

# RIGHTING UNRIGHTABLE WRONGS: EXPLORING THE POTENTIAL OF RESTORATIVE JUSTICE IN DEALING WITH HISTORICAL INSTITUTIONAL CHILD SEXUAL ABUSE

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*Organisations entrusted with the care of children are undeniably one of the most significant institutions in our society. Unfortunately, research and public inquiries, most notably the Australian Royal Commission into Institutional Responses to Child Sexual Abuse, show that abuse of children within these institutions has been endemic and sustained over many years. Evidence also shows that traditional court processes have continually failed to meet the needs of victims/survivors. Therefore, alternative ways to address the shortcomings of these processes must be found. This timely article considers the use of restorative justice in redressing adult victim/survivors of historical institutional child sexual abuse in righting these unrightable wrongs. In particular, it highlights the potential benefits of restorative justice, which emphasises creating dialogue between those involved and victim/survivor healing. This article also discusses the limitations and challenges of restorative justice as a way of dealing with historical institutional child sexual abuse and the safeguards needed to address these concerns.*

## I INTRODUCTION

This article considers the use and effectiveness of restorative justice practices to deal with institutional and historical child sexual abuse. Restorative justice is an ethos, perspective, or way of viewing the world (including a lens through which to think about crime and justice),<sup>1</sup> underpinned by certain principles, values, signposts, and guiding questions.<sup>2</sup> These underpinning features guide the implementation of

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<sup>1</sup> Howard Zehr, *Changing Lenses: Restorative Justice for Our Times* (Herald Press, rev ed, 2015).

<sup>2</sup> As relating to principles, see Howard Zehr, *The Little Book of Restorative Justice* (Good Books, rev ed, 2015) 43, app 1, 83–8; relating to values see John Braithwaite, 'Restorative Justice and Social Justice' (2000) 63(1) *Saskatchewan Law Review* 185, 185–6; Kay Pranis, 'Restorative Values' in Gerry Johnstone and Daniel Van Ness (eds),

restorative justice processes. Such processes include the informal restorative conversation or more formal options such as conferencing, sentencing circles, and victim-offender mediation. The method used depends on a range of factors, including the attitude of the victim and offender, the nature of the harm occasioned, and what is being sought. It is unduly restrictive to proffer one restorative process in the context of institutional child sexual abuse; therefore, this article suggests considering various restorative justice practices and choosing one that is most appropriate in the particular case.

The primary purpose of this article is to explore the potential of restorative justice in addressing the needs of victims of historical institutional sexual abuse in the Australian context. Therefore, the focus of this article is aligned with that of the Royal Commission into Institutional Responses to Child Sexual Abuse (the ‘Royal Commission’). However, this article fills a crucial gap in the Royal Commission’s recommendations, which failed to give adequate attention to the potential of restorative justice in achieving meaningful redress.<sup>3</sup> Moreover, this article considers the limitations of the criminal and civil justice systems in responding to the needs of victims. It does not consider the utility of restorative justice in dealing with child sexual abuse recently experienced by a victim who is still a child and where

*Handbook of Restorative Justice* (Routledge, 2011) 59, 59–74; Howard Zehr, *The Little Book of Restorative Justice* (Good Books, rev ed, 2015) 46–7; United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (United Nations, 2<sup>nd</sup> ed, 2020) 6; as relating to signposts, see Howard Zehr, *The Little Book of Restorative Justice* (Good Books, rev ed, 2015) 51; and, as pertaining to guiding questions see Howard Zehr, *The Little Book of Restorative Justice* (Good Books, rev ed, 2015) 49.

<sup>3</sup> The Royal Commission’s reservations for not considering restorative justice approaches were mainly based on the belief that ‘because of the power dynamics and seriousness of institutional child sexual abuse offending, restorative justice approaches may only be suitable in a small number of these cases; many survivors do not wish to seek a restorative justice outcome with the perpetrator of the abuse; and given the frequent delay before reporting, many offenders will be unavailable or unwilling to participate in restorative justice approaches’: *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report: Executive Summary and Part I – II, August 2017) 13. However, as will be seen in this article, restorative justice processes can be effective in redressing adult victims of institutional child sexual abuse if sufficient safeguards are implemented. It should be noted that the Royal Commission did not completely disregard restorative justice approaches, stating: ‘The Royal Commission provided for elements of restorative justice approaches in institutional child sexual abuse through the “direct personal response” component of redress’: *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report: Executive Summary and Part I – II, August 2017) 13. See *Royal Commission into Institutional Responses to Child Sexual Abuse* (Redress and Civil Litigation Report, 2015).

there is no barrier to criminally prosecuting offenders.

The methodology involved analysing the relevant research and literature about institutional child sexual abuse and restorative justice. However, as there is limited research on the applicability of restorative justice in historical institutional child sexual abuse cases,<sup>4</sup> this article draws upon the broader literature that has considered the use of such processes in dealing with abuse outside of institutions. As it will be seen, the unique features of restorative justice, which is non-adversarial and seeks to empower victims, may better help victims of historical institutional child sexual abuse overcome the psychological, emotional, and spiritual trauma.

At the outset, it is important to clarify what is and is not being argued in this article. This article does not suggest that restorative justice is a panacea to historical child sexual abuse or that such approaches should replace the established court system. Nor does it argue that restorative justice processes should be a diversion from criminal prosecution, because doing so would inappropriately send the message that institutional child sexual abuse offences are less serious than other criminal offences; '[t]here is no replacement for the criminal justice system in finding offenders guilty, imposing punishments on them, and taking them out of society to protect the public'.<sup>5</sup> Rather, the argument posed is that given some of the major limitations of traditional legal avenues, innovative redress mechanisms are needed to support victims. Restorative justice is put forward as one of those strategies because it can overcome many of the shortcomings of the traditional court process and provide victims with a greater sense of justice.<sup>6</sup> It should not replace conventional court processes but should

<sup>4</sup> Kate Gleeson and Aleardo Zanghellini, 'Graceful Remedies: Understanding Grace in the Catholic Church's Treatment of Clerical Child Sexual Abuse' (2015) 41(2) *Australian Feminist Law Journal* 219, 222; Anne-Marie McAlinden and Bronwyn Naylor, 'Reframing Public Inquiries as "Procedural Justice" for Victims of Institutional Child Abuse: Towards a Hybrid Model for Justice' (2016) 38(3) *Sydney Law Review* 277, 285.

<sup>5</sup> Meredith Doyle, 'Circles of Trust: Using Restorative Justice to Repair Organizations Marred by Sex Abuse' (2014) 14(2) *Pepperdine Dispute Resolution Law Journal* 175, 176.

<sup>6</sup> See Niamh Joyce-Wojtas and Marie Keenan, 'Is Restorative Justice for Sexual Crime Compatible with Various Criminal Justice Systems?' (2016) 19(1) *Contemporary Justice Review* 43.

operate alongside them to increase the options for victims seeking redress.<sup>7</sup>

It is also important to provide a note on terminology. A question that arises is ‘should it be restorative *justice* or restorative *practices*?’<sup>8</sup> For many victims, the word ‘justice’ may not be seen as appropriate because they feel true justice for the wrongdoing suffered will never be achieved. While acknowledging the limits of the term, this article uses the term ‘restorative justice’ given its widely accepted use. There is also controversy over whether to describe the participants in restorative justice processes as ‘victim’ and ‘offender’ given the belief that these words may be stigmatising.<sup>9</sup> For some, the term ‘survivor’ is the preferred language in a sexual abuse context to describe victims. Acknowledging each person’s experience is unique, this article uses the term ‘victim’ and ‘survivor’ interchangeably to refer to a person who had been sexually abused as a child while in an institution responsible for their care. For consistency, the term ‘offender’ and ‘perpetrator’ are used interchangeably to refer to the person alleged to have perpetrated that abuse.

The remainder of this article is structured into six substantive parts. Part II provides background to the problem of institutional child sexual abuse, which is followed by a discussion of some of the key findings of the Royal Commission in Part III. The main current legal and non-legal responses to institutional child sexual abuse will be explored in Part IV. Part V considers restorative justice as a potential response to institutional child sexual abuse. Part VI explores some of the unique benefits restorative justice can offer victims of historical institutional sexual abuse. However, as will be canvassed in Part VII, such benefits do not come without potential pitfalls and challenges. Nevertheless, effective safeguards to minimise those pitfalls and challenges will be offered to help guide future policymakers and reform before concluding.

<sup>7</sup> Theo Gavrielides and Dale Coker, ‘Restoring Faith: Resolving the Roman Catholic Church’s Sexual Scandals through Restorative Justice (Working Paper I)’ (2005) 8(4) *Contemporary Justice Review* 345, 358. See also Marie Keenan, *Sexual Trauma and Abuse: Restorative and Transformative Possibilities?* (University College Dublin, 2014).

<sup>8</sup> Zehr (n 2) 12–3.

<sup>9</sup> See Marian Liebmann, *Restorative Justice: How It Works* (Jessica Kingsley Publishers, 2007) 19.

