

“The Jersey Way”- moving on

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Abstract

The 2017 Jersey Independent Care Inquiry report identified decades of significant child protection failures within the care system in Jersey. It also highlighted the ‘Jersey Way’ which it described as ‘a failure to establish a culture of openness and transparency, leading to a perception at least, of collusion and cover up’. The report made numerous recommendations designed to improve child protection arrangements on the Island. This article discusses the extent to which the outcome of the public inquiry will deliver justice for the victims of abuse. We argue that Inquiries are influenced by political bias, often failing to deliver what Burton and Carlen term discourse closure. We suggest adopting McAlinden and Naylor’s hybrid approach to justice, involving a combination of procedural and restorative justice, to bring the victims a true sense of closure.

Key Words:

Public Inquiries. Child Abuse. Procedural and Restorative Justice. The ‘Jersey Way’.

Introduction

The Jersey Independent Care Inquiry Report (JICIR) was hoped to draw a line once and for all over one of Jersey’s darkest periods. The report was initiated by the launch of Operation Rectangle in September 2007, originally an investigation into allegations of historical sexual abuse within the Jersey Sea Cadets before it expanded to include the former children’s home Haut de la Garenne (HDLG).

It was only a few weeks later that revelations began pouring out from the HDLG investigation site. The island was in the throes of a moral panic- to the point where a coconut shell was mistaken for a child’s skull. The Anglican Dean even held a church service to ‘commemorate and pray for those children believed to have been murdered’.¹ The island became the focus of insatiable media interest, frequently subject to ‘lurid headlines in the national and international press’.² Jersey went into ‘complete shock’ as the then Chief Minister Frank Walker described it to the Care Inquiry Commission.³

Political interference in police procedures and operations, according to the Jersey Care Leavers Association, led to a polarisation between those who ‘wanted to aggressively pursue the investigation and those who had concerns for Jersey’s reputation’.⁴ Those concerns were further compounded by the then Bailiff, Sir Philip Bailhache in his 2008 Liberation Day speech, in which he said:

‘...all child abuse, wherever it happens, is scandalous, but it is the unjustified and remorseless denigration of Jersey and her people that is the real scandal’.⁵

¹ Independent Jersey Care Inquiry, (2017) The Report of the Independent Jersey Care Inquiry 2017, 747.

² *id.*, 747.

³ *ibid.*

⁴ *id.*, 753.

⁵ *ibid.* It should be noted that the report makes it clear that Sir Philip was not suggesting that the reputation of Jersey was more important than investigating child abuse. ‘We cannot accept that a politician and lawyer of his experience would inadvertently make such an “unfortunate juxtaposition” ... [H]is linking of Jersey’s reputation to the child abuse investigation was, we are satisfied, a serious political error, rather than a considered attempt to influence the course of the police investigation. (JICIR, 753).

Operation Rectangle officially closed in 2010 following eight criminal prosecutions, but calls for a public inquiry continued. In March 2012 the States set up a compensation scheme for victims of historic abuse and in March 2013, the Assembly eventually voted through the Terms of Reference that should form the basis of an inquiry into the Jersey care system. The Independent Jersey Care Inquiry, chaired by Francis Oldham QC began in 2014. There were 149 hearing days with evidence from over 400 witnesses, including, the police, social workers, victims of abuse, staff working in the care system and convicted offenders.⁶

Although new to Jersey, inquiries into child abuse and child protection failings have been a recurrent element of child protection policy and practice in most Anglophone countries. For example, in Britain, the regular use of the inquiry process began in the 1970s with an inquiry into the death of Graham Bagnall. This was quickly followed by the Maria Colwell Inquiry.

Major policy and practice changes followed both the subsequent Caldwell and Victoria Climbié inquiries which examined police misconduct in investigating a murder and the failures of the child protection system respectively, suggesting that inquiries are a powerful mechanism for bringing about systemic change. Every time there has been an inquiry in the UK, blame focuses on the heads of those agencies identified as responsible for failing to act. The pressing question becomes: whose fault was it that little was done to identify and deal with those who were responsible for the abuse?

