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**JUSTICE FOR NEW ZEALAND'S STOLEN
GENERATION: THE STATE'S CRIMINAL
RESPONSIBILITY FOR HISTORICAL INSTITUTIONAL
CHILD ABUSE**

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Abstract

The New Zealand Government has been increasingly pressured to establish an independent public inquiry into the abuse and neglect of children in social welfare residences between the 1950s to the 1990s. This paper seeks to determine a response to historical institutional child abuse in New Zealand that achieves justice for victims. The State should be held criminally responsible for historical institutional child abuse in New Zealand by responding to it in a way that recognises its criminal nature. Although New Zealand's criminal law does not provide for the criminal prosecution of the State for historical institutional child abuse, and legislating a retrospective offence would be inappropriate, a restorative justice process should be used to recognise the criminal responsibility of the State.

Keywords

Institutional child abuse – State crime – restorative justice

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I Introduction

How can you move forward if you don't acknowledge the past? The Crown is trying to put a plaster on a massive wound and the Crown wants this issue hushed up and hidden. The Crown has more than just skeletons in its closet: it has a whole urupa in there – and they're coming out.¹

The abuse and neglect of Keith Wiffin as a child in New Zealand's social welfare residences represents one of those skeletons. In 1968, the Head Office of the government department in charge of child welfare was notified that 12 boys were sexually assaulted by a staff member while asleep at Epuni Boy's Home.² The staff member was dismissed, but no police complaint laid because allegedly the boys suffered “no irreparable damage”.³ Keith was placed in Epuni Boy's Home in 1971 due to the unexpected death of his father.⁴ In 1972, another staff member – Keith's eventual abuser – was convicted

¹ Brief of Evidence of Marilyn Stephens in Support of an Application for an Urgent Hearing Concerning the Settlement of Historical Grievances of Maori Children Put into State Care Dated 20 March 2017 (Wai 2615, #A1) at [54].

² See Statement of Claim in Support of an Application for an Urgent Hearing Concerning the Settlement of Historical Grievances of Maori Children Put into State Care Dated 20 March 2017 (Wai 2615, #1.1.1) at [17]-[20]; and Mike Wesley-Smith “Cover-up in state care?” (9 September 2017) Newshub <www.newshub.co.nz>.

³ Wesley-Smith “Cover-up in State care?”, above n 2.

⁴ Ibid.

for five offences relating to the indecent assault of boys.⁵ When Keith recently discovered that his abuser had convictions prior to his assault, he was extremely angry and upset as that meant his abuser was “allowed to quietly slip away and create a lot more victims of which I was one, under the same employer...It puts his offending in a whole new category because the Ministry is actually complicit in that offending”.⁶ Keith recently met his abuser at a restorative justice meeting where he appreciated having “all the power” and was able to break “every spell” his abuser had over him.⁷ However, when he asked his abuser if any senior staff members made further investigations around the scale of his offending, the abuser said no. Keith has since made his abuse publicly known as he believes the State is yet to be brought to justice. It is a shame that the State “has not been similarly courageous in its response”.⁸

As long ago as 1979, and persistently throughout 2017, the New Zealand Government has been increasingly pressured to establish an independent public inquiry into the abuse and neglect of children in social welfare residences between the 1950s to the 1990s.⁹ The Government rejects the need for an inquiry, arguing that its responses to date – particularly the now defunct Confidential Listening and Assistance Service (a kind of Truth and Reconciliation forum) and the in-house Ministry of Social Development Historical Claims Team (a kind of dispute resolution) – are sufficient, thus there is no need to put “all that energy into going over history again”.¹⁰ However, many victims like Keith deny they have received justice. Those advocating for victims similarly believe that the State’s “refusal to hold any sort of inquiry shows a callous disregard for the trauma of

⁵ Ibid.

⁶ Ibid.

⁷ Elizabeth Stanley *The Road to Hell: State Violence against Children in Postwar New Zealand* (Auckland University Press, Auckland, 2016) at 253.

⁸ Moana Jackson “Colonisation and the suffering of children” (April 2017) E Tangata <www.e-tangata.co.nz>.

⁹ See Confidential Listening and Assistance Service *Some Memories Never Fade: Final Report of The Confidential Listening and Assistance Service 2015* (June 2015) [CLAS Report]; and Wesley-Smith “Cover-up in State care?”, above n 2.

¹⁰ “‘Never again’ – HRC calls for State abuse inquiry” (13 February 2017) Radio New Zealand <www.radionz.co.nz>.

the victims as well as an unwillingness to accept responsibility”.¹¹ This raises the question: how can justice against the State be achieved?

Broadly speaking, justice requires the equality of everyone before the law, including access to effective legal processes. The legal processes pursued thus far – such as individual criminal prosecutions, civil litigation and alternative dispute resolution with the State – have not achieved justice for victims. The processes are fraught with obstacles such as legal technicalities, evidential deficiencies, and a lack of impartiality and independence. This paper seeks to determine a response to historical institutional child abuse in New Zealand that achieves justice for victims by analysing its relationship with the concept of State crime.

Researchers in the discipline note that even though “[t]here is a dearth of research on victims of institutional child abuse”, recent responses to institutional child abuse show there is a “need to question current orthodoxies and think more creatively in addressing the needs of victims for procedural justice outside legalistic variants of justice”.¹² This paper argues that the State should be held criminally responsible for historical institutional child abuse in New Zealand. Such a response to historical institutional child abuse has not been thoroughly explored before. Without the benefit of an inquiry determining the full extent of historical institutional child abuse in New Zealand, this paper, after analysing existing evidence, concludes that the abuse and neglect was of a systemic nature. In other words, the harms have causal roots located in organisational systems or policies of the State, despite sometimes being perpetrated by an individual. As New Zealand’s criminal law does not provide for the prosecution of the State for historical institutional child abuse, and retrospectively legislating an offence would be inappropriate, this paper concludes that a restorative justice process should be used to recognise the criminal responsibility of the State.

¹¹ Jackson, above n 8.

¹² Anne-Marie McAlinden and Bronwyn Naylor “Reframing public inquiries as 'procedural justice' for victims of institutional child abuse: towards a hybrid model of justice” (2016) 38(3) *Sydney Law Review* 277 at 285.

Part II of this paper outlines the global and New Zealand contexts of historical institutional child abuse, the latter focusing on the disproportionate effect on Māori. Parts III and IV conceptualise State crime and victimisation and determine how and why institutional child abuse can equate to State crime. Part V determines what justice looks like for victims of historical institutional child abuse and concludes that a restorative justice process is the most appropriate avenue for recognising the State's criminal responsibility. Part VI concludes that recent reforms to child welfare legislation are insufficient to prevent future institutional child abuse.

A few preliminary points require clarification. First, this paper's terminology: The use of the term "victim" includes all those who have alleged abuse and neglect in institutional residences, whether it has been proven or not. Varying terms are used to describe the institutions under scrutiny, including social welfare residences and State care homes. Secondly, like most of the existing research on New Zealand's historical institutional child abuse, this paper places particular reliance on the findings of the Confidential Listening and Assistance Service (which heard from approximately 1,100 victims),¹³ Elizabeth Stanley's research (105 victims),¹⁴ Sonja Cooper's civil litigation work (approximately 900 cases) and claims made to the Ministry of Social Development (approximately 1,550 claims).¹⁵ The overlap of victims who have used one or more of these services, and therefore the number of victims who have come forward and alleged abuse in State care, is unclear. Finally, the scope of this paper is limited to determining a domestic response to historical institutional child abuse and does not analyse how international criminal law could respond.

¹³ CLAS Report, above n 9.

¹⁴ Stanley *The Road to Hell*, above n 7.

¹⁵ For example, *White v Attorney-General* (CIV 1999-485-85 and 2001-485-864, High Court Wellington, 28 November 2007).

II Context: Historical Institutional Child Abuse

A A Global Problem: The “Discovery” of Institutional Child Abuse

The term “institutional child abuse” originated in 1975 and encompassed acts of abuse and abusive conditions and policies.¹⁶ It built upon the “discovery” of child physical abuse in the 1960s and child sexual abuse in the 1970s.¹⁷ Public inquiries into the “institutional abuse of children” were first conducted in the United States in 1979 and over the last 30 years have been conducted in Australia and Canada and across Central Europe, Scandinavia and the United Kingdom.¹⁸

Due to the global nature of the problem, the term has been used varyingly. There are three main ways that institutional child abuse has been classified:¹⁹

...sexual abuse of children by adults in a range of residential care and community-based settings; physical, sexual, or emotional [and cultural] abuse of children by adults (or their peers) in residential and out-of-home care; and, most broadly, the conditions of life in the “dehumanising institutional environment” of residential care.

Generally, historical institutional abuse focuses on adult victims seeking recognition and redress for a wide range of abuses in residential facilities.²⁰ Contemporary institutional abuse often focuses on sexual abuse in a wide variety of settings and identifies modes of intervention and prevention.²¹

Prior to the 1960s, physical abuse of children in institutions was merely termed “mistreatment” or “harsh discipline”.²² There are many reasons why these institutional

¹⁶ Kathleen Daly “Conceptualising responses to institutional abuse of children. (Canada, Australia, United Kingdom)” (2014) 26(1) *Current Issues in Criminal Justice* 5 at 8, citing David Gill (1975).

¹⁷ Daly “Conceptualising responses”, above n 16, at 8.

¹⁸ Daly “Conceptualising responses”, above n 16, at 5.

¹⁹ Daly “Conceptualising responses”, above n 16, at 6.

²⁰ Daly “Conceptualising responses”, above n 16, at 6-7.

²¹ Daly “Conceptualising responses”, above n 16, at 6-7.

²² Daly “Conceptualising responses”, above n 16, at 8.

practices prevailed, including a tougher attitude towards children, religious organisational control of institutions, and the ability of institutional carers to give the impression of adequate care when inspections were carried out.²³ Stanley believes the increased institutionalisation and harsh environments were a product of the highly punitive political climate at the time when “there was a real moral panic about youth delinquents”.²⁴ However, when the social conscience changed, so did the response.

Five factors led to institutional child abuse becoming a recognised social problem:²⁵

1. Higher living standards meant that children held more rights;
2. New concepts of child physical and sexual abuse facilitated the “seeing” of abuse;
3. Media publicity around major cases of clergy sexual abuse of boys;
4. A “sexual turn” in the institutional abuse story; and
5. Allegations that authorities covered-up abuse and their failures to investigate and respond to complaints of abuse.

The “sexual turn” played the biggest part in this recognition. Even though there was a fair degree of acceptance for harsh physical regimes and corporal punishment at the time, children’s allegations could no longer “be easily brushed aside as discipline” because of the disturbing nature of sexual abuse and the escalation of reported cases creating a collective victimisation story.²⁶

Considering the global context, this paper uses comparative analyses to inform an appropriate response for New Zealand.²⁷ The primary comparator will be Canada. The Republic of Ireland, Northern Ireland and Australia also feature. It is important to

²³ Daly “Conceptualising responses”, above n 16, at 8-9.

²⁴ Daly “Conceptualising responses”, above n 16, at 8-9.

²⁵ Daly “Conceptualising responses”, above n 16, at 9-11 and 16-17.

²⁶ Daly “Conceptualising responses”, above n 16, at 9.

²⁷ For an explanation of why comparative analyses are appropriate in this context, see McAlinden and Naylor, above n 12, at 280-281.

recognise the specific cultural lens (particularly the institutional racism towards Māori) through which the issue emerged in New Zealand.²⁸

B New Zealand's Problem

1 Historical Focus: from the 1950s to the 1990s

Over 100,000 children were removed from their families and institutionalised in social welfare residences in New Zealand between the 1950s and 1990s.²⁹ They were institutionalised for misbehaving or for welfare reasons such as neglect, ill-treatment or being “out of parental control”.³⁰ However, the “progressive framework” for the welfare residences “was not matched by stringent inspection, monitoring or oversight” by authorities.³¹ Limited resources meant the residences were poorly maintained and staffed with inexperienced and ill-trained employees.³² Many of the children suffered physical, sexual, psychological, emotional and cultural abuse at the hands of the State.³³

So far, over 1,550 alleged victims have come forward claiming they were abused and neglected in social welfare residences prior to 1993.³⁴ Common forms of reported abuse and neglect include: violent attacks with pieces of wood and jug cords; sexual attacks including forced masturbation, oral sex and rape; bullying by staff and other children; denial of food and water; solitary confinement; being made to scrub yards with

²⁸ Ibid.

²⁹ Dame Susan Devoy “State child care may explain why so many Māori are in prison” (2 March 2017) NZ Herald <www.nzherald.co.nz>.

³⁰ Elizabeth Stanley “The Victimization of Children in State-Run Homes in New Zealand” in Dawn Rothe and David Kauzlarich (eds) *Towards a Victimology of State Crime* (Routledge, London, 2014) at 47, citing Human Rights Commission *Report of the Human Rights Commission on Representations by the Auckland Committee on Racism and Discrimination: Children and Young Person's Homes* (Human Rights Commission, Wellington, 1982).

³¹ Stanley “The Victimization of Children in State-Run Homes in New Zealand”, above n 30, at 47.

³² Stanley “The Victimization of Children in State-Run Homes in New Zealand”, above n 30, at 47.

³³ For example, around 57% of the men and women the CLAS Panel saw had been sexually abused. See CLAS Report, above n 9, at 12.

