exposure for 'stakeholders';
- (iv) public reassurance;
- (v) making individuals and organisations accountable; and
- (vi) wider political considerations.<sup>114</sup>

<sup>110</sup> See, eg, Department of Health, *The Report of the Public Inquiry into Children's Heart Surgery at the Bristol Royal Infirmary 1984–1995: Learning from Bristol*, Cm 5207 (2001); Robert Francis, *Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry*, House of Commons Paper No 898-I, Session 2012–13 (2013).

<sup>111</sup> See, eg, Committee of Inquiry into Children's Homes and Hostels, above n 80; Peter Hunt, *Report of the Independent Inquiry into Multiple Abuse in Nursery Classes in Newcastle upon Tyne* (City Council of Newcastle upon Tyne, 1994); Sir Ronald Waterhouse, *Lost in Care — Report of the Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd since 1974* (Her Majesty's Stationery Office, 2000). For a critical overview, see Nigel Parton, 'From Maria Colwell to Victoria Climbié: Reflections on Public Inquiries into Child Abuse a Generation Apart' (2004) 13(2) *Child Abuse Review* 80; Brian Corby, Alan Doig and Vicki Roberts, *Public Inquiries into Abuse of Children in Residential Care* (Jessica Kingsley, 2001).

<sup>112</sup> Adam Delacorn, 'Royal Commissions in Victoria 1854–2009' (Research Paper, Parliamentary Library, Victoria, July 2011).

<sup>113</sup> Sir Robert Scott, *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, House of Commons Paper No 115, Session 1995–96 (1996).

<sup>114</sup> Howe, above n 10.

These aims map broadly on to the goals of public inquiries identified by Steele as those of ‘scandal control, blame attribution and lesson-learning’.<sup>115</sup> Justice processes designed by elites, however, ‘always run the risk of instrumentalizing victims or local communities’,<sup>116</sup> in order to spearhead a reform agenda. As outlined above, there may be a sizeable gap between the rhetoric of public inquiries and the reality of practice on the ground. In particular, the myriad politically orientated aims of public inquiries may obfuscate any real victim focus.

In this respect, it is the third and fifth of Lord Howe’s aims (catharsis and accountability) that are of central importance in establishing victim-centred discourses on institutional child abuse. Distilling Lord Howe’s list further, and drawing on the work of Popkin and Roht-Arriaza in the related context of investigatory commissions,<sup>117</sup> a public inquiry can potentially achieve at least four aims that traditional legal avenues (such as civil or criminal proceedings) cannot. It can provide an authoritative account of what happened; it can give victims a forum to tell their story; it can recommend policy changes to prevent future recurrences of the harm; and it can identify offenders and make them publicly accountable. However, as Harlow has contended, these expectations of public inquiries or truth commissions can also be highly contradictory because establishing facts may ultimately undermine accountability and a forward-looking focus may diminish accountability for past wrongs.<sup>118</sup> Moreover, a collective discourse that emphasises organisational accountability may provide little catharsis for individual victims.<sup>119</sup>

The purported aim of inquiry frameworks is often inquisitorial in nature, with support services being made available for victims and witnesses. Inevitably, however, a highly adversarial framework is often the norm within the investigatory, fact-finding component where ‘all the classical strategies of cross-examination are used to discredit their [complainants’] accounts’.<sup>120</sup> Having completed the acknowledgement forum stage, which occurred in a private setting, the inquiry process in Northern Ireland has more recently focused on ongoing public hearings that began in January 2014 and bring with them the full legal apparatus of the adversarial system. Meanwhile, in Australia, the Royal Commission has held public hearings and private sessions concurrently. It is the procedural format of the investigatory or public component in particular that is typically steeped in technocratic concerns and is virtually ‘indistinguishable from the forensic tenor of court proceedings’.<sup>121</sup> Indeed, the peculiar constitutional apparatus of the public inquiry constitutes ‘a hybrid legal-and-administrative

---

<sup>115</sup> Steele, above n 10, 740.

<sup>116</sup> Kieran McEvoy and Louise Mallinder, ‘Amnesties in Transition: Punishment, Restoration and the Governance of Mercy’ (2012) 39(3) *Journal of Law and Society* 410, 432.

<sup>117</sup> Margaret Popkin and Naomi Roht-Arriaza, ‘Truth as Justice: Investigatory Commissions in Latin America’ (1995) 20(1) *Law and Social Inquiry* 79.

<sup>118</sup> Carol Harlow, ‘What Price Inquiries?’ on *UK Constitutional Law Association Blog* (28 February 2013) <<https://ukconstitutionallaw.org/2013/02/28/carol-harlow-what-price-inquiries/>>.

<sup>119</sup> See Hamber and Wilson, above n 77.

<sup>120</sup> Corby, Doig and Roberts, above n 111, 139.

<sup>121</sup> Sir Louis Blom-Cooper, ‘What Went Wrong on Bloody Sunday: A Critique of the Saville Inquiry’ [2010] (1) *Public Law* 61, 63.

process'.<sup>122</sup> It is this synthesis of juridical procedure with broader collective State interests that arguably undermines its viability and usefulness for individual victims as a form of redress.

Specifically, the inherent structural and administrative limitations of public inquiries, which typically operate within narrow terms of reference focused on making recommendations for law reform, may impede the deeper systemic exploration of the context, causes, and consequences of abuse that may be necessary in seeking a just process and outcomes for victims. Scholars have espoused several factors as being central to 'healing for victims' — account-making (providing an authoritative account and identifying those accountable), apology, forgiveness and procedural justice.<sup>123</sup> While the public inquiry model may address some of the elements deemed necessary for the healing of victims (chiefly in terms of providing an authoritative record of events, disclosure of abuse, and accountability of offenders or institutions however narrowly this is construed), it is more limited in the extent to which it can achieve other forms of redress including apology, forgiveness and procedural justice.

Tyler has elaborated on five elements that underpin procedural justice: impartiality, ethicality, lack of bias, correctability and control.<sup>124</sup> We argue that the first three of these may be achievable within the inquiry rubric, in terms of the impartial, independent review of events. However, in relation to correctability and control, the rather narrow and linear focus on institutional accountability and the wider systemic issues in making recommendations for reform may result in missed opportunities to promote individual offender accountability for acts or omissions in particular cases, as highlighted above in relation to criticisms of the Ryan Commission. Similarly, the public inquiry as a State-controlled process with a restricted legal and administrative remit leaves little room for consideration of victim participation or control over the process.