The Jersey Care Inquiry held its last hearing in July 2016 and reported back in June 2017. The Inquiry panel made widespread findings including that child care in residential homes was inadequate and lagged 20-30 years behind the UK in the provision of children's services. Key amongst its findings though was reference to the 'Jersey Way', which it describes as 'a failure to establish a culture of openness and transparency, leading to a perception, at least, of collusion and cover up'.⁸ Overall, it was felt, 'an inappropriate regard for the 'Jersey Way' is likely to have inhibited the prompt development of policy and legislation concerning children'.⁹

The preservation of the 'Jersey Way' guided policy and shaped the extent to which the attributes of justice, both ethical and procedural were marginalised in this context. The failures identified by the Commission were therefore both political and institutional – even if we accept that not everyone knew what was going on, there appear to be enough people implicated to infer that many had a fair idea.

One of the key recommendations of the report was to tackle the 'fear factor and lack of trust'.¹⁰ It recommends 'open consideration involving the whole community' be given to how this negative perception of the 'Jersey Way' can be 'countered on a lasting basis'.¹¹

In this article we discuss the 'Jersey Way' and contend that one way in which this negative perception can be countered is through the adoption of McAlinden and Naylor's hybrid approach to justice- a combination of procedural and restorative justice, to bring the victims a true sense of closure. We accept their contention that public inquiries, despite their so-called independence, are coloured by political bias-

⁶ *id.*, p.2.

⁷ H. Laming and Baron Laming, (2003) The Victoria Climbié Inquiry: Summary Report of an Inquiry.

⁸ *See supra* 1, ch.12. p.23.

⁹ *id.*, ch.2, p.27.

¹⁰ *id.*, 61.

¹¹ *id.*, 63.

and as a result are also limited in their finality and ability to deliver what Burton and Carlen (in Lippens)¹² call ‘discourse closure’.

The ‘Jersey Way’

Many of the witnesses spoke of the ‘Jersey Way’ suggesting that it facilitated a culture in which reporting abuse was difficult and often ignored. Where the reputation of the Island was put before the safety of vulnerable children. This was reflected in the report which states:

‘...efforts to protect the island’s reputation and international standing, while well intentioned, have misguidedly failed to acknowledge the gravity of the island’s failings in respect of its children or the egregious nature of the some of the abuses perpetrated on them. Such attitudes have only increased suspicion of politicians and professionals and their motives, impacting on the social cohesion of the community’.¹³

Whilst the report acknowledges the Chief Minister’s public apology in 2010, and the instigation of the Historic Redress Scheme as positive initiatives, the inquiry found that ‘there is still widespread scepticism and distrust of government in Jersey’.¹⁴ Many victims of the care system, the report acknowledges, have no trust in the system for its failure to listen to them over the years, and for letting those responsible for abusive behaviour go unpunished and even unchallenged.

This raised obvious concerns about the legitimacy of those who govern the Island – their failure to respond when called for help and distancing themselves from those most in need. It could be argued that in this context the ‘Jersey Way’ institutionalised power and authority that limited State intervention. In the eyes of victims and campaigners this undermined democratic legitimacy by linking political authority to the needs and preferences of the ‘Jersey Way’ itself. It also raises obvious questions about other contexts where similar conditions could apply. Residential and locked institutions, mental hospitals, prisons, police stations are all contexts where authority, rather than inducing an ethic of care, can be used by abusers to intimidate and silence.

To tackle this long term in relation to future generations of islanders, the report states that it is crucial that distrust is not inherited, leading to a disconnect with the political systems and professional care services. This ‘will be achieved only by a cultural shift throughout the States of Jersey and its services to promote greater transparency in decision making and greater openness in communication’.¹⁵ Crucially, ‘this includes a greater readiness by politicians and professionals to admit problems, shortcomings and failures promptly and fully when they do occur, and to address them. We recognise that, in an island community, where it is not possible, as elsewhere for public servants to remain anonymous, considerable integrity and fortitude is required publicly to admit mistakes and shortcomings.

‘Greater openness about failures and readiness to resolve them will demonstrate, however, greater public accountability and garner the respect and trust of the community’.¹⁶

¹² R. Lippens, (2013) ‘Explaining whiteness: The 1996–98 Belgian parliamentary inquiry into the handling of a paedophilic affair’, in G. Gilligan and J. Pratt (eds.), (2013) *Crime, Truth and Justice: Official Inquiry, discourse, knowledge*. p.214.

¹³ See *supra* 1, ch.12. p.23.