## II SCOPING THE PROBLEM: INSTITUTIONAL CHILD SEXUAL ABUSE

Child sexual abuse refers to a range of problematic behaviours, including exposing a child to sexual acts or materials, sexual exploitation (such as grooming), and hands-on offences ranging from sexual touching to violent sexual assaults. Sexual abuse during childhood is a major risk factor in developing long-term psychological problems that can continue into adulthood. It is beyond the remit of this article to examine the vast research highlighting the devastating effects of child sexual abuse on victims. However, it is useful to note some of the main effects identified in the literature, which include depression, fear, anxiety, feelings of isolation, poor self-esteem, anger and hostility, substance abuse, sexual maladjustment, and difficulty trusting others.<sup>10</sup>

Institutional child sexual abuse is associated with the same pervasive effects listed above on the overall wellbeing of victims. However, abuse in institutional settings has been found to be more severe, often occurs over a lengthy period and may involve more than one perpetrator than abuse that happens in other settings.<sup>11</sup> These effects are felt not only by the primary victims but also their families and the broader community.<sup>12</sup>

Sexual abuse in religious settings is said to create in victims ‘unique trauma characteristics distinct from other types of abuse’.<sup>13</sup> According to Gavrielides, ‘clergy child sexual abuse has an additional dimension not identifiable within other child sexual abuse cases ... It relates to the violation first of an individual’s faith and basic human right to dignity, and second to the sacramental culture of Catholicism’.<sup>14</sup> A consequence of child sexual abuse in religious institutions is that victims and community

<sup>10</sup> Diane J Shea, ‘Effects of Sexual Abuse by Catholic Priests on Adults Victimised as Children’ (2008) 15(3) *Sexual Addiction & Compulsivity* 250, 251; Theo Gavrielides, ‘Clergy Child Sexual Abuse and the Restorative Justice Dialogue’ (2013) 55(4) *Journal of Church and State* 617, 623.

<sup>11</sup> See Tamara Blakemore et al, ‘The Impacts of Institutional Child Sexual Abuse: A Rapid Review of the Evidence’ (2017) 74 *Child Abuse & Neglect* 35, 37.

<sup>12</sup> *Ibid* 39.

<sup>13</sup> Derek P Farrell and Maye Taylor, ‘Silenced by God – an Examination of Unique Characteristics within Sexual Abuse by Clergy’ (2000) 15(1) *Counselling Psychology Review* 22, 22.

<sup>14</sup> Gavrielides (n 10) 621–2.

members may lose their faith in religion,<sup>15</sup> especially when the abuse was carried out in the name of God.<sup>16</sup> For instance, in McLaughlin's study, a majority of the victim participants felt they had to separate themselves from the church to deal with spiritual trauma.<sup>17</sup> In other studies, victims have expressed the loss of spirituality as more damaging than the sexual abuse itself.<sup>18</sup>

It is impossible to accurately estimate the prevalence of institutional child sexual abuse given its historical nature and because many victims do not report the abuse.<sup>19</sup> However, the evidence shows that institutional child sexual abuse was, and continues to be, a widespread problem.<sup>20</sup> For example, a 2012 Australian inquiry revealed that several thousand children were abused over seventy years.<sup>21</sup> In the *Forgotten Australians* report,<sup>22</sup> 20.9% of the 889 respondents said they had experienced sexual abuse while in institutional care between 1940 and 1980.<sup>23</sup> The findings are comparable to those uncovered by inquiries in other countries, including Canada, Ireland, and the United States.<sup>24</sup> However, these findings are likely to be a

<sup>15</sup> See Doyle (n 5).

<sup>16</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, 251.

<sup>17</sup> Barbara R McLaughlin, 'Devastated Spirituality: The Impact of Clergy Sexual Abuse on the Survivor's Relationship with God and the Church' (1994) 1(2) *Sexual Addiction and Compulsivity* 145.

<sup>18</sup> Deborah Sauvage and Patrick O'Leary, 'Child Sexual Abuse in Faith-Based Institutions: Gender, Spiritual Trauma and Treatment Frameworks' in Yorick Smaal, Andy Kaladelfos and Mark Finnane (eds) *The Sexual Abuse of Children: Recognition and Redress* (Monash University Publishing, 2016) 146, 152.

<sup>19</sup> Mary Gail Frawley-O'Dea, 'The History and Consequences of the Sexual Abuse Crisis in the Catholic Church' (2004) 5(1) *Studies in Gender and Sexuality* 11.

<sup>20</sup> See *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017).

<sup>21</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* (Final Report, November 2013) 3.

<sup>22</sup> Community Affairs References Committee, Parliament of Australia, *Forgotten Australians: A Report on Australians who Experienced Institutional or Out-of-Home Care as Children* (Final Report, August 2004).

<sup>23</sup> Blakemore et al (n 11) 36.

<sup>24</sup> Timothy W Jones, 'Royal Commission Recommends Sweeping Reforms for Catholic Church to End Child Abuse', *The Conversation* (online, 14 December 2017) <<https://theconversation.com/royal-commission-recommends-sweeping-reforms-for-catholic-church-to-end-child-abuse-89141>>.

gross underestimate given the significant barriers and obstacles victims face in disclosing child sexual abuse.<sup>25</sup>

Many cases of institutional abuse are not revealed until the child victim becomes an adult.<sup>26</sup> The significant delay in reporting the abuse is another complicating factor. Some reasons for the delay include the unwillingness of a victim to speak out until they have left the institution,<sup>27</sup> or because the perpetrator and church representatives have used silencing strategies to prevent victims from disclosing the abuse. Silencing strategies include exerting pressure on the victim to remain silent for ‘God’ and ‘the good of the church’.<sup>28</sup>

### III SHARPENING THE FOCUS: THE AUSTRALIAN ROYAL COMMISSION

In December 2012, following extensive media coverage of sexual abuse in religious institutions and evidence from previous inquiries, the Australian Federal Government announced the establishment of the Royal Commission.<sup>29</sup> Subsequently, on 11 January 2013, the Governor-General appointed six members to the Royal Commission to investigate how Australian institutions have responded to allegations of child sexual abuse.<sup>30</sup> A distinguishing feature of the inquiry is its focus solely on *sexual* child abuse within institutions.<sup>31</sup> The Commission’s investigation is now

<sup>25</sup> Blakemore et al (n 11) 36.

<sup>26</sup> Gavrielides (n 10) 625–6.

<sup>27</sup> In its interim report, the Royal Commission noted that it took adults on average 20 years to disclose their abuse: *Royal Commission into Institutional Responses to Child Sexual Abuse* (Interim Report, June 2014) vol 1, 158.

<sup>28</sup> Sauvage and O’Leary (n 18) 151.

<sup>29</sup> Katie Wright, Shurlee Swain and Kathleen McPhillips, ‘The Australian Royal Commission into Institutional Responses to Child Sexual Abuse’ (2017) 74 *Child Abuse & Neglect* 1, 2.

<sup>30</sup> See *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) 4.

<sup>31</sup> Some have criticised the Royal Commissions exclusive focus on sexual abuse for, among other things, positioning sexual abuse as the most damaging and ignoring the profoundly deleterious effects of other forms of abuse in institutions. See, eg, Frank Golding, ‘Sexual Abuse as the Core Transgression of Childhood Innocence: Unintended Consequences for Care Leavers’ (2018) 42(2) *Journal of Australian Studies* 191. Nevertheless, it is important not to overlook significant contributions the

considered the largest public inquiry into institutional child sexual abuse in Australian history and internationally.<sup>32</sup>

During its five years of investigation, the Royal Commission conducted 8,013 private sessions with victims of institutional sexual abuse. While these private sessions arguably share some characteristics similar to restorative justice processes, such as empathetic listening and allowing victims to speak, they are not the same. The needs of victims are often not met by public inquiries, which typically have ‘more wide-reaching aims and objectives than addressing harm to individual victims’.<sup>33</sup> Neither the representatives of the institutions nor the perpetrators were present at the private sessions.<sup>34</sup> Nor were the sessions designed to repair the harm that the abuse had occasioned. Nevertheless, these sessions allowed ‘Commissioners to bear witness and to hear firsthand the experiences and impacts of child sexual abuse, so as to better understand how it might be prevented in the future’.<sup>35</sup>

While the Commission was not investigating only faith-based organisations, the inquiry revealed that the majority of abuses occurred in religious institutions.<sup>36</sup> Of those who told the Commission they were abused in a religious institution, 61.4% said they experienced abuse in a Catholic Church institution, followed by an Anglican Church institution (14.8%).<sup>37</sup> The majority of victims who shared their experiences with the Royal Commission were men (63.6%), with an average age of 52 years at the time of the session.<sup>38</sup> The average age of victims when first abused was

Royal Commission has made in providing insight and widening the knowledge base of institutional child sexual abuse.

<sup>32</sup> Wright, Swain and McPhillips, ‘The Australian Royal Commission into Institutional Responses to Child Sexual Abuse’ (n 29) 1.

