Submission to the Senate Community Affairs References Committee Inquiry into Children in Institutional Care

By Professor Reg Graycar and Jane Wangmann,
Faculty of Law
University of Sydney

Introduction and context of this submission

We welcome the Senate Community Affairs References Committee's inquiry into Children in Institutional Care in Australia. The negative experiences of children in a variety of institutions have increasingly been brought to the attention of governments and the public in Australia (as well as in many other countries). It is indeed a very pressing issue that requires the development of appropriate systems of responding to and repairing the harms that many children have experienced in these institutions.

We are currently investigating civil legal responses to systemic injuries (ie injuries such as institutional child sexual assault and abuse more generally; the experiences of the Stolen Generations; the taking of children from their single mothers for adoption; the forced sterilisation of women with disabilities etc). This research will examine the limitations of the current tort system to adequately address and compensate victims of systemic injuries (eg through the operation of statutes of limitations;[1] evidentiary issues;[2] the impact of the passage of time; problems in attributing responsibility;[3] and occasionally jurisdictional issues). There is a clear disjunction between the types of injuries for which the tort (civil damages) system was designed, and the broader range of injuries that happen to people in society, particularly injuries of a systemic, rather than a one-on-one, nature.[4] As part of our research, we are examining alternative methods of redress or reparations that have been developed, primarily overseas, which are seen to be more responsive to these particular types of harms.

The main aim of our research is to develop more effective and appropriate responses to systemic injuries. In order to achieve this, the research will:

- investigate barriers created by traditional legal categories and doctrines that prevent people who have experienced forms of systemic injury from receiving adequate recompense;

---

[1] See Reg Graycar and Jenny Morgan, 'Disabling Citizenship: Civil Death for Women in the 1990s?' (1995) 17 *Adelaide Law Review* 49; Queensland Law Reform Commission, *Review of the Limitation of Actions Act 1974* (Qld), Report No 53, 1998.

[2] See *Lorna Cubillo and Peter Gunner v Commonwealth* (2000) 174 ALR 97 affirmed on appeal (2001) 183 ALR 249, and see Jennifer Clarke, 'Casenote: *Cubillo v Commonwealth*' (2001) 25 *Melbourne University Law Review* 218. See also *Williams v The Minister Aboriginal Land Rights Act 1983 and The State of New South Wales* [2000] NSWCA 255.

[3] The issue of vicarious liability has been reconsidered in Canada and England in the context of institutional abuse of children: see *Bazley v Curry* [1999] 2 SCR 534; *Lister and Others (AP) v Hesley Hall Limited* [2002] 1 AC 215. Compare, however, the decision of the High Court of Australia in *New South Wales v Lepore; Rich v Qld; Samin v Qld* [2003] HCA 4.

[4] For a clear account of some of the problems arising from the interface between standard tort doctrine and attempts to seek legal redress for systemic injuries (focussing on sexual abuse) see Bruce Feldthusen, 'The Canadian Experiment with the Civil Action for Sexual Battery' in Nicholas J Mullany (ed), *Torts in the Nineties*, LBC, North Ryde, 1997.

- explore the roles of monetary compensation, restorative justice approaches such as acknowledgement and apology, and a range of therapeutic responses such as counselling and medical treatment for people who have been harmed; and
- design a workable system of redress for survivors of systemic harms and make recommendations for changes to the tort system that are responsive both to the needs of survivors of various forms of abuse and injury and to concerns about the perceived 'liability crisis'.

This research is ongoing. In this submission, we present some of our initial findings from the literature, case law and various redress packages that we consider may be useful to the Committee in its inquiry. In particular we draw to the Committee's attention various articles/ reports and examples of redress packages that may assist the committee in its deliberations. At the outset it needs to be recognised that different victims will choose to explore different methods (and are seeking different outcomes from that method) of resolution to the abuse that they suffered as a child in an institution. This necessitates creating a range of responsive options for seeking redress – and that will require changes to the civil litigation system as well as designing specific redress packages.[5]

Key inquiries

In recent years there have been a number of key inquiries in Australia and overseas that have detailed the experiences of children within a range of different institutional settings.

Law Commission of Canada: *Restoring Dignity*

We draw the Committee's attention to the comprehensive work in this area that has been undertaken by the Law Commission of Canada. The final report, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, was published in 2000. There are also a number of background papers associated with the Law Commission's work that should be of primary interest to the Committee.[6]

As well as acknowledging that the needs of survivors are diverse and unique, the Law Commission also identified a number of common 'needs'. These are:

- an 'acknowledgement of the harm done and accountability for that harm';
- an apology;
- access to therapy/counselling and education;
- compensation;
- a memorial;
- commitment to 'raising public awareness of institutional child abuse and preventing its recurrence'.[7]

Our research also emphasises the essential nature of these components in assisting victims of abuse in institutions with their healing.

---

[5] See conclusion in Bruce Feldthusen, Olena Hankivsky and Lorraine Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' (2000) 12 *Canadian Journal of Women and the Law* 66, at 112.

[6] The final report of the Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, 2002, along with the Executive Summary and the various background papers are available at <http://www.lcc.gc.ca> (last accessed on 17 July 2003).

[7] Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, Executive Summary, 2000, p 3.

Ireland

Reference should also be had to the ongoing work in this area being undertaken in Ireland. On 11 May 1999, the An Taoiseach, Mr Bertie Ahern TD gave an apology[8] on behalf of the Irish Government and the community for the abuse suffered by children in residential schools. Following this apology an inquiry was established into the extent and nature of child abuse by the Commission to Inquire into Child Abuse (known as the 'Laffoy' Commission).[9] The Laffoy Commission is not expected to complete its final report until 2005.[10] The Irish Government has also recently created the Residential Institutions Redress Board[11] to deal with applications for redress and a National Office for Abuse Victims (NOVA) to provide support, advice and other assistance to people who suffered abuse as a child in a residential institution. This multi-pronged approach – with its simultaneous arms (inquiry, redress and support) - is an interesting example of a process for addressing institutional child abuse. It is also an unusual process. In Australia, and in other jurisdictions, a formal inquiry has tended to be followed by a separate fight for redress/compensation (often not eventuating – at least in Australia[12]) and other supportive measures. Yet all three actions (inquiry, redress and support) form integral components of what amounts to redress or reparations.