¹⁴ *ibid.*

¹⁵ *id.*, ch.12, p.33.

¹⁶ *ibid.*

This seems to suggest that there is room for restorative justice to enter the transitional period in Jersey. The fact that it is a small community makes it more amenable to the direct contact that victims sometimes seek in their quest for justice. We shall explore this further below.

Is the ‘Jersey Way’ different to any other way?

The Report highlights with concern how Jersey fell behind mainstream (UK) social care developments and practice. This it puts down to a lack of political appetite ‘for addressing social issues concerning the welfare of children’.¹⁷ As for the number of reports produced over the years, ‘some recommendations have been implemented; many have not, including some of significance’.¹⁸ Although the Report’s authors accept that limited resources are a feature equally applicable to many local authorities in the UK, they found that Jersey has ‘consistently failed, over a long period, to resource adequately and to commit to strategic planning for children in care’.¹⁹ Even more worryingly, it concludes that ‘priority is given within the States to legislation related to the financial life of the island,’²⁰ supporting what many care leavers had been saying for years.

This seems damning but a secretive or downplayed approach to child abuse is not reserved for the island of Jersey. We can find a parallel in Ireland. The Ryan Report found ‘the desire to protect the reputation of the Congregation and institution (of the Church) was paramount’, whilst the Murphy Report noted, ‘the obsessive concern with secrecy and avoidance of scandal’ to which the protection of children was subordinated’.²¹

McAlinden states that, in order to make sense of its abusive past, the Catholic Church and the Irish State had to employ rationalising mechanisms to render them ‘legible’.²² They did this through a number of ‘neutralizing discourses’, as described by Matza, where normally prohibited behaviour is sought to be made acceptable. Amongst the most widely applied myths was the idea that children within the care system were the object of ‘Christian charity’, whereas in reality it was a legal requirement funded by the State. Also, the idea that the institutions were ‘reformatories’ for young people found guilty of criminal offences was harnessed, even though in many cases children were simply institutionalised because their families were unable to care for them.²³ This is just as we know it was also the case in Jersey, where there was an exceptionally high frequency of institutionalisation, often on the basis of criteria that would not have resulted in children being taken into care in the UK.

What results, is an ‘inward struggle with public identity’- in Ireland that meant the Church trying to distance itself from allegations of abuse by failing to admit the extent of its knowledge. This again can lead to a ‘social amnesia’, which McAlinden describes as ‘the mode by which an entire society separates itself from a disreputable past’.²⁴ The mode of denial can vary, from ‘conscious cover-up’, ‘interpretive denial’ where ‘facts are given an alternative meaning’, as in the Irish case, or ‘implicatory’ denial where ‘the political or moral implications of the event are minimised or denied’.²⁵

¹⁷ *id.*, 448.

¹⁸ *ibid.*

¹⁹ *id.*, ch.5, p.450.

²⁰ *id.*, ch.6, p.463

²¹ A. McAlinden, ‘An inconvenient truth: barriers to truth recovery in the aftermath of institutional child abuse in Ireland’, (2013) *Legal Studies*, Vol.33, No.2, p.207.

²² *id.*, p.208.

²³ *id.*, p.209.

²⁴ *ibid.*

²⁵ *ibid.*

McAlinden also argues, ‘a broader level of denial resonates through the practices of child-care institutions themselves, which also spills into wider society. It has been argued that childcare institutions appear to be “self-protective, secretive and closed by nature” and as such deflect attention away from deficiencies in policies or the signs of abuse’.²⁶ It could be suggested that this was evident in the case of Jersey, where people often feared that speaking up might cause them to lose their jobs, which in turn could threaten their ability to remain in the island. Housing rules thus, as the Care Inquiry Report concluded, at times had a significant, detrimental impact on secrecy within the childcare system in that they ‘had an inhibiting effect on their (individuals’) ability to raise concerns’.²⁷ This is unforgivable and sounds a warning for malpractice in all areas of public service delivery.