The rules that govern how an inquiry conducts itself (eg the evidential rules governing the privilege against self-incrimination, the attendance of witnesses, and disclosure and the production of documents)<sup>125</sup> are fundamental — not just to what Tyler would describe as the procedural fairness of an inquiry,<sup>126</sup> but also more broadly to the extent to which it is viewed as legitimate by victims. The 'spectacle of legality',<sup>127</sup> and the deployment of legal 'theatre' and judges in particular, in issues of high social or political controversy, lends 'a seal of credibility'<sup>128</sup> and

<sup>122</sup> Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3<sup>rd</sup> ed, 2009) 571.

<sup>123</sup> Blecher, above n 45; Doak, 'Honing the Stone: Refining Restorative Justice as a Vehicle for Emotional Redress', above n 45.

<sup>124</sup> Lind and Tyler, above n 55. See also Tom R Tyler, 'What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22(1) *Law & Society Review* 103.

<sup>125</sup> See, eg, *Inquiry into Historical Institutional Abuse Rules (Northern Ireland) 2013* (NI) c 2.

<sup>126</sup> *Ibid.*

<sup>127</sup> Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press, 2001) 41.

<sup>128</sup> Sedley, above n 10, 472. See also Gavin Drewry, 'Judicial Inquiries and Public Reassurance' [1996] (3) *Public Law* 368. On the counterarguments relating to the constitutional propriety of the extrajudicial use of judges in public inquiries see, eg, Sedley, above n 10; Steele, above n 10.

respectability to the proceedings. What Bourdieu terms ‘the force of law’<sup>129</sup> as an organising principle, however, serves to reinforce the formal, adversarial, regulatory agenda underpinning inquiry processes and, as such, leaves little room for addressing the affective needs of victims, and the incorporation of broader informal, restorative principles. The incorporation of those principles includes the possibility of referral to a diversionary restorative process that promotes a level of direct engagement and the rebalancing of power between victims and offenders and, with it, the empowerment of victims, full disclosure of wrongdoing, and genuine remorse and accountability on the part of offenders. In the next part of this article, we argue that formal incorporation of some of the ideals of restorative justice into the public inquiry model may make it more useful for victims in future.

## IV Restorative Responses to Institutional Child Abuse

### A *The Restorative Paradigm*

Some scholars have characterised the restorative justice vision as a paradigm shift in criminal law.<sup>130</sup> Others, however, highlight the compatibility of informal restorative principles and formal State justice as alternative forms of justice.<sup>131</sup> For the latter scholars, these two frameworks may, in fact, be integrated as part of the same system of justice where they would complement and work in tandem with each other. Restorative justice may, indeed, serve many of the formal functions of law such as denunciation, rehabilitation/reintegration, individual and public protection — and achieve a better balance between these aims than formal criminal justice does.<sup>132</sup>

Restorative justice approaches to institutional child abuse, however, are only in their infancy. Several jurisdictions have put in place user-led restorative processes for survivors and perpetrators of clerical abuse, which generally take place outside of traditional justice processes. Ad hoc schemes have developed in a number of jurisdictions — including Canada, the US and Belgium — employing primarily mediation-based practices.<sup>133</sup> In the Netherlands, for example, in the aftermath of the Deetman Commission,<sup>134</sup> a tripartite approach comprised of mediation, a settlement agreement and an award of compensation has been

---

<sup>129</sup> Pierre Bourdieu, ‘The Force of Law: Towards a Sociology of the Juridical Field’ (1987) 38(5) *Hastings Law Journal* 814.

<sup>130</sup> See above n 66.

<sup>131</sup> Lucia Zedner, ‘Reparation and Retribution: Are They Reconcilable?’ (1994) 57(2) *Modern Law Review* 228; Niamh Joyce-Wotjas and Marie Keenan, ‘Is Restorative Justice for Sexual Crime Compatible with Various Criminal Justice Systems?’ (2016) 19(1) *Contemporary Justice Review* 43.

<sup>132</sup> Kathleen Daly, ‘Revisiting the Relationship between Retributive and Restorative Justice’ in Heather Strang and John Braithwaite (eds), *Restorative Justice: Philosophy to Practice* (Ashgate, 2000) 33.

<sup>133</sup> Gavrielides, above n 41, 632–6. See also Janine Geske, ‘Restorative Justice and the Sexual Abuse Scandal in the Catholic Church’ (2007) 8(2) *Cardozo Journal of Conflict Resolution* 651; Ivo Aertsen, ‘Sexual Abuse in the Roman Catholic Church in Belgium: Phenomenon and Response Mechanisms’ (Paper presented at the Workshop on Sexual Abuse in the Church and Other Institutional Settings, Oñati, Spain, 10–11 April 2014).

<sup>134</sup> Deetman et al, above n 4.

established.<sup>135</sup> Such schemes, however, may remain overtly adversarial for victims, due largely to the presence of legal representatives.<sup>136</sup> In other jurisdictions such as Australia and the Republic of Ireland, churches have set up internal processes to hear the claims of survivors of institutional child abuse, and to address counselling and compensation, but these are not clearly framed within a ‘restorative’ paradigm.<sup>137</sup> Indeed, taken as a whole, organised restorative responses to clerical abuse operate on an ad hoc basis and are ‘extremely limited’<sup>138</sup> and highly problematic in addressing the claims of victims. Moreover, empirical evidence and evaluations are scant or non-existent.<sup>139</sup>

Critics of restorative justice have generally underlined the dangers inherent in a communitarian approach to justice, principally regarding the need to ensure legitimacy,<sup>140</sup> accountability<sup>141</sup> and adequate safeguards.<sup>142</sup> While neo-Marxist scholars have pinpointed the role of the State within restorative processes as the chief area of concern,<sup>143</sup> feminist writers have traditionally highlighted the unsuitability of restorative justice in the domain of gendered and sexualised violence primarily underlining the need to hold offenders formally accountable and the risk of perpetuation of power imbalances between victims and offenders.<sup>144</sup> More recently, there has been increased feminist engagement with informal justice<sup>145</sup> and a growing recognition that the restorative paradigm may have a role to play in dealing with intimate violence and abuse.<sup>146</sup> The suitability of restorative justice with high level forms of offending such as sexual abuse, however, remains

---

<sup>135</sup> Anke Bisschops, ‘The Handling of Childhood Sexual Abuse Cases in the Roman Catholic Church: A Comparison of Three Procedures’ (Paper presented at the Workshop on Sexual Abuse in the Church and Other Institutional Settings, Oñati, Spain, 10–11 April 2014).

<sup>136</sup> Aertsen, above n 133.

<sup>137</sup> The best known are the counselling and support services established by the Catholic Church for survivors of institutional, clerical and religious abuse. See, eg, *Towards Healing* (2016) Catholic Church in Australia <<https://www.catholic.org.au/professional-standards/towards-healing>>.

<sup>138</sup> Gavrielides, above n 41, 639.

<sup>139</sup> On the Australian Church processes, see Courtin, above n 65, ch 6.