The civil litigation process

The primary focus of our research is the difficulties faced by people who have suffered systemic injuries (such as institutional child abuse) in 'successfully' pursuing compensation though the civil court system. Claims of this nature encounter a number of different barriers that make it virtually impossible to achieve compensation. One of the main reasons for this is that the tort system (and in particular, the modern action for negligence) was largely developed in the 19th century to cope with increasingly industrialisation and the use of motorised forms of transportation.[13] The typical tort action arises out of a one-on-one accidental (fortuitous) encounter. By contrast, the elements of the type of injury the inquiry is concerned with are very different. Most involve an ongoing relationship, a situation of dependence and control and a particular vulnerability on the part of the victim/survivor.

One clear example of this disjunction is the treatment by courts of the circumstances in which the doctrine of vicarious liability will be relied on. While the courts have recognised the application of that doctrine in cases involving criminal behaviour,[14] until recently, cases of ongoing abuse within institutions had not been similarly seen as part of an organisation's responsibility. In recent years, however, both the Supreme Court of Canada[15] and the House of Lords in England[16] have held organisations (both involving schools that provided

---

[8] This apology was in the following terms: 'a sincere and long overdue apology to the victims of childhood abuse for our collective failure to intervene, to detect their pain, to come to their rescue'. The apology also outlined a number of the measures that the Government was to implement to address this issue: Compensation Advisory Committee, *Towards Redress and Recovery*, Report to the Minister for Education and Science, January 2002, para 1.1. Available at <http://www.rirb.ie/ryanreport.asp> (last accessed on 23 July 2003).

[9] See the Laffoy Commission's website, http://www.childabusecommission.ie/ (last accessed on 17 July 2003).

[10] Compensation Advisory Committee, above n 8, para 1.2.

[11] See the web site for the Residential Institutions Redress Board at <http://www.rirb.ie/> (last accessed on 17 July 2003).

[12] An obvious example here would be the Stolen Generations. See also Matthew Franklin 'Victim Compo 'No Go', *The Courier-Mail* (4 December 2002) discussing the issue of compensation arising from the recommendations made in the *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions* (the Forde Inquiry), 8 June 1999. The report of the Forde Inquiry and the various government responses are available at http://www.qld.gov.au/html/fordeinquiry.

[13] eg see, Morton Horwitz, *The Transformation of American Law, 1780-1860,* Harvard University Press, Cambridge, Massachusetts, 1977.

[14] eg *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716; *Bugge v Brown* (1919) 26 CLR 110.

[15] See *Bazley v Curry* [1999] 2 SCR 534.

[16] See *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

residential care for children[17]) responsible vicariously for the abusive behaviour of an employee. The High Court is yet to decide whether it would find a school authority vicariously liable for the sexual abuse of children by one of its employees. Recently the High Court was asked to consider whether a school authority owes a pupil a non-delegable duty of care, or whether vicarious liability is the more appropriate method of allocating responsibility.[18] The High Court decided that vicarious liability is the most appropriate way of determining these cases but in the cases before it left this question open – the text of the judgments suggests some division (and hesitancy) as to whether vicarious liability would be found (particularly where the school does not involve residential care).

Limitation periods

Statutes of limitations represent the primary hurdle (and for many it is the one that is insurmountable) for many claimants. Limitation of actions legislation sets out the time limits within which civil claims must be brought.[19] In cases involving children, the time limit might start from the time they reach adulthood, but it is still usually a very short period (often around three years). Time may run out for a variety of reasons – the victim/survivor might experience shame and embarrassment; might blame her or himself, may not realise the connection between their injury or illness and the abuse suffered at the hands of the defendant.[20] S/he may need more time to come to terms with the experience.

The problem of limitation periods came to particular prominence in the 1950s when we became aware of the devastating effects of working in certain dusty environments, particularly those with dangerous products such as asbestosis. A group of workers in England sought damages against their employer for having contracted mesothelioma; but the House of Lords held that the cause of action arose when the damage occurred, and therefore their actions were brought too late. In other words, time ran out before the workers were able to know they were ill: their lungs had been damaged long before that became evident to them.[21] These cases highlighted the need for a legislative response, and indeed, such a response did follow closely on the decision of the House of Lords. Each jurisdiction in Australia now has a provision that allows for a limited extension of time in certain circumstances.[22] However, while these laws may be of use to people who are suffering from work related dust diseases, like a tort system designed for accidental one-on-one interactions, they are not so readily adaptable to a type of injury not contemplated when they were designed.[23]

---

[17] But compare *Jacobi v Griffiths* [1999] 2 SCR 570, a Canadian decision concerning a recreational club for children in which most of the assaults by the program director against two children took place away from the clubs activities and premises. In this case the court was split 4/3 – with the majority holding that the non-profit organisation was not vicariously liable for the actions of its' employee as it was not sufficiently connected to the risk created by the employers enterprise.

[18] *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* [2003] HCA 4.

[19] See *Limitation Act 1985* (ACT); *Limitation Act 1969* (NSW); *Limitation Act* (NT); *Limitation of Actions Act 1974* (Qld); *Limitations of Actions Act 1936* (SA); *Limitation Act 1974* (Tas); and *Limitation of Actions Act 1958* (Vic); *Limitation Act 1935* (WA).

[20] See discussion in Reg Graycar and Jenny Morgan, above n 1, at 65- 67 and fn 84. See also Janet Mosher, 'Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest' (1994) 44 *University of Toronto Law Journal* 169; Law Commission of Canada, above n 6, at 151-152.

[21] *Cartledge v E Jopling & Sons Ltd* [1963] AC 758.