Public Inquiries and truth

Sköld suggests that truth commissions and inquiries into historical abuse, ‘share features characteristic of transitional justice processes, that is, a willingness to come to terms with history’, and she quotes sociologist John Torpey as having said ‘making whole what has been smashed’.²⁸ She also refers to Jeffrey Olick’s description of a ‘politics of regret’ as being characteristic of our time, with regret having become the modern expression of political responsibility.²⁹

McAlinden and Naylor describe public inquiries as ‘an instrument of government’, ‘a chosen strategy in many jurisdictions to address a range of State- or State-supported-harms, chiefly because of their organisational and ‘curative properties’ as a form of ‘scandal management’.³⁰ By highlighting potential failures of the state, they suggest that public inquiries have the potential to re-build public trust ‘through the promotion of institutional accountability’.³¹

The task of inquiries into particular crises, for Burton and Carlen, is to represent failure as temporary, or not failure at all, and to re-establish the image of administrative and legal coherence and rationality. This locates inquiries at the heart of official discourse, essential ‘for political and ideological hegemony’.³²

But one of the key problems with the public inquiry model is that there may be a ‘sizeable gap between the rhetoric of public inquiries and the reality of practice on the ground’. In particular, ‘the myriad of politically orientated aims of public inquiries may obfuscate any real victim focus’.³³ Specifically, McAlinden and Naylor argue, the inherent limitations of public inquiries, like narrow terms of reference, which are primarily focused on 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’.³⁴

Pratt and Gilligan’s³⁵ collection of essays on public inquiries and official discourse, points out that public inquiries too tend to reflect power structures in society, but perhaps more importantly: ‘...almost by default, they provide the empirical truth on

²⁶ *id.*, p.211.

²⁷ *See supra* 1, 28.

²⁸ J. Sköld, ‘Historical Abuse- A contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Care Worldwide’, (2013) *Journal of Scandinavian Studies in Criminology and Crime Prevention*, Vol.14, No.81, p.10.

²⁹ J. Olick, (2007) *The politics of regret*, pp.130-132.

³⁰ A. McAlinden and B. Naylor, (2016) *Reframing Public Inquiries as ‘Procedural Justice’ for Victims of Institutional Child Abuse: Towards a Hybrid Model of Justice*, *Sydney Law review*, Vol.38, p.291.

³¹ *id.*, p.292.

³² F. Burton and P. Carlen, (1979) *Publications, Ideology and the State*, p.13.

³³ *See supra* 30, p.293.

³⁴ *id.*, p.294.

³⁵ G. Gilligan and J. Pratt (eds.), ‘Crime, Truth and Justice: Official Inquiry, discourse, knowledge’, (2013) *Introduction: crime, truth and justice- official inquiry and the production of knowledge*, pp. 1-7.

which to evaluate the effectiveness or otherwise of that agency (here the state). It is almost inevitable in these circumstances that the assertions of some of these reports are not challenged by many, as most people seek to simply get on with the daily challenges that they face in their own social and working lives'.³⁶ So rather than offering resolution to the victims, are we actually just leaving them behind in a sea of official conclusions and recommendations?

Pratt and Gilligan point to the legitimisation capacity of official discourse, but equally acknowledge the potential of official inquiry to play a social repair or healing role. This is supported by Smith³⁷ who suggests that, 'a social climate or political discourse that allows challenges to certain hegemonic structures, whether hegemony is represented by the good, paternalistic state, or the almighty Church, likely contributes to the soil that allows the growth of processes of recognition and reconciliation'.³⁸

'The challenge regarding official inquiry, truth and criminal justice is to construct analytic models that simultaneously both recognise and deny the power of official discourse without eulogising it as truth'.³⁹ This seems crucial to our debate and the role of restorative justice in our quest for closure.

Phil Scraton, looks at the example of the Lockerbie bomb, and how the rejection of a public inquiry by successive governments, implied 'that such an open process risked embarrassing and politically compromising public discourse'.⁴⁰

The decision to commission an inquiry, says Scraton,⁴¹ its status and terms of reference, are political. 'Restricted disclosure, privileged access to evidence ... the realignment of terms of reference do not occur in a vacuum'.⁴² Indeed, citing Foucault, he argues, 'truth' is derived and sustained within the dominant, structural relations of power.⁴³