<sup>33</sup> McAlinden and Naylor (n 4) 278.

<sup>34</sup> Ilan Katz et al, Submission to Royal Commission in Institutional Responses to Child Sexual Abuse, *Life Journeys of Victim/Survivors of Child Sexual Abuse in Institutions: An Analysis of Royal Commission Private Sessions* (December 2017) 20.

<sup>35</sup> Ibid.

<sup>36</sup> Kathleen McPhillips, ‘Silence, Secrecy and Power: Understanding the Royal Commission Findings into the Failure of Religious Organisations to Protect Children’ (2018) 31(3) *Journal for the Academic Study of Religion* 116.

<sup>37</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Information Update* (Web Page) 1

<[https://www.childabuseroyalcommission.gov.au/sites/default/files/final\\_information\\_update.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/final_information_update.pdf)>.

<sup>38</sup> Ibid 3.



10.4 years.<sup>39</sup> Almost all of the victims involved in the private sessions expressed having mental health issues due to the abuse.<sup>40</sup> They noted several effects the abuse had on their wellbeing, such as the effect on their relationships, physical health, education levels, employment, and financial security.<sup>41</sup> The time it took for a victim to reveal the abuse to someone was an average of almost 24 years.<sup>42</sup> One in 10 of these victims said their discussion with the Royal Commission was the first time they had disclosed the abuse they endured as a child to anyone.<sup>43</sup>

In December 2017, the Royal Commission completed its final report. It highlighted that child sexual abuse was endemic in institutions responsible for the care of children and that these institutions continually failed to address the abuse over several decades. Regarding religious organisations, the Royal Commission stated, ‘[i]ndependent, autonomous or decentralised governance structures often served to protect leaders of religious institutions from being scrutinised or held accountable for their actions, or lack of action, in responding to child sexual abuse’.<sup>44</sup>

The Royal Commission made over 400 recommendations designed to inform governments on how to redress victims, implement legislative reforms, and suggested measures to prevent future abuse in institutional contexts.<sup>45</sup> None of the recommendations supported restorative justice processes as part of the criminal justice responses to institutional child sexual abuse. This was despite the emerging evidence showing restorative justice can be used safely in cases involving sexual abuse and can have a

<sup>39</sup> Ibid 4.

<sup>40</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *A Brief Guide to the Final Report* (Web Page) 5

<[https://www.childabuseroyalcommission.gov.au/sites/default/files/a\\_brief\\_guide\\_to\\_the\\_final\\_report.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/a_brief_guide_to_the_final_report.pdf)>.

<sup>41</sup> Ibid 5.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid 6.

<sup>44</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) vol 16, book 2, 29.

<sup>45</sup> It is beyond the scope of this article to discuss the uptake of Australian governments and institutions to implement the Royal Commission’s recommendations. However, a major limitation of the Royal Commission is that it has no power to compel governments to implement the recommendations. Once the Royal Commission finishes its term, it ceases to exist; thus ‘what is taken up and implemented and what is ignored is a matter for the federal government, and the states and territories’: Wright, Swain and McPhillips (n 29) 5.

range of benefits for victims, offenders and communities.<sup>46</sup> Fifty-seven recommendations specifically targeted religious institutions.<sup>47</sup> These recommendations were focused on the factors the Royal Commission identified as contributing to the occurrence of institutional child sexual abuse and addressing the inadequate institutional responses.<sup>48</sup> Additionally, the Royal Commission recommended a National Redress Scheme that is ‘survivor focused’ comprising three elements: a direct personal response, counselling and psychological care, and capped monetary payment.<sup>49</sup> The direct personal response allows victims to tell their ‘story to a representative of the institution and receive an apology and an explanation of what the institution is doing to stop anyone else from being abused in the future’.<sup>50</sup> While a direct personal response incorporates elements of restorative justice processes, it does not involve the same safeguards, such as a neutral third-party facilitating the discussion. Also, it is offered only to those who receive an offer through the National Redress Scheme and is therefore inadequate.

The Scheme, which started on 1 July 2018 and is planned to run only for ten years, has been subject to considerable criticism. This includes the criticism that it ‘protects institutions at the expense of justice for

<sup>46</sup> Jane Bolitho and Karen Freeman, Submission to Royal Commission in Institutional Responses to Child Sexual Abuse, *The Use and Effectiveness of Restorative Justice in Criminal Justice Systems Following Child Sexual Abuse or Comparable Harms* (March 2016) 61.

<sup>47</sup> Kathleen McPhillips, ‘Religion after the Royal Commission: Challenges to Religion-State Relations’ (2020) 11(1) *Religions* 44:1–13, 5.

<sup>48</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) vol 16, book 1, 12.

<sup>49</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse* (Redress and Civil Litigation Report, 2015) 8. For examples of other redress schemes outside of Australia, see Kathleen Daly, ‘Redress for Historical Institutional Abuse of Children’ in Antje Deckert and Rick Sarre (eds) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (Palgrave Macmillan, 2017) 449; Estelle Pearson, David Minty and Justin Portelli, ‘Institutional Child Sexual Abuse: The Role & Impact of Redress’ (Seminar Paper, Actuaries Institute, 6–10 November 2015).

<sup>50</sup> ‘Direct personal response’, *National Redress Scheme* (Web Page)

<<https://www.nationalredress.gov.au/applying/what-can-you-apply/direct-personal-response>>.

survivors'<sup>51</sup> and is re-traumatising for some survivors.<sup>52</sup> Another limitation is that not all victims can access the Scheme as they must meet the eligibility requirements, including the condition that the institution responsible has joined the Scheme by 30 June 2020.<sup>53</sup>

#### IV THE TRADITIONAL RESPONSES TO INSTITUTIONAL CHILD SEXUAL ABUSE

This part discusses the three main traditional approaches to historical child sexual abuse within institutions: criminal proceedings, civil proceedings and internal institutional processes.

##### A *Criminal Proceedings*

The criminal justice system is focused on balancing the rights of offenders with the power of the state to maintain public order and security.<sup>54</sup> The state has the discretion to prosecute the offender, settle by plea bargaining or continue with the trial, and request the court to impose a specific punishment.<sup>55</sup> Consequently, victims have little or no involvement in the process and their needs neglected, such as the need for truth-telling, empowerment, and restitution.<sup>56</sup> The failure of the criminal justice system to attend to the needs of victims is partly due to the legal definition of crime, which defines it as a wrong committed against the state and is not

<sup>51</sup> Kathleen Daly and Juliet Davis, 'National Redress Scheme for Child Sexual Abuse Protects Institutions at the Expense of Justice for Survivors', *The Conversation* (online, 7 March 2019)

<<https://theconversation.com/national-redress-scheme-for-child-sexual-abuse-protects-institutions-at-the-expense-of-justice-for-survivors-112954>>.

<sup>52</sup> Megan Neil, 'Woman Tells of Redress Scheme 'Hell'', *The Queensland Times* (online, 20 March 2020) <<https://www.qt.com.au/news/woman-tells-of-abuse-redress-scheme-hell/3977410/>>.

<sup>53</sup> For details about eligibility see Department of Social Services, Commonwealth of Australia, *National Redress Scheme* (Web Page)

<<https://www.nationalredress.gov.au/>>.

<sup>54</sup> Marilyn Fernandez, *Restorative Justice for Domestic Violence Victims: An Integrated Approach to Their Hunger for Healing* (Lexington Books, 2010) 9–10.

<sup>55</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, 380.

<sup>56</sup> Fernandez (n 54) 9–10.

inclusive of victims themselves.<sup>57</sup> The criminal justice system treats crime as a wrong against the state because it is a violation against public order.

Given the seriousness of a criminal conviction and to prevent wrongful convictions, the state must prove the offender's guilt to a very high standard of proof — beyond reasonable doubt — to secure a conviction.<sup>58</sup> However, establishing guilt beyond a reasonable doubt is an inherent challenge and child sexual abuse cases are 'widely recognised by prosecutors and legal commentators as one of the most difficult crimes to investigate and prosecute'.<sup>59</sup> Very few cases reach the court,<sup>60</sup> and even if they do, the chance of securing a conviction is low.<sup>61</sup> Consequently, 'for many survivors of child sexual abuse (in any form) justice is simply not achieved'.<sup>62</sup> Cases of historical child sexual abuse may be particularly challenging to prosecute because the evidence may no longer exist and memories may have faded.<sup>63</sup> Other challenges include issues with the admissibility and reliability of evidence, and the availability of witnesses, many of whom may have died or be untraceable,<sup>64</sup> and statute of limitations legislation preventing prosecutions.<sup>65</sup> Nevertheless, there have been some

<sup>57</sup> Zehr (n 2) 37.

<sup>58</sup> Noll and Harvey (n 55) 380.

<sup>59</sup> Judy Cashmore, Alan Taylor and Patrick Parkinson, 'The Characteristics of Reports to the Police of Child Sexual Abuse and the Likelihood of Cases Proceeding to Prosecution after Delays in Reporting' (2017) 74 *Child Abuse & Neglect* 49, 49.