[22] eg *Limitations Act 1969* (NSW), Division 3 Personal Injury Cases sets out two ways in which an limitation period may be extended, one for causes of action which accrued prior to 1 September 1990 and one for actions that accrued after that date. See also *Limitations of Actions Act 1974* (Qld), Part 3 Extension of Periods of Limitation; *Limitation Act 1985* (ACT), Part 3 Postponement of the Bar; *Limitations of Actions Act 1958* (Vic), Part II Extension of Limitation Periods.

[23] Compare *M(K) v M(H)* [1992] 3 SCR 3; and *Stubbings v Webb* [1993] AC 498 (HL); Reg Graycar and Jenny Morgan, above n 1.

The recent litigation involving Lorna Cubillo and Peter Gunner, members of the Stolen Generations, provides a clear example of how difficult it is to use such provisions.[24] Of course, even if a victim/survivor is able to get an extension of time, the same issues that go to a consideration of whether to grant such an extension (eg, will the passage of time disadvantage the defendant etc; will witnesses be found; are there any extant documents etc?) will also affect the substantive issues in a trial (see, for example, the case involving Joy Williams).[25]

By contrast, a number of overseas jurisdictions have addressed the limitation barrier by implementing legislative measures specifically designed to respond to these types of cases. For example:

- Some jurisdictions have eliminated limitation periods for all claims of child abuse.[26]
- Some jurisdictions have imposed moratoria for certain types of actions.[27]

These types of measures are important as they recognise the very real difficulties that people who experienced abuse as a child encounter when trying to fit within a legislative requirement that requires them to acknowledge and speak out about their abuse within a certain time period.[28]

Who to sue? – vicarious liability

Claimants often face difficulties in determining who to sue. Very occasionally the actual perpetrator of violence/abuse is sued,[29] but often this provides little by way of redress since individuals are rarely insured against the cost of judgments of this kind against them. Many victims of institutional child abuse also see the organisations, or the governments that facilitated their institutionalisation, as responsible for their abuse. As noted above, proving direct or vicarious liability on the part of organisations (such as churches or school authorities) or the government has proved difficult in Australia. The most recent case to be decided by the High Court, *Lepore, Rich and Samin*[30] – left the matter open.

We suggest that the Committee might draw some insights from the recent relevant decisions of the Supreme Court of Canada in *Bazley v Curry*[31] and *Jacobi v Griffiths*,[32] and of the House of Lords in *Lister*[33] – which indicate a contextualised understanding of the issues, and of the nature and impact of institutional child abuse.

Evidentiary issues for applicants

Even where claimants manage to get over the limitation hurdle, they can encounter numerous difficulties in proving their cases due to the passage of time. These difficulties are clearly

---

[24] *Lorna Cubillo and Peter Gunner v Commonwealth* (2000) 174 ALR 97 affirmed on appeal (2001) 183 ALR 249.

[25] *Williams v The Minister Aboriginal Land Rights Act 1983 and The State of New South Wales* [2000] NSWCA 255.

[26] eg *Limitation Act 1996* (British Columbia) s 4(k); *The Revised Statutes of Saskatchewan 1978*, Ch L-15, Limitation of Actions Act, s 3(3.1).

[27] In California the limitations period for certain child sexual abuse claims has been suspended for one year commencing on 1 January 2003 by an amendment to *Code of Civil Procedure,* s 340.1.

[28] For a discussion of the statute of limitation difficulties encountered in child sexual abuse actions see Annette Marfording, 'Access to Justice for Survivors of Child Sexual Abuse' (1997) 5 *Torts Law Journal* 221.

[29] See *Ainsworth v Ainsworth* (2002) Aust Torts Reports 81-664; [2002] NSWCA 130. This was an intentional tort action where a woman was awarded $572,815 against her former husband in respect of assaults by him.

[30] Above n 18.

[31] Above n 15.

[32] Above n 17.

[33] Above n 16.

evidenced in *Cubillo*[34] and *Williams*.[35] Both cases illustrate the difficulties that flow from the inability to recollect events; the death of potential witnesses; the loss of records and documents; and so on.[36]

Adversarial nature of judicial proceedings

The adversarial nature of tort proceedings creates a number of difficulties for people giving evidence. This difficulty is obviously exacerbated for people who are recounting traumatic events from their childhood:

> ...victims often find the process of testifying and facing cross-examination painful, as it brings back memories and opens old wounds. Victims complain that they often feel as if they are the ones on trial because they are forced to 'prove' what happened to them. [37]

The adversarial nature of traditional civil litigation, particularly as compared to redress mechanisms, mean that they are '...an unlikely forum for the promotion of acknowledgement, apology and reconciliation',[38] as it '...encourages defendants to deny, not acknowledge, responsibility'.[39] This lack of scope for an apology, is compounded by the process of challenging evidence that often involves personal challenges by the defendant about the plaintiff, his/her lifestyle and the substance of his/her claim.[40]

Costs of bringing proceedings

The cost of legal proceedings and the decline in the availability of legal aid for anything other than criminal law has also made litigation a less practicable method of redress.[41] In addition to having to fund one's own legal case there is also the risk, if the plaintiff loses that they might be required to pay some, or all of the defendant's costs, and this may well be an effective deterrent in pursing a civil action.[42]

In the Australian context, the Stolen Generations litigation of Cubillo and Gunner, was estimated as costing 'taxpayers over $11.5 million to date and there are more costs to come. These costs, when broken down, include over $1 million for one lawyer alone and $770,000 spent on private investigators'.[43] And these costs related only to the trial: the (unsuccessful) appeal would have involved considerable additional costs. Ms Cubillo and Mr Gunner lost their cases.