³⁴ <https://www.ms.govt.nz/documents/about-msd-and-our-work/contact-us/complaints/2017-06-30-web-page-quarterly-report.pdf>

toothbrushes; being stripped and made to stand for hours or days holding a medicine ball overhead; having to stand on “a line” for hours or days; and electroconvulsive therapy.³⁵

The Ministry of Social Development (MSD) believes that there is “no evidence that the care systems were universally broken ... [and] the majority of children and young people in care had positive experiences with no abuse and neglect”.³⁶ The number of claims received thus far suggests that only 3.5 percent of children in State care may have been abused or neglected.³⁷ However, although it is clear that not all children were abused in welfare residences, many believe that thousands of victims are yet to come forward.³⁸

Elizabeth Stanley, a criminologist who has interviewed 105 victims, equates the State home environment to incarceration.³⁹ The punitive environment was often disproportionate to the reasons the children were there: very few were institutionalised for serious offending such as violence and burglary.⁴⁰ Many were institutionalised for trivial misbehaviour such as truancy, or things like stealing a pencil.⁴¹ Others were removed against the wishes of their struggling parents.⁴² The number of children in social welfare care doubled in 20 years to more than 16,000 by 1972.⁴³

³⁵ See, for example, Statement of Claim, above n 2, at [2]-[3]; and Aaron Smale “Justice Delayed, Justice Denied” (9 December 2016) Radio New Zealand <www.radionz.co.nz>

³⁶ Office of the Minister of Social Development “Government Response to the Final Report of the Confidential Listening and Assistance Service” (8 September 2016) at [33].

³⁷ Office of the Minister of Social Development “Government Response to the Final Report of the Confidential Listening and Assistance Service” (8 September 2016) at [33].

³⁸ See Brief of Evidence of Areatā Kopu in Support of an Application for an Urgent Hearing Concerning the Settlement of Historical Grievances of Māori Children Put into State Care Dated 20 March 2017 (Wai 2615, #A2) at [24].

³⁹ Smale “Justice Delayed, Justice Denied”, above n 35.

⁴⁰ Smale “Justice Delayed, Justice Denied”, above n 35.

⁴¹ Smale “Justice Delayed, Justice Denied”, above n 35.

⁴² CLAS Report, above n 9; and Mike Wesley-Smith “Seen and not heard” (2 September 2017) Newshub <www.newshub.co.nz>.

⁴³ Wesley-Smith “Seen and not heard”, above n 42.

When children were released from institutions, the State neglected to prepare them for independence and did not support their reintegration into society.⁴⁴ After leaving State care individuals were more likely to offend and suffer from mental health problems.⁴⁵ Victims used crime as a “retaliation for the way they had been treated in care”.⁴⁶ The Confidential Listening and Assistance Service (CLAS) identified the following common “legacies” of those who suffered abuse: distrust and fear of authority, difficulty forming relationships, loss of culture, family breakdown, anger and violence, depression, criminal behaviour, and poor education causing loss of potential.⁴⁷

Some of those who came through the welfare system formed gangs to replace the familial relationships that the State denied them.⁴⁸ The CLAS Panel was told that many gangs actually began in State institutions.⁴⁹ One victim explained that:⁵⁰

We needed unity for safety and that’s how the gangs started. Being inside was essentially gang training. It was recruitment. I genuinely believe that there is a clear connection between me being placed in Kohitere [a state residence] and me subsequently joining a gang and criminal activity.

A Black Power member who was institutionalised said “[o]nce you get separated from everything, you start looking for ... something to connect to, something to belong to ... I’ll never leave what they call the gang. For me it’s my iwi, it’s my hapu”.⁵¹

⁴⁴ CLAS Report, above n 9, at 26.

⁴⁵ Kim Workman “I was part of NZ’s history of abuse in state care, and I’m in no doubt an inquiry is crucial” (21 March 2017) *The Spinoff* <www.thespinoff.co.nz>; and CLAS Report, above n 9, at 30-32.

⁴⁶ CLAS Report, above n 9, at 31-32.

⁴⁷ CLAS Report, above n 9, at 30.

⁴⁸ Aaron Smale “Smashed by the state: The kids from Kohitere” (13 February 2017) *Radio New Zealand* www.radionz.co.nz; and Aaron Smale “Gangs a byproduct of state care - Black Power member” (13 February 2017) *Radio New Zealand* <www.radionz.co.nz>.

⁴⁹ CLAS Report, above n 9, at 28.

⁵⁰ Brief of Evidence of Ian Shadrock in Support of an Application for an Urgent Hearing Concerning the Settlement of Historical Grievances of Maori Children Put into State Care Dated 20 March 2017 (Wai 2615, #A4) at [23].

⁵¹ Smale “Smashed by the state”, above n 48.

Today, approximately 40 percent of prison inmates have been through welfare homes.⁵² Over 80 percent of the prison population under 20 have a history of State care whether it was themselves, their parents, or their grandparents who were institutionalised.⁵³ Institutionalisation has become an intergenerational problem as victims suffer from long-term harms that effect those surrounding them.

2 “Justice Delayed, Justice Denied”⁵⁴

After being repeatedly ignored, allegations of abuse and neglect eventually contributed to the “complete overhaul of the youth justice system in NZ”.⁵⁵ The Children, Young Persons and their Families Act 1989 pursued, inter alia, a framework of deinstitutionalisation: “In 1988, 2,000 children were in State institutions. By late 1996, the figure was under 100”.⁵⁶ However, despite deinstitutionalisation and varied acts of resistance, victims of institutional abuse have been consistently denied meaningful redress. The denial began in the homes where children were ignored or further abused if they complained. Consequently, many victims and their families hold a sense of deep distrust and hostility towards the State.

This paper describes and critiques the inadequate responses that have been pursued thus far. They include: criminal prosecutions of social workers who abused the children; civil litigation against the government; dispute resolution with the Historical Claims Team, set

⁵² CLAS Report, above n 9.

⁵³ Workman “I was part of NZ’s history of abuse in state care”, above n 45.

⁵⁴ Smale “Justice Delayed, Justice Denied”, above n 35.

⁵⁵ Stanley “The Victimization of Children in State-Run Homes in New Zealand”, above n 30, at 48, citing Auckland Committee on Racism and Discrimination *Social Welfare Children’s Homes: Report on an Inquiry Held on June 11 1978* (Auckland, ACORD, Nga Tamatoa, Arohanui Inc, 1978).

⁵⁶ Andrew Becroft “Are there Lessons to be Learned from the Youth Justice System?” in G. Maxwell (ed) *Addressing the Causes of Offending: What is the Evidence?* (Institute of Policy Studies, 2009) at 28.

up in 2006 and administered by MSD; and CLAS (2008–2015), a confidential forum for people with concerns regarding their treatment to come forward for assistance.⁵⁷

Most recently, the United Nations Committee on the Elimination of Racial Discrimination recommended that the New Zealand Government immediately establish an independent commission of inquiry “with the authority to determine redress, rehabilitation and reparation from victims, including an apology from the State party”.⁵⁸ Despite recent public pressure, the Government argues that an inquiry is not needed because claims have been dealt with, it will be expensive, it will take too long, victims don’t need a public apology, victims will be revictimized, and their focus is on preventing future abuse.⁵⁹ Current Prime Minister Bill English believes that “the extent of [the harm is] pretty well known and pretty well understood”.⁶⁰ The Government prioritises a “completely new child-centred operating model led by the Ministry for Vulnerable Children, Oranga Tamariki” instead of putting “all that energy into going over history again”.⁶¹

However, nobody has assessed the systemic nature of the abuse. Consequently, the State cannot promise history will not be repeated. The State continues to fail these victims by refusing to investigate and denying victims meaningful redress. Stanley highlights why something more is necessary:⁶²

We have no sense of the generational nature and impact of abusive State care. We have little idea of how whole groups of children – including Māori and those with disabilities – became targets for removals. We don’t really understand how our institutional structures, policies and practices ensured that abuse was hidden away yet undertaken in such plain sight. And we have not yet grasped the impact that this

⁵⁷ CLAS Report, above n 9, at 9.

⁵⁸ Committee on the Elimination of Racial Discrimination CERD/C/NZL/CO/21-22 at [34].

⁵⁹ Elizabeth Stanley “Reasons for vetoing inquiry into historic abuse don't stand up” (22 February 2017) Stuff <www.stuff.co.nz>.

⁶⁰ “‘Never again’ - HRC calls for State abuse inquiry”, above n 10.

⁶¹ Ibid.

⁶² Stanley “Reasons for vetoing inquiry into historic abuse don't stand up”, above n 59.

has all had on New Zealand life, over generations. We have dealt with it, but in ways that have often silenced victims and deepened their victimisation.

3 *The Disproportionate Effect on Māori*

The cultural significance of this institutional abuse should not be understated. In the 1980s, Māori children made up 12 percent of the population, but over 50 percent of the children in State care.⁶³ In some institutions, 80–90 percent of the residents were Māori.⁶⁴ Stanley and other commentators believe that “[t]he funnelling of Māori children into welfare institutions was the real start of our systematic mass imprisonment in this country”.⁶⁵ The correlation between the high percentage of Māori who have been through State care and the current overrepresentation of Māori in New Zealand’s prisons is stark.⁶⁶ Out of the 1,100 victims the CLAS Panel saw, 37 percent were Māori, a large number of which were seen in prison.⁶⁷ The fact that Māori were “very quickly escalated into the system” indicates institutional racism.⁶⁸

Child welfare practices that targeted Māori children were a product of, inter alia, the government’s policy to urbanise Māori after the war.⁶⁹ Māori migrated to the cities, but were often excluded from opportunities and isolated “because of the ‘pepper-potting’ policy of the government that scattered Māori among Pākehā neighbourhoods to try and make them assimilate”.⁷⁰ Whānau networks were broken up and children were often left to their own devices while their parents worked long hours to make ends meet.⁷¹ Māori children were targeted by the police for trivial reasons such as truancy, or for simply for

⁶³ Workman “I was part of NZ’s history of abuse in state care”, above n 45.

⁶⁴ Smale “Justice Delayed, Justice Denied”, above n 35; and Workman “I was part of NZ’s history of abuse in state care”, above n 45. For example, Kohitere in Levin.

⁶⁵ Smale “Justice Delayed, Justice Denied”, above n 35; and Workman “I was part of NZ’s history of abuse in state care”, above n 45.

⁶⁶ Over 50% of prisoners are Māori <www.corrections.govt.nz>.

⁶⁷ CLAS Report, above n 9, at 28.

⁶⁸ Smale “Justice Delayed, Justice Denied”, above n 35.

⁶⁹ In 1936, 17 percent of Māori were urban, in 1945 45 percent, and in 1966 62 percent. See James Belich *Paradise Reforged* (Penguin, Auckland, 2001).

⁷⁰ Smale “Smashed by the state”, above n 48.

⁷¹ Smale “Smashed by the state”, above n 48.

being different.⁷² While Pākehā children were often placed in foster care, the lack of networks between the government and Māori communities meant Māori children would often go straight to a welfare institutions.⁷³ Consequently, Māori children were often denied their cultural and whānau connections: “these Māori children were stripped of their identity and alienated from their families, the resulting prejudice of which has been life-long and intergenerational”.⁷⁴

The State fails to recognise the disproportionate effect institutional abuse and neglect has had on Māori. In March 2017, Ian Shadrock of Ngati Te Wehi and Ngatiwai, Marilyn Stephens of Ngatiwai and Tyrone Marks of Ngati Raukawa, made an urgent Waitangi Tribunal claim into Māori placed in State care.⁷⁵ The claimant sought a finding from the Waitangi Tribunal that Māori families were actively singled out for intervention by the State in breach of Treaty principles and therefore:⁷⁶

As their Treaty partner, the Crown must provide Māori with [a] process to settle their claims against the Crown that is meaningful, open and transparent, accountable and independent, culturally compliant, cognisant and reflective of Treaty principles.

The claim stated that “[t]he Crown has failed to establish with Māori ... a culturally appropriate means of inquiring into and settling claims of abuse and neglect while in State care”.⁷⁷ It argued that all current and former responses have been created without adequate Māori input, they have been deficient in terms of tikanga Māori, the Treaty of Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples, and they have not comprehensively addressed the effect of State care on Māori whānau

⁷² CLAS Report, above n 9, at 28.

⁷³ Smale “Smashed by the state”, above n 48.

⁷⁴ CLAS Report, above n 9, at 28; Statement of Claim, above n 2, at [2]; and see Brief of Evidence of Marilyn Stephens, above n 1, at [52].

⁷⁵ The Waitangi Tribunal is currently considering this claim.

⁷⁶ Statement of Claim, above n 2, at [8].

⁷⁷ Statement of Claim, above n 2, at [4].

(including consequences of incarceration, gang membership, family violence, educational failure, unemployment, alcohol and drug abuse, and ill health).⁷⁸

The targeted institutionalisation of Māori children, and the State's refusal to acknowledge the racial implications of its practices, is yet another factor exacerbating the devastating effects of colonisation on Māori. Moana Jackson notes that the unfounded perception of a "better" colonisation in New Zealand allows the State to deny the disproportionate effect of institutional abuse on New Zealand's indigenous people:⁷⁹

For while people express shock over the removal of Aboriginal children from their families in Australia, and abhor the residential schools set up to "kill the Indian in order to save the child" in Canada and the United States, there is an almost smug belief that such abuse never happened here.

Indeed, there's a presumption that because of the honour of the Crown, colonisation was somehow "better" in this country than anywhere else. Yet ... [b]y its very nature, the colonisation of indigenous peoples has always been an abusive process.

...

... something like the abuse of children has been too appallingly frequent and systemic to be dismissed as an exception or an aberration. It jars too much against the colonisers' self-image and is a historical fact that seems too hard for the Crown to accept within the context of its own misrepresentations – let alone seek to meaningfully remedy.

In combination with other State-led discrimination, the harms caused by the targeted institutionalisation of Māori children, and the intergenerational legacies of such, created New Zealand's own stolen generation.⁸⁰ While the effects of child abuse in state

⁷⁸ Statement of Claim, above n 2, at [4]-[6].

⁷⁹ Jackson, above n 8.

⁸⁰ See McAlinden and Naylor, above n 12, at 288-289 regarding the first use of the term "Stolen Generation" in relation to the Australian Indigenous children who were removed from their parents and placed with white families or in institutions.

institutions occurs to non-Māori as well, the use of the term “New Zealand’s Stolen Generation” highlights the disproportionate effect that historical institutional child abuse has had on Māori through its links to abuse of indigenous Australians.

It ought to be acknowledged that many of the children were already victims of abuse and neglect prior to institutionalisation, and therefore the source of the harms and the cause of their subsequent behaviours may be unclear.⁸¹ However, there is a correlation between abuse and neglect in State care and the damaged legacies of those who survived State care. In light of the inadequate State responses thus far, this paper goes further by analysing how the State caused the damaged legacies of State care victims, and consequently should be held criminally responsible.