<sup>140</sup> Raymond Paternoster et al, ‘Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault’ (1997) 31(1) *Law & Society Review* 163.

<sup>141</sup> Declan Roche, *Accountability in Restorative Justice* (Oxford University Press, 2003).

<sup>142</sup> Andrew Ashworth, ‘Responsibilities, Rights and Restorative Justice’ (2002) 42(3) *British Journal of Criminology* 578; Wright, ‘The Court as Last Resort’, above n 47.

<sup>143</sup> Rob White, ‘Shaming and Reintegrative Strategies: Individuals, State Power and Social Interests’ in Christine Alder and Joy Wundersitz (eds), *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Australian Institute of Criminology, 1994) 181; Chris Cunneen, ‘Community Conferencing and the Fiction of Indigenous Control’ (1997) 30(3) *Australia and New Zealand Journal of Criminology* 292.

<sup>144</sup> Julie Stubbs, ‘Shame, Defiance, and Violence against Women: A Critical Analysis of “Communitarian” Conferencing’ in Sandy Cook and Judith Bessant (eds), *Women’s Encounters with Violence: Australian Experiences* (Sage, 1997) 109; Ruth Busch, ‘Domestic Violence and Restorative Justice Initiatives: Who Pays If We Get It Wrong?’ in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 223.

<sup>145</sup> Kathleen Daly and Julie Stubbs, ‘Feminist Engagement with Restorative Justice’ (2006) 10(1) *Theoretical Criminology* 9; Naylor, above n 31.

<sup>146</sup> Angela Cameron, ‘Stopping the Violence: Canadian Feminist Debates on Restorative Justice and Intimate Violence’ (2006) 10(1) *Theoretical Criminology* 49; Donna Coker, ‘Restorative Justice, Navajo Peacemaking and Domestic Violence’ (2006) 10(1) *Theoretical Criminology* 67.

controversial,<sup>147</sup> particularly among adult survivors of historical child sexual abuse.<sup>148</sup> The core concerns of critics, particularly those related to the proper role of the State and the right to legal representation, and fears about power imbalances and repeat victimisation in offender-centred processes, are addressed below.

While the breadth of the theory and practice of restorative justice is discussed extensively in the literature,<sup>149</sup> we are only concerned here with drawing out some of the key themes that are of direct relevance to the issue of procedural justice for victims of institutional child abuse. In tandem with the core ingredients of procedural justice outlined above, three key themes of restorative justice are explored here:<sup>150</sup> giving victims a voice or an element of control over the process; correctability in terms of promoting organisational and individual offender accountability; and achieving what Gavrielides and Coker claim is central to a restorative process for victims — namely, a culture of ‘open dialogue and constructive shaming’.<sup>151</sup>

The first two of these intrinsic objectives (namely victim participation, and perpetrator accountability) chime with the core objectives of public inquiries as outlined above. Restorative justice, however, offers a broader perspective of victim empowerment and offender accountability which may improve the capacity of public inquiries to play a more constructive role in responding to institutional child abuse. In the sections that follow, we look first at the scope for voice and accountability in the public inquiry, and then at ‘open dialogue and constructive shaming’<sup>152</sup> and other aspects of restorative justice that may be more difficult to achieve within a public inquiry setting.

## **B** *Giving ‘Voice’ to Victims*

Some of the core concerns of critics of restorative justice about exacerbating power imbalances and encouraging repeat victimisation,<sup>153</sup> are largely mitigated by the emphasis on victim empowerment and active participation, which are regarded as key components of restorative processes. Noll and Harvey, for example, outline three core rules that underpin successful restorative justice practices with clergy sexual abuse cases and are directly related to the discursive nature of the process — namely, that the parties are able to:

---

<sup>147</sup> See, eg, Annie Cossins, ‘Restorative Justice and Child Sex Offences: The Theory and the Practice’ (2008) 48(3) *British Journal of Criminology* 359.

<sup>148</sup> See, eg, Shirley Jülich, ‘Views of Justice among Survivors of Historical Child Sexual Abuse: Implications for Restorative Justice in New Zealand’ (2006) 10(1) *Theoretical Criminology* 125. The survivors in Jülich’s study, for example, conceptualised justice in ways consistent with restorative goals, but were reluctant to endorse restorative justice as a paradigm within which to pursue justice.

<sup>149</sup> See above n 33.

<sup>150</sup> *Ibid.*

<sup>151</sup> Gavrielides and Coker, above n 32, 347.

<sup>152</sup> *Ibid.*

<sup>153</sup> See, eg, Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (University of British Columbia Press, 2004); Cossins, above n 147.

- (i) meet and discuss their experiences of the wrong;
- (ii) discuss and agree how to make things as right as possible between them; and
- (iii) discuss and agree how future safety might be achieved.<sup>154</sup>

With the emphasis on inclusivity and active decision-making, the incorporation of a restorative component within the inquiry process may provide a more inclusive forum for victim narratives to be told. In contrast to the conventional constraints of public inquiry processes, which often limit participation to certain classes of victim, restorative justice makes the victim's perspective central to the proceedings. As Hudson put it, the victim can 'put her claims in her own terms' and not 'have to accommodate to the dominant modes of legal/political discourse'.<sup>155</sup>

Giving victims a voice and an active role in the justice process helps to challenge the abuse of power which lies at the heart of abusive relationships. Affording a wider range of victims of institutional child abuse the opportunity to 'tell their story', has important cathartic benefits and is perhaps the single most important value of a victim-focused public inquiry process that aims to incorporate a restorative response to such offences. The age difference between child victims and adult offenders in cases of child sexual abuse also raises crucial power differentials.<sup>156</sup> Moreover, cases of historical child abuse may entail an additional, more complex power dimension in that the victim as an adult is facing a perpetrator who abused them as a child. This also underscores the need to adopt a similar approach to that taken in the resolution of cases of family violence<sup>157</sup> where appropriate mechanisms are put in place to support victim decision-making throughout the process. Such models have been used in New Zealand, Canada and the US and adopt a family decision-making model that brings together family members, and other close supports to address areas of concern.<sup>158</sup>

Although the understanding of victims' experiences of restorative justice is currently both underdeveloped and contested, there is an accepted need for a more fully rounded and nuanced conception of what Pemberton terms 'psycho-social assistance' for victims<sup>159</sup> — that is, support, assistance and therapeutic encounters for individual victims divorced from prevailing law and justice discourses.

<sup>154</sup> Douglas E Noll and Linda Harvey, 'Restorative Mediation: The Application of Restorative Justice Practice and Philosophy to Clergy Sexual Abuse Cases' (2008) 17(3-4) *Journal of Child Sexual Abuse* 377, 383.

<sup>155</sup> Barbara Hudson, 'Beyond White Man's Justice: Race, Gender, and Justice in Late Modernity' (2006) 10(1) *Theoretical Criminology* 29, 34.