---

[34] Above n 24.
[35] Above n 25.
[36] See discussion in Jennifer Clarke, above n 2, at 264-266, 286-287.
[37] See Jennifer Llewellyn, 'Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice', (2002) 52 *University of Toronto Law Journal* 253, at 269.
[38] Law Commission of Canada, above n 6, at 161.
[39] Law Commission of Canada, above n 6, at 168 fn omitted.
[40] See discussion in Jennifer Llewellyn, above n 37, at 271-273 in which she discusses the underlying assumptions of the tort trial – that the parties have completely adverse and opposing interests; the pitting of sides against each other; the focus on 'winning' or 'losing'; and that this process 'risks intensifying the conflict between the parties in the process of resoling their disputes'.
[41] Compare Reg Graycar and Jenny Morgan, above n 1. See also discussion in Jennifer Llewellyn, above n 37, at 268-269 discussing the high financial cost involved in the Canadian Indian residential schools litigation and difficulties encountered with contingency fees.
[42] Law Commission of Canada, above n 6, at 155.
[43] Bob McMullan, former federal Shadow Minister for Aboriginal and Torres Strait Islander Affairs, Reconciliation and the Arts, 'Reparations for the Stolen Generations: Government Responds', paper presented at the *Moving Forward: Achieving Reparations for the Stolen Generations* conference, 15-16 August 2001, UNSW, Sydney. Available at http://www.humanrights.gov.au/movingforward/speech_mcmullan.html (16 August 2001). McMullan was relying on figures presented to Senate Estimates Committees.

In a study conducted in Canada, nine civil litigants reported that on average their litigation cost them CAD$20,000, and these were actions only against the individual perpetrator of the abuse (not the institutions or authorities who might also be held responsible), and some were undefended.[44]

In addition we need to consider costs not merely in financial terms. There are also significant emotional costs involved in pursing this type of litigation, even where successful.[45] The emotional costs of being unsuccessful, where this decision is likely to result from the limitation period or the effects of the passage of time on the court being unable to determine what took place and who is responsible, would clearly be devastating.[46]

The ability of the legal system to understand different experiences and responses

Plaintiffs in these actions tend to come from maginalised groups (ie women, indigenous people, and people with disabilities). As noted above the tort system was not developed with these types of systemic claims in mind, not was it developed with these groups in mind as potential claimants. It is therefore difficult for people from marginalised groups to have their harms and damage recognised and adequately compensated. This is demonstrated in:

- Judicial statements about how victims of sexual abuse are assumed to respond or behave;[47]
- What counts as harm;[48]
- Notions of 'consent';[49]
- Notions of the 'standards of the day'; [50]
- The way in which credibility is assessed;[51] and
- The reliance on documentary evidence created by Government departments that does not reflect the experiences of Aboriginal children removed from their families,[52] or the experiences of children in institutions more generally.

Damages

The ways in which damages rules are themselves imbued with racial and gendered stereotypes means that even if a case succeeds, there may be no meaningful compensation

---

[44] Bruce Feldthusen, Olena Hankivsky and Lorraine Greaves, above n 5, at 96-97; Law Commission of Canada, above n 6, at 188, fn 78.

[45] The impact of the nature of adversarial proceedings and cross examination have been discussed above. See Bruce Feldthusen, Olena Hankivsky and Lorraine Greaves, above n 5, at 83, 85-86.

[46] Law Commission of Canada, above n 6, at 167.

[47] eg comments by Lord Griffiths in *Stubbings v Webb* [1993] AC 498, at 505-506.

[48] Eg in the Indian residential schools litigation in Canada the inability to receive damages for the loss of culture and language means that the civil system is unable to respond to the damage and harm suffered: see discussion in Dianne Rowe, 'What's the Damage? Aboriginal Claims for Compensation for the Effects of Church and State Policies of Assimilation, Cultural and Spiritual Elimination', paper presented at the Canadian Bar Association *Aboriginal Law Continuing Legal Education* conference, 29 April 2000, Winnipeg, Manitoba. Available at http://www.wob.nf.ca/News/2000/whats thedamage.htm (last accessed on 25 October 2002).

[49] eg the way in which 'consent' was discussed and assessed in *Lorna Cubillo and Peter Gunner v Commonwealth* (2000) 174 ALR 97. See commentary on this by Hannah Robert, 'Unwanted Advances': Applying Critiques of Consent in Rape to *Cubillo v Commonwealth*', (2002) 16 *Australian Feminist Law Journal* 1.

[50] KTA Consulting, *Review of Indian Residential Schools Dispute Resolution Projects*, Volume One, prepared for the Office of Indian Residential Schools Resolution, 18 October 2002, at 14. Available at <http://www.irsr-rqpi.gc.ca/english/review.htm> (last accessed on 29 July 2003).

[51] Law Commission of Canada, above n 6, at 166.

[52] This was an issue in *Lorna Cubillo and Peter Gunner v Commonwealth* (2000) 174 ALR 97. See Jennifer Clarke, above n 2, at 264.

awarded.[53] Some of these issues have been discussed in relationship to Canadian residential school cases.[54] In the context of sexual assault tort actions, awards have been described as being generally inadequate.[55] Damages may also be impacted upon in terms of what the court thinks a 'victim' should be like, how she should be affected – so that if she appears strong and resilient in court, her damages award may be reduced.[56]

Advantages of the civil litigation system

We have briefly outlined the key barriers encountered when attempting to pursue a civil action for damages for institutional child abuse, however, it is also important to consider some of the key advantages or benefits that the civil system, when claims are successful, may possess. These include:[57]

- the extent of control that a plaintiff may have over the legal action (particularly as compared to the criminal justice system).[58] For example, deciding when and if to commence action; choosing their own legal representation and witnesses; more actively involved in deciding what is being claimed and how much damages are sought; role in giving and determining own evidence[59];
- the openness of the process, and the resultant 'public record'. This may also play a role in prevention and deterrence.
- the fact-finding capability of the process;
- ability to hold defendants publicly accountable and responsible for the harms suffered;
- a larger amount of financial compensation;[60] and

---

[53] See Martha Chammalas, 'Questioning the Use of Race Specific and Gender Specific Economic Data in Tort Litigation: A Constitutional Argument' (1994) 63 *Fordham Law Review* 73; Jamie Cassels, '(In)Equality and the Law of Tort: Gender, Race and the Assessment of Damages' (1995) 17 *Advocates' Quarterly* 158; Reg Graycar, 'Hoovering as a Hobby and Other Stories: Gendered Assessments of Personal Injury Damages' (1997) 31 *University of British Columbia Law Review* 17.