III The State’s Criminal Responsibility for Historical Institutional Child Abuse

Conceptualising State crime is a necessary precursor for determining its applicability to institutional child abuse. This Part analyses what constitutes State crime and applies the concept to historical institutional child abuse in New Zealand. Subpart A analyses the concept of State crime and subpart B examines the State’s responsibility. It concludes that the New Zealand State should be held criminally responsible for the abuse and neglect perpetrated on New Zealand’s stolen generation.

A Conceptualising State Crime

1 Who is the “State” in State Crime?

To attach criminal responsibility to the State, “the State” should be defined. However, the task is complex and there is no definitive answer.

Without the involvement of the State, a crime is not a State crime and is best conceptualized as an organizational, corporate, or corporate-State crime ...

⁸¹ CLAS Report, above n 9; and Wesley-Smith “Seen and not heard”, above n 42.

Conceptualizations of State crime must remain within the realms of State authority and responsibility.⁸²

Narrowly, the State is made up of “an assemblage of governmental institutions” and the activities of actors who make up those governmental institutions.⁸³ It is argued that “[a]ny analysis of State actions must be attentive to what parts of the “structural ensemble’ ... were effectively responsible for the outcomes under scrutiny”.⁸⁴ In the context of institutional child abuse, the most obvious part of the “structural ensemble” would be the governmental department responsible for child welfare. However, the relevant department has been restructured since the 1940s.⁸⁵ Furthermore, the government controlling the relevant department changes regularly. As such, it would be difficult to argue that the current Government is directly responsible for historical institutional child abuse.

More broadly, the State is a “set of intersecting processes that both reproduce and alter the social order as articulations of interdependent economic, political and cultural practices”.⁸⁶ Thus, drawing absolute boundaries around a broad concept of the “State” as encapsulating government, economy and culture is difficult.

How can we hold an undefined “State” criminally responsible? A thorough analysis of who or what constitutes the State is beyond the scope of this paper. This paper instead takes a broad, holistic approach by characterising the State based on its exercise of public power and force, via its access to resources, and thus its ability to alter society.⁸⁷ In the context of historical institutional child abuse in New Zealand, while the boundary is

⁸² David Kauzlarich, Christopher Mullins, and Rick Matthews “A complicity continuum of state crime” (2003) 6 *Contemporary Justice Review* 241 at 246.

⁸³ Raymond Michalowski “In Search of ‘State and Crime’ in State Crime Studies” in William Chambliss, Raymond Michalowski and Ronald Kramer (eds) *State Crime in the Global Age* (Cullompton, Willan Publishing, 2010).

⁸⁴ Michalowski “In Search of ‘State and Crime’ in State Crime Studies”, above n 83.

⁸⁵ See Statement of Claim, above n 2, at [17]-[20].

⁸⁶ Michalowski “In Search of ‘State and Crime’ in State Crime Studies”, above n 83.

⁸⁷ See “Defining the State as Criminal” in Penny Green and Tony Ward (eds) *State Crime: Governments, Violence and Corruption* (London, Pluto Press, 2004).

unclear the State at least includes past and present governments and government departments. Importantly, the State is not restricted to individuals, thus ensuring true accountability for the significant harms perpetrated by the State. To justify criminalising the State using this less than definitive conclusion, the next section explains the purpose in holding the State criminally responsible.

2 *The Purpose in Holding the State Criminally Responsible*

... the stigma of the label criminal carries significant weight, and perhaps it is time criminal States carried that burden themselves.⁸⁸

The principles and purposes of criminalising behaviour, and the stigma attached to and the societal awareness generated by a criminal label, provide justification for holding the State criminally responsible.

First, Parliament and the judiciary have highlighted the importance of criminalising the exercise of public power when it resembles crime. Parliament passed the Crown Organisations (Criminal Liability) Act 2002 which provides for prosecutions against Crown organisations for certain offences.⁸⁹ As well as a symbolic conviction, a Crown organisation may be ordered to pay reparation to victims. Although this Act cannot apply to historical institutional child abuse due to its non-retrospective scope, its purposes illustrate the impetus behind recognising criminal responsibility of the State. Those purposes are to:⁹⁰

... provide incentives for the Crown to avoid instances of systemic failure, and to provide for the accountability of the Crown if a systemic failure occurs. Making the

⁸⁸ Rick Matthews and David Kauzlarich “State crimes and State harms: a tale of two definitional frameworks” (2007) 48 *Crime, Law and Social Change* 43 at 50.

⁸⁹ Section 6. Offences under the Building Act 2004, the Health and Safety at Work Act 2015, the Resource Management Act 1991, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, and Part 3 of the Vulnerable Children Act 2014.

⁹⁰ “Explanatory Note of Bill; Phil Goff 10 October 2002 – Crown Organisations (Criminal Liability) Bill – 2nd reading” <www.beehive.govt.nz> .

Crown subject to criminal liability also provides parity of treatment with private sector organisations.

Judges frequently discuss the importance of criminal responsibility under the Act in terms of the principles and purposes in the Sentencing Act 2002, irrespective of imprisonment or the imposition of a fine.⁹¹ In particular, courts highlight that a criminal conviction will promote a sense of responsibility and accountability for the harm done, and denounce and deter similar systemic failure in the future.⁹²

In *Worksafe v Ministry of Social Development*, the Ministry argued that a criminal conviction under the Health and Safety at Work Act would be too severe because of the indirect consequences of reputational damage.⁹³ The Court refused to discharge the Ministry without conviction. Although the Ministry's culpability fell into the lower band, the gravity of the offending extended to "systemic failures", which made the offending "significant".⁹⁴ Therefore, the defendant had to be held to account.⁹⁵

Secondly, crime represents a breach of societal norms and values and therefore generates public attention. Thus, a criminal label does two things: first, it generates societal awareness of victimisation and secondly, it creates public pressure that compels the State to meaningfully respond and remedy the harms.⁹⁶

Social recognition of the State's wrongs would help to create justice for victims. An increase of "social awareness about the levels and nature of abuse against children, and the generational legacies of victimisation for victims, their families and communities"

⁹¹ Sentencing Act 2002, s 7.

⁹² See *Worksafe NZ v Department of Corrections* [2016] NZDC 24865 CRI-2014-042-002678 at [7] and [13]; *Worksafe NZ v Ministry of Social Development* [2016] NZDC 24649 CRI-2015-085-2309 at [4] and [15].

⁹³ *Worksafe NZ v Ministry of Social Development*, above n 92, at [57].

⁹⁴ At [60]. Emphasis added.

⁹⁵ At [60]. Emphasis added.

⁹⁶ Matthews and Kauzlarich "State crimes and State harms: a tale of two definitional frameworks", above n 88, at Abstract.

would enable New Zealand society to acknowledge, understand and apologise for what happened to victims of institutional child abuse.⁹⁷ It would enable the public and State authorities to recognise the connection between institutional child abuse and its long-term intergenerational harms such as poverty, mental illness, heavy substance use, family violence, and imprisonment.⁹⁸ This recognition would assist the victims to heal by transferring the stigmatic burden of institutional child abuse from victims onto the State.

Furthermore, pressures created by the mobilisation of public support compel the State to respond in a meaningful way and work towards alleviating the long term intergenerational harms caused by institutional child abuse. Unfortunately, responses thus far limit societal awareness and public support by retaining confidentiality over testimonies and individual apologies in non-criminal forums (such as civil litigation, CLAS and the MSD process). This conceals the criminal nature of the State's acts and omissions and therefore allows the State to evade pressures to respond meaningfully.

As Elizabeth Stanley states:⁹⁹

We often expect offenders to demonstrate *public* remorse and shame. We want them to admit guilt, and we punish more harshly when they don't. Why should it be any different when the State is the "offender"?

3 *Defining State Crime*

State crime is also a contested concept, for two main reasons. The first concerns the definition of crime – whether this should be constrained to activities that violate criminal law or be expanded to include activities that violate basic human rights and cause social

⁹⁷ Elizabeth Stanley "Decades of brutality in our name, and Key and Tolley cover their ears – nothing to see here" (5 December 2016) The Spinoff <www.thespinoff.co.nz>.

⁹⁸ Stanley "Decades of brutality in our name, and Key and Tolley cover their ears – nothing to see here", above n 97.

⁹⁹ Stanley "Reasons for vetoing inquiry into historic abuse don't stand up", above n 59 (emphasis added).

injury.¹⁰⁰ The second concerns the unit of analysis of crime – whether this should be restricted to the individual, or expanded to include larger groupings.¹⁰¹ Reflecting these issues, there exist two common approaches to defining State crime: the narrow legalistic approach, and the broad harm approach. This Section illustrates that the narrow nature of the legalistic approach makes it inappropriate for defining State crime by connecting criticisms of the legalistic approach with the failures in responding to historical institutional child abuse in New Zealand thus far. It concludes that the harm approach is the most appropriate way to define State crime as it accommodates the characteristics of historical institutional child abuse.

a. The Legalistic Approach

The legalistic approach characterises State crime as “acts *defined by law* as criminal and committed by State officials in the pursuit of their jobs as representatives of the State”.¹⁰² This has traditionally been restricted to violations of domestic or international law.

Those that advocate the legalistic approach “suggest that it adds legitimacy” to the concept of State crime by connecting illegality to a legal code.¹⁰³ However, critics argue that this approach uses the law as a “tool of the State”, and that law is limited in its ability to address organisational deviance and the systemic harms that flow from it.¹⁰⁴ There exist three main criticisms, all of which apply in the context of historical institutional child abuse in New Zealand.

¹⁰⁰ Matthews and Kauzlarich “State crimes and State harms: a tale of two definitional frameworks”, above n 88, at 44.

¹⁰¹ Matthews and Kauzlarich “State crimes and State harms: a tale of two definitional frameworks”, above n 88, at 44.

¹⁰² William Chambliss “State-organized crime” (1989) 27 *Criminology* 183 at 183.

¹⁰³ Dawn Rothe and David Kauzlarich “A Victimology of State Crimes” in *Towards a Victimology of State Crime* (Routledge, London, 2014) at 6-7.

¹⁰⁴ See Raymond Michalowski “The Master’s Tools: Can Supranational law confront crimes of powerful States?” in Elizabeth Stanley and Jude McCulloch (eds) *State Crime and Resistance* (Routledge, London, 2013).

First, because legal apparatuses are designed by powerful States, harms they commit will avoid being defined as crime in law.¹⁰⁵

When the State commits acts they would view as intolerable or illegal by others ... they generally label them “legitimate”, a “positive” violence, or justified by the greater good. ... [W]hile a State’s domestic laws ideally can serve to control its actions, due to the unique position of a government as a self-regulator and lawmaker, it is in the position to create or nullify laws governing it.¹⁰⁶

The narrow scope of the aforementioned Crown Organisations (Criminal Liability) Act 2002 illustrates the reluctance of a State to self-incriminate. Notably, however, the Act may result in criminal prosecutions of the State in the sphere of institutional child abuse in the future. Offences under pt 3 of the Vulnerable Children Act 2014 (concerning children’s worker safety checking) were added to the exhaustive list of offences under the Act’s 2015 amendments.¹⁰⁷ More broadly, a Crown Organisation may face criminal liability under the Health and Safety at Work Act 2015. The Act places a duty on persons (including the Crown) conducting a business or undertaking, to ensure that the health and safety of persons is not put at risk from work carried out as part of the conduct of the business or undertaking. The person commits an offence if they fail to comply with the duty. Consequently, since 2015, there is potential for Crown Organisations to be criminally prosecuted for putting children’s health and safety at risk in social welfare residences.

This raises the question of why other laws relating to child protection in State institutions – such as pt 2 of the Vulnerable Children Act 2014 regarding child protection policies and ss 15–17 and pt 7 of the Oranga Tamariki (Children’s and Young People’s Well-

¹⁰⁵ Dawn Rothe “Complementary and Alternative Domestic Responses to State Crime” in Dawn Rothe and Christopher Mullins (eds) *State Crime : Current Perspectives* (Rutgers University Press, 2010) at 199-200; Michalowski “The Master’s Tools: Can Supranational law confront crimes of powerful States?”, above n 104, at 210-211; and Rothe and Kauzlarich, above n 103, at 6-7.

¹⁰⁶ Rothe “Complementary and Alternative Domestic Responses to State Crime”, above n 105, at 199-200.

¹⁰⁷ See s 6.

being) Act 1989 regarding investigations of ill-treatment and neglect and the duties of those with control over children in care – are not included as offences under the 2002 Act. If the State wants to demonstrate true accountability for historical institutional child abuse, this could be a way of doing so as it would mean the State acknowledges that what they did was criminal. Indeed:¹⁰⁸

This legal boundary-setting obscures those everyday violations and humiliations within the Homes, as well as the lost opportunities and on-going harms that have cemented a legacy of disadvantage for these claimants.

Ultimately, because of the power and position of the State, and its reluctance to self-incriminate, the concept of State crime should not be restricted to violations of criminal law.

Secondly, formal legal processes that respond to breaches of criminal law are usually adversarial and burdened by legal technicalities. Therefore, they are inappropriate in the context of State crime where the State has a significant power advantage and control over resources.

In New Zealand, victims who have been brave enough to seek justice have encountered significant obstacles which the State relies upon to deny liability. There have been few criminal prosecutions as it was “almost impossible to get police attention during the 1970s and 1980s”.¹⁰⁹ Those who tried to lay complaints were told to stop wasting police time and were not believed.¹¹⁰ Other times, if a perpetrator was already serving preventative detention, police argued against action as it would not result in an increased sentence.¹¹¹

¹⁰⁸ Stanley “The Victimization of Children in State-Run Homes in New Zealand”, above n 30, at 58.

¹⁰⁹ Stanley *The Road to Hell*, above n 7, at 180.

¹¹⁰ At 180; and Wesley-Smith “Cover-up in State care?”, above n 2.

¹¹¹ Stanley *The Road to Hell*, above n 7, at 180.