<sup>156</sup> Cossins, above n 147; Kathleen Daly, 'Setting the Record Straight and a Call for Radical Change: A Reply to Annie Cossins on "Restorative Justice and Child Sex Offences"' (2008) 48(4) *British Journal of Criminology* 557.

<sup>157</sup> See, eg, Joan Pennell and Gale Burford, 'Widening the Circle: Family Group Decision Making' (1994) 9(1) *Journal of Child and Youth Care* 1.

<sup>158</sup> Joan Pennell, 'Stopping Domestic Violence or Protecting Children? Contributions from Restorative Justice' in Dennis Sullivan and Larry Tiftt (eds), *Handbook on Restorative Justice: A Global Perspective* (Routledge, 2006) 286.

<sup>159</sup> Antony Pemberton, 'Psycho-Social Assistance' in Rianne Letschert, Ines Staiger and Antony Pemberton (eds), *Assisting Victims of Terrorism* (Springer, 2010) 143.

Similarly, what Doak has referred to as the ‘therapeutic dimension’<sup>160</sup> of transitional or restorative processes may incorporate, among other things, account-making, ‘justice’ and ‘deliberative encounter’.<sup>161</sup> The latter, in particular, speaks to the psychological and emotional benefits to victims of having an organised face-to-face conference with offenders. Within the current inquiry frameworks in Northern Ireland and Australia, as set out above, victims as a category of inquiry witness have the opportunity to construct a narrative in their own words and give a personal account of their experiences either in private or public sessions. As noted above and discussed further below, however, there are inherent difficulties in the further step of facilitating an open, face-to-face encounter between victims and individual perpetrators or institutional leaders as part of a two-way process of ‘constructive shaming’.

### C Offender Accountability

Rather than minimising serious criminal behaviour as critics claim,<sup>162</sup> restorative justice aims to directly engage offenders to help them appreciate the impact of their actions on victims and significant others and ensure accountability for their actions. Beyond the ‘norm-affirming expressive role of adversarial criminal justice’, restorative processes may play ‘an additional, norm-creating role’.<sup>163</sup> This may be especially important in the context of historical institutional child abuse, in challenging prevailing cultural attitudes protective of the Church or the State, which public inquiries with a narrow statutory remit are ill-equipped to address. Engaging victims in face-to-face encounters with Church or State authorities to hear them take responsibility for wrongdoing can also have a powerful therapeutic effect on victims.<sup>164</sup> Equally, offender remorse and empathy for victims (typically in the form of an ‘apology’ or an acknowledgement of harm from the offender or the Church) have greater potential to achieve offender restoration than the stigmatisation inherent in investigatory processes.<sup>165</sup> As noted above, victims have a broader range of interests than punishment of the offender. Indeed, in terms of accountability, apologies are often regarded by restorative justice practitioners and

---

<sup>160</sup> Jonathan Doak, ‘The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions’ (2011) 11(2) *International Criminal Law Review* 263, 263.

<sup>161</sup> *Ibid* 269.

<sup>162</sup> See eg Ruth Lewis et al, ‘Law’s Progressive Potential: The Value of Engagement with the Law for Domestic Violence’ (2001) 10(1) *Social and Legal Studies* 105; Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates* (Willan Publishing, 2002). For an overview of the key critiques of restorative justice as applied to gendered and sexualised violence, see especially Barbara Hudson, ‘Restorative Justice: The Challenge of Sexual and Racial Violence’ (1998) 25(2) *Journal of Law and Society* 237; Alison Morris, ‘Critiquing the Critics: A Brief Response to Critics of Restorative Justice’ (2002) 42(3) *British Journal of Criminology* 596.

<sup>163</sup> Hudson, above n 162, 250.

<sup>164</sup> Lode Walgrave and Ivo Aersten, ‘Reintegrative Shaming and Restorative Justice: Interchangeable, Complementary or Different?’ (1996) 4(4) *European Journal of Criminal Policy and Research* 67, 77.

<sup>165</sup> Heather Strang, ‘Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration’ in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart Publishing, 2001) 183; Nathan Harris, Lode Walgrave and John Braithwaite, ‘Emotional Dynamics in Restorative Conferences’ (2004) 8(2) *Theoretical Criminology* 191.



by victims in particular as much more important than retribution or material reparation such as compensation.<sup>166</sup> Recent research, for example, with victims of institutional abuse in the Republic of Ireland has demonstrated that an ‘apology’ is foremost in what victims want as a form of restorative redress.<sup>167</sup>

A potential latent problem, of course, concerns the genuineness and legitimacy of the ‘apology’ as an expression of offender remorse and accountability.<sup>168</sup> The overuse and insincerity of apologies, particularly by public figures, may serve to cheapen or belittle justice.<sup>169</sup> To be perceived as conveying true ‘sorriness’, a ‘functional apology’<sup>170</sup> needs to have a focus not just on the self (recognition of what the offender has done), but on the other who has been harmed (empathetic acknowledgement of the harm as experienced by the victim, and willingness to repair the harm). An abject apology should be a response by the person who has harmed showing that they acknowledge the harm they caused and should be given without expecting anything in return (such as acceptance of the apology or forgiveness).<sup>171</sup> This may be especially problematic when it comes to large institutions such as the State or the Catholic Church where there is likely to be a performative aspect to apologies. Language is known to have a pivotal role in the aftermath of trauma.<sup>172</sup> The politics and syntax of apology — who says ‘sorry’ and for what (that is individual offenders or the institutions themselves) — may also have a determining role in the legitimacy and acceptance of apology for victims.

Indeed, apology, as a prelude to healing, and as the touchstone of restorative justice, is an extremely complex, variable, and fragile gesture.<sup>173</sup> In the case of clerical sexual abuse, the issues are manifestly more complex because of the dual complicity of both Church and State in sustaining the abuse in some instances as happened in the Republic of Ireland<sup>174</sup> and, to a lesser extent, Australia. In relation to the State, as outlined above, the setting up the inquiry process is typically accompanied by an expression of regret and a public apology to victims on behalf of the State, albeit the sincerity of the apology may be questioned by the public.<sup>175</sup>

<sup>166</sup> Suzanne M Retzinger and Thomas J Scheff, ‘Strategy for Community Conferences: Emotions and Social Bonds’ in Burt Galaway and Joe Hudson (eds), *Restorative Justice: International Perspectives* (Criminal Justice Press, 1996) 315.

<sup>167</sup> Katherine O’Donnell, “‘I Believe the Women’”: Justice for Magdalenes and Epistemic Injustice’ (Paper presented at the Workshop on Understanding Institutional and Residential Welfare and Public Health in Twentieth-Century Ireland and Britain, Queen’s University Belfast, 28 November 2014).