[54] See Diane Rowe, 'Race, Culture and Gender Considerations: Contingent Factors and Damage Awards for Sexual Assault and Abuse', 2001: <http://www.wob.nf.ca/News/2001/race,%20culture,%20gender.htm> (accessed on 19 February 2003). See also Lorena Sekwan Fontaine, 'Canadian Residential Schools: the Legacy of Cultural Harm' (2002) 5(17) *Indigenous Law Bulletin* 4. Compare Reg Graycar, 'Compensation for the Stolen Children: Political Judgments and Community Values' (1998) 21 *University of New South Wales Law Journal* 253.

[55] Commenting on situation in Canada see Nathalie Des Rosiers, Bruce Feldthusen and Olena Hankivsky, 'Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System' (1998) 4 *Psychology, Public Policy and Law* 433, at 448-449; in the UK see Joanne Conaghan, 'Tort Litigation in the Context of Intra-familial Abuse', (1998) 61 *The Modern Law Review* 132, at 145-147.

[56] Nathalie Des Rosiers, Bruce Feldthusen and Olena Hankivsky, above n 55, at 449.

[57] Law Commission of Canada, above n 6. See also discussion of advantages in Jennifer Llewellyn, above n 37, at 266-268.

[58] See Jane Doe's discussion about her experience in her civil action, *Jane Doe v Metropolitan Toronto (municipality) Commissioners of Police* (1998) 160 DLR (4th) 697, compared to the criminal proceedings, in her recent book Jane Doe, *The Story of Jane Doe: A Book About Rape*, Random House, 2003.

[59] Bruce Feldthusen, 'The Civil Action for Sexual Battery: Therapeutic Jurisprudence? (1993) *25 Ottawa Law Review* 203, at 213-216. The extent of a victim's 'control' or role in 'directing proceedings' is of course constrained by rules of evidence and procedures: see Jennifer Llewellyn, above n 37, at 269-270 discussing some victim's dissatisfaction with the civil process as they were unable to tell their story the way in which they wanted.

[60] Generally the financial compensation available under redress schemes is much less than would be awarded if the person were successful in a civil action. For example, in a study comparing therapeutic outcomes between civil litigation, criminal injuries compensation, and a redress scheme for victims of sexual abuse, it was found that those who were successful in litigation received on average in excess of CAD$200,000, compared to the redress scheme where claimants received CAD$60,000, compared to the criminal injuries compensation claimants who received between CAD$5,000-$10,000: Bruce Feldthusen, Olena Hankivsky and Lorraine Greaves, above n 5, at 79. However, redress schemes (and settlements) possess a level of flexibility and innovation that means that in addition to the financial amount the redress package may include other measures that 'benefit' the claimant.

- That it is a familiar and known process.

When looking at devising other methods of redress or reparations – it is important to consider how some of these key benefits may also be incorporated within those alternative, non-adversarial approaches.

Examples of redress/reparations packages

We draw the Committee's attention to a number of redress or reparations packages that have been implemented in some overseas jurisdictions (most notably in Canada) – that should be considered, given the variable components of these packages and the manner in which they were specifically designed to address the institutional abuse experienced within specific institutions. In some circumstances the victims were actively involved in the design of the process and packages (eg Grandview), while in others victims had a more limited role in relation to determining key features of the package (eg the more recent Resolution Framework introduced for the Indian residential schools claims).[61]

Redress/reparations packages need to be developed in a manner that is responsive to the particular needs of the victim/ survivors of institutional abuse. Often this will require that individual packages are developed for abuse that took place in a particular institution, or that was experienced by a particular community. As the Law Commission of Canada put it:

> The Law Commission believes that approaches to providing redress to survivors of institutional child abuse must take the needs of survivors, their families and their communities as a starting point.
> The Commission cannot recommend any single approach to redress be adopted as an exclusive recourse simply because the circumstances and needs of survivors and their communities are too diverse to be satisfied by any one option.[62]

While recognising the wide variety of redress programs that have been (or may be) created, the Law Commission noted that they all have a common goal:

> To respond to the needs of survivors of institutional child abuse in a way that is more comprehensive, more flexible and less formal than existing legal processes.[63]

The Law Commission proposes a number of criteria by which we can assess redress processes/packages:

- **Respect, engagement and informed choice** – Does the process satisfy the values of respect and engagement? Does it offer the Information necessary for survivors to make an informed choice about participating in the process?
- **Fact-finding** – Can the process uncover all the important facts to validate whether abuse took place? Does it help establish an understanding of how the abuse occurred?
- **Accountability** – Do those administering the process have the authority to hold people and organisations to account for their conduct?
- **Fairness** – Is the process fair to all parties directly and indirectly affected by it – whether as claimants, defendants, witnesses or in some other capacity?
- **Acknowledgement, apology and reconciliation** – Does the process promote acknowledgement, apology and reconciliation in cases where abuse has occurred?

---

[61] One of the criticisms made by victims of the pilot ADR projects was the inability to negotiate on some key components of the package (eg types of harms that would be recognised): see KTA Consulting, above n 50, at 15. However, it is interesting to note that the ADR system has been postponed in Canada to allow for greater consultations to take place: see brief discussion on the Indian Residential Schools Resolution Canada website, <http://www.irsr-rqpa.gc.ca/english/dispute_resolution.html> (last accessed on 17 July 2003).

[62] Law Commission of Canada, Executive Summary, above n 7, at 9.

[63] Law Commission of Canada, above n 6, p 304.

- **Compensation, counselling and education** – Can the process lead to outcomes that address the needs of survivors for financial compensation, counselling, therapy, education and training?
- **Needs of families, communities and peoples** – Can the process meet the needs of the families of those who were abused as children as well as the needs of communities and peoples?
- **Prevention and public education** – Does the process promote public education about institutional child abuse and contribute to prevention?[64]

We agree that these are critical components that need to be considered when designing a redress scheme. Without a consideration of these factors, it is likely that the redress scheme will not be perceived as an appropriate option and may further harm victims as they then seek 'multiple' methods of redress.