More recently, however, the police have pursued some criminal prosecutions:¹¹²

In June 2011, a man called Ivan Chambers received two and a half years imprisonment for indecent assault against six Epuni boys between 1979 and 1983. The same year, a judge sentenced Alan Moncreif-Wright to twelve months home detention and to pay \$5000 reparation to three Epuni victims (including Keith) for sexual and physical assaults in the early 1970s.

However, those who get to trial are confronted with an extremely adversarial process where “defence practices, in particular, could stoop lower than victims ever expected”.¹¹³ Defence counsel tried to discredit complainants by framing them as liars, and money-hungry criminals. As one victim recalls:¹¹⁴

I was giving my story ... it was very hard giving it ... And then [the defence] started. The lady kept asking me the most ridiculous questions. It was really ridiculous when she said, “Are you doing this for the money?” I said, “No, money’s got nothing to do with this, it wouldn’t bother me if I didn’t get a cent out of it. It’s actually about me and my past. Getting myself at peace with myself”. I said, “The reason I’m doing this is to make you aware...about what I’ve suffered, what I went through. And unless somebody is going to bring it out, the abuse is going to keep going on”

...

[The defence] tried to discredit me, because [they] talked about how basically I had anti-social behaviour before going to the boys’ home. That’s what she was putting to me and I had to say “Yes”, but we were still abused.

“Such attacks on credibility and harsh adversarial legal conduct are not appropriate for a cohort of victims who have faced denial over decades”.¹¹⁵ Moreover, research indicates

¹¹² At 180.

¹¹³ Stanley *The Road to Hell*, above n 7, at 181.

¹¹⁴ At 181-182.

¹¹⁵ Stanley *The Road to Hell*, above n 7, at 182.

that the adversarial process is particularly detrimental to the well-being of victims of sexual abuse.¹¹⁶

Alternatively, victims have the option of filing civil claims against the Government in court. However, litigation is extremely technical, timely and costly. Sonja Cooper is the Principal at Cooper Legal who has been advocating for approximately 900 victims of abuse and neglect in State care since 1995. She explains that claims were originally framed as torts (negligence and vicarious liability), but due to legal technicalities – claims are often time-barred under the Limitations Act 1950 – they have been reframed as human rights breaches.¹¹⁷ To add insult to injury, the State has restricted access to legal aid for these cases.¹¹⁸ To protect the legitimacy and reputation of the State, the Government pushes for settlement outside of court. Around 600 claims have been filed in court, of which 408 were resolved out of court.¹¹⁹ None have been resolved in court for cases prior to 1993.¹²⁰ The average payment made to victims is \$19,952 across 349 people.¹²¹

Thirdly, legal systems of the most powerful States operate “largely according to conceptions of individualism”, allowing States to shirk responsibility “despite the breadth of the social injuries they cause”.¹²² An individual focus challenges the particular government or persons and not the State itself, and therefore leaves in place core socio-

¹¹⁶ At 181-182.

¹¹⁷ “Pursuing Justice for Victims of State Abuse” 16 May 2017, Victoria University of Wellington Public Lecture.

¹¹⁸ See *White v Attorney-General*, above n 15. Other States, such as Australia, have abolished limitations.

¹¹⁹ “‘I’ll be scarred for life’ - brave Kiwi opens up on abuse he suffered while in State care” (13 February 2017) Television New Zealand <www.tvnz.co.nz>.

¹²⁰ “Historic Claims” Ministry of Social Development <www.msd.govt.nz>.

¹²¹ “Historic Claims” Ministry of Social Development <www.msd.govt.nz>.

¹²² Michalowski “The Master’s Tools: Can Supranational law confront crimes of powerful States?”, above n 104, and 213-214.

political and economic structures that facilitate systemic crime.¹²³ Consequently, harms are rarely prevented from reoccurring.¹²⁴

This is evident in New Zealand. Oranga Tamariki, the Ministry for Vulnerable Children, has responsibility for New Zealand's existing youth institutions: five youth justice residences and four care and protection residences. The Children's Commissioner Report *State of Care 2017: A focus on Oranga Tamariki's secure residences*, found that "there is room for considerable improvement" in the performance of the residences.¹²⁵

As far as we can establish, residences appear to be generally safe. However, we remain concerned about the variable quality of practice and the fundamental system issues that underpin this variability. As Oranga Tamariki takes over from the 1st April 2017, residences still fall far short of the new agency's aspirations for them.¹²⁶

Although it found "no concrete evidence of systemic abuse or inhuman practice" currently, there have been repeated reports of bullying and a lack of faith in the complaints system to report instances of serious abuse and violence.¹²⁷ Unfortunately, the overrepresentation of Māori has increased: 60 percent of those detained in a care and protection residences, and 70 percent of those detained in youth justice residences are Māori.¹²⁸

Ultimately, the legal approach to defining State crime is too narrow, illustrated by failures of New Zealand's formal legal system thus far.

¹²³ See Matthews and Kauzlarich "State crimes and State harms: a tale of two definitional frameworks", above n 88, at 48.

¹²⁴ Michalowski "The Master's Tools: Can Supranational law confront crimes of powerful States?", above n 104, at 211 and 213-214.

¹²⁵ Office of The Children's Commissioner *State of Care 2017: A focus on Oranga Tamariki's secure residences* (May 2017) at 2.

¹²⁶ Office of The Children's Commissioner, above n 125, at 4.

¹²⁷ Office of The Children's Commissioner, above n 125, at 2.

¹²⁸ Office of The Children's Commissioner, above n 125, at 3.

b. The Harm Approach

The harm approach responds to the criticisms levelled at the legalistic approach. Advocates recognise that crime is “subjectively defined by States within the context of broader issues of power, and political and economic interests” and therefore many harmful acts or omissions of the powerful are rarely defined as criminal.¹²⁹ The harm approach holds that the concept of State crime encompasses physical, sexual, financial and economic, psychological and emotional, and cultural harms.¹³⁰ This includes systemic harms such as those resulting from State policies causing institutionalised classism and racism.¹³¹ The harm approach focuses on the origins of the suffering (a State’s systems), rather than the individuals involved, and therefore encourages a response that prevents the harm from reoccurring.

Broadly speaking, the harm approach protects human rights – all of which may not be codified in criminal law. At a basic level, the United Nations Universal Declaration of Human Rights “represents a general moral consensus of acceptable and unacceptable behaviors”.¹³² Advocates of the legalistic approach are beginning to move in this direction, expanding the concept of State crime to include actions or inactions relating directly to an assigned or implied trust or duty, or “misconduct that entails [serious], avoidable and unnecessary harm to society ... and resembles other kinds of acts criminalized in the countries concerned or by international law”.¹³³ Importantly, implied duties and trusts refer to “expectations of behavior that are not codified in a specific legal code, yet still fall under general expectations of a State’s part of a social contract ... as established by culture and social structures”.¹³⁴ This ensures that the State cannot shirk criminal responsibility by refusing to legislate for their own criminal prosecution.

¹²⁹ Rothe and Kauzlarich, above n 103, at 7.

¹³⁰ Rothe and Kauzlarich, above n 103, at 7.

¹³¹ Rothe and Kauzlarich, above n 103, at 7.

¹³² Kauzlarich, Mullins and Matthews, above n 82, at 244.

¹³³ Kauzlarich, Mullins and Matthews, above n 82, at 244-246; and Matthews and Kauzlarich, above n 23, at 47.

¹³⁴ Kauzlarich, Mullins and Matthews, above n 82, at 245.

In the context of historical institutional child abuse, physical and sexual assaults generated the most obvious harm to children in State care. However, although these specific violations of law were intensely damaging, they were just one element of the harms experienced by the children.¹³⁵ Victims have identified other common, yet less obvious harms:¹³⁶

Alongside the horrors of particular acts, claimants have talked movingly about ... the stress of being continually belittled by adults around them, their frustration of not receiving a “proper” education, their struggle to gain friends outside the Homes because they were labelled a “care-kid”, their despair in not having unconditional love, their constant worry about being moved to yet another place, their loss of autonomy, their continued feelings of insecurity or their fears that they might not see their family again ... the problems of being released with no support in place, their frustrations in not knowing how to feel or act in ‘normal’ company, their attempts to sabotage relationships because they fear further loss, their struggles to find satisfying work or their frustration at how life is impeded by poor health. These experiences, many of them highlighting the mundane realities of State crime, have a long legacy.

In other words, the children “experienced a general absence of love, human warmth, encouragement, training and modelling in fundamental human behaviour”.¹³⁷ Another less obvious harm was the cultural deprivation Māori children suffered as Māori children were denied their heritage and whānau connections: “I had no whakapapa as a Māori. It affected all [of] my outlook on life. I was numb with pain”.¹³⁸

Many of these harms result from how the system treated children in State care, and do not concern the individual perpetration of abuse. For the concept of State crime to be most

¹³⁵ Stanley “The Victimization of Children in State-Run Homes in New Zealand”, above n 30, at 58.

¹³⁶ Stanley “The Victimization of Children in State-Run Homes in New Zealand”, above n 30, at 58. Also see Human Rights Commission “*Institutions are places of abuse*”: *The experiences of disabled children and adults in State care* (July 2017) at 41 and CLAS Report, above n 9.

¹³⁷ CLAS Report, above n 9, at 27.

¹³⁸ CLAS Report, above n 9, at 28-29.

effective it must encompass these types of harms to ensure that the system is held to account.

The harm approach recognises that, because of the powerful position of a State, the most effective response to ensure a State carries the burden of criminal responsibility must look beyond codified law and outside of traditional criminal prosecutions. Considering the tendency towards a harm approach in defining State crime, the following Section adopts the harm approach and sets out the evidence of the State's criminal responsibility for historical institutional child abuse in New Zealand.

B State Responsibility: The Systemic Requirement

Logically, for the State to be criminally responsible, it must be responsible for the acts or omissions causing the harm. The State will be responsible when these acts or omissions are systemic – where they have causal roots located in organisational systems or policies of the State, despite sometimes being perpetrated by an individual.¹³⁹

The concept of systemic abuse recognises that “the system has operated in ways that has provided the opportunity for abuse to occur, or for it to continue unchallenged”.¹⁴⁰ For abuse to be systemic, it must be “attributable to system-level factors or failures that have worked actively or passively to enable or facilitate abuse under the particular system”.¹⁴¹

A useful way to determine whether harms are systemic may be to use a “complicity continuum of State crime”.¹⁴² There are four points on the continuum:

1. Explicit Acts of Commission;
2. Implicit Acts of Commission;
3. Explicit Acts of Omission; and

¹³⁹ Human Rights Commission “*Institutions are places of abuse*”, above n 136, at 40.

¹⁴⁰ Human Rights Commission “*Institutions are places of abuse*”, above n 136, at 40.

¹⁴¹ Human Rights Commission “*Institutions are places of abuse*”, above n 136, at 40.

¹⁴² Kauzlarich, Mullins and Matthews, above n 82, at 246.

4. Implicit Acts of Omission.

The commission end of the continuum involves “active decision-making and conscious, purposeful behaviour”.¹⁴³ The omission end of the continuum involves “failure to act, or failure to act properly”.¹⁴⁴ In the context of historical institutional child abuse in New Zealand, the State is most likely responsible for explicit and implicit acts of omission. It may also be responsible for implicit acts of commission. These are detailed below.

Additionally, it is important to recognise that any determination of the State’s criminal responsibility must account for societal norms at the time the harms occurred, especially as societies’ norms and sanctions that attempt to control behaviours perceived to be harmful “vary greatly in time and space”.¹⁴⁵ As noted earlier, the acceptable treatment of children differed greatly over the twentieth century.

1 Explicit and Implicit Acts of Omission

Omissions involve the failure to act or failure to act properly. Explicit acts of omission are akin to severe negligence.¹⁴⁶ They occur when:¹⁴⁷

...the State disregards unsafe and dangerous conditions, when it has a clear mandate and responsibility to make a situation or context safe. Many times it is caused by bureaucratic failures and institutional dysfunction ... Safety is usually compromised in the name of ... State legitimacy.

Implicit acts of omission occur when the State does nothing, or next to nothing, to ameliorate such problems as racial, income, and gender inequality – “the State is engaged in crime because it is allowing institutions and actors to remain inequitable, harmful, and

¹⁴³ Kauzlarich, Mullins and Matthews, above n 82, at 246.

¹⁴⁴ Kauzlarich, Mullins and Matthews, above n 82, at 246.

¹⁴⁵ Kauzlarich, Mullins and Matthews, above n 82, at 244-246.

¹⁴⁶ Kauzlarich, Mullins and Matthews, above n 82, at 249.

¹⁴⁷ Kauzlarich, Mullins and Matthews, above n 82, at 249.

marginalizing”.¹⁴⁸ Directly relevant in this context, it has been argued that the State commits a crime of omission when it allows a culture of violence to flourish.¹⁴⁹

New duties in the Crimes Act 1961, added in 2012, may provide guidance for this discussion. Under s 152, everyone who is a parent or guardian who has actual care or charge of a child under the age of 18 is under a legal duty to provide that child with necessities and take reasonable steps to protect that child from injury. Under s 150A, a person is criminally responsible for omitting to discharge or perform the s 152 duty only if, in the circumstances, the omission is a “*major departure* from the standard of care expected of a reasonable person to whom that legal duty applies”.¹⁵⁰ The wording suggests that to criminalise a breach of duty in relation to child care, the breach must be major. This paper suggests that any systemic breach of a duty is inherently major due to their tendency to have large-scale effects.

The State certainly had a clear duty to ensure social welfare residences were safe. Despite the hardships children may have faced prior to institutionalisation, the State voluntarily took on the responsibility of ensuring the children’s welfare by removing children from their parents or caregivers and placing them in welfare residences. Even if there was no explicit legislated duty that the State must ensure the children’s welfare, there ought to have been an implied duty based on fundamental human rights.¹⁵¹ Some care must be taken in this argument due to the differing societal norms at the time of the abuse. Indeed, it has not always been accepted that children had individual rights independent of their parents.¹⁵² However, regulatory manuals that governed the administration of the residences suggest otherwise. They created a “progressive framework” encouraging an educational and sociable environment where rules were to be kept to a minimum, corporal punishment was to be used as a last resort and “[t]he

¹⁴⁸ Kauzlarich, Mullins and Matthews, above n 82, at 250.