An obvious hole in the Jersey Care Inquiry Report is the absence of former Senator Stuart Syvret's evidence. Syvret had been an outspoken critic of the way the Jersey establishment had dealt with allegations of child abuse dating back to the 1970's. In 2007 he was dismissed from his post as the Minister for Health and Social Services after claiming that child abuse cases were being covered up. When Syvret called for an independent inquiry he was accused by the then Chief Minister, Frank Walker, of damaging Jersey's reputation. Syvret was arrested in April 2008 and charged under the Data Protection Act in relation to articles written on his blog allegedly containing confidential information. The Care Inquiry report noted his refusal to assist the inquiry as regrettable. But Syvret himself told the Jersey Evening Post that he wanted to give evidence, but did not because he was not granted legal representation, something he felt he needed to prevent the breach of any of the court orders that were in place against him.⁴⁴

If the States of Jersey truly wanted to draw a line and turn a new leaf, which is what this inquiry sought to do, then legal representation should have been granted to Stuart Syvret. That would have served one of the strongest possible indications yet that the

³⁶ *id.*, p.20

³⁷ *See supra* 28

³⁸ *id.*, p.16

³⁹ *See supra* 35, p.23

⁴⁰ P. Scraton, 'From deceit to disclosure: the politics of official inquiries in the United Kingdom', in (2013) G. Gilligan and J. Pratt (eds.), *Crime Truth and Justice: Official Inquiry, discourse, knowledge*, p.47.

⁴¹ *ibid.*

⁴² *id.*, p.65

⁴³ *ibid.*

⁴⁴ Stuart Syvret Interview: 'A systemic decades-long betrayal of the innocents', 25th July 2017, <https://jerseyeveningpost.com/features/2017/07/25/stuart-syvret-interview-a-systemic-decades-long-betrayal-of-the-innocents-2/>

government wants to move forward into an era of transparency and honesty whilst at the same time demonstrating an element of humility, which has been so lacking in the eyes of the victims.

Discourse closure?

Following the publication of the report Jersey is in a period of transitional justice that includes a range of judicial and extra-judicial mechanisms- from prosecutions, and truth commissions, to apology, reparation and ultimately institutional reform- which are all aimed at 'helping a society come to terms with previous large-scale human rights abuses in order to ensure accountability for wrongdoing, achieve justice and reconciliation for the victims'.⁴⁵

Burton and Carlen argue that official discourses in general are always seeking 'discursive closure' by trying to silence alternative views by attempting to 'appropriate, incorporate and annihilate whatever alternatives to official explanation may emerge'. Official discourse, such as public inquiries, they suggest are continually substituting one paradigm for another 'in a bid for closure' with the aim to, 'buttress the image of administrative rationality' (in Gilligan 2002: 294).⁴⁶

Gilligan also points to problems with adopting Burton and Carlen's general theory of official discourse because there are indeed times where they can prove to be not just vital information gatherers but also avenues of accountability. Far from simply supporting the status quo he argues, official discourse, 'may actually embarrass the government's own bureaucratic organisations'.⁴⁷ Official discourse, Gilligan and Pratt argue, no longer just tries to bring 'closure' but may actually become 'an aide-de-camp to government in exposing further layers of bureaucratic incompetence and inefficiency'.⁴⁸

We suggest that the Jersey Independent Care Inquiry failed to achieve discourse closure. Whilst exonerating politicians from any direct cover up of child abuse it did point to a systemic failure overall to care for the island's institutionalized children thereby providing a degree of political embarrassment. But it failed to achieve discourse closure because of its lack of personification; the State as 'surrogate offender' hampers the road to closure in that it still hasn't delivered 'justice' to the victims.

But could restorative justice fill that void in the justice process?

What is justice?

Before we move on to discussing restorative justice we must briefly consider what we mean by justice. Simply put it means making sure that the right thing is being done, that balance is restored where wrongs have been committed, through compensation, punishment or apology, or sometimes all of those in combination. The problem with defining justice is that the topic is speculatively fluid. It is ethically inconclusive legal term with transcendental properties. Definitions are therefore problematic given the vast amount of varying theories. This, however, does not vitiate our intuitive insights about what justice is and ought to be, in the context of the 'Jersey Way'. We suggest that justice mirrors integrity, rightness, equality, fairness and retribution.

Obioha⁴⁹ claims that justice as fairness is better than every other conception of justice. Much of the theory of justice centres on debates about distributive and corrective

⁴⁵ See *supra* 21, p.197.

⁴⁶ G. Gilligan, 'Royal Commissions of Inquiry', (2002) *The Australian and New Zealand Journal of Criminology*, Vol.35, No.3, p.294.

⁴⁷ See *supra* 35, p.5.