Examples of redress packages in Canada

1. The **'Grandview Healing Package'** was a compensation agreement negotiated with the Province of Ontario, Canada, by a group of survivors of physical and sexual abuse in a girls' detention centre (the Grandview School for Girls, earlier known as the Ontario Training School for Girls at Galt). That agreement led to the creation of a process specifically designed by the victim/survivors to deal with those claims of abuse. The first paragraph of the agreement states:

> This Agreement is based on a recognition that abuse or mistreatment as defined in this Agreement cannot be tolerated nor condoned. It is further based on a recognition that society has a direct responsibility to provide the support necessary to facilitate the healing process of survivors of sexual and institutionalized abuse, particularly when such abuse arises in the context of an institution housing children. It also recognizes the current individual-based solutions offered by the civil justice system are inadequate responses to institutionalized and sexual abuse. These problems are prevalent enough in our society so as to warrant a social based response which seeks, ultimately, to facilitate the healing of survivors of such abuse and mistreatment.[65]

As part of the Grandview process, those who signed the agreement waived their right to sue at common law and were able to claim an amount of up to CAD$60,000 depending on the types of injury they had sustained. This is significantly less than the amount they might have received had they sued successfully at common law. In addition to this limited financial compensation, the Grandview survivors were eligible for services such as counselling (before and after adjudication) and assistance of other kinds such as tattoo removal (it was common in the institution for the girls to tattoo themselves and each other). The adjudication process was designed by the survivors' group, in consultation with their lawyer, and all adjudications were undertaken by women in a carefully designed environment and process.

The Grandview Agreement process has been the subject of an evaluation,[66] and has also been commented upon in a number of academic articles.[67]

2. The **'Jericho Individual Compensation Program'** (JICP) was established by the government of British Columbia in 1995 to compensate Deaf and/or visually impaired

---

[64] Law Commission of Canada, above n 6, at 106-107. For a more information about what is meant by these criteria see discussion at 326-334.

[65] The agreement is available at <http://www.grandviewsurvivors.on.ca> (accessed on 19 February 2003).

[66] Deborah Leach, *Evaluation of the Grandview Agreement Process*, 1998. Available at http://www.grandviewsurvivors.on.ca/gsummary.htm (accessed on 13 March 2003).

[67] Eg see Bruce Feldthusen, Olena Hankivsky and Lorraine Greaves, above n 5; Jennifer Llewellyn, above n 37; and Seetal Sunga, 'The Meaning of Compensation in Institutional Abuse Programs' (2002) 17 *Journal of Law & Social Policy* 39.

children who attended the Jericho Hill School for the Deaf.[68] The compensation program was established following an Ombudsman's report that detailed the abuse (including sexual abuse) by employees and pupils experienced by children at the School.[69] Whilst the parameters of the program (ie levels of compensation; what harms would be compensated etc) were devised by the Government - the terms of reference for the program were devised in consultation with the Deaf community and measures were put in place to ensure that personnel working on the program were sensitive to, and aware of, the different cultural needs and requirements of the Deaf community. In particular the report of the Program highlights the special role played by the 'Compensation Consultants' who were fluent in American sign language, had an awareness of sexual abuse, and whose role was to '...assist the claimants in developing their claims and to be a neutral resource to the [compensation] Panel...'[70] There was also a 'special track' process to assist claimants who had multiple disabilities.

Compensation payments under the JICP ranged from $3 000 to $60 000 (the average payment was $35 000).[71] In determining claims the Panel had to be satisfied that there was a 'reasonable likelihood' that the claimant was sexually abused at Jericho Hill School (a lesser standard than the more common civil standard – on the balance of probabilities).[72] The JICP received 365 claims for compensation, of which 359 claims were validated. Ninety-five per cent of the people who had their claims validated by the JICP accepted the settlement.[73]

There is a comprehensive report about the nature of the JICP by Jane Morley, the Compensation Panel Chair.[74] This report notes that many of the people who went though this Program found it 'therapeutic' in that it gave them an opportunity to tell their story and have it validated.[75]

Of interest in relation to the JICP is that a number of the residents at Jericho Hill School opted out of this compensation program and have instead elected to proceed through the courts. This litigation is proceeding as a class action and has not yet been finalised.[76]

Other Canadian redress/reparations packages include:[77]

---

[68] This compensation program was modelled on the Grandview Healing Package: Ombudsman of British Columbia, *Annual Report 1995*, Children and Youth Team Report, Follow-up Ombudsreport 1993: Abuse of Deaf Children. Available at <http://www.ombud.gov.bc.ca/publications/reports/report_1995/children_and_youth/abuse_deaf_children.html> (last accessed on 17 July 2003). The JICP has also been utilised as a model for another compensation program for Deaf and hearing impaired children who were abused at Baxter School for the Deaf, Maine USA. See the Baxter Compensation Authority, <http://www.baxtercomp.org> (last accessed on 27 June 2003). The first settlements under the Baxter Compensation Authority were received in 2003.

[69] Ombudsman of British Columbia, *Public Report No 32: Abuse of Deaf Students at Jericho Hill School for the Deaf*, November 1993. Available at http://www.ombud.gov.bc.ca/publications/reports/Public_Reports/PR32_Jericho_Hill_School.html (last accessed on 26 June 2003)

[70] Jane Morley, *The Jericho Hill Compensation Program (JICP): A Unique Response to Institutional Sexual Abuse*, Final Report of the Compensation Panel Chair, 5 September 2001, at a. Available at <http://www.janemorley.com> (last accessed on 29 July 2003).

[71] Jane Morley, above n 70, at 1.

[72] And of course, this is an even lesser standard than, beyond reasonable doubt, the criminal standard of proof.

[73] Jane Morley, above n 70, at 1-2.

[74] Jane Morley, above n 70.

[75] Jane Morley, above n 70, at b.

[76] See *Rumley v British Columbia* [2001] 3 SCR 184 allowing the matter to proceed as a class action.