¹⁴⁹ Kauzlarich, Mullins and Matthews, above n 82, at 250.

¹⁵⁰ Emphasis added.

¹⁵¹ See Smale “Justice Delayed, Justice Denied”, above n 35, citing Judge Henwood who was astonished that there was no duty of care articulated anywhere in the department.

¹⁵² Wesley-Smith “Seen and not heard”, above n 42, quoting Robert Ludbrook.

placement of children in 'secure' units was to be undertaken as an emergency measure, for limited periods, and subject to continual review".¹⁵³

Regrettably, these regulations were not always followed as bureaucratic failures and institutional dysfunction led to the disregard of the unsafe conditions in residences. "The lack of effective oversight was the biggest failure of the State".¹⁵⁴ For example:¹⁵⁵

... the Department of Social Welfare Head Office rarely undertook inspections, external Visiting Committees (established in the mid-1970s) were ad hoc in their approach, and Principals of the institutions had significant autonomy and independence in the way that Homes were run.

Quite contrary to the regulatory manuals, a former high-level member of the Child Welfare Department recalls that the goal of the institutions was clear – "a place to provide a secure place for children and young people".¹⁵⁶ Indeed, even though "secure" was to be undertaken as an emergency measure, for limited periods, there was a systematic practice of introducing children to institutional life by holding them in a cell-like room for days.¹⁵⁷

Between 1979 and 1982, the Government would confirm that 12,754 children and young people had passed through secure units nationwide, spending on average 3 days inside and 100 kids spent more than one month detained.¹⁵⁸

Often, the State failed to assess the needs of the children before placing them in a residence.¹⁵⁹ This has a particularly negative effect on Māori who were sent straight to an

¹⁵³ Stanley "The Victimization of Children in State-Run Homes in New Zealand", above n 30, at 47-48, citing Ian Lambie *Care and Protection Secure Residences: A report on the international evidence to guide best practice and service delivery* (Ministry of Social Development, May 2016).

¹⁵⁴ CLAS Report, above n 9, at 28.

¹⁵⁵ Stanley "The Victimization of Children in State-Run Homes in New Zealand", above n 30, at 47-48.

¹⁵⁶ Wesley-Smith "Seen and not heard", above n 42.

¹⁵⁷ Wesley-Smith "Seen and not heard", above n 42.

¹⁵⁸ Wesley-Smith "Seen and not heard", above n 42.

¹⁵⁹ CLAS Report, above n 9, at 27-28.

institution without regard for their need for cultural connections.¹⁶⁰ Moreover, although there has been no mention of an explicit policy to target Māori children, the evidence outlined earlier suggests the authorities “failed to act properly” by very quickly escalating Māori into the system.

Furthermore, the authorities failed to investigate complaints: “[I]f kids did complain, there was no official complaints procedure in those days – they were ignored”.¹⁶¹

Even workers didn’t feel safe making complaints to the department. Some approached the Auckland Committee on Racism and Discrimination (ACORD) instead. During the 1970s, ACORD amassed a large number of complaints and repeatedly asked the State for an inquiry:¹⁶²

Every time there was a new case regarding the abuse of children in welfare homes ... we sent the details to the Ministers. At no stage could the Crown say that they had no idea what was going on because we made sure they did.

Keith’s story described above evidences systemic failures. Other evidence comes from employees who worked in the institutions, witnessed abuse and reported it to their bosses, but were ignored. Ken Cuthbert worked in residential care in the 1970s. He says that “the vast majority” of his fellow staff members were decent and caring, but “it was the system that let everybody down”.¹⁶³ In 1982, Ken wrote a letter to a very senior social welfare officer raising concerns about five separate staff members who were the subjects of physical and sexual abuse complaints. He stated:¹⁶⁴

¹⁶⁰ CLAS Report, above n 9, at 27-28.

¹⁶¹ CLAS Report, above n 9, at 27-28; and Mike Wesley-Smith “Seen and not heard” (2 September 2017).

¹⁶² See Oliver Sutherland’s Wai 2615 Brief of Evidence at [13]-[17].

¹⁶³ Wesley-Smith “Cover-up in State care?”, above n 2.

¹⁶⁴ Wesley-Smith “Cover-up in State care?”, above n 2.

What concerns me in these situations is the method whereby the Department, particularly Head Office personnel, appear to cover up some situations by transferring the accused staff member to another position.

Furthermore, the State failed to train social workers to address sexual abuse; they were left “without a vocabulary for constructing sexual abuse” and therefore “could not pick up the warning signs”.¹⁶⁵ Although there was a lack of awareness of sexual abuse before the 1980s, “crossing a line like that is unacceptable whether it was back in the 70s or it’s today”.¹⁶⁶

The CLAS Report highlights some of the bureaucratic failures of the child welfare sector during the time of alleged abuse:¹⁶⁷

There seemed to be no high level overview of the department or of the children in its care. There was an apparent lack of expertise and skill, with many social work failures. Social work focused on making placements, and then the State involvement was often withdrawn or absent.

...

The most shocking thing was that much of this was preventable. If people had been doing their jobs properly and if proper systems had been in place, much of this abuse could have been avoided with better oversight.

...

The State delegated its responsibilities to others and did not connect properly or engage with the child after that point. The child was a ward in law only and some

¹⁶⁵ Wesley-Smith “Cover-up in State care?”, above n 2 citing Bronwyn Dalley *Family Matters: Child Welfare in Twentieth Century New Zealand*.

¹⁶⁶ Wesley-Smith “Cover-up in State care?”, above n 2.

¹⁶⁷ CLAS Report, above n 9, at 9, 12-13 and 27-28.

monetary arrangements were put in place. After that the child felt abandoned to his or her fate.

...

Sometimes decisions were made to return children home to abusive parents with no evidence that the family circumstances had improved.

The self-interest of the State – compromising children’s safety in the name of State legitimacy – is evident. It was not common practice in the 1960s and 70s to report complaints of abuse to police. The dismissal of complaints were justified in various ways: “products of petty jealousies of the girls concerned”; “complaints unfounded”; and “complainant didn’t want to give statement”.¹⁶⁸ Rob recalls why: “you would have to deal with the consequences of maybe a court appearance ... the thing around publicity is massive”.¹⁶⁹ This indicates that the State was prioritising its legitimacy and reputation over child safety and allowing a culture of indifference or denial towards wrongdoing within some of New Zealand’s residences.

Based on current indications, the New Zealand State’s willingness to place children in State care and subsequently neglect them undoubtedly constitutes systematic harm equated to State crime. Indeed, many of the cited failures align with the reasons why historical institutional child abuse in the Republic of Ireland was held to be systemic by the Ryan Commission.¹⁷⁰ Even though the offending is primarily at the omission end of the continuum, and therefore the State is supposedly less culpable, the State must be held criminally responsible for the harms it caused (as was the case in *Worksafe NZ v Ministry of Social Development*).¹⁷¹ Ironically, in July 2017, the Government admitted that “from

¹⁶⁸ CLAS Report, above n 9, at 9.

¹⁶⁹ Wesley-Smith “Cover-up in State care?”, above n 2.

¹⁷⁰ See especially, Government of Ireland *Report of the Commission to Inquire into Child Abuse* (The Stationary Office, Dublin, May 2009). (vol 4) at [6.10], [6.13], [6.20], [6.22]-[6.23] and [6.30].

¹⁷¹ *Worksafe NZ v Ministry of Social Development*, above n 92.

what we have heard from the [CLAS and] from the way that we are settling claims ... there has been systemic abuse in State care".¹⁷²

IV A Victimology of State Crime and Historical Institutional Child Abuse

This Part presents a victimology of State crime and historical institutional child abuse to illustrate that victims of historical institutional child abuse are indeed victims of State crime. The victimology analysis further confirms the State's criminal responsibility and the inadequacies of responses thus far.

A The Struggle for Recognition

Not all victims are equal – “whose suffering we recognize is a social construction”.¹⁷³ Recognition of victimhood is more likely when it upholds the State's interests; priority is given to those that are victims of offences against the State, not offences by the State. Whether an individual is labelled and recognised as a victim impacts their ability to seek redress for their victimisation.¹⁷⁴ This is particularly significant for victims of State crime who may not realise they are victims of State policy and who must challenge a system that has the resources to influence how such individuals are viewed by society.

Victims of historical abuse in New Zealand's State care institutions have only recently started to come to terms with their victimisation. For those that Stanley interviewed,¹⁷⁵

...the realization of having been victimized ... has been a journey. Their own identification as being a victim, and their recognition of the consequences of that victimization, has emerged over their lifetimes.

They have reached the stage where they feel the need to be officially recognised as victims.¹⁷⁶ However, given the State's control over the discourse of victimisation, victims

¹⁷² (6 July 2017) 723 NZPD unpaginated.

¹⁷³ Stanley “The Victimization of Children in State-Run Homes in New Zealand”, above n 30, at 51.

¹⁷⁴ Rothe and Kauzlarich, above n 103, at 9.

¹⁷⁵ Stanley “The Victimization of Children in State-Run Homes in New Zealand”, above n 30, at 47.

¹⁷⁶ Stanley “The Victimization of Children in State-Run Homes in New Zealand”, above n 30, at 49-51.

continue to lack the recognition and redress they deserve.¹⁷⁷ A number of variables contribute to the lack of recognition of victims of State crime and historical institutional child abuse.¹⁷⁸

First, the State can present victims as criminals and undeserving of sympathy. The ideal victim is said to be passive, innocent and vulnerable.¹⁷⁹ In contrast, victims of institutional child abuse are commonly perceived to be responsible for their treatment because they are, or must have been, offenders.¹⁸⁰

This approach to victimhood ignores the fact that victims and offenders are often the same people.¹⁸¹ Indeed, after being released from State care, victims struggled to reintegrate into society and often offended in retaliation to State-led victimisation.¹⁸² Consequently, society may regard State care victims as unworthy victims.

Secondly, “[w]ho is listened to, and who has the capacity to put themselves forward, is contextualized by structural relations of power linked to economy, gender, and ‘race’”.¹⁸³ In this context, the State has significant power and control over resources compared with victims whose lowly structural position and capabilities mean they lack voice. For example, most of those who pursue civil litigation rely on scarce legal aid and those who are in threatening environments such as prison are often too afraid to speak out.¹⁸⁴

Thirdly, victims often distrust the system and have no interest in using redress avenues offered by the State.¹⁸⁵ Victims are placed in a double bind where the State is their

¹⁷⁷ Stanley “The Victimization of Children in State-Run Homes in New Zealand”, above n 30, at 49-51.

¹⁷⁸ Rothe and Kauzlarich, above n 103, at 9.

¹⁷⁹ Stanley “The Victimization of Children in State-Run Homes in New Zealand”, above n 30, at 51.

¹⁸⁰ Stanley “The Victimization of Children in State-Run Homes in New Zealand”, above n 30, at 52.

¹⁸¹ Rothe and Kauzlarich, above n 103.

¹⁸² Stanley “The Victimization of Children in State-Run Homes in New Zealand”, above n 30, at 53; and CLAS Report, above n 9, at 31-32.

¹⁸³ Stanley “The Victimization of Children in State-Run Homes in New Zealand”, above n 30, at 56.

¹⁸⁴ Stanley “The Victimization of Children in State-Run Homes in New Zealand”, above n 30, at 56-57.

¹⁸⁵ Rothe and Kauzlarich, above n 103, at 10.

offender, but also their protector and resolver of claims.¹⁸⁶ A pertinent illustration of this dilemma is the MSD's Historical Claims Team.

Since 2006, as an alternative to civil litigation against the government, victims can pursue dispute resolution with MSD via its Historical Claims Team. MSD discusses a victim's case with them and carries out a "thorough enquiry" into victims' allegations of abuse.¹⁸⁷ It can offer an acknowledgement and apology, financial payment, counselling and access to services or education. If a claim includes allegations of physical or sexual abuse, MSD refers that information to the police who decide whether to carry out an investigation of any alleged criminal offending.¹⁸⁸ By June 2017, MSD had received 1,550 claims for abuse before 1993.¹⁸⁹ More than 1,000 claims have been closed, and 829 payments made "to acknowledge failings", the average amount being \$19,117.¹⁹⁰

However, the process' impartiality and independence are seriously questioned as the government departments preceding MSD were responsible for the institutions where the children were abused. Indeed, MSD has denied some of the most serious allegations of abuse by claiming the records are not complete and has redacted information from files.¹⁹¹ Sonja Cooper condemns the way things are being handled by the government:¹⁹²

It suits them to have this coercive process run by the government department itself where it's either "Take it or bye". That's pretty cost-effective, isn't it? You take a pretty damaged and vulnerable group of clients, you don't accept that the most serious abuse that they allege happened to them because there is nothing in the records ... We've had records recording abuse mysteriously vanish ... MSD gives absolutely no weight to propensity. A court would. An independent body would.

¹⁸⁶ Stanley "The Victimization of Children in State-Run Homes in New Zealand", above n 30, at 55.

¹⁸⁷ "Historic Claims" Ministry of Social Development <www.msd.govt.nz>.

¹⁸⁸ "Historic Claims" Ministry of Social Development <www.msd.govt.nz>.

¹⁸⁹ "Historic Claims" Ministry of Social Development <www.msd.govt.nz>.

¹⁹⁰ "Historic Claims" Ministry of Social Development <www.msd.govt.nz>.

¹⁹¹ Smale "Justice Delayed, Justice Denied", above n 35.

¹⁹² Smale "Justice Delayed, Justice Denied", above n 35.

Moreover, although victims do appreciate the government acknowledging their victimisation via a personal apology, they believe it does not go far enough as it avoids public disclosure and true accountability in the name of State legitimacy.