<sup>60</sup> Patrick N Parkinson et al, 'The Process of Attrition in Child Sexual Assault Cases: A Case Flow Analysis of Criminal Investigations and Prosecutions' (2002) 35(3) *Australian and New Zealand Journal of Criminology* 347, 349–50.

<sup>61</sup> Jacqueline Fitzgerald, 'The Attrition of Sexual Offences from the New South Wales Criminal Justice System' (Crime and Justice Bulletin No 92, NSW BOSCAR, January 2006).

<sup>62</sup> Bolitho and Freeman (n 46) 10.

<sup>63</sup> Michael Newbury, 'Historical Child Sexual Abuse Investigations: A Case for Law Reform' (2014) 26(1) *Current Issues in Criminal Justice* 44, 44–5.

<sup>64</sup> Cashmore, Taylor and Parkinson (n 59) 50. Nevertheless, the authors concluded 'historical matters where the report has been delayed into adulthood should not be presumed to have fatal evidentiary challenges at the investigatory stage and in laying charges': 60.

<sup>65</sup> See Sinead Ring, 'Beyond the Reach of Justice? Complainant Delay in Historic Child Sexual Abuse Cases and the Right to a Fair Trial' (2009) 9(2) *Judicial Studies Institute Journal* 162; 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, 381.

criminal prosecutions of priests who have committed child sexual abuse.<sup>66</sup> In Australia, between 1993 and 2016, there were over 100 charges laid against priests for child sexual abuse.<sup>67</sup> In the United States, from 1950 to 2002, it was reported that only 226 out of 4,392 priests accused of child sexual abuse were criminally prosecuted, and only 138 of those prosecuted were convicted.<sup>68</sup>

### B Civil Proceedings

Survivors may choose to commence civil proceedings against the abuser or institution responsible. The civil law is focused on providing the injured party reparation for the wrongs committed by the wrongdoer. The standard of proof (on the balance of probability) is much lower than that of the criminal system, and the rules of evidence are less strict because civil penalties are considered to be less severe.<sup>69</sup> A civil court cannot imprison the wrongdoer but can award a range of civil remedies, the most common being financial compensation.

Statute of limitations legislation may be a barrier to individuals commencing civil action. Although the courts in some cases have the discretion to waive the limitation period, 'the uncertainty and inconsistency of this approach makes limitation periods a tangible restriction on the options of many victims of sexual assault who feel unable to recount their experiences until years, or even decades, have passed'.<sup>70</sup>

Additionally, the civil litigation process is not accessible for many individuals because of the costs, time, and emotional distress associated with the process. For instance, although the costs were later waived, an adult survivor of institutional child sexual abuse, John Ellis, was pursued

<sup>66</sup> See James Gallen, 'Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice' (2016) 10(2) *International Journal of Transitional Justice* 332, 345.

<sup>67</sup> 'Black Collar Crime', *Broken Rites Australia* (Web Page) <<http://brokenrites.org.au/drupal/node/235>>.

<sup>68</sup> Gavrielides (n 10) 618. See also John Jay College Research Team, *The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950-2010* (Report, May 2011).

<sup>69</sup> Noll and Harvey (n 55) 382.

<sup>70</sup> Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending – Pathways for Better Outcomes of Victims, Offenders and the Community* (Report, May 2014) 92.

for \$750,000 in legal expenses by the Church's lawyers.<sup>71</sup> The case of John Ellis exemplifies the trauma, stress, and financial strain civil litigation can have on adult survivors of institutional child sexual abuse.<sup>72</sup>

Although civil litigation give victims greater opportunities to participate in the process,<sup>73</sup> it is still adversarial and confrontational, posing a high risk of re-traumatising victims.<sup>74</sup> In a United States study conducted on survivors of sexual abuse and domestic violence, the participants 'frequently complained of feeling powerless and marginalized in the face of the complex rules and procedures of the legal system, which they often perceived as a cynical game'.<sup>75</sup>

Further, monetary compensation, which is the main outcome of civil proceedings, can be limiting. Capped monetary payment is also offered by the National Redress Scheme to eligible survivors but only if applied for before 30 June 2027 and the institution responsible has joined the Scheme.<sup>76</sup> While no amount of financial compensation can truly compensate victims for the pain and suffering they have endured, it can help in acknowledging the abuse as a wrong and afford a sense of justice and closure for many victims.<sup>77</sup> Equally, compensation can 'alienate abuse survivors and objectify injuries that are personal and psychic in nature', and survivors feel that 'their worth has not been understood or acknowledged by the party responsible for the abuse'.<sup>78</sup>

<sup>71</sup> John Ellis and Nicola Ellis, 'A New Model for Seeking Meaningful Redress for Victims of Church-related Sexual Assault' (2014) 26(1) *Current Issues in Criminal Justice* 31, 35.

<sup>72</sup> See John Ellis, Submission to the Parliament of Victoria, *Inquiry into the Handling of Child Abuse by Religious and Other Organisations* (5 June 2013).

<sup>73</sup> Centre for Innovative Justice (n 70) 93.

<sup>74</sup> Wendy Blacker and Laoise O'Connor, 'A Defendant's Approach' (2017) 141 (July/August) *Precedent* 45, 45.

<sup>75</sup> Judith L Herman, 'Justice from the Victim's Perspective' (2005) 11(5) *Violence Against Women* 571, 582.

<sup>76</sup> Payments are decided on an individual basis, ranging from less than \$10,000 through to \$150,000. See Department of Social Services, Commonwealth of Australia, *National Redress Scheme* (Web Page) <<https://www.nationalredress.gov.au/>>.

<sup>77</sup> Australian Senate Community Affairs References Committee, *Forgotten Australians: A Report on Australians who Experienced Institutional or Out-of-Home Care as Children* (Report, 2004) 226, para 8.119.

<sup>78</sup> Seetal Sunga, 'The Meaning of Compensation in Institutional Abuse Programs' (2002) 17 *Journal of Law and Social Policy* 39, 41. Also see Kathleen Daly, *Redressing Institutional Abuse of Children* (Palgrave Macmillan, 2014) 177.

The struggle for settlement consumes many victims and even if settlement is reached, it is ‘not uncommon for victims to feel pain after settlement because the validation ... does not fill the emotional and spiritual void’.<sup>79</sup> This can leave victims ‘extraordinarily dissatisfied’.<sup>80</sup> Monetary compensation may insufficiently acknowledge the wrongdoing and can ‘enable perpetrators and the church to prevent their crimes from becoming public, to avoid trials and to circumvent the disclosure of internal documents’.<sup>81</sup> Victims’ dissatisfaction with monetary compensation may reflect their need for other forms of redress.<sup>82</sup>

Before its removal, the so-called ‘Ellis defence’ had prevented victims from achieving compensation via civil litigation in Australia.<sup>83</sup> In *Trustees of the Roman Catholic Church v Ellis*, it was held that corporate trustees of church property were not liable to suit for abuse committed by the clergy and that ‘[t]he relationship between an assistant parish priest and the “members” [of the Church] as a whole is too slender and diffuse to establish agency in contract or vicarious liability in tort’.<sup>84</sup> This decision has the effect of significantly limiting the ability of victims to obtain compensation, especially where the offender was deceased or has insufficient finances,<sup>85</sup> as well as denying ‘survivors the satisfaction of

<sup>79</sup> Jonathan Finer, ‘Settlement Hasn’t Eased Their Pain’, *The Washington Post* (online, 1 March 2004)

<[https://www.snapnetwork.org/psych\\_effects/settlement\\_hasn't\\_eased\\_pain.htm](https://www.snapnetwork.org/psych_effects/settlement_hasn't_eased_pain.htm)>, quoting a victim’s lawyer, Mitchell Garabedian.

<sup>80</sup> Noll and Harvey (n 55) 383.

<sup>81</sup> Gallen (n 66) 347.

<sup>82</sup> Daly has observed that financial payments are the most common outcomes of redress schemes but argued that does not mean that money is the most important form of redress. She noted, ‘the available evidence suggests that counselling is as, if not more, important’: Daly (n 78)174.

<sup>83</sup> The defence was removed based on the Royal Commission’s recommendations. See Michelle Brown, ‘Catholic Church Ellis Defence Scrapped in ‘Momentous Day’ for Abuse Survivors’, *ABC News* (online at 1 January 2019) <<https://www.abc.net.au/news/2019-01-01/catholic-church-ellis-defence-scrapped-from-new-years-day/10675890#:~:text=The%20so%2Dcalled%20%22Ellis%20defence,into%20Institutional%20Child%20Sex%20Abuse>>.

<sup>84</sup> *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565, 578 [54] (Mason P, Ipp and McColl JJA agreeing at 604).