⁴⁸ *ibid.*

⁴⁹ P. Obioha, 'The nature of justice', (2011) *Journal of Social Science*, 29:2, p.p.183-192.

justice. While there is no widespread agreement regarding the content of just distribution, there is broadly general agreement as to the criteria for just punishment. Feinberg⁵⁰ argues that punishment is functionalist and expresses a society's disapproval of a given act with the more serious crime receiving the most disapprovals. But the 'Jersey Way' points to the re-evaluation of system or institutional characteristics. So, in this context the focus must fall on the process of achieving justice. Tyler and Caine⁵¹ found that perceived procedural justice accounted for unique variance in evaluations of government leaders and institutions beyond that contributed by distributive justice. "Procedural justice has especially strong effects on attitudes about institutions or authorities, as opposed to attitudes about the specific outcome in question".⁵² "In making leadership or institutional evaluations people are taking a long-term perspective on membership within a group. With personal satisfaction they are reacting to a single decision".⁵³ Lind and Tyler's conclusions suggest that procedural justice is more highly related to institutional evaluations that require a long-term perspective, like organization⁵⁴.

Baroness Stern in her review of the handling of rape complaints by public authorities in England and Wales, stated that whilst a criminal conviction is a 'worthwhile outcome', victims wanted more- they want processes which 'honour the experience'. This, as opposed to a criminal conviction, involves much more subtle elements like 'being believed, dignified treatment, safety, support services, feeling in control and the ability to make informed choices- 'procedural justice'.⁵⁵ Operation Rectangle resulted in eight prosecutions and seven convictions. For many victims, we know from what they themselves have said, this is not enough. For them there are still people out there that need to be punished.

The role of restorative justice

The Jersey Care Inquiry does call for significant changes and its recommendations have been accepted by the State's government. However, implementation of recommendations is often imposed by those institutions criticised by inquiries. This could prove problematic in Jersey; the report acknowledges that many of the victims of abuse have no trust in the system because of its failure to listen to them over the years. As a result, policy makers must guard against outcomes and resolutions that may be viewed with suspicion by those victims involved in their criminal justice response. For Jersey's child protection policy to be effective all key stakeholders, including victims, need to feel some ownership over the responses and outcomes that are decided. As Barton⁵⁶ points out:

'The parties feel no ownership over responses and outcomes that are decided, and are forced on them by others. Consequently, even if wise and competent, decisions by professionals will tend to result in less stakeholder satisfaction ... Traditional processes of the criminal justice system disempower both parties to the conflict and create a sense of isolation and unnecessary alienation

⁵⁰ J. Feinberg, 'The expressive function of punishment', (1965) *The Monist: Philosophy of Law*, 49:3, 397-423.

⁵¹ T. R. Tyler and A. Caine, 'The influence of outcomes and procedures on satisfaction with formal leaders', (1981) *Journal of Personality and Social Psychology*, pp.642-655.

⁵² E. A. Lind and T. R. Tyler, (1988) *The social psychology of procedural justice*, p.179.

⁵³ *id.*, p.224.

⁵⁴ Niels Christie's example of the Birkenau hanging is instructive in this context. He doesn't challenge the punishment as such, he questions whether that act managed to 'hit the whole target'. 'By hanging the commander (...) a good feeling of accomplishment is created; vengeance, often called justice, is carried out, but at the same time the discussion of the causes behind the atrocities (...) is effectively cut off'. Christie, N. 'Peace or punishment?' in (2013) Gilligan, G. and J. Pratt (eds.), *Crime Truth and Justice: Official Inquiry, discourse, knowledge*, pp.243-256 at 244

⁵⁵ C. McGlynn, N. Westmarland and N. Godden, "I just wanted him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice', (2012) *Journal of Law and Society*, Vol.39, No.2, p.213.

⁵⁶ C. Barton, 'Theories of Restorative Justice', (2000) *Australian Journal of Professional and Applied Ethics*. Vol. 2, no.1.

between them, thus exacerbating feelings of helplessness, anger, hatred and fear, which in turn worsens the plight of everyone involved on both sides.’

Restorative justice, according to McAlinden and Naylor, 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’. Barbara Hudson,⁵⁷ suggests that restorative processes may even have a ‘norm-creating role’, which could be especially important in the context of historical child abuse, in ‘challenging prevailing cultural attitudes protective of the Church or State’.