Māori victims are particularly reluctant to use the MSD process. Victims who submitted evidence for the Waitangi Tribunal claim expressed the inappropriate nature of the process for Māori:¹⁹³

I won't use the MSD process. It is demoralising. It does nothing for our tikanga but take it away. I know many other Māori who will not use the MSD process. You need to understand that we see the MSD process as a process put up by the Crown for the Crown. I see the MSD process and I see the people who locked me up: the Crown. I want nothing to do with it. I've been through the Waitangi Tribunal process and I enjoyed it. It was empowering, strengthening and uplifting. All my Whānau and hapu came together and supported each other when we gave our evidence before Judge Ambler. I know that if we had something like that for the hearing of our grievances in respect of State care they'd do the same thing and come along and tautoko. But I wouldn't take them along to a process like the MSD process, no way. Too Pākehā for me.

A Human Rights Commission report, drafted in 2011 in response to the United Nations' condemnation of the way the State was handling the claims, was never published.¹⁹⁴ One of its key recommendations was to establish an independent inquiry to deal with historical abuse claims. The Attorney-General, Christopher Finlayson, and Crown Law (counsel defending the government in civil litigation claims) shut down the report arguing that MSD's process was sufficiently impartial and that international law did not require an independent inquiry in the circumstances. Once again, the State is relied on legal technicalities and ignored victims' needs.

¹⁹³ Brief of Evidence of Ian Shadroch, above n 50, at [32].

¹⁹⁴ Smale "Justice Delayed, Justice Denied", above n 35.

Cooper believes the MSD process is used to mitigate risk and to avoid accepting full responsibility. A Cabinet paper lists some of the risks associated with the current backlog of claims, including “fiscal risk”, “loss of confidence and trust in the process”, “the potential of a renewed call for a public enquiry into historical claims” and “an alternative process being called for either by the Courts or through public opinion and pressure”.¹⁹⁵ The paper even discusses how the Government expects the number of claims to reduce as victims die out. The Cabinet paper has made one victim “furious” as it only talks about “settling the claims quickly and for less money ... Nowhere does the paper talk about doing the right thing”.¹⁹⁶

Many victims believe that these obstacles associated with State crime victimhood must be faced because “[i]f you don’t deal with it, it just stays with you and it rots your soul, it rots your very self. It’s corrosive”.¹⁹⁷ However, these obstacles should not persist. It is the State’s responsibility to provide a platform where a majority of those who have been victimised by the State feel as though it will be worthwhile to come forward. To uncover the totality of victimhood of historical institutional abuse, many believe an independent inquiry is necessary.¹⁹⁸ To restore justice and meet the victims’ needs, and to ensure true accountability of the State, the remainder of this paper argues that a response that recognises the State’s acts and omissions as crime is necessary.

V Responding to Historical Institutional Child Abuse as State Crime

A meaningful response to State crime must acknowledge the criminal nature of the State’s acts and omissions and cater to the unique needs of State crime victims. Although formal criminal prosecution of the State is not possible in this context – due to the State’s control over the law and the inappropriateness of creating a retrospective offence – New

¹⁹⁵ Cabinet Paper from the Office of the Minister for Social Development to the Chair Cabinet State Sector Reform and Expenditure Control Committee.

¹⁹⁶ Brief of Evidence of Ian Shadroch, above n 50, at [3].

¹⁹⁷ Stanley “The Victimization of Children in State-Run Homes in New Zealand”, above n 30, at 58-60.

¹⁹⁸ See “An Open Letter to the New Zealand Prime Minister” <www.neveragain.co.nz> and Committee on the Elimination of Racial Discrimination CERD/C/NZL/CO/21-22 at [34].

Zealand's legal system recognises the importance of criminalising the State in principle. This Part argues that a restorative justice process can be used to recognise the State's criminal responsibility for historical institutional child abuse and therefore achieve a measure of justice. The features of restorative justice – particularly its focus on victims' needs and social equality – most appropriately respond to historical institutional child abuse. Indeed, considering the conceptualisation of State crime and victimisation discussed above, “responses may need to be more than what is typically thought of as systems of accountability”.¹⁹⁹

This Part determines what “justice” looks like for victims of historical institutional child abuse and suggests that CLAS was a step in the right direction to achieving justice. It concludes that a restorative justice process, like the Canadian Indian Residential Schools Settlement Agreement 2006, can accommodate victims' justice interests and hold the state criminally responsible.

It must be kept in mind that:²⁰⁰

... in every case no mechanism of social control can serve as a form of justice for all.
... there will always be underlying factors to each system that can be easily critiqued, and there will be those victims and perpetrators who feel that whatever control was enacted did not succeed in a justice for all.

A Conceptualising Justice

In legal terms, justice is often categorised into three types: procedural (encompassing distributive), retributive and restorative.²⁰¹ Procedural justice is about fairness and equality. It requires fair processes and treatment and the fair distribution of resources. Retributive justice is offender-focused and is about punishment for wrongdoing with the

¹⁹⁹ Rothe “Complementary and Alternative Domestic Responses to State Crime”, above n 105, at 199.

²⁰⁰ Rothe “Complementary and Alternative Domestic Responses to State Crime”, above n 105, at 218.

²⁰¹ See, for example McAlinden and Naylor, above n 12, at 284.

intent to denounce and deter unacceptable behaviour. Restorative justice is more holistic, placing particular emphasis on victim-empowerment:²⁰²

... a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future.

Restorative justice aims to “establish or re-establish social equality in relationships.”²⁰³

This paper argues that victims of historical institutional child abuse prioritise restorative and procedural forms of justice. The focus is on victims’ justice interests for two reasons: the power imbalance between the State as the alleged offender and vulnerable victims of State crime, and the constant denial of justice victims have suffered to date. Certainly, others’ justice interests are important – such as due process and an accused’s right to be innocent until proven guilty. Obviously, it cannot be assumed that everything victims claim is true and therefore any response must incorporate due process aspects such as a fact-finding component.

B Justice Interests of Victims of Historical Institutional Child Abuse

Although victims want both formal justice – denunciation of the harm suffered and punishment for the offender – and informal justice – a broader range of outcomes – it is widely acknowledged that a majority of victims prioritise informal justice.²⁰⁴ Informal justice can provide victims with:²⁰⁵

²⁰² John Braithwaite “Restorative Justice: Assessing Optimistic and Pessimistic Accounts” (1999) 25 *Crime and Justice* 1 at 4-5; J. Llewellyn and R. Howse *Restorative Justice - A Conceptual Framework* (Ottawa: Law Commission of Canada, 1998) at 20; and Declan Roche’s works: “Dimensions of Restorative Justice” (2006) 62(2) *Journal of Social Issues* 217 at 220.

²⁰³ Jennifer Llewellyn “Dealing with the Legacy of Native Residential School Abuse: Litigation, ADR, and Restorative Justice” (2002) 52 *UTLJ* 253.

²⁰⁴ For example, see Elizabeth Stanley “Responding to State Institutional Violence” (2015) 55(6) *British Journal of Criminology* at 1162.

²⁰⁵ McAlinden and Naylor, above n 12, at 283-284. See Stanley *The Road to Hell*, above n 7, at 181.

... public acknowledgement of the harm they have suffered, by both the offender and the community; a genuine voice and some control over the process; mechanisms of genuine accountability, including an apology from the perpetrator and compensation or reparation; preventing the recurrence of the abuse; and forgiveness and reconciliation with offenders.

Based on the desires expressed by New Zealand victims who have sought justice thus far, two elements stand out: the need for the State to be held publicly accountable and accept responsibility for the wide range of harms and prevention of institutional child abuse in the future.²⁰⁶ Elizabeth Stanley has helpfully summarised three components of justice for victims of historical institutional child abuse “almost unanimously” chartered by those she interviewed: recognition, repair and prevention.²⁰⁷ Briefly, recognition is public acknowledgement of the impact of multiple layers of harm and acceptance that some individuals and agencies are responsible. Repair includes reparations, including an apology, counselling, opportunities to meet individual perpetrators or workers, prosecutions, and compensation. Prevention requires challenging the ongoing victimisation of children in State care.

The interests of New Zealand’s victims are similar to those identified in Kathleen Daly’s comparative research on redressing institutional child abuse in Canada and Australia: participation, voice and validation (akin to recognition), and vindication and offender accountability (akin to repair and prevention).²⁰⁸ Participation requires being informed of the options, developments, and negotiations in a case, understanding how the process works, as well as actively participating in and shaping the elements of redress.²⁰⁹ Voice is “telling the story of what happened and its impact in a significant setting, where a victim or survivor can receive public recognition and acknowledgment”.²¹⁰ Validation is

²⁰⁶ See, for example, Elizabeth Stanley “Responding to State Institutional Violence” (2015) 55(6) *British Journal of Criminology* at 1163.

²⁰⁷ See Elizabeth Stanley “Responding to State Institutional Violence” (2015) 55(6) *British Journal of Criminology* at 1159-1164; and Stanley *The Road to Hell*, above n 7, at 191-200.

²⁰⁸ Daly *Redressing* at ch 7.

²⁰⁹ Daly *Redressing* at 162.

²¹⁰ Daly *Redressing* at 162.

“affirming that the victim is believed ... and is not blamed for or thought to be deserving of what happened”.²¹¹ Vindication has two aspects: “vindication of the law (affirming *the act* was wrong, morally and legally) and vindication of the victim (affirming *a perpetrator’s actions* against the victim were wrong).”²¹² Vindication “can be expressed in symbolic and material forms of reparation (for example, apologies, memorialization, financial assistance) and standard forms of State punishment”.²¹³ Offender accountability requires perpetrators to take “active responsibility for the wrong caused, to give sincere expressions of regret and remorse, and to receive censure or sanction that may vindicate the law and a victim”.²¹⁴

Victims in New Zealand have expressed these desires in various ways. One victim focused on accountability and prevention:²¹⁵

What I want most is for someone to take responsibility for what happened and for someone to accept that it happened and to explain to me why it happened. I also want them to promise that it will not continue to happen in the future.

Another focused on participation – the desire to be heard and to engage in dialogue with those who have hurt them:²¹⁶

Whether [the abuser] is still alive or anything I don’t really know but I just feel that if he is still alive he needs to be confronted with what he did. I know probably nothing will come out of it, I don’t really expect him to go to jail or anything like that now, but I just really feel like I need him to be confronted with what he did to me which has caused me so many nightmares.

²¹¹ Daly *Redressing* at 162.

²¹² Daly *Redressing* at 162.

²¹³ Daly *Redressing* at 162.

²¹⁴ Daly *Redressing* at 162.

²¹⁵ Brief of Evidence of Tyrone Marks in Support of an Application for an Urgent Hearing Concerning the Settlement of Historical Grievances of Maori Children Put into State Care Dated 20 March 2017 (Wai 2615, #A3) at [94].

²¹⁶ Stanley *The Road to Hell*, above n 7, at 181.

Another prioritised recognition and validation:

The truth needs to come out ... There are things that make people into “monsters”. There are things that make people do the things they do... They need to acknowledge what happened to us and that, as a result of that, some of us have been fucked up ... I’m not saying that people don’t have the choices, because everyone’s got choices, but the government’s got to acknowledge their part.²¹⁷

Stanley emphasises that reparation must include a top-level public apology as a form of moral repair:²¹⁸

It would mean that the guilty State openly takes responsibility for heinous acts of violence and neglect. Apologising would help countless traumatised victims, across multiple generations, who endure shame, fear, despair and loss about their childhood and its legacies. Official acknowledgement would assist them to come to terms with the past and more easily move on.

Recent research with victims of institutional abuse in the Republic of Ireland has demonstrated that an apology is “foremost in what victims want as a form of restorative redress”.²¹⁹ Without a public apology where the State admits responsibility for the harms caused victims, there is no public accountability, only a sense of impunity.²²⁰

A general theme emerges that victims tend to prioritise symbolic and forward-looking accountability that ensures better futures for themselves, their families and future children in State care (a restorative outlook) rather than punishing those who inflicted the harms (a

²¹⁷ Stanley “A Responsive Response” at 1160.

²¹⁸ Stanley “Decades of brutality in our name, and Key and Tolley cover their ears – nothing to see here”, above n 97.

²¹⁹ McAlinden and Naylor, above n 12, at 300, citing Katherine O’Donnell ““I Believe the Women”: Justice for Magdalenes and Epistemic Injustice” (Paper presented at the Workshop on Understanding Institutional and Residential Welfare and Public Health in Twentieth-Century Ireland and Britain, Queen’s University Belfast, 28 November 2014).

²²⁰ Stanley “Reasons for vetoing inquiry into historic abuse don’t stand up”, above n 59.

retributive outlook). Therefore, a restorative justice process is more suited to respond to historical institutional child abuse as State crime.

C Restorative and Procedural Justice for Historical Institutional Child Abuse

Restorative justice has been “the dominant model of criminal justice throughout most of human history for all the world's peoples” and traditional practices have had a significant influence on the “emerging social movement for criminal justice reform of the 1990s”.²²¹ In New Zealand, for example, tikanga Māori influenced the creation of Family Group Conferences (FGCs), which respond to allegations of child abuse by convening a meeting with whānau, social workers, and any advocates for the child, and determine whether a child is “in need of care or protection”.²²² Vitally, the use of restorative justice processes is not limited to responding to those acts and omissions that violate criminal law and can be criminally prosecuted. Instead, restorative processes offer a type of informal justice and therefore accommodate the broad harm approach to defining State crime.

If the State supports a restorative justice process in the context of historical institutional child abuse in New Zealand, because of the common use of restorative justice as a response to crime, the State effectively acknowledges the criminal nature of their acts or omissions. Indeed, a restorative justice process is only effective where interested parties are willing participants, so the State's involvement as offender can be regarded as an admission of criminal responsibility.

Many restorative justice principles align with victim's justice interests. The aligning principles include: the focus on relationships; contextuality and flexibility; subsidiarity, inclusion, and participation (including dialogical and democratic aspects); and forward-

²²¹ Braithwaite “Restorative Justice: Assessing Optimistic and Pessimistic Accounts”, above n 202, at 2 and 5.