<sup>85</sup> Blacker and O’Connor (n 74) 46.

holding the Church entity culpable for failing to protect and support them'.<sup>86</sup>

The potential of compensation being awarded in a civil case should be weighed against the time and costs victims may incur through the process. There may be little utility in bringing action against a defendant with limited resources to meet any compensation ordered. Before commencing litigation against an institution, victims need to consider the prospect of the institution using the sufficient funds 'to defend the claim until the resources of the complainant are exhausted'.<sup>87</sup>

### C *Internal Institutional Processes*

Some institutions have created internal processes to deal with claims of clerical child sexual abuse.<sup>88</sup> This includes the *Towards Healing* program, which was established in 1996 by the Australian Catholic Bishops Conference to respond to abuse complaints. However, this program operated only at the discretion of the Director of Professional Standards, and such church-based restorative justice programs have been subject to criticism for operating on an ad hoc basis, lacking impartiality, and being adversarial and extremely limited in addressing claims.<sup>89</sup> It has also been argued that the 'outcomes are inconsistent because each bishop has complete discretion and power with regard to the provision of an apology, funding for counselling and the provision of compensation'.<sup>90</sup>

Other criticisms have been made about institutional responses to complaints alleging child sexual abuse, which have yielded a high level of

<sup>86</sup> Ellis and Ellis (n 71) 35.

<sup>87</sup> Centre for Innovative Justice (n 70) 92.

<sup>88</sup> For an overview of the internal institutional process created by the Australian Defence Force (ADF), Defence Abuse Response Taskforce (DART), in response to a culture of sexual abuse in the ADF, see Tony Foley, 'Changing Institutional Culture in the Wake of Clerical Abuse – the Essentials of Restorative and Legal Regulation' (2019) 22(2) *Contemporary Justice Review* 171, 173.

<sup>89</sup> McAlinden and Naylor (n 4); Kate Gleeson, 'The Money Problem: Reparation and Restorative Justice in the Catholic Church's Towards Healing Program' (2015) 26(3) *Current Issues in Criminal Justice* 317.

<sup>90</sup> Judy Courtin, 'Church "Healing" is Strangling Victims', *Sydney Morning Herald* (online, 5 October 2013) <<https://www.smh.com.au/opinion/church-healing-is-strangling-victims-20131004-2uzqz.html>>. See also, Kathleen Daly and Juliet Davis, 'Civil Justice and Redress Scheme Outcomes for Child Sexual Abuse by the Catholic Church' (2021) *Current Issues in Criminal Justice* (advance).



victim dissatisfaction and re-traumatisation.<sup>91</sup> When a survivor pursues internal institutional processes following child sexual abuse, ‘they are being asked to trust a source of previous trauma’.<sup>92</sup> The evidence shows that institutions have not sufficiently addressed allegations of child sexual abuse but have ‘adopted policies and practices which have led to its continuation’ and impunity for offenders.<sup>93</sup> This evidence suggests that internal institutional complaint handling is not an adequate response, raises a conflict of interest, and lacks independent oversight.

The significant inadequacies of the traditional court processes and internal processes make it crucial to consider other ways of achieving meaningful redress for victims. The potential benefits of restorative justice conferencing in helping victims achieve this redress is considered in the following part.

## V THE RESTORATIVE WAY

Although there is general agreement on the basic outlines of restorative justice, there is no universal definition of this term. The basic outlines of restorative justice are captured by Zehr, who defines restorative justice as ‘an approach to achieving justice that involves, to the extent possible, those who have a stake in a specific [offence] or harm to collectively identify and address harms, needs, and obligations in order to heal and put things as right as possible’.<sup>94</sup>

Another useful definition regularly cited in the literature and used by experts is that provided by Marshall, who describes restorative justice as ‘a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future’.<sup>95</sup> Similarly, a restorative process has been defined as ‘any process in which the victim and the

<sup>91</sup> Sauvage and O’Leary (n 18) 158.

<sup>92</sup> *Ibid* 155.

<sup>93</sup> UN Committee on the Rights of the Child, *Concluding Observations on the Second Periodic Report of the Holy See*, 65<sup>th</sup> sess, UN Doc CRC/C/VAT/ CO/2 (31 January 2014).

<sup>94</sup> Zehr (n 2) 48.

<sup>95</sup> Tony Marshall, ‘The Evolution of Restorative Justice in Britain’ (1996) 4(4) *European Journal on Criminal Policy and Research* 21, 37.

offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator'.<sup>96</sup> As can be seen from these definitions, restorative justice practices are about bringing together those who have a legitimate interest or stake in the offence — most notably victims and offenders, but also other parties, such as members of the community,<sup>97</sup> depending on the process used — to help find a resolution together. Both primary and secondary victims can attend restorative justice processes. Primary victims are those who the crime is committed directly against; secondary victims may include the primary victims' family and friends, and members of the community who have been indirectly affected.<sup>98</sup>

Since its modern birthplace in Ontario (Canada) in 1974,<sup>99</sup> the use of restorative justice has become widespread around the world.<sup>100</sup> For example, in the United States, restorative justice began with victim-offender conferencing in Indiana between 1977 and 1978.<sup>101</sup> Family group conferencing has been the default response to juvenile offending in New Zealand since 1989.<sup>102</sup> In Australia, police-facilitated restorative justice conferencing began through the so-called 'Wagga Wagga model' in 1991.<sup>103</sup> Despite these specific examples, restorative philosophy can be found in Western systems and other countries before the 1970s. Indeed, Zehr reminds us that despite these modern examples, the 'precedents and roots of restorative justice ... reach back into human history'.<sup>104</sup> Modern restorative justice processes were used initially mainly to deal with crimes considered to be less serious, such as minor property offences, and to divert juvenile offenders from the criminal justice system. The success of such diversion has led to the expansion of restorative justice practices to address

<sup>96</sup> United Nations Office on Drugs and Crime (n 2) 7.

<sup>97</sup> For a summary of what the concept of 'community' entails see Zehr (n 2) 37–8.

<sup>98</sup> Zehr (n 2) 24.

<sup>99</sup> Zehr (n 1) 159–60; Michael S King, 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' (2008) 32(3) *Melbourne University Law Review* 1096, 1104.

<sup>100</sup> Bolitho and Freeman (n 46) 10.

<sup>101</sup> Zehr (n 1) 160.

<sup>102</sup> Zehr (n 2) 62.

<sup>103</sup> King (n 99) 1105.

<sup>104</sup> Zehr (n 2) 19.

various types of crimes, including more serious violent offending.<sup>105</sup> Restorative justice practices have also been used to deal with conflict outside the criminal justice system, such as conflicts in educational institutions, workplaces, and religious institutions.<sup>106</sup>

Despite research suggesting that restorative justice can be a safe and effective option that empowers victims of sexual abuse,<sup>107</sup> its use in dealing with such offences remains controversial.<sup>108</sup> There has been reluctance of criminal law practitioners to use restorative justice to deal with family violence,<sup>109</sup> and sexual abuse, even when restricted to abuse committed by and against adults.<sup>110</sup> It may therefore be unsurprising that there are scant examples of, and research on, the use of restorative justice to address institutional child sexual abuse. Bolitho and Freeman ‘found no examples of programs attached to criminal justice systems, domestically or internationally that have reported using restorative justice to address institutional child sexual abuse’.<sup>111</sup>

Therefore, it is essential to refer to some of Zehr’s points about what restorative justice is *not* about to dispel any misconceptions when considering its appropriateness in the context of sexual abuse.<sup>112</sup> First, it is not primarily about forgiveness or reconciliation. While a restorative justice encounter can provide a safe environment for forgiveness and reconciliation to occur, it is not the principal focus. Whether forgiveness or

<sup>105</sup> Ibid 6.

<sup>106</sup> Ibid 18.

<sup>107</sup> Scottish Government, *Uses of Restorative Justice: Evidence Review* (May 2019) 6.

<sup>108</sup> See, eg, Barbara Hudson, ‘Restorative Justice: The Challenge of Sexual and Racial Violence’ (1998) 25(2) *Journal of Law and Society* 237; Suzanne Ost, ‘A New Paradigm of Reparation for Victims of Child Pornography’ (2016) 36(4) *Legal Studies* 613, 615; Kathleen Daly, ‘Sexual Assault and Restorative Justice’ in Heather Strang and John Braithwaite (eds) *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 62; Annie Cossins, ‘Restorative Justice and Child Sex Offences: The Theory and Practice’ (2008) 48(3) *British Journal of Criminology* 359; Anne-Marie McAlinden, ‘Restorative justice as a response to sexual offending: addressing the failings of current punitive approaches’ (2008) 3(1) *Sexual Offender Treatment* 1.

<sup>109</sup> See, eg, Fernandez (n 54) 10.

<sup>110</sup> See, eg, Francesca Marsh and Nadia M Wager, ‘Restorative Justice in Cases of Sexual Violence: Exploring the Views of Public Survivors’ (2015) 62(4) *Probation Journal* 336.

<sup>111</sup> Bolitho and Freeman (n 46) 31.