They point to the research of Walker and Ben-Yehuda to suggest that restorative justice is also a means of ‘moral repair’, and of ‘restoring trust at the interpersonal, organisational and societal levels’.⁵⁸ Importantly, they argue⁵⁹ that restorative justice being incorporated into official responses doesn’t just directly engage with the offending individuals and institutions, but also 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’.

McAlinden and Naylor suggest a ‘hybrid model of justice’ when it comes to effectively responding to institutional child abuse. They examine the use of restorative justice within the public inquiry framework, questioning the efficacy and merits of the public inquiry model as a response to historical institutional abuse on its own. A key element of restoration, they argue is ‘securing procedural justice for both victims and offenders, where there is focus on building trust and legitimacy in the fairness of the process and in securing therapeutic benefits for the victims’.⁶⁰

They similarly highlight the importance of an apology over that of retribution or compensation. ‘A potential latent problem’, however, they point out, ‘concerns the genuineness and legitimacy of the ‘apology’ as an expression of offender remorse and accountability. The overuse and insincerity of apologies, particularly by public figures, may serve to cheapen or belittle justice’. The ‘performative’ aspect of an official apology may indeed ‘have a determining role in the legitimacy and acceptance of apology for the victims’.⁶¹

Part of the problem with the public inquiry/official apology approach as Gavrelides suggests⁶² is that the Church in some cases, but equally as is applicable here, the State, as suggested above, becomes a ‘surrogate offender’- depriving the victim of ‘the direct confrontation with those who have inflicted harm upon them’.

McAlinden and Naylor argue there is clear scope for establishing a space for apology between victims and offenders as part of a restorative process within the broader public inquiry framework. Indeed, they suggest it is the public nature of the apology that ‘may ultimately confirm ethical and social norms and validate efforts aimed at correcting any perceived wrongdoing’.⁶³

Because for many survivors it is the acknowledgment of responsibility that is the most important thing, Barbara Hudson⁶⁴ goes as far as to suggest that restorative justice could in fact carry out the ‘traditional functions of criminal justice- retribution,

⁵⁷ See *supra* 30, p.299.

⁵⁸ *id.*, p.308

⁵⁹ *id.*, p.309

⁶⁰ *id.*, p.283

⁶¹ *id.*, p.300

⁶² *id.*, p.305

⁶³ *id.*, p.301

⁶⁴ See *supra* 54, p.233.

rehabilitation/reintegration, individual and public protection- better than formal justice does,' in some cases.

In conclusion McAlinden and Naylor suggest that an amalgam of restorative justice and the public inquiry model, offers a procedure that 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 as 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'.⁶⁵

They further suggest that for some victims 'a genuine voice and some control of the process' is more important than just a public acknowledgement of the harm they have endured, including 'an apology from the perpetrator and compensation or reparation; preventing the recurrence of the abuse, and forgiveness and reconciliation with offenders'.⁶⁶

Importantly they point out, that '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'⁶⁷. In other words, the restorative element picks up where the inquiry ends.

This could be described as part of the process of moral re-engagement, which could play an important role in addressing lingering concerns about the 'Jersey Way' and the State's responses to the recommendations. The failure of the Institutions of State to protect vulnerable children could be characterised as a collective form of moral failure where appeals to the 'Jersey Way' was one way of rationalising the consequences of this failure by regarding the reputation of the Island as of greater importance than the protection of victims of abuse.

The Inquiry lists 10 examples of where the State has fundamentally failed to protect children, number 5 states:

'Failure to establish a culture of openness and transparency, leading to a perception, at least, of collusion and cover-up. Jersey's culture has not encouraged the reporting of poor and abusive practice. At times, efforts to protect the island's reputation and international standing have led to insufficient acknowledgement of the gravity of the Island's failings and the egregious nature of some of the abuses perpetrated on children in its care. Such attitudes have fostered the suspicion, within parts of the community, that most politicians and States employees cannot be trusted and that abusive practices have been covered up.'⁶⁸

Given this finding, the idea of moral re-engagement is highly relevant to the implementation of effective criminal justice interventions. It can be used, for example, to point to the transformative effectiveness of a child protection policy that allows the victim to tell those tasked with protecting them about the disruption and harm their failure to act has caused and to seriously challenge those responsible institutions. This forms part of the healing process for victims, because being faced with disengaged and disinterested officials leads in some cases to an ongoing and intense mistrust of those who failed them. Restoring trust will only be promoted if the responses of the

⁶⁵ See *supra* 30, p.306.