²²² See Oranga Tamariki Act 1989, s 22; and Jacinta Ruru “Kua tutū te puehu, kia mau” in M Henaghan and B Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) ch 2.

focused, solution-focused, and remedial outcomes (including comprehensive/holistic aspects).²²³

The unifying concept of restorative justice is “establishing, or re-establishing, a social equality”.²²⁴ Social equality exists when “relationships are such that each party has their rights to dignity, equal concern and respect satisfied”.²²⁵ The focus on relationships and social equality is particularly apt in this context where victims lack resources, are portrayed as unworthy and distrust State authority. The restoration of social equality results from the implementation of the other restorative justice principles.

Restorative processes achieve justice via a contextual assessment of relationships, not by applying an “abstract set of rules and principles”.²²⁶ The community is the context in which relationships occur and thus plays an important role in restoring relationships. This allows for a flexible approach to achieving justice. In this context, flexibility ensures that the broad range of harms caused by historical institutional child abuse can be accounted for. In comparison, retributive justice would be restricted to recognising only those harms criminalised in law.

Furthermore, a contextual-community focus can highlight the disproportionate effect on Māori and therefore encourage a Māori-specific response. The key to a community appropriate approach is to focus on the inherent flexibility of restorative processes and what they aim to achieve in lieu of criminal trials:²²⁷

... the design of restorative justice processes is for participant ownership and adaptation whereas the design of the Western criminal trial is for consistency – to be determinedly unicultural – one people, one law.

²²³ Jennifer Llewellyn “Dealing with the Legacy of Native Residential School Abuse: Litigation, ADR, and Restorative Justice” (2002) 52 UTLJ 253.

²²⁴ At 39 (emphasis added).

²²⁵ At 39.

²²⁶ At 40.

²²⁷ Braithwaite “Restorative Justice: Assessing Optimistic and Pessimistic Accounts”, above n 202, at 86.

Since around half of the children institutionalised were Māori, tikanga Māori must be incorporated into the process. This is the view expressed in the Waitangi Tribunal claim.²²⁸ Indeed, restorative justice principles align well with some of the foundations of tikanga Māori, especially: whanaungatanga (the centrality of relationships to Māori life); manaakitanga (nurturing relationships, looking after people, and being very careful how others are treated); and utu (the principle of balance and reciprocity).²²⁹

The principles of subsidiarity, inclusion and participation accommodate victims' justice interests of participation, voice and recognition. Emphasis should be placed on the discursive nature of the process. Parties should be able to:²³⁰

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

This provides an inclusive forum for victims' stories to be told and centralised. Allowing victims to tell their story in their own words has important cathartic benefits. Moreover, doing so in a public forum will increase societal awareness and understanding.²³¹ Victims should be able to meet face-to-face with individual perpetrators, institutional leaders, or State representatives where possible. Returning to Keith's story, he spoke of the benefits of meeting his offender: "when I met him, I had all the power, and I've broken every spell he ever had over me, and that was great. That was the biggest thing".²³²

²²⁸ Statement of Claim, above n 2, at [258].

²²⁹ Carwyn Jones *New Treaty New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 38.

²³⁰ McAlinden and Naylor, above n 12, at 297-298, citing 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 at 383.

²³¹ McAlinden and Naylor, above n 12, at 298.

²³² Stanley *The Road to Hell*, above n 7, at 253.

Restorative justice aims to directly engage offenders to help them appreciate the impact of their actions on victims and significant others and ensure accountability for their actions ... This may be especially important in the context of historical institutional child abuse, in challenging prevailing cultural attitudes protective of the Church or the State.²³³

Regardless of whether a victim believes an apology is genuine, a public apology is a “powerful symbol of the public and self-shaming of the offender” which “may ultimately confirm ethical and social norms and validate efforts aimed at correcting any perceived wrongdoing”.²³⁴

Additionally, restorative justice can incorporate many elements of procedural justice. Procedural justice generally refers to:²³⁵

... the procedures and decisions that help shape and inform an outcome, and the impact that this has on how fairly participants feel they have been treated and whether their needs have been met.

Commentators emphasise the importance of procedural justice in the context of historical institutional child abuse because of its ability to incorporate many core benefits for victims.²³⁶ Procedural justice can affirm victims’ voices and dignity in proceedings and alleviate secondary victimisation.²³⁷ In fact:²³⁸

Some of the core concerns of critics of restorative justice about exacerbating power imbalances and encouraging repeat victimisation, are largely mitigated by the emphasis on victim empowerment and active participation, which are regarded as key components of restorative processes.

²³³ McAlinden and Naylor, above n 12, at 299-300.

²³⁴ McAlinden and Naylor, above n 12, at 299-300.

²³⁵ McAlinden and Naylor, above n 12, at 284.

²³⁶ See McAlinden and Naylor, above n 12; and Daly *Redressing* at ch 7.

²³⁷ McAlinden and Naylor, above n 12, at 285.

²³⁸ McAlinden and Naylor, above n 12, at 297.

Critically, any restorative justice process must be particularly attentive in ensuring adequate safeguards are put in place. Indeed, “[t]here can be little doubt that courts provide superior formal guarantees of procedural fairness”.²³⁹ Safeguards are particularly important in this context to moderate the power imbalance held by the State as the accused, and to prevent revictimisation considering the traumatic nature of the harms suffered, such as sexual abuse.²⁴⁰

Therefore, it is critical that victims are central to the process and proactively advised of their rights.²⁴¹ Braithwaite believes that:²⁴²

The best remedy to this problem is systematic attention in the restorative justice preparatory process to empowerment of the most vulnerable parties ... and systematic disempowerment of the most dominant parties ...

This can be achieved with simple procedural rules such as allowing the offender and victim to give their version of events first.²⁴³

Notably, restorative justice is “not about fact-finding for the determination of guilt, but rather reparation in the aftermath of harm and devising an appropriate response to

²³⁹ Braithwaite “Restorative Justice: Assessing Optimistic and Pessimistic Accounts”, above n 202, at 103.

²⁴⁰ McAlinden and Naylor, above n 12, at 297, citing Annie Cossins, ‘Restorative Justice and Child Sex Offences: The Theory and the Practice’ (2008) 48(3) *British Journal of Criminology* 359 and 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.

²⁴¹ Braithwaite “Restorative Justice: Assessing Optimistic and Pessimistic Accounts”, above n 202, at 103.

²⁴² Braithwaite “Restorative Justice: Assessing Optimistic and Pessimistic Accounts”, above n 202, at 96-97.

²⁴³ Braithwaite “Restorative Justice: Assessing Optimistic and Pessimistic Accounts”, above n 202, at 97.

admitted behaviour”.²⁴⁴ To ensure due process, a restorative process may need to incorporate features of a public inquiry as “the focus of public inquiries is on adjudication and establishing fault or responsibility for particular acts or omissions”.²⁴⁵ A feature of common law jurisdictions, “public inquiries represent a State-sponsored, independent and typically judicially chaired review of events, usually focused on a specific controversial occurrence” involving State or State-supported harms.²⁴⁶ The aims of public inquiries have been summarised as “scandal control, blame attribution and lesson-learning”.²⁴⁷

Elizabeth Stanley and Dr Keri Lawson-Te Aho have praised the Australian Royal Commission into Institutional Responses to Child Sexual Abuse for “having an enormous impact on laws, guidelines, institutional norms and training” by developing “highly-detailed, rights-conscious and child-focused provisions into national standards of care”.²⁴⁸

In this sense, the public inquiry process aligns with a restorative vision of justice founded on forward-focused and solution-focused methods of accountability – such as policy reform, reparation payments, and the provision of services like counselling – compared with a retributive vision of founded on individual, alienating methods of accountability such as on imprisonment and fines.²⁴⁹ This feature of public inquiries aligns well with victims’ desires for the prevention of future institutional child abuse and neglect.

²⁴⁴ McAlinden and Naylor, above n 12, at 286, citing Carolyn Hoyle and Richard Young “Restorative Justice: Assessing the Prospects and Pitfalls” in Mike McConville and Geoffrey Wilson (eds) *The Handbook of the Criminal Justice Process* (Oxford University Press, 2002) 525 at 525.

²⁴⁵ McAlinden and Naylor, above n 12, at 286, citing Carolyn Hoyle and Richard Young “Restorative Justice: Assessing the Prospects and Pitfalls” in Mike McConville and Geoffrey Wilson (eds) *The Handbook of the Criminal Justice Process* (Oxford University Press, 2002) 525 at 525.

²⁴⁶ McAlinden and Naylor, above n 12, at 291.

²⁴⁷ Ian Steele “Judging Judicial Inquiries” at 740.

²⁴⁸ Submissions at select com stage for Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill.

²⁴⁹ J. Llewellyn and R. Howse *Restorative Justice - A Conceptual Framework* (Ottawa: Law Commission of Canada, 1998) at 40.

However, public inquiries lack the victim focus that is possible in restorative processes, and therefore ought only to be a component of a response, not a response in and of itself. McAlinden notes that public inquiries can limit “participation to certain classes of victim” and “dominant modes of legal/political discourse”.²⁵⁰ For example, the Republic of Ireland Commission to Inquire into Child Abuse (the Ryan Commission – a judge-led model with a statutory remit) was criticised for “[f]ocusing on a limited number of exemplary cases” which tended to “individualise narratives of victimhood and obscure broader patterns of victimisation” including secondary and tertiary victims, such as the families of victims.²⁵¹ This risks concealing the systemic nature of, and State responsibility for, institutional abuse and neglect.

To conclude, although restorative justice responses to institutional child abuse are “only in their infancy”, some jurisdictions have put in place such processes.²⁵² The remainder of this Part applies a restorative justice framework to former and existing responses to historical institutional child abuse to assess their suitability: New Zealand’s now defunct CLAS and the Canadian Indian Residential Schools Settlement Agreement 2006.

D The Confidential Listening and Assistance Service: A “Halfway House”

CLAS operated from 2008–2015. It was a Panel chaired by Judge Carolyn Henwood that heard, in confidence, testimonies from 1,103 individuals who experienced abuse and neglect in State care before 1993.

[It] was set up as a kind of Truth and Reconciliation forum, modelled along the lines of the post-apartheid hearings in South Africa in the 1990s. The aim was to provide a forum for people with concerns regarding their treatment in State care to come forward for assistance. This was a visionary way to provide customised help to specific individuals and it has been successful in that.²⁵³

²⁵⁰ McAlinden and Naylor, above n 12, at 298, citing Barbara Hudson “Beyond White Man’s Justice: Race, Gender, and Justice in Late Modernity” (2006) 10(1) *Theoretical Criminology* 29 at 34.

²⁵¹ McAlinden and Naylor, above n 12.

²⁵² McAlinden and Naylor, above n 12, at 295-296.

²⁵³ CLAS Report, above n 9, at 9.

CLAS did not determine responsibility or liability for the abuse and neglect. Instead, CLAS provided access to information about redress options and, if desired, referred them to the appropriate agency to pursue a formal claim.²⁵⁴ Importantly, victims were able to speak to an official body, chaired by a Judge, independently appointed and supported by a “neutral” government department.²⁵⁵

The CLAS report, *Some Memories Never Fade*, acknowledged the extreme abuse and neglect suffered by individuals in State care. It recommended that the Government:²⁵⁶

Acknowledge the need for accountability in the social services sector by designing and implementing an independent body (such as the IPCA) to resolve historic and current complaints to hold the sector to account.

Although most recommendations in the Report have not been adopted, the Government claims to have used the Report to inform the redrafting of Oranga Tamariki (Children’s and Young People’s Well-being) Act 1989.²⁵⁷ However, legislative reforms have been critiqued for not going far enough.²⁵⁸

While CLAS operated, it was effective in delivering some restorative justice aspects. One of the Panelists, Areata Kopu, praised the service for providing a platform for victims to tell their story:²⁵⁹

There was recognition for the need for people to just be able to speak. There was healing in simply talking and having someone listening. For the short time that it was in place it provided a platform for many Māori who had nowhere else to go.

²⁵⁴ “Historic Claims” Ministry of Social Development.

²⁵⁵ CLAS Report, above n 9, at 20.

²⁵⁶ CLAS Report, above n 9, at 37. Note, The Independent Police Conduct Authority is an independent body that considers complaints against New Zealand Police and oversees their conduct.

²⁵⁷ Office of the Minister of Social Development, above n 36.

²⁵⁸ See Part VI.

²⁵⁹ Brief of Evidence of Areata Kopu, above n 38, at [27].

However, she also expressed her disappointment at the lack of cultural understanding on the Panel: “I had a challenge getting the rest of the panel to look at things differently and to try to look at it from a Māori perspective. Culturally it was very difficult”.²⁶⁰

Victims praised the service in feedback from the Client Satisfaction Survey, reporting that attending the service gave them a sense of relief that people were interested in what happened.²⁶¹ One victim acknowledged that “it would have possibly been the first time I felt human, with understanding people and was not looked upon as a piece of dirt”.²⁶² These statements illustrate that CLAS gave victims voice and validation.

Therefore, CLAS had some success in addressing victims’ justice interests such as participation, voice and validation. However, CLAS offered little in the way of reparation, public acknowledgement and offender accountability: the service did not hear evidence or make findings and one victim highlighted the lack of reparation provided – “the ‘issue’ is still a great impact in my daily life”.²⁶³ Members of the Panel regret that CLAS ended up as a halfway house. After CLAS had been wound up, people were still calling to use the service.²⁶⁴ Henwood regrets that the Government “didn’t pursue it because they didn’t see the value of it. In one sense I don’t think they paid attention. I think they threw away a pearl”.²⁶⁵

E The Canadian Indian Residential Schools Settlement Agreement 2006

The Canadian Indian Residential Schools Settlement Agreement (the Agreement) provides another example of a type of restorative justice response to historical institutional child abuse:²⁶⁶

²⁶⁰ Brief of Evidence of Areata Kopu, above n 38, at [21].

²⁶¹ CLAS Report, above n 9, at 11.

²⁶² CLAS Report, above n 9, at 11.

²⁶³ CLAS Report, above n 9, at 11 and 23.

²⁶⁴ Brief of Evidence of Areata Kopu, above n 38, at [24].