<sup>112</sup> Zehr (n 2) 13–20.

reconciliation occurs is up to the individual and this will vary from participant to participant.<sup>113</sup> Neither victim forgiveness nor reconciliation between the victim and offender should be expected as a goal of restorative justice in cases of child sexual abuse. According to survivor John Ellis, '[s]urvivors of abuse often do not wish to restore their relationship with the Church and certainly not with the perpetrator (if still alive)'.<sup>114</sup> Although the harm of child sexual abuse cannot be truly repaired, a restorative justice encounter may help the victim towards healing.

Second, despite the term 'restorative', restorative justice processes are not necessarily about restoring the past to the position before the wrong was committed. Given the severity of child sexual abuse, this is unlikely to be achieved. Rather, restorative justice aims to transform the status quo positively; it 'often involves movement toward a new sense of identity and health or new, healthier relationships'<sup>115</sup> for victims of crime with other people.

Third, while restorative justice practices may prevent re-offending, it is not its primary aim. Determining the effectiveness of restorative justice practices in reducing re-offending has been problematic, mainly because of methodological issues. Studies have produced inconsistent results, with some finding decreased recidivism after restorative justice participation, while others finding no effect or even the opposite effect.<sup>116</sup> Nevertheless, the encounter aims to give a voice to those who have suffered harm, which 'includes validation on the part of the community that its norms were violated and that suffering has taken place — suffering that may be ongoing'.<sup>117</sup> For the offender, the aim is to promote acceptance of responsibility for their wrongdoing and repair the harm within their capabilities. Those affected by an offence should be able to engage in the process, regardless of whether it reduces the chances of re-offending.

<sup>113</sup> Ibid 13.

<sup>114</sup> Ellis and Ellis (n 71) 38.

<sup>115</sup> Zehr (n 2) 14.

<sup>116</sup> See Lawrence W Sherman and Heather Strang, *Restorative Justice: The Evidence* (Smith Institute, 2007) 68–71. See also Joanna Shapland et al, *Does Restorative Justice Affect Reconviction?: The Fourth Report from the Evaluation of Three Schemes* (Ministry of Justice Research Series 10/08, June 2008) 10.

<sup>117</sup> Jennifer Speed, 'Restorative Justice: Emergence, Institutionalization, and Critiques' in Walter L Fihlo et al (eds), *Peace, Justice and Strong Institutions* (Springer, 2020) 7.

Lastly, restorative justice should not be seen as either a panacea or a replacement for the criminal justice legal system.<sup>118</sup> Restorative justice is not appropriate in all situations and, in many cases, the censure of the criminal law and severe punishments are justified. However, given the low number of sexual abuse cases reaching criminal trial and the system's limits in addressing victims' needs, adding restorative justice processes to the 'menu of justice'<sup>119</sup> is required to promote greater victim participation and to meet their redress needs.

## VI THE POTENTIAL BENEFITS OF RESTORATIVE JUSTICE IN THE CONTEXT OF INSTITUTIONAL CHILD SEXUAL ABUSE

The benefits of using restorative justice processes for survivors of abuse stem largely from its victim-orientated focus. This can be contrasted to the traditional criminal justice system that is primarily focused on punishing offenders and usually considers victims as 'at best, a secondary concern of justice'.<sup>120</sup>

Research exploring restorative justice processes, albeit not exclusively in a sexual abuse context, have consistently found high satisfaction levels in victim participants. It has been found that victims who participated in a restorative justice process have decreased symptoms of post-traumatic stress disorder immediately following and six months after the encounter than those whose case was processed in the justice system.<sup>121</sup> Victims have also reported reduced levels of fear and anxiety, and displayed less interest in seeking vengeance.<sup>122</sup> These studies are informative when considering the appropriateness of restorative justice to deal with historical cases of institutional child sexual abuse but it is important to qualify their findings in the context of child sexual abuse survivors.

<sup>118</sup> This is consistent with the guiding principles underlying the Australian Capital Territory's *Crimes (Restorative Justice) Act 2004* (ACT), s 6(d), which states that restorative justice should not be a substitute for the criminal justice system.

<sup>119</sup> Joyce-Wojtas and Keenan (n 6) 61.

<sup>120</sup> Zehr (n 2) 32.

<sup>121</sup> Sherman and Strang (n 116) 64.

<sup>122</sup> See, eg, Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Clarendon Press, 2002).

It is pertinent to note that some research reports victim dissatisfaction with certain restorative justice processes. For example, Cossins, who is critical of the usefulness of restorative justice processes in the context of sex offending, noted several studies where ‘a significant minority of victims felt worse after participation’.<sup>123</sup> However, it seems that the dissatisfaction is mostly caused by an aspect of the process, such as failure to resolve some issues or failure to complete outcome agreements, rather than it being caused by the restorative justice approach itself.<sup>124</sup>

Jülich’s study involving interviews with 21 adult survivors of historical familial child sexual abuse highlights some of the potential benefits restorative justice may have in addressing the shortcomings of the criminal justice system.<sup>125</sup> The participants, who had not engaged in restorative justice processes and ‘were not convinced it would work for them’,<sup>126</sup> were interviewed during 1995 and 1997, when ‘restorative justice was beginning to emerge for adult offenders in New Zealand’.<sup>127</sup> Although the participants were not asked what they might want from restorative justice processes, the common themes in the participants’ views were aligned with, and could be met by, these approaches. The common themes included the participants’ need to tell their story in a safe forum based on equality, the need to have their experience of victimization validated by offenders and bystanders, and the need for the offender to assume responsibility and accountability for their abuse. Additionally, all the participants ‘criticized the criminal justice system for denying them a voice, and this contributed to their lack of confidence in the current system’.<sup>128</sup>

Criminal and civil proceedings are restricted by statute of limitations legislation in many jurisdictions, which may bar commencing proceedings. Conversely, restorative justice processes can be held outside of the context of criminal and civil proceedings and, therefore, not subject to the statute of limitations. In other cases, prosecution may not be brought because of

<sup>123</sup> Cossins (n 108) 363. But see Kathleen Daly, ‘Setting the Record Straight and a Call for Radical Change’ (2008) 48(4) *British Journal of Criminology* 557.

<sup>124</sup> Shapland et al (n 116) 27.

<sup>125</sup> 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.

<sup>126</sup> *Ibid* 136.

<sup>127</sup> *Ibid* 128.

<sup>128</sup> *Ibid* 131.

reasons such as a lack of evidence or because the offender has died or cannot be located.<sup>129</sup> In these circumstances, the offender would be represented by the institution where the abuse occurred.<sup>130</sup> A restorative justice process may still go ahead even if the offender is deceased or cannot be located because it provides victims with an opportunity to express the effect of the abuse in front of the participants, which can 'provide an experience of healing'<sup>131</sup> in itself.

Restorative justice practices 'focus on repairing the harm done to the victim, thus making victims' needs a priority'.<sup>132</sup> Voice is a primary need of many victims of crime and restorative justice processes give victims the opportunity to speak and be heard. Studies have shown that many victims want to face their perpetrators to voice the effect the abuse has had on them and ask the offender questions to understand why the abuse occurred.<sup>133</sup> The ability of the victim to hear directly from the offender why the offence was committed is not contained to the 'speculation or the legally constrained information that comes from a trial or plea agreement'.<sup>134</sup>

Giving victims a voice in the process can lead to better outcomes tailored to meet their needs than those that can be achieved in criminal or civil proceedings. The outcomes are not limited to monetary compensation and can include an apology, provision of therapeutic services such as counselling, promises about future behaviour, and community service.<sup>135</sup> Even if an outcome cannot be reached, engaging in the restorative justice process may of itself be beneficial. For example, victims may experience

<sup>129</sup> Mary P Koss, Karen J Bachar and Quince C Hopkins, 'Restorative Justice for Sexual Violence: Repairing Victims, Building Community, and Holding Offenders Accountable' (2003) 989 *Annals New York Academy of Sciences* 384, 392.

<sup>130</sup> Research has found that victims of institutional child sexual abuse would likely be interested to pursue restorative justice conferencing with non-offenders, such as institutional representatives. See Katherine van Wormer and Lois Berns, 'The Impact of Priest Sexual Abuse: Female Survivors' Narratives' (2004) 19(1) *Affilia: Journal of Women & Social Work* 53, 53–67; Gavrielides and Coker (n 7) 357–8; Gavrielides (n 10) 617–39.

<sup>131</sup> Zehr (n 2) 33.

<sup>132</sup> Jo-Anne Wemmers, 'Restorative Justice for Victims of Crime: A Victim Oriented Approach to Restorative Justice' (2002) 9(1) *International Review of Victimology* 43, 43.

<sup>133</sup> McAlinden and Naylor (n 4) 285.

<sup>134</sup> Zehr (n 2) 22.