<sup>168</sup> Judith Lewis Herman, ‘Justice from the Victim’s Perspective’ (2005) 11(5) *Violence Against Women* 571, 586–7.

<sup>169</sup> Jeffrie G Murphy, ‘Remorse, Apology and Mercy’ (2007) 4 *Ohio State Journal of Criminal Law* 423.

<sup>170</sup> Alfred Allan, ‘Functional Apologies in Law’ (2008) 15(3) *Psychiatry, Psychology and Law* 369.

<sup>171</sup> See, eg, Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford University Press, 1991); Susan Alter, ‘Apologising for Serious Wrongdoing: Social, Psychological and Legal Considerations’ (Report, Law Commission of Canada, May 1999).

<sup>172</sup> Leslie H Wind, James M Sullivan and Daniel J Levins, ‘Survivors’ Perspectives on the Impact of Clergy Sexual Abuse on Families of Origin’ (2008) 17(3–4) *Journal of Child Sexual Abuse* 238.

<sup>173</sup> Blecher, above n 45.

<sup>174</sup> McAlinden, above n 36.

<sup>175</sup> For example, most recently in the Republic of Ireland, in the wake of the *Report of the Inter-Departmental Committee to Establish the Facts of State Involvement with the Magdalen Laundries*, above n 69, the Taoiseach, Enda Kenny, initially issued a parsimonious and highly formulaic apology, followed some weeks later by a ‘full’ and ‘unreserved’ apology: ‘Making Amends to

In this instance, therefore, apology acts a precursor to, rather than a corollary of, the inquiry process. In relation to the Church, however, public apologies are typically less forthcoming and are usually only dispensed, if at all, following the formal adjudication of guilt and the bringing to bear of significant public pressure. Both of these circumstances are illustrative of the limitations of legalistic and formulaic expressions of institutional regret<sup>176</sup> and the difficulties of achieving ‘open dialogue and constructive shaming’<sup>177</sup> between victims and offenders.

Despite these historic complexities surrounding apologies by the Church in particular, we contend that there is clear scope for establishing space for apology between victims and offenders as part of a restorative process within the broader public inquiry framework. This is achievable during the public inquiry process with a public acknowledgement of the harm done (including by denial and collusion) and a genuine expression of remorse by the offender as part of the restorative dialogue. Public recognition of wrongdoing in the context of institutional clerical abuse is inherently problematic because it poses a threat to both the collective identity of the Church and its ethical norms as well as to the ‘imagined selves’<sup>178</sup> of offenders as members of religious orders. However, while apologies may also be given to victims in private, it is the public nature of apology that may ultimately confirm ethical and social norms and validate efforts aimed at correcting any perceived wrongdoing.<sup>179</sup> This could be given at the end of the restorative process as a component of the public inquiry as outlined below. This optimal version of apology, therefore, emerges not only as the crucial factor in the healing of victims, but as a powerful symbol of the public and self-shaming of the offender.<sup>180</sup>

## V Incorporating Restorative Justice: Opportunities, Challenges and Limitations

### A *Combining the Paradigms*

In advocating the incorporation of a restorative justice process into the public inquiry model, it is acknowledged that both public inquiries and restorative programmes have limitations when it comes to addressing the needs of victims of institutional clergy abuse. As noted above, restorative processes are not appropriate, for example, for achieving a thorough and independent investigation of facts to establish truth, or arguably for determining an obligation for support by the State or the Church. They operate on the presumption that the offender has

---

Magdalene Women’, *The Irish Times* (online), 29 June 2013 <[www.irishtimes.com/news/social-affairs/making-amends-to-magdalene-women-1.1446791](http://www.irishtimes.com/news/social-affairs/making-amends-to-magdalene-women-1.1446791)>.

<sup>176</sup> For example, in 2012, Cardinal Seán Brady, the then Catholic Primate of All Ireland (who had previously required a victim to sign an ‘oath of secrecy’) apologised publicly, but refused to resign, leading to the charge that his leadership of the Catholic Church was irreparably damaged.

<sup>177</sup> Gavrielides and Coker, above n 32, 347.

<sup>178</sup> Anderson, above n 28.

<sup>179</sup> Nathan Harris, ‘Part II: Shaming and Shame: Regulating Drink-Driving’ in Eliza Ahmed et al (eds), *Shame Management through Reintegration* (Cambridge University Press, 2001) 71.

<sup>180</sup> Tavuchis, above n 171.

accepted responsibility for wrongdoing and focus on the outcome or ‘penalty phase’.<sup>181</sup> An adjudicatory component would more properly be dealt with separately under an investigative pathway, whether within a public inquiry or conventional civil or criminal proceedings. Offers of reparation made by offenders (usually the State or a religious order) to victims in the course of the restorative dialogue may also run counter to, or in parallel with, judicial or statutory compensation schemes. At the same time, the open dialogue between victim and abuser via restorative conferencing, leading to a transformative understanding on the part of the abuser of the harm committed, may also be problematic within the rubric of a formal public inquiry. Recognising these potential limitations, however, we argue here that it should be given further consideration as a possible avenue for appropriate cases. As such, routes in and out of restorative pathways would have to be carefully considered and formally governed.<sup>182</sup>

It is our contention, therefore, that restorative justice as a response to institutional child abuse can usefully be incorporated within the public inquiry framework as part of a hybrid model and not merely as an ‘add on’ following the conclusion of the inquiry process. Within this hybrid model, we propose two pathways for providing restorative, victim-centred components of a public inquiry. In addition to the ‘confidential committee’ stage, which already provides opportunities for the victim’s voice to be heard and for the compilation of a public record of narratives, victims could choose either an ‘investigatory’ route, with a view to adversarial fact-finding and possible prosecution, or a ‘restorative’ route, as an alternative gateway to conferencing with willing offenders. As with all restorative processes, the starting point would be the readiness of the victim to take an alternative pathway on a consensual basis, together with the willingness of the offender to accept responsibility for the harm caused and to participate in the restorative pathway.<sup>183</sup> Procedures for the selection of cases and referral into the restorative route could be mainstreamed as part of the overall inquiry framework with statutory based criteria and formal procedures.

The restorative route in the hybrid public inquiry model would provide a vital alternative avenue for addressing a broader range of victim needs and expectations that is currently absent from inquiry processes. We now turn to specific challenges in the proposed model, including procedural protections for offenders (and victims) and pragmatic considerations of identifying relevant offenders, institutions, and victims.

## **B** *‘Use Immunity’*

A detailed exposition of the schematics of a hybrid public inquiry model is beyond the scope of this article, but the following analysis provides some fundamentals in terms of how this process could operate in practice. As noted above, it is envisaged that the restorative component would run concurrently with an investigatory route whereby victims would be offered a restorative route in lieu of an investigatory

---

<sup>181</sup> Daly, above n 132, 37.