⁶⁶ *id.*, p.284.

⁶⁷ *id.*, p.286.

⁶⁸ See *supra* 1, 56.

institutions are proportionate to the extent to which they prove successful in reversing their moral failures. The onus is on the institutions to detect and address the presence of potential moral failures when implementing the recommendations and to use appropriate policy to prevent them.

Justice in postmodernity

Public inquiries seem to be firmly embedded in the postmodern condition. If we also acknowledge the bias that necessarily comes with such investigative methods, it seems we are also acknowledging the main contention of postmodern theorists- the lack of any one truth- a metanarrative. If that is the case, if truth is no longer a fact, is the achievement of justice even possible? If there is no one truth- restorative justice must be even more important in that it acknowledges the absence of finality in procedural justice alone. As Pat Carlen suggests ‘if there are no guarantees of truth and justice how can the pursuits of knowledge and law ever be moral or political projects?’⁶⁹

Carlen is not denying the possibility of transitional justice completely, instead she advocates a poststructuralist approach, ‘which in both recognising and denying structuralism can also recognise law’s power without celebrating it as truth’.⁷⁰ She does this by arguing for a poststructuralist view that, ‘allows recognition of the value of already-known structures of criminal justice production, at the same time as denying that they have ever necessarily achieved justice, either in any specific ‘case’ or for any or all of the parties involved in any particular trial’.⁷¹ In other words, procedural justice should not be standing on its own. Restorative justice may go some way to achieving a more robust answer, even if there is no one truth, and in doing so bring us, and victims of abuse in particular, closer to the overall achievement of justice.

Conclusion

Dealing with and tackling the negative perception of the Jersey Way once and for all, according to the report’s authors, would ‘provide a very strong, visible marker that there was a deep determination in the island to use the conclusion of the Independent Jersey Care Inquiry as a platform to ensure that the island’s children and young people will be looked after in a caring and compassionate system, that is underpinned by a system of governance in which there is the utmost confidence among all of the island’s citizens’.⁷²

It seems fair to adopt McAlinden’s conclusion that whilst public inquiries can assist in the process of getting to the truth, they mark ‘the commencement rather than the resolution of the process of truth recovery in practical terms’ by showing the State to be doing something. Ultimately, they have a limited reformative function and ‘the inherently restrictive nature of their transformative potential in making recommendations, means that they lack the mandate to effect tangible change’.⁷³ She further stresses⁷⁴ the importance of a bottom-up approach to the embedding of corrective mechanisms into democratic reformative and transitional justice processes ‘and to give victims, the community and non-State actors a stake in an ownership of such processes’. This indeed would speak in favour of a restorative approach, where such is the wish of the victims in question.

To finally move away from ‘the Jersey Way’- Jersey needs to show its own islanders and the world that there is another way- a transparent way, and an empathetic way, a

⁶⁹ P. Carlen, ‘Official discourse, comic relief and the play of governance’, in G. Gilligan, J. and Pratt (eds.), (2013) *Crime Truth and Justice: Official Inquiry, discourse, knowledge*, p.259.

⁷⁰ *ibid.*

⁷¹ *id.*, p.265.

⁷² *See supra* 1, ch.13, p.64.

⁷³ *See supra* 21, p.213.

⁷⁴ *id.*, p.214.

way that stands up for the weakest and refrains from simply protecting the most powerful. A thriving democracy needs debate, it needs people willing to stand up and challenge the system. It needs to listen.

Few challenges can be more powerful than victims of abuse directly confronting their abusers- for the victims and the offenders. It will sound a warning with power to affect any future abuse as well as a final acknowledgement to those who have struggled to be believed, that they are indeed believed, that they are being taken seriously, and that control of the abusive relationship is finally in their hands.

We contend that restorative justice in this context should not be limited to the victim/offender relationship. State actors need to come face to face with the consequences of their failure to protect. This may induce fine-tuning of their own moral compasses. The Inquiry report should shape the development of child protection policies that break through the arrogance of the 'Jersey Way' which has dominated the political scene so far, shielding State actors from the reality of child abuse, and denying victims their justice as a result.