²⁶⁵ Smale “Justice Delayed, Justice Denied”, above n 35, citing Henwood.

²⁶⁶ Mayo Moran “The role of reparative justice in responding to the legacy of Indian Residential Schools” (2014) 64(4) University of Toronto Law Journal 529 at 529-530.

Signed by over 70 parties including the Government of Canada, most major churches as well as Aboriginal organizations and legal counsel, and at an estimated worth of approximately \$5 billion, it is the largest class action settlement in Canadian history. In the range of institutions it creates and remedies it grants, it also represents the most ambitious effort by a sitting government anywhere in the world to comprehensively respond to widespread historic injustice.

The relevant historic injustice was the Indian Residential School (IRS) policy in Canada. Between 1879 and 1986 approximately 150,000 First Nations children were forcibly taken from their families and placed in residential schools.²⁶⁷ Like in New Zealand's welfare residences, physical and sexual abuse and neglect were systemic.²⁶⁸ Additionally, the schools suppressed the children's native language, culture and beliefs.²⁶⁹ The Canadian State appeared to have the goal of eradicating the indigenous culture, much more overtly so than was the case in New Zealand with Māori.²⁷⁰

A sudden mass of civil litigation the late 1990s and early 2000s promoted the negotiation of the Agreement. It aimed not just to settle this litigation, but also, more meaningfully, to achieve a "fair, comprehensive and lasting resolution" to the grievous, large-scale historic wrongdoing associated with the IRS legacy, "shaped by a distinctively reparative vision of justice".²⁷¹

The Agreement consists of forward-looking and reparative/compensatory components. The main forward-looking component is the Truth and Reconciliation Commission (TRC). Others include the healing fund and educational credits for the children of claimants. There are two reparative components: the Common Experience Payment (CEP), and the Independent Assessment Process (IAP).

The TRC is particularly noteworthy as "[s]uch commissions have tended to be seen as

²⁶⁷ Moran, above n 266, at 531.

²⁶⁸ Moran, above n 266, at 531.

²⁶⁹ Moran, above n 266, at 531.

²⁷⁰ Moran, above n 266, at 558.

²⁷¹ Moran, above n 266, at 530-531.

institutions that move repressive, undemocratic regimes toward more egalitarian democracy, particularly in the wake of regime change”.²⁷² Canada’s TRC is pioneering for western democracies like New Zealand who can also adopt the method to address historic injustices.

The explicitly restorative nature of the TRC is highlighted when comparing it to a public inquiry:²⁷³

... a truth commission might be considered a specialized form of public inquiry insofar as both are independent, investigative bodies aimed at promoting accountability. However, a public inquiry is a judicial body with powers of investigation, whereas a truth commission is a non-judicial body that may or may not have investigative powers. In turn, whereas *public education and shifting social attitudes* might be part of a public inquiry’s role, these are explicit features of a truth commission.

Public education and awareness were made possible through former students, their families, and communities having the opportunity to share their IRS experiences.²⁷⁴ Key indigenous organisations such as the Assembly of First Nations have placed their greatest hopes on the TRC for achieving the larger collective aims of well-being and reconciliation.

These features directly align with the restorative justice principles of re-establishing social equality, participation, and forward-focused outcomes. They also correspond with the societal awareness purpose of criminalising the State. Something like a TRC would help New Zealand to understand the effects of its own colonisation.

²⁷² Moran at 554-555; and Rosemary Nagy “The Truth and Reconciliation Commission of Canada: Genesis and Design” (2014) 29(2) Canadian Journal of Law and Society 199 at 200.

²⁷³ Rosemary Nagy “The Truth and Reconciliation Commission of Canada: Genesis and Design” (2014) 29(2) Canadian Journal of Law and Society 199 at 200, citing Kim Stanton, “Reinventing the Public Inquiry: Truth Commissions in Established Democracies” (paper presented at International Studies Association, San Diego, CA, April 2, 2012). Emphasis added.

²⁷⁴ Moran at 532.

The CEP and IAP components complement the TRC and aim to redress past wrongs through compensation. These components align with the victims' justice interests of reparation and offender accountability. The CEP responds to systemic harms perpetrated by the IRS legacy, whereas the IAP responds to individual harms.

In effect, the CEP provides recognition to every single person who attended an IRS as:²⁷⁵

... whatever else their experience, the fact of being taken forcibly away from family and community and put into an institution designed to eradicate all of the markers of Aboriginality – language, spirituality, and culture – was in and of itself wrong.

Former students received \$10,000 for the first school year (or part of a school year) plus \$3,000 for each school year (or part of a school year) thereafter.²⁷⁶ Any left over credit is invested in Aboriginal education.²⁷⁷

The CEP addressed the difficult challenge of capturing the nature of the wrong in question – broad systemic harms including those not proscribed by law. This was particularly important due to the significant loss of family, culture, language and religion – central aspects of victims' suffering.²⁷⁸ Indeed, the Prime Minister's apology, although not formally part of the Agreement, emphasised the systemic wrongs at the root of the system:²⁷⁹

... the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions, that it created a void in many lives and communities ... We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately

²⁷⁵ Moran at 557-558.

²⁷⁶ Moran at 557.

²⁷⁷ Moran at 557.

²⁷⁸ Moran at 556.

²⁷⁹ Moran at 558.

controlled, and we apologize for failing to protect you. Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.

New Zealand's victims, and particularly those who are Māori, deserve an apology of this magnitude. It would be difficult to argue for a blanket payment to all of those institutionalised as only half suffered cultural deprivation as Māori and the cultural deprivation was less deliberate: New Zealand, children were supposedly institutionalised for welfare reasons (although Māori were often targeted simply for being different), whereas in Canada, the policy was to institutionalise children *because* they were First Nations. This suggests the need for a more case-specific compensation model in New Zealand, especially as many children are thought to have had a good experience in state care.

The IAP explicitly displaces the ordinary civil litigation model, including the burden of satisfying vicarious liability or negligence rules.²⁸⁰ It is an independent adjudication process, run by an independent Adjudication Secretariat chosen by representatives of the parties involved, that examines evidence to determine awards for abuse, other wrongful acts and loss of income. Awards range from \$5,000 to \$275,000 with the goal of generating compensation levels “consistent with or more generous than court awards” by transparently applying the factors used by the courts.²⁸¹

The independent nature of the IAP “marked a vital departure from the earlier ADR process” run by the Canadian Government.²⁸² This is certainly an aspect that New Zealand should adopt considering the in-house nature of the MSD Historical Claims Team and the consequent lack of trust and satisfaction victims experience.

Furthermore, the IAP is explicitly claimant-centred. Claimant-centred features include: expertise of adjudicators in indigenous culture and history, and sexual and physical abuse

²⁸⁰ Moran at 564.

²⁸¹ Moran at 563-564.

²⁸² Moran at 559.

issues; preference given to the claimant's choice of venue; its inquisitorial rather than adversarial approach – only the adjudicator can question witnesses and the role of alleged perpetrators is limited; the incorporation of cultural ceremonies into the hearing; the provision of some legal aid by the Canadian Government; the limits on time delays, including specific timelines and simplified legal rules and procedures; and the significance of income loss payments.²⁸³

All of these features directly address many of the criticisms and failings of the State's responses to historical institutional child abuse in New Zealand thus far, and would therefore provide significant benefits to New Zealand's victims. The significance of income loss payments can be illustrated by Tyrone Marks' legacy. Tyrone Marks is one of the aforementioned Waitangi Tribunal claimants who was institutionalised as a boy. In state care, he was physically and sexually abused, denied an education, and given electroshock therapy.²⁸⁴ He has worked hard to turn his life around and studied to become a counsellor, yet cannot find relevant and stable work because of the legacy of his past.²⁸⁵ Tyrone participated in the MSD process but said the compensation was "so low it was an insult".²⁸⁶ Income loss payments would provide meaningful redress to many victims. Indeed, New Zealand should avoid criticisms that the Northern Ireland inquiry has faced for its lack of adequate support and redress mechanisms for victims.²⁸⁷

The IAP has received over three times the number of claims than originally estimated and has consequently made considerable adjustments. New Zealand would need to be wary of underestimating numbers, especially considering the Governments unrelenting argument that the extent of the harms are already known.

²⁸³ Moran at 559-562.

²⁸⁴ Brief of Evidence of Tyrone Marks, above n 215.

²⁸⁵ Brief of Evidence of Tyrone Marks, above n 215.

²⁸⁶ Brief of Evidence of Tyrone Marks, above n 215, at [94].

²⁸⁷ McAlinden and Naylor, above n 12, at 288, citing see, eg, Chris Moore "What Northern Ireland is REALLY Offering Child Abuse Survivors" (5 October 2011) The Detail <www.thedetail.tv>; and "Northern Ireland Historical Abuse Victims Issue Plea for Compensation" (17 May 2016) The Belfast Telegraph <www.belfasttelegraph.co.uk>.

Finally, the Canadian model bears some resemblance to the hybrid restorative-inquiry model proposed by McAlinden.²⁸⁸ The hybrid model is two-tiered, the latter tier consisting of two pathways. The first tier would be a “confidential committee” that provides opportunities for the victim’s voice to be heard and for the compilation of a public record of narratives. In the second tier, “victims could choose either an ‘investigatory’ route, with a view to adversarial fact-finding and possible prosecution, or a ‘restorative’ route, as an alternative gateway to conferencing with willing offenders”.²⁸⁹ Other commentators have similarly suggested the need for “process pluralism” to deal with modern mass harms that the formal legal system has not yet developed the capacity to address.²⁹⁰

To conclude this Part, considering the justice interests of victims and the evaluation of existing restorative models, it seems that New Zealand should adopt a novel, context-specific restorative justice process that incorporates victim-centred procedures, public awareness, and meaningful forward-looking solutions including significant compensatory payments and child welfare policy reform. The Canadian model would not be a bad place to begin.

*VI Conclusion: “E Kore Ano: Never Again”?*²⁹¹

The Government argues that the July 2017 legislative reforms of the Oranga Tamariki (Children’s and Young People’s Well-being) Act 1989 satisfy the victims’ interest of prevention.²⁹² The reforms changed the purposes and principles of the Act to better ensure young people are at the centre of decision-making, while considering them within the context of their family, whānau, hapū, iwi, family groups, and broader networks and

²⁸⁸ McAlinden and Naylor, above n 12.

²⁸⁹ McAlinden and Naylor, above n 12, at 284.

²⁹⁰ See Carrie Menkel-Meadow “Unsettling the lawyers: Other forms of justice in Indigenous claims of expropriation, abuse, and injustice” (2014) 64(4) University of Toronto Law Journal 620.

²⁹¹ “‘Never again’ - HRC calls for State abuse inquiry”, above n 10.

²⁹² See “Investing in New Zealand’s Children: legislative reform” Ministry of Social Development <www.msd.govt.nz>. The amendments will come into force no later than 1 July 2019.

communities.²⁹³ It proposes to strengthen information sharing to keep vulnerable children and young people safe from harm and enhance complaints processes.

When first introduced in Parliament, the Bill faced strong backlash, especially concerning the removal of the State obligation to place Māori children within their whānau, hapu or iwi.²⁹⁴ In the end, this obligation was reinstated, however, Moana Jackson believes the Act “adopts Māori terminology without lessening the possibility that children may still be put at risk” in State care.²⁹⁵ The Labour and Green parties opposed the legislation as it did not place sufficient emphasis on the whānau-first principle and on other cultural rights such as access to language and cultural practices.

The Children’s Commissioner believes that Oranga Tamariki is in a position to “address the underlying system issues” and “design transformational residences of the future, providing young people with a solid platform for enduring change that enables them to grow into flourishing adults”.²⁹⁶ However, it must work diligently to achieve this goal. The Ministry must: develop and implement a clear national strategy for meeting children’s needs, particularly those of Maori children; commit to increased independent monitoring of residences; and create an external, independent Advisory/Reference Group to provide advice on best practice.²⁹⁷ The Children’s Commissioner went as far as suggesting that it may be that we should consider phasing care and protection residencies out: “I think the tide has gone out on that sort of approach. We need smaller, securer, well-supervised community-based residences”.²⁹⁸

²⁹³ See especially ss 5 and 6.

²⁹⁴ See for example H Kaimarama and K Scarlet “A Critical Analysis of the Children, Young Persons, and Their Families Act (Oranga Tamariki) Legislation Bill” *Council Brief* (online ed, Wellington, February 2017) at 6; and New Zealand Law Society “Submission to the Social Services Committee on the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 2016” at [114] and [115], which described the proposal as “a radical departure”, clashing with the United Nations Convention on the Rights of the Child.

²⁹⁵ Jackson, above n 8. See s 7A.

²⁹⁶ Office of the Children’s Commissioner, at 6.

²⁹⁷ Office of the Children’s Commissioner, at 7.

²⁹⁸ Anna Bracewell-Worrall “Youth residences violent, bleak and prison-like – Children's Commission” (15 May 2017) Newshub <www.newshub.co.nz>.

The implementation of these recommendations will be more effective if New Zealand first learns from its past in two respects. First, regarding the extent of and reasons behind historical institutional child abuse. This paper has argued that the State should be held criminally responsible for historical institutional child abuse in New Zealand by responding to it in a way that recognises its criminal nature. Existing evidence illustrates that the abuse and neglect had causal roots located in organisational systems and policies of the State. More information is needed to ensure these systemic failures are comprehensively addressed. And secondly, from the successes of past restorative justice processes. New Zealand has been innovative and successful in the restorative justice space before, considering the widespread adoption of Family Group Conferences in other jurisdictions. A novel, context-specific restorative justice process that incorporates victim-centred procedures, public awareness, and meaningful forward-looking solutions including significant compensatory payments and child welfare policy reform should be pursued by the newly elected Government. Indeed, whoever the new Prime Minister will be, if they are to be a true leader, they will need to be willing to face the challenge of the scrutiny of the past.²⁹⁹ To avoid action will be to perpetuate yet another “moral and fiscal failure”.

Word Count: 15,349

²⁹⁹ Wesley-Smith “Seen and not heard”, above n 42, citing Oliver Sutherland.

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