<sup>135</sup> United Nations Office on Drugs and Crime (n 2) 43.

therapeutic benefits by having had a chance to express themselves and hearing the offender acknowledge responsibility for the abuse.<sup>136</sup> The outcome plan agreed to in a restorative justice process can include ways to address the causes of the sexual abuse and place greater responsibility on the institutions involved to prevent it from happening in future. This is important in light of research showing many victims ‘want to know that steps are being taken to reduce such harms to themselves and others’.<sup>137</sup>

Another advantage is that restorative justice processes encourage offender accountability and provide an opportunity for them to gain insight into the consequences of their actions. This is important because ‘[o]ften survivors of sexual abuse want the offender or offender’s religious community to be accountable and remorseful’.<sup>138</sup> Accountability can be evidenced ‘by an attitude of wanting to make things right as far as possible with the victim, recognizing and acknowledging the nature of an unrightable wrong’.<sup>139</sup> This encouragement of responsibility contrasts with the traditional adversarial criminal justice processes that may involve denial or downplaying of responsibility to avoid punishment.<sup>140</sup>

## VII RESTORATIVE JUSTICE CONFERENCING AND INSTITUTIONAL CHILD SEXUAL ABUSE: PITFALLS AND CHALLENGES

Despite the potential benefits of restorative justice in dealing with historical institutional child sexual abuse, its pitfalls and challenges need to be considered. A major concern with diverting cases of sexual abuse from the court system to restorative justice processes is that it will diminish the seriousness of the crime.<sup>141</sup> In the context of family violence, some critics have argued that it is a ‘soft option’ to deal with such offences because the process and outcomes are not formal and the punishment imposed on offenders is not severe enough.<sup>142</sup> Since one of the goals of

<sup>136</sup> Ibid 77.

<sup>137</sup> Zehr (n 2) 40.

<sup>138</sup> Gavrielides (n 10) 635 citing Eloise Rosenblatt, *Restorative Justice for Sexual Misconduct and Abuse in the Faith Community* (RJC, 2008) 2.

<sup>139</sup> Noll and Harvey (n 55) 392.

<sup>140</sup> See Zehr (n 2) 24.

<sup>141</sup> Marsh and Wager (n 110) 340.

<sup>142</sup> See Fernandez (n 54) 10.



restorative justice is to divert the offender from the criminal justice system, this may lead to a perception that sexual assault will be treated less seriously.<sup>143</sup>

However, it must be stressed that restorative justice in the context of child sexual abuse should never be used as an alternative to criminal prosecution or bar victims from pursuing civil litigation. Rather, it should be offered as an additional part of these processes. It can also be used if going to court is not possible because, for example, statutory limitation periods apply, the offender cannot be located, or the prosecutor believes there is insufficient evidence to prove the offender committed the abuse to the requisite standard of proof. Additionally, a 'restorative justice process does not necessarily rule out all forms of punishment (eg fine, incarceration, probation), but its focus remains firmly on restorative, forward-looking outcomes'.<sup>144</sup> Restorative justice processes can also be offered after an offender has been prosecuted and convicted in a court.<sup>145</sup>

Another challenge in the successful use of restorative justice processes is the power imbalance that may exist between the victim and perpetrator in sexual abuse cases.<sup>146</sup> However, this is an issue that the traditional court processes have not been able to rectify.<sup>147</sup> The neutral role of facilitators may exacerbate power imbalances by not recognising the difference between the victim and the offender. To appear impartial, facilitators may fail to stop victim-blaming attitudes and attempts by the offender to minimise the abuse.<sup>148</sup> Therefore, addressing power imbalances may

<sup>143</sup> Ruth Lewis et al, 'Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence' (2001) 10(1) *Social & Legal Studies* 105.

<sup>144</sup> United Nations Office on Drugs and Crime (n 2) 11.

<sup>145</sup> For example, the Restorative Justice Unit runs Victim-Offender Mediation for offenders post-sentence for New South Wales Corrective Services: Kate Milner, 'Restorative Justice and Adult Offending: Twelve Years of Post-Sentence Practice' in Jane Bolitho, Jasmine Bruce and Gail Mason (eds), *Restorative Justice: Adults and Emerging Practice* (Federation Press, 2012) 80.

<sup>146</sup> Estelle Zinsstag and Marie Keenan, 'Restorative Justice and Sexual Offences: Can "Changing Lenses" Be Appropriate In This Case Too?' (2014) 97(1) *Monatsschrift für Kriminologie und Strafrechtsreform* 93, 99. Also see Gleeson and Zanghellini (n 4).

<sup>147</sup> Jülich (n 125) 133.

<sup>148</sup> See Donna Cooker, 'Enhancing Autonomy for Battered Women' (1999) 47(1) *UCLA Law Review* 1, 90; Shirely Jülich, 'Restorative Justice and Gendered Violence in New Zealand: A Glimmer of Hope' in James Ptacek (ed), *Restorative Justice and Violence Against Women* (Oxford University Press, 2010) 239, 249.

require facilitators to adopt interventions that cannot be described as neutral and to treat participants unequally to achieve substantive equality.

Additionally, a victim may be re-traumatised by having to confront the perpetrator, especially because the essence of child sexual abuse offences 'is manipulation, control, self-gratification and lack of empathy'.<sup>149</sup> This is compounded when an offender does not show remorse.<sup>150</sup> Although most studies indicate that victims found restorative justice processes beneficial, some studies indicate otherwise. For instance, Morris et al reported that 25% of victims 'felt worse' after a restorative justice process and expressed increased fear, depression, distress, and unresolved anger.<sup>151</sup> Also, unless the agreements reached in the process are made into court orders, perpetrators cannot be legally forced to comply with any agreed outcomes. Failure to fulfil the outcomes and a lack of enforcement options may also re-traumatise victims.

Often in cases of child sexual abuse, the perpetrator has abused multiple children in their care over some time.<sup>152</sup> If more than one victim wishes to engage in a restorative justice process, it may be repetitive for the perpetrator to participate in each process. It may be possible to hold one process with several victims, but this may lessen the quality of the meetings for victims and reduce the time they have to express themselves. Being confronted by more than one victim may also be too overwhelming for offenders and result in them being defensive. Also problematic is where a victim has been abused by multiple people while in an institution. In such circumstances, it is questionable whether there should be one restorative justice process with all the identified perpetrators or whether there should be a separate process with each perpetrator. Both options have their drawbacks. Simultaneously confronting several abusers can be distressing for the survivor; however, holding separate processes can be mentally and physically exhausting.

<sup>149</sup> Cossins (n 108) 365.

<sup>150</sup> Wemmers (n 132) 52.

<sup>151</sup> Allison Morris, Gabrielle M Maxwell and Jeremy P Robertson, 'Giving Victims a Voice: A New Zealand Experiment' (1993) 32(4) *Howard Journal of Criminal Justice* 304, 301–21. Also see studies cited in *ibid* 50.

<sup>152</sup> McAlinden and Naylor note that 'institutional child abuse typically involves the abuse of multiple victims, and often multiple perpetrators, over a period of time': McAlinden and Naylor (n 4) 305.

In the circumstances where the offender is no longer alive or untraceable, the use of church representatives as ‘surrogate offenders’ may mean that victims do not have the opportunity to confront the offender who inflicted the harm.<sup>153</sup> Even though ‘restorative approaches can and do operate effectively in both individual as well as organisational contexts’,<sup>154</sup> the victim may have wanted to confront the individual perpetrator of the offence.<sup>155</sup>

Assurance of confidentiality is essential in promoting open discussion between the participants.<sup>156</sup> However, maintaining confidentiality can be difficult and harmful if the perpetrator reveals other instances of child sexual abuse during the restorative justice process.<sup>157</sup> If such disclosure were made, should there be an obligation on the facilitator or any of the participants to report the abuse to the authorities? If so, it would seem that disclaimers would need to be made at the start of the process informing the participants that absolute confidentiality cannot be guaranteed. Such disclaimers might hinder open communication and prevent the offender making full disclosure in fear of future investigation.

Another concern is the costs associated with restorative justice processes.<sup>158</sup> Given the nature of the crime, it is likely that institutional child sexual abuse case would require more extensive resources to help prepare for restorative justice processes and offer follow-up support to victims. Several sessions may be necessary to give victims sufficient time to express themselves and for the parties to reach an outcome, which may cause a strain on resources.<sup>159</sup>

### A Safeguards

The preceding part showed that restorative justice is not without its

<sup>153</sup> McAlinden and Naylor (n 4) 305.

<sup>154</sup> John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) 32.

<sup>155</sup> Gerry Johnstone, ‘Critical Perspectives on Restorative Justice’ in Gerry Johnstone and Daniel Van Ness (eds), *Handbook of Restorative Justice* (Routledge, 2011) 598.

<sup>156</sup> See Gavrielides and Coker (n 7) 357–8.

<sup>157</sup> See Jülich (n 148) 249.

<sup>158</sup> Marsh and Wager (n 110) 341.

<sup>159</sup> Jülich (n 125) 133; see also Shirley Jülich and Natalie Thorburn, ‘Sexual Violence and Substantive Equality: Can Restorative Justice Deliver?’ (2017) 2(1–2) *Journal of Human Rights and Social Work* 34, 41.

shortfalls, limitations and challenges. However, these should not preclude its use in historical institutional child sexual abuse cases. Rather, safeguards should be developed to alleviate the disadvantages and risks.