[77] For a discussion of these and other redress/reparations packages see Goldie Shea, *Redress Programs Relating to Institutional Child Abuse in Canada*, for the Law Commission of Canada, October 1999. Available at <http://www.lcc.gc.ca/en/themes/mr/ica/shea/redress/redress_main.asp> (last accessed on 17 July 2003).

- The **Helpline Reconciliation Agreement** was devised as a 'reconciliation model' to 'heal the impact' of the physical and sexual abuse experienced by former students at St Joseph's Training School for Boys, Alfred, Ontario and St John's Training School for Boys, Uxbridge, Ontario. The agreement was made between Helpline (an association formed by former students of the Schools), the Brothers of the Christian Schools of Ottawa; the Government of Ontario; the Archdiocese of Ottawa; and the Archdiocese of Toronto. It included an apology; a system of submitting and validating claims; the creation of an Opportunity Fund to provide a variety of support, medical and educational assistance to validated claimants; a contribution to lost wages; a counselling service; a public record; and a commitment of behalf of the participants in the Agreement to prevent child abuse.[78]

- In relation to the experiences of Indian children in the Canadian residential school system, the Canadian Government is implementing an alternative dispute resolution (ADR) process. Information about this can be found at the website for the office created in July 2001 to assist in resolving residential schools claims, **Indian Residential Schools Resolution Canada** (http://www.irsr-rqpa.gc.ca/english/). In 1998-1999 the Government, the churches and Aboriginal leaders commenced a process of investigating non-adversarial dispute resolution processes as a way of dealing with claims concerning the residential schools. As a result of this a national dialogue was conducted across Canada and ten pilot projects were established.[79] It was intended that the ADR projects would offer victims of the residential school system a more sensitive and timely response to the claims than is afforded by litigation.[80]

  > The projects were intended to enlarge the thinking about what might be possible in resolving abuse cases outside litigation, and to ensure that survivor groups had a meaningful voice in determining how their stories were told and their redress was determined.[81]

  These pilot projects were seen as having a number of positive outcomes for participants by a review published in October 2002.[82] The review was conducted at a very early stage[83] and a number of its findings regarding process and boundaries between groups are of key interest in establishing schemes such as this. There were two key points of dissatisfaction expressed by survivors involved in the pilot projects:
  - the 'standards of the day' requirement which survivors found 'difficult to understand and difficult to swallow' and objected to the '...very application of western, 'white' standards of discipline to resolving residential schools abuse cases'; [84] and
  - the limitation of compensation to recognised causes of action, effectively meaning that claims for language and culture loss would not be compensated under the ADR projects.[85]

---

[78] For more information about this agreement see Douglas Roche and Ben Hoffman, *The Vision to Reconcile: Process Report on the Helpline Reconciliation Model Agreement*, Fund for Dispute Resolution, 1993. Available at http://www.nicr.ca/publications/fund/helpline/ (last accessed on 13 March 2003).
[79] The ten projects involved 504 survivor participants: KTA Consulting, above n 50, p iii, fn 6.
[80] KTA Consulting, above n 50, at 2.
[81] KTA Consulting, above n 50, at ii, fn omitted.
[82] KTA Consulting, above n 50.
[83] At the time of the review only one project had been completed.
[84] KTA Consulting, above n 50, at 14.
[85] KTA Consulting, above n 50, at 15.

The resolution process for the Indian Residential schools is continuing in Canada and the ADR process has recently been postponed to allow for further consultations and negotiations to take place (and is expected to recommence in Fall, 2003).[86] Our research is closely monitoring both the outcome of the ADR initiatives as well as the ongoing litigation.

Ireland

As has been mentioned above, there have been a number of recent, and continuing, measures introduced in Ireland to address child abuse that took place in residential and industrial schools.

The compensation scheme established under the *Residential Institutions Redress Act 2002* is of considerable interest to our work (and that of the Senate Committee). It is a no fault scheme[87] for compensation for people who experienced child abuse (which is very widely defined)[88] when they were a resident in an institution. The Act establishes a Residential Institutions Redress Board (RIRB) that receives and assesses claims.[89] It commenced receiving claims in December 2002 and by June 2003 it had received 1334 applications.[90] Of these 106 have been determined – 47 were settled through negotiations,[91] 13 were determined via a hearing and 46 were refused as they did not fall within the framework provided by the Act.

The Act requires that the process adopted by the RIRB be as informal as possible.[92] An applicant lodges a written claim which provides evidence of his/her identity; proof that he/she was a resident in a particular institution as a child; and evidence of the injury that was suffered in that institution consistent with the alleged abuse. These are the three criteria that must be met before the RIRB can make an award.[93] The application may be determined via settlement negotiations[94] or via the conduct of a hearing (in which evidence may be presented in writing or orally). In both of these processes the applicant may be legally represented. The Board informs 'relevant persons'[95] of the nature of the claim being made and provides them with an opportunity to respond to the claim; give evidence; and cross examining the applicant.[96] However, it is important that this is not about 'fault' but rather a validation mechanism.

---

[86] See information regarding postponement at the Indian Residential Schools Resolution Canada website, <http://www.irsr-rqpa.gc.ca/english/dispute_resolution.html> (last accessed on 17 July 2003). During 2003, the Canadian Government has signed agreements with the Anglican and Presbyterian Churches about how they will participate in compensating Indian residential school students.

[87] eg see *Residential Institutions Redress Act 2002*, ss 5(3); 7(5); and 13(11).

[88] It is not limited to physical and sexual abuse – but also includes neglect and other acts and omissions that have resulted in serious physical, mental, educational or behavioural impairment: see the definition in *Residential Institutions Redress Act 2002*, s 1.

[89] An extensive list of residential schools is provided in the Schedule to the *Residential Institutions Redress Act 2002*. Additions to this list may also be made by the Minister, s 4.

[90] Residential Institutions Redress Board (RIRB), Newsletter June 2003, available at <http://www.rirb.ie/> (last accessed on 10 July 2003).

[91] *Residential Institutions Redress Act 2002*, s 12. The process for settlements is discussed in brief detail in the RIRB, Newsletter March 2003, available at <http://www.rirb.ie/> (last accessed on 10 July 2003).