<sup>182</sup> Naylor, above n 31, 671.

<sup>183</sup> *Ibid* 671–2.

process. At present, within the context of the inquiry model in both Northern Ireland and Australia, victims are asked to choose either a confidential committee/acknowledgment forum process where they are given the chance to recount their experiences or an investigatory/formal inquiry process that brings with it the full legal apparatus of the adversarial system. We contend that victims should not be presented with this stark choice at the outset of the process, but that instead a two-tier process should operate whereby following any participation in an acknowledgement forum, victims are then asked to choose between either 'formal' or 'informal' justice. Such a system would protect the victim's right to choose which mode of participation best suits their needs. As noted above, one of the defining features of restorative justice is 'the balance of interests' principle and the need to give due weight to the multiple interests at stake in the process.<sup>184</sup> In particular, therefore, for individual cases, diversion into a restorative pathway must sit alongside, but cannot be followed consecutively with, a formal investigatory process. To do otherwise would be to undermine the due process rights of offenders. It is a key procedural concern of critics of restorative justice,<sup>185</sup> for example, that offenders could be subjected to multiple processes at the whim of individual victims.

In relation to safeguarding the procedural rights of offenders, 'use immunity' — the guarantee of non-prosecution, where amnesty is traded for truth — is a long established element of the public inquiry within British law. The underlying rationale is that as individuals are compelled to cooperate with the inquiry process, the privilege against self-incrimination is offered as a recompense, though often they can still be prosecuted on the evidence of others.<sup>186</sup> Extending this framework further, we propose that if an offender agreed to a restorative process, he or she would be offered a guarantee of *total* immunity from future criminal or civil liability in exchange for 'truth' and full disclosure about the past. The formal justice system and referral back to the inquiry process, however, could operate as a fall-back position as part of an 'enforcement pyramid' for those offenders who are unwilling to engage fully with restorative processes.<sup>187</sup>

Evidence of such engagement could include, for example, full and public acknowledgement of harm as well as the official acceptance of accountability. While on one level closing down future adversarial processes may not rest easily with victim advocates, such an approach accords with what victims want from justice or redress processes as outlined above. In the context of clergy abuse, there has been vigorous institutional resistance to admitting wrongdoing by clergy (via, for example, removing priests between parishes or dioceses, or defending civil

---

<sup>184</sup> Crawford and Goodey, above n 34.

<sup>185</sup> Ashworth, above n 142; Wright, 'The Court as Last Resort', above n 47.

<sup>186</sup> See generally Kieran McEvoy and Louise Mallinder, 'Truth, Amnesties and Prosecutions: Models for Dealing with the Past' (Submission No 2 to the Haass All-Party Talks, 3 December 2013) <<https://amnesties-prosecution-public-interest.co.uk/project-outputs/truth-amnesty-prosecutions-models-dealing-past/>>.

<sup>187</sup> Braithwaite, for example, envisages restorative justice at the base of the pyramid reinforced by deterrence and incapacitation, but explicitly not retribution: John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002), 32.

actions).<sup>188</sup> Replacing an investigatory/prosecutorial route with a restorative one would also offer a practical means of engaging offenders (or institutional representatives) more fully in the justice process.

The restorative component could take the form of conferencing, whereby victims and their supporters meet offenders in the presence of a trained arbitrator to facilitate a process of dialogue about the offence, and to agree on some form of reparation on the part of the offender, which may be in the form of an apology.<sup>189</sup> Such sessions would be held in private, although as contended above, this could be followed by an open expression of remorse in the form of a public apology to victims as part of the agreed reparation. Critics of restorative justice have argued that the right to legal advice is perhaps the most important due process check on the process and outcomes, given that the offender may effectively confess to the commission of an offence.<sup>190</sup> In this vein, access to legal advice would be an important element at the *outset* of the process in giving offenders advice on the nature of the immunity agreement and the consequences of not fully cooperating with the process. As offenders would be protected from future prosecution under the proposed model, however, there would be no need for formal legal representation *during* the restorative process. Moreover, removing lawyers and other adversarial imperatives (such as the rules of evidence and proof) from the proposed restorative justice process helps to safeguard against partisan, advisory and representative roles that may monopolise the process and reduce the offenders' involvement and the opportunity to confront their offending and take responsibility for their actions.<sup>191</sup> Financial redress schemes, which typically operate alongside or in the aftermath of a public inquiry process, could continue to operate following the conclusion of the restorative component.

### C *Pragmatic Concerns*

Enacting a restorative justice component as part of a public inquiry is likely to face several pragmatic challenges stemming from the organisational nature of offending and the collective nature of victimhood. First, effective reintegrative shaming, as part of the restorative model, depends on the public expression of remorse and

---

<sup>188</sup> See Kathleen R Robertson, 'Dark Days for the Church: Canon Law and the Response of the Roman Catholic Church to the Sex Abuse Scandals' (2005) 4(1) *Washington University Global Studies Law Review* 161.

<sup>189</sup> Retzinger and Scheff, above n 166; Mark Umbreit and Howard Zehr, 'Restorative Family Group Conferences: Differing Models and Guidelines for Practice' in Eugene McLaughlin et al (eds), *Restorative Justice: Critical Issues* (Sage, 2003) 69.

<sup>190</sup> Kate Warner, 'Family Group Conferences and the Rights of the Offender' in Christine Alder and Joy Wundersitz (eds), *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Australian Institute of Criminology, 1994) 141; Bernd-Dieter Meier, 'Restorative Justice: A New Paradigm in Criminal Law?' (1998) 6(2) *European Journal of Crime, Criminal Law and Criminal Justice* 125.

<sup>191</sup> Martin Wright, *Restoring Respect for Justice* (Waterside Press, 1999); Adam Crawford, 'The Prospects for Restorative Youth Justice in England and Wales: A Tale of Two Acts' in Kieran McEvoy and Tim Newburn (eds), *Criminology, Conflict Resolution and Restorative Justice* (Palgrave, 2002) 171.

commitment to repairing the harm done.<sup>192</sup> The absence of such remorse may result in incomplete catharsis for some victims. A referral process from the public inquiry will also be dependent on an admission by the offender.<sup>193</sup> As noted above, the Catholic Church has exerted significant pressure to defend allegations in the face of their potential enormous financial liability.<sup>194</sup> Individual priests may have little choice about acknowledging or taking part in restorative programmes. Much will depend, therefore, on the willingness of the institutional church to accept restorative programmes and allow individual clergy to take part.<sup>195</sup>

Second, and following on from the previous point, the institutional character of clerical abuse undoubtedly makes the issues much more complex. By way of example, there are additional complications in identifying who is the relevant 'offender' in complex forms of institutional child abuse where the Church ran institutions on behalf of the State. Equally, where the offender is a State-like institution such as the Catholic Church — highly bureaucratic and hierarchical — there may be heightened concerns about such authorities monopolising the process. Moreover, perpetrators of historical abuse may no longer be alive. The use of church representatives as 'surrogate offenders' as suggested by some writers,<sup>196</sup> may deprive the victim of direct confrontation with those who have inflicted harm upon them. However, as other scholars have contended, restorative approaches can and do operate effectively in both individual as well as organisational contexts.<sup>197</sup> Such concerns may be managed when programmes follow closely the well-recognised restorative principles and respect and protect the rights of all participants as parties affected by the harms surrounding institutional child abuse.