Many concerns about restorative justice can be minimised by developing best practice models embedded in initiatives specifically targeting historical institutional child sexual abuse. A useful resource that can be followed when developing these guidelines is the *UN Handbook on Restorative Justice Programmes*,<sup>160</sup> which contains the *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, adopted by the United Nations Economic and Social Council in 2002. These principles offer important guidance for policymakers, community organisations and criminal justice officials involved in developing restorative justice responses to crime in their society. Drawing on the UN Handbook and other sources, some safeguards that could be implemented in the context of historical institutional child sexual abuse are proposed below. These safeguards, which are not intended to be exhaustive, should exist at various stages of the restorative justice process.<sup>161</sup>

Effective screening of potential participants of restorative justice processes is necessary to ensure success of the process and to avoid re-victimisation. The United Nations Office on Drugs and Crime has set out four ‘critical ingredients’ that need to be present before restorative justice practices should be used:

- 1 an identifiable victim;
- 2 voluntary participation by the victim;
- 3 an offender who accepts responsibility for his/her criminal behaviour; and
- 4 non-coerced participation of the offender.<sup>162</sup>

<sup>160</sup> United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (United Nations, 1<sup>st</sup> ed, 2006); United Nations Office on Drugs and Crime (n 2).

<sup>161</sup> For an overview of useful safeguards and practices that can be used when offering restorative justice in cases of institutional child sexual abuse see Bolitho and Freeman (n 46).

<sup>162</sup> United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (United Nations, 1<sup>st</sup> ed, 2006) 8; for an overview of the application of these critical ingredients in an environmental offending context see Hadeel Al-Alosi and Mark Hamilton, ‘The Ingredients of Success for Effective Restorative Justice Conferencing in an Environmental Offending Context’ (2019) 42(4) *University of New*

In the case of institutional child sexual abuse, a victim should be identified and voluntarily express their desire to engage in a restorative justice process. Voluntariness and non-coercion go hand-in-hand. Voluntariness requires the parties to give informed consent to participate, which means they should have been advised about the process, their rights, and the possible consequences of participating. This information is also vital to help avoid victim dissatisfaction and manage any unrealistic expectations they may hold. Each participant should be free to not engage in the process and not be 'induced by unfair means to participate in restorative processes or to accept restorative outcomes'.<sup>163</sup> They should also have the right to withdraw their consent to participate at any time during the process.

Criteria should be developed to help assessors determine offender suitability for restorative justice.<sup>164</sup> Important considerations include the offender's willingness to accept responsibility and signs of remorse. Failure to screen offenders thoroughly can place victims at risk of further harm. It is beyond the scope of this article to discuss whether acceptance of responsibility for offending should be a mandatory prerequisite to participating in a restorative justice process in the context of institutional child sexual abuse. It can be argued that it is not essential for the offender to acknowledge full responsibility before the encounter, as this can be achieved during the process.<sup>165</sup> Also, requiring offenders to accept responsibility before the meeting may result in very few cases being eligible for restorative justice because sexual abuse cases are often associated with high rates of denial and offenders using a range of

*South Wales Law Journal* 1460; Hadeel Al-Alosi and Mark Hamilton, 'The Potential of Restorative Justice in Achieving Acceptance of responsibility in the Context of Environmental Crimes' (2021) 44(2) *University of New South Wales Law Journal* 487.

<sup>163</sup> Unicef, 'Restorative Justice', *Toolkit on Diversion and Alternatives to Detention* (Web Page) <[https://www.unicef.org/tdad/index\\_56040.html](https://www.unicef.org/tdad/index_56040.html)>; see also, United Nations Office on Drugs and Crime (UNODC), *Handbook on Restorative Justice Programmes* (Criminal Justice Handbook Series, United Nations, 2006) annex II, 101.

<sup>164</sup> Section 36 of *Crimes (Restorative Justice) Act 2004* (ACT) provides useful criteria to determine suitability. This includes a) the extent (if any) of the offender's contrition or remorse for the offence; (b) the offender's personal characteristics; (c) the offender's motivation for taking part in restorative justice; (d) the impact of the offence as perceived by the offender.

<sup>165</sup> Zehr (n 2) 58; Al-Alosi and Hamilton, 'The Potential of Restorative Justice in Achieving Acceptance of responsibility in the Context of Environmental Crimes' (n 162).

techniques to minimise their offending.<sup>166</sup>

However, an encounter with an offender who does not accept responsibility places victims who are already emotionally vulnerable at risk of being re-victimised. As a middle ground, perhaps an offender should still be able to engage in a restorative justice process if they have not explicitly accepted responsibility but only if they have not denied it either. Alternatively, the process may still go ahead if the institution where the abuse occurred is willing to accept responsibility for the abuse.

Facilitators play a pertinent role in risk mitigation. At the very least, they should be empathetic, victim-sensitive and knowledgeable about institutional child sexual abuse.<sup>167</sup> Importantly, they must be independent of the institution where the abuse occurred and address power imbalances between the parties. Before the process is held, the facilitator, ideally in conjunction with other professionals, should assess the readiness of victims and offenders to participate. Not all victims may be ready or want to engage in the restorative justice process; for some, the thought of confronting the abuser or institution representative may trigger emotional and psychological distress.<sup>168</sup> The timing of restorative justice should be at a time suited to the victim's needs. It should be ensured that victims who want to participate are emotionally and psychologically prepared to do so. Victims should be given the option of an indirect meeting because a face-to-face encounter with the offender may be inappropriate or too confronting for the victim.<sup>169</sup> An indirect meeting, which is less intimidating, can be facilitated by various forms, such as shuttle mediation<sup>170</sup> or by the exchange of letters and videos.<sup>171</sup> Research shows that indirect mediation can have the same healing benefits for victims as direct

<sup>166</sup> Sophia Boutilier and Lana Wells, 'The Case for Reparative and Transformative Justice Approaches to Sexual Violence in Canada: A Proposal to Pilot and Test New Approaches' (Shift: The Project to End Domestic Violence, University of Calgary, November 2018) 20.

<sup>167</sup> United Nations Office on Drugs and Crime (n 2) 48.

<sup>168</sup> Noll and Harvey (n 55) 390.

<sup>169</sup> An indirect encounter might include correspondence through letters, video exchange, or meeting with a person who represents the victim: Zehr (n 2) 37.

<sup>170</sup> Shuttle mediation is where the parties do not meet, and the facilitator goes back and forth to negotiate an agreement.

<sup>171</sup> Fernandez (n 54) 12.

interactions.<sup>172</sup> Some victims may prefer to be represented by a designated person, so this should also be accommodated if requested.

Additionally, safeguards should be implemented after a restorative justice process by having follow-ups with the victim and the offender. Oversight following the encounter should ensure that any agreements reached during the process are fulfilled and assess victim satisfaction.<sup>173</sup> This is important in light of Wemmers' finding that 'a major complaint by victims who participated in a variety of restorative projects is that project workers failed to monitor compliance by the offender'.<sup>174</sup> Follow-up services should also be provided to monitor the effect of the meeting on the victim and help them cope with any new or unresolved issues.<sup>175</sup> Legislation can also be introduced that makes the outcomes reached in a restorative justice process legally enforceable and sets out implications for non-fulfilment.<sup>176</sup>

## VIII CONCLUSION

The criminal justice system should remain the principal response to child sexual abuse because criminal censure plays an important role in condemning unacceptable behaviour. However, the reality is that many victims of historical institutional child sexual abuse are unable to seek justice from the courts for the reasons discussed in this article. Even when offenders can be prosecuted or sued in civil proceedings, the legal system often fails to meet victims' needs adequately. Restorative justice provides an innovative approach to addressing the failures of the court processes and may be the only way to obtain redress when going to court is not an option. However, it is vital that safeguards are implemented and continuously developed to protect the participants who choose a restorative justice approach.

<sup>172</sup> Wemmers (n 132) 55.

<sup>173</sup> Jane Anderson, 'Comprehending and Rehabilitating Roman Catholic Clergy Offenders of Child Sexual Abuse' (2015) 24(7) *Journal of Child Sexual Abuse* 772, 788.

<sup>174</sup> Wemmers (n 132) 48–9.

<sup>175</sup> *Ibid* 55.

<sup>176</sup> A useful example of restorative justice legislation in Australia is the *Crimes (Restorative Justice) Act 2004* (ACT).

Victim-orientated restorative justice processes can provide a glimmer of hope to survivors of historical institutional child sexual abuse. It is not being suggested that restorative justice is a ‘Holy Grail’ or a panacea for victims; it might not provide victims with all the outcomes they seek, and the wrongs they suffered may never be truly righted. Nevertheless, it does offer a wider range of outcomes than formal justice systems and can provide victims with meaningful redress. Having the choice to pursue restorative justice can be valuable to victims seeking to gain a sense of justice and move towards healing. It is now time for restorative justice to be given legal status as one of the mechanisms available for victims to pursue justice to help right the unrightable wrongs as far as possible.