[92] *Residential Institutions Redress Act 2002*, s 5(1)(d).

[93] *Residential Institutions Redress Act 2002*, s 7.

[94] *Residential Institutions Redress Act 2002*, s 12. The process for settlements is discussed in brief detail in the RIRB, Newsletter March 2003, available at <http://www.rirb.ie/> (last accessed on 10 July 2003).

[95] ie the person alleged to have committed the child abuse; or the institution in which it is alleged that the acts of abuse took place. See *Residential Institutions Redress Act 2002*, s 1.

[96] See *Residential Institutions Redress Act 2002*, ss 11(8)-(12).

The Act provides for interim awards to be made in appropriate cases.[97] It also provides for additional payments for reasonable travel expenses; witness costs; legal costs; medical expenses incurred before and after the determination of the RIRB.[98]

To determine the scale of the awards that would be made by the RIRB, the Minister for Education and Science, appointed a Compensation Review Panel to provide advice on this issue.[99] The Panel considered different forms of compensation for these types of claims and reviewed some of the Canadian developments but ultimately it recommended adopting an approach that more closely accorded with conventional tort law remedies.[100] In 2002 the Minister followed the advice of the Panel and introduced a regulation that provides for the RIRB to weight claims on two scales.[101] The first scale, to assess the severity of the abuse, requires the RIRB to assess four 'constitutive elements of redress' – (1) the severity of the abuse; and the three measures of injury resulting from the abuse, (2) medically verified physical/psychiatric illness; (3) psycho-social sequelae; and (4) loss of opportunity. After determining the scaling for the severity of the abuse, the RIRB then turns to the second scale. The second scale provides for five levels of compensation: (1) up to €50,000; (2) €50,000-€100,000; (3) €100,000 - €150,000; (4) €150,000 - €200,000; and (5) €200,000 - €300,000. It is also possible for an applicant to claim aggravated damages. The RIRB has made it clear that aggravated damages will only be awarded in the most 'oppressive or outrageous' of cases.[102] The award may be paid in either a lump sum or instalments. The payments that have been made to date average between €50,000 - € 70,000.[103]

If an applicant is not satisfied with the RIRB's determination of the claim or the amount of the award, it is possible to appeal to the Residential Institutions Redress Review Committee.

If an applicant accepts the award determined by the RIRB (or Review Committee) then the applicant must waive their rights to pursue civil action against the same institutions or persons alleged to have caused the child abuse that was the subject of the redress application.[104] Potential applicants who have already sought civil relief for the harm that they suffered in a residential institution are not allowed to make a claim under the Act[105] – however, if the civil claim was rejected in an interlocutory proceeding or on the basis of the statute of limitation – then those people may still make an application to the RIRB.[106]

The scheme is primarily funded by the State, however the Church has agreed to provide €128 million comprised of both cash and property.[107] The contribution made by the Church has been subject to some controversy regarding its inadequacy and the manner in which the deal was struck.[108]

---

[97] *Residential Institutions Redress Act 2002*, s 10(10).
[98] See discussion of witness and travel expense in the explanation of the hearing procedures (April 2003) on the Residential Institutions Redress Board at <http://www.rirb.ie/hearing.asp> (last accessed on 29 July 2003). See also *Residential Institutions Redress Act 2002*, s 32.
[99] This was provided for under *Residential Institutions Redress Act 2002*, s 16.
[100] Compensation Advisory Committee, above n 8, esp at para 7.4.
[101] *Residential Institutions Redress Act 2002* (Section 17), Regulations 2002.
[102] RIRB, Newsletter June 2003, available at <http://www.rirb.ie/> (last accessed on 10 July 2003).
[103] Liam Reid, 'Low-level' Abuse Victims get up to .70k from State', *The Sunday Tribune*, (29 June 2003), p 4.
[104] *Residential Institutions Redress Act 2002*, s 13(12).
[105] *Residential Institutions Redress Act 2002*, ss 6(2)-(3).
[106] *Residential Institutions Redress Act 2002*, s 6(7).
[107] Mark Hennessy and Patsy McGarry, 'State yet to Accept Religious Properties for Redress', *The Irish Times*, (10 July 2003), p 1.
[108] See Mark Hennessy, 'Did the Cabinet answer the Church's Prayers?', *The Irish Times*, (12 February 2003), p16; Colm O'Gorman, ' State has put the Interest of the Church Ahead of Victims' Needs', *The Irish Times*, (8

Other redress packages in other countries

There are a number of other redress/reparations packages and process that have been implemented in other countries (eg Baxter Compensation Authority, Maine, USA[109] and the New Zealand Government's response to abuse at Lake Alice Hospital[110]) as well as many more in Canada. In this submission we are unable to present all examples of redress packages and do justice to them all.

2. In undertaking this reference, the committee is to direct its inquiries primarily to those affected children who were not covered by the 2001 report *Lost Innocents: Righting the Record*, inquiring into child migrants, and the 1997 report, *Bringing them Home*, inquiring into Aboriginal children.

While we appreciate the reasons behind the Committee being required to direct its attention primarily to those children who were not covered by earlier reports, namely the *Lost Innocents: Righting the Record* (2001) and *Bringing them Home* (1997). We note that many of the recommendations in *Bringing them Home* remain to be actioned – there are continuous calls for an appropriate apology from the Federal Government and a system of reparations. Without these actions taking place the impact of the harms for the Stolen Generation continue and there is an inability to attempt to reach closure and begin healing. It must not be considered that these groups of children have been 'dealt' with simply because there has been a public report and inquiry – which is only one step in a long road to providing redress.

February 2003), p 14; Patsy McGarry, 'Indemnity Agreement Attracted much Criticism Last Year', *The Irish Times*, (3 February 2003), p 7.

[109] See <http://www.baxtercomp.org/> (last accessed on 24 July 2003).

[110] Paula Oliver, 'Former Lake Alice Patients lay Abuse Claims', *The New Zealand Herald*, (12 March 2002), p 4.