Third, institutional child abuse typically involves the abuse of multiple victims, and often multiple perpetrators, over a period of time<sup>198</sup> with the setting up of the inquiry acting as a locus of collective action and mutual support. In affording individual victims the choice of pursuing a restorative route, there is also the risk of victims feeling pressured into following a particular pathway in the

---

<sup>192</sup> Braithwaite, above n 187, 203. For some scholars, however, empathy and remorse are more important aspects of restorative justice than shaming. See, eg, Gabrielle Maxwell and Allison Morris, 'The Role of Shame, Guilt and Remorse in Restorative Justice Processes for Young People' in Elmar G M Weitekamp and Hans-Jürgen Kerner (eds), *Restorative Justice: Theoretical Foundations* (Willan Publishing, 2002) 267; Bas Van Stokkom, 'Moral Emotions in Restorative Justice Conferences: Managing Shame, Designing Empathy' (2002) 6(3) *Theoretical Criminology* 339.

<sup>193</sup> There are those who would argue, however, that restorative justice may also be inherently coercive if the offender is presented with a stark choice between a restorative programme or a more adversarial route involving investigation and ultimately prosecution: see especially Acorn, above n 153.

<sup>194</sup> The Catholic Church in Australia, for example, has ensured that Church property is held in trusts that are not responsible for the employment of offending clergy. With no other responsible Church agency, it is difficult or impossible for victims to obtain financial compensation (see *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565). In the UK, however, the Catholic Church has been held vicariously liable for abuse by a priest as 'employee' (see the UK Supreme Court ruling in *The Catholic Child Welfare Society v Various Claimants* [2013] 2 AC 1).

<sup>195</sup> Grimes, above n 40, 1735–6.

<sup>196</sup> Gavrielides, above n 41, 635–6.

<sup>197</sup> Braithwaite, above n 187.

<sup>198</sup> Bernard Gallagher, *Grappling with Smoke: Investigating and Managing Organised Abuse: A Good Practice Guide* (National Society for the Prevention of Cruelty to Children, 1998); Anne-Marie McAilinden, 'Grooming' and the Sexual Abuse of Children: *Institutional, Internet and Familial Dimensions* (Oxford University Press, 2012) ch 5.

event of disagreement among victims. This pressure may stem from the possibility of disenfranchisement from the wider group of victims and, as a result, the fear of society minimising or failing to attach sufficient weight to their individual harm and suffering. Such difficulties may be particularly acute when there are formalised networks and support groups for survivors who maintain an often vociferous media presence emphasising collective harm. In the model envisaged here, however, restorative processes would operate as part of the rubric of statutory inquiries. As Hudson has argued, formal law, therefore, could stand behind restorative justice procedures as a guarantor of rights that cannot be overridden by decisions arrived at by consensus or majority.<sup>199</sup> While some victims may wish to pursue a restorative route and others an investigatory route, each case of victimisation by an offender must be taken on an individual basis. Although, on one level, this may raise pragmatic concerns of subjecting an individual offender to dual processes across a range of cases with a number of different victims, ultimately this would facilitate greater offender accountability linked to individual cases. Moreover, it should mean that a victim's right to choose one or other avenue would be protected against an opposing group or community view, and that his or her choice would be guaranteed against oppression by a stronger advocate.

## VI Conclusion

This analysis has proposed that an amalgam of restorative justice and the public inquiry model offers a unique set of opportunities and an alternative means of achieving justice for victims of institutional child abuse. In the face of the ever-expanding international crisis of responding to historical abuse, it has been argued that a synthesis of formal regulatory powers with restorative problem-solving approaches<sup>200</sup> would engender a more collaborative inquiry process that better meets the affective and expressive needs of victims. The advantages of this type of model over simple arbitration or mediation — and over individual civil or criminal litigation — is that it takes place within the framework of the public inquiry model, thereby retaining its important public and political functions as a demonstration of the State's commitment to addressing systemic wrongs. At the same time, it also addresses the inherent weaknesses of public inquiries in terms of securing wider victim participation and offender accountability via meaningful engagement with the justice process.

At the conceptual level, this approach carries potent implications for the advancement of what has been termed a 'maximalist' version of restorative justice.<sup>201</sup> A broadly punitive penal climate has, to date, hampered the expansion of restorative justice — confining it, by and large, to lower level forms of

---

<sup>199</sup> Hudson, above n 162, 256.

<sup>200</sup> Arie Freiberg, 'Problem-Oriented Courts: Innovative Solutions to Intractable Problems?' (2001) 11(1) *Journal of Judicial Administration* 8.

<sup>201</sup> Lode Walgrave, 'How Pure Can a Maximalist Approach to Restorative Justice Remain? Or Can a Purist Model of Restorative Justice Become Maximalist?' (2000) 3(4) *Contemporary Justice Review* 415.

offending.<sup>202</sup> Restorative justice has, however, been used as a response to serious human rights abuses and political violence such as those in South Africa, Rwanda and Northern Ireland.<sup>203</sup> It has also been the underpinning philosophy of circles of support and accountability used on an ad hoc basis in Canada, England and Wales and elsewhere in the reintegration of high-risk sex offenders.<sup>204</sup> Within this broader context, we therefore propose extending restorative justice as a mainstream response to one of the most serious forms of harm: historical institutional child abuse, with its complex emotional and psychological dynamics. Such an application would underscore the legitimacy of the restorative paradigm and further its recognition as a mainstream response to serious forms of offending behaviour.

At a pragmatic level, this analysis has offered important insights for other jurisdictions seeking to respond to institutional child abuse and come to terms with the legacy of past abuses. The model adopted, however, would require nuanced understanding of localised contexts and ‘a close grasp of ... “imagined” politics’.<sup>205</sup> As Lawry-White has acknowledged more broadly in relation to the reparative effect of truth-seeking, ‘one size does not fit all’ so that ‘the “therapeutic” element’ that we have argued here is integral to procedural justice, may be highly dependent on the victim’s cultural view of catharsis.<sup>206</sup> Northern Ireland, for example, as a post-colonial paradigmatic society transitioning from serious religious and political conflict, generates additional cultural considerations that a contemporary settled, and fundamentally secular, Western democracy such as Australia does not.<sup>207</sup> In the former context, seeking to establish restorative schemes run in conjunction with the State or a State-like institution such as the Catholic Church, may raise crucial questions for some sectors of society relating to the legitimacy and authority of the process.<sup>208</sup> On the other hand, restorative justice has been used as the basis of an alternative response to paramilitary violence in Northern Ireland where the emotional, social and political stakes are also high. Moreover, it is also

---

<sup>202</sup> Anne-Marie McAlinden, ‘“Transforming Justice”: Challenges for Restorative Justice in an Era of Punishment-Based Corrections’ (2011) 14(4) *Contemporary Justice Review* 383.

<sup>203</sup> See, eg, C Villa Vincenzo, ‘A Different Kind of Justice: The South African Truth and Reconciliation Commission’ (1999) 1(4) *Contemporary Justice Review* 403; Mark A Drumbl, ‘Sclerosis: Retributive Justice and the Rwandan Genocide’ (2000) 2(3) *Punishment & Society* 287; Kieran McEvoy and Harry Mika, ‘Policing, Punishment and Praxis: Restorative Justice and Non-Violent Alternatives to Paramilitary Punishments in Northern Ireland’ (2001) 11(3–4) *Policing and Society* 359.

<sup>204</sup> Mechtild Höing, Stefan Bogaerts and Bas Vogelvang, ‘Circles of Support and Accountability: How and Why They Work for Sex Offenders’ (2013) 13(4) *Journal of Forensic Psychology Practice* 267; Andrew Bates et al, ‘Circles South East: The First 10 Years 2002–2012’ (2014) 58(7) *International Journal of Offender Therapy and Comparative Criminology* 861.

<sup>205</sup> McEvoy and Mallinder, above n 116, 439.

<sup>206</sup> Lawry-White, above n 83, 167.

<sup>207</sup> See, eg, the allegations of sexual abuse by Mairia Cahill at the hands of former IRA members and in particular ‘the cover-up’ of this by the relevant paramilitary ‘authorities’. This case demonstrates that historical institutional abuse is caught up in fierce political contests about the past conflict more generally: Gerry Moriarty, ‘Mairia Cahill Case Forms Backdrop to Debate about Abuse in North’, *The Irish Times* (online), 19 November 2014 <<http://www.irishtimes.com/news/ireland/irish-news/ma%C3%ADria-cahill-case-forms-backdrop-to-debate-about-abuse-in-north-1.2006198>>.

<sup>208</sup> McEvoy and Mika, above n 203.



used in Northern Ireland with respect to youth conferencing and young people who have committed sexual offences.<sup>209</sup>

At the normative level, restorative justice is a valuable prism through which to view institutional child abuse for transitional and non-transitional societies alike, and even for fields unrelated to conflict. Beyond the micro-level narratives of victimhood that have been the focus of this article, a restorative framework also opens up the possibility of countenancing meso- and macro-level narratives of victimhood relating to the past. As McEvoy and Mallinder have contended, the framework of restorative justice can be used ‘to facilitate and enhance compliance with the rule of law, strengthen justice norms as well as assist with broader processes of social and communal “dealing with the past”’.<sup>210</sup> More recently, the potential cross-over between modes of addressing the past was voiced by the Lord Chief Justice in the Court of Appeal in Northern Ireland, proposing a non-transitional model for addressing issues arising in a transitional setting. In an application for judicial review of the UK’s investigatory obligations under art 2 of the *European Convention on Human Rights*<sup>211</sup> in ‘legacy cases’ stemming from ‘the Conflict’ His Lordship proposed that such cases would best be considered in a ‘time bound’, judicially chaired inquiry such as under the ongoing Historical Institutional Abuse Inquiry model.<sup>212</sup>

Restorative justice is also presented as a means of ‘moral repair’<sup>213</sup> and of restoring trust at the interpersonal, organisational and societal levels.<sup>214</sup> Public inquiries typically unveil an unprecedented scale of abuse, and of State or organisational complicity in that abuse. In both countries discussed here, the legacy of institutional child abuse has emerged as a further integral element of societal understanding of national identity and the process of coming to terms with the past. In relation to clerical abuse in particular, institutional child abuse may impact upon not only primary and secondary victims, but also tertiary victims and the public at large. Revelations about clergy sexual abuse are typically accompanied by widespread public outcry. Within the context of the Catholic Church, for example, the clerical abuse scandal has had profound implications for the Catholic community who have expressed ‘deep hurt’<sup>215</sup> and spiritual damage<sup>216</sup> in response to perceived betrayal by the Church.

---

<sup>209</sup> See *Criminal Justice (Children) (Northern Ireland) Order 1998* (NI) SI 1998/1504 (NI 9) arts 3A–3C, as inserted by *Justice (Northern Ireland) Act 2002* (UK) c 26, s 57.

<sup>210</sup> McEvoy and Mallinder, above n 116, 427–8.

<sup>211</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, ETS No 194 (entered into force 1 June 2010).

<sup>212</sup> *Re Three Applications by Hugh Jordan for Judicial Review* [2014] NICA 76 (17 November 2014) [124].

<sup>213</sup> Margaret Urban Walker, *Moral Repair: Reconstructing Moral Relations after Wrongdoing* (Cambridge University Press, 2006).

<sup>214</sup> Nachman Ben-Yehuda, *Betrayal and Treason: Violations of Trust and Loyalty* (Westview, 2001); Diego Gambetta, ‘Can We Trust Trust?’ in Diego Gambetta (ed), *Trust: Making and Breaking Co-operative Relations* (Basil Blackwell, 1988) 213.

<sup>215</sup> Paul M Kline, Robert McMackin and Edna Lezotte, ‘The Impact of the Clergy Sexual Abuse Scandal on Parish Communities’ (2008) 17(3–4) *Journal of Child Sexual Abuse* 290.

The incorporation of restorative justice into official responses to crises such as ongoing revelations of institutional abuse in Australia and Northern Ireland directly engages with offending institutions and individuals. At the same time it offers a realistic means of promoting individual as well as institutional accountability and of re-establishing public trust and credibility in such figures or organisations.<sup>217</sup> Reframing the justice process in this way opens up the possibility of bringing more perpetrators within the realms of justice, of giving individual victims an active role in this process and of reaffirming public confidence in inquiry processes. More broadly, it offers a real and viable opportunity of responding to the complex and pragmatic needs of victims of such large-scale harms.

---

<sup>216</sup> Stephen J Rossetti, 'The Impact of Child Sexual Abuse on Attitudes toward God and the Catholic Church' (1995) 19(12) *Child Abuse & Neglect* 1469.

<sup>217</sup> Tom R Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime and Justice* 283.

