

# A National Redress Scheme

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## 1. A NATIONAL REDRESS SCHEME

### 1.1. A NATIONAL SCHEME

The **preferred approach for a redress scheme is:**

- 1. a national scheme;**
- 2. funded by all levels of government with significant contributions from the various institutions identified as those in which children have been abused.**

In designing and implementing a national redress scheme, the federal government and other parties (including the institutions concerned and survivor groups), should employ the ‘eight general criteria’ identified by the Law Commission of Canada (LCC) in its detailed inquiry into the abuse of children in Canadian institutions as criteria against which to assess not only past schemes but also in the design of any ‘**potential redress processes**’.<sup>1</sup> These eight criteria are:

- Respect, engagement and informed choice
- Fact-finding
- Accountability
- Fairness
- Acknowledgment, apology and reconciliation
- Compensation, counselling and education
- Needs of families, communities and peoples
- Prevention and public education.<sup>2</sup>

As the LCC notes ‘[t]hese criteria give concrete expression to the two values that...must infuse all approaches to redress: respect and engagement; and information and support’.<sup>3</sup> In satisfying these criteria it is important that redress is broadly conceived and understood. As Kathleen Daly, in her recent book, has made clear:

...redress is more than financial payment. Broadly conceived, it includes all the processes that occur when claimants seek financial payments, benefits and services: how well informed they are and whether they understand the redress process; how they are treated; and whether they have a role in shaping the process and desired outcomes.<sup>4</sup>

It is this broad understanding of redress that must underpin the development and design of any scheme/ response; and it is this broad conception of the many components of redress that informs the comments set out in this submission.

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<sup>1</sup> Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (LCC, 2000), 106. Emphasis added.

<sup>2</sup> *Ibid*, 106-107.

<sup>3</sup> *Ibid*, 106.

<sup>4</sup> Kathleen Daly, *Redressing Institutional Abuse of Children* (Palgrave Macmillan, 2014), 115.

### 1.2. CONTINUED MEANINGFUL INPUT AND ADVICE FROM SURVIVORS

**An advisory committee or consultation process must be formally established by the Government to continue to ensure meaningful input from survivors into the design and implementation of any redress scheme.**

As the *Royal Commission* notes, and is evident in the *Commission's* work to date, the needs of survivors must be central in the development of any redress response.

We can learn a great deal from the experience of redress schemes, past and present, in Australia and overseas. In Daly's extensive review of Canadian and Australian redress schemes, she notes that in six of the ten Canadian schemes reviewed, survivors and their advocacy groups were involved in 'shaping the design' of those schemes, and in another scheme survivors were consulted.<sup>5</sup> This has not been the case in any of the Australian schemes which instead have been 'government stipulated' or imposed.<sup>6</sup> While the extent of survivor involvement in the Canadian schemes has varied – it would appear that more positive and progressive elements can be identified in those schemes that had more direct involvement, such as the extent to which wider harms are broadly defined and compensable under the scheme,<sup>7</sup> the extent to which more creative forms of redress were included that directly respond to survivors needs,<sup>8</sup> and the extent to which schemes moved beyond a tort (and more legalistic) approach to, not only the harms that are compensable, but also the process of validation.<sup>9</sup>

The positive difference that the involvement of survivors can have in the final design and implementation of a redress scheme (including processes and the benefits made available under the scheme) can be seen in the experience of the Canadian government responding to the Indian Residential Schools experience. In 2003, the Canadian government imposed an alternative dispute resolution (ADR) process on survivors (despite some early consultative steps). The absence of any meaningful consultation with survivors about the final design meant that the 2003 scheme failed to achieve any of its stated reconciliatory or redress goals; it adopted a narrow torts view of compensable harms, failed to capture adequately the harms suffered by children in those institutions, and hence was widely criticised and abandoned by the very people it was designed to assist through compensation.<sup>10</sup> Few survivors engaged with the 2003 ADR process and instead continued to litigate; eventually a class action was certified by the Supreme Court of Canada which led to further negotiations (with active involvement of survivor groups, namely the Assembly of First Nations). The resultant Indian Residential School Settlement Agreement is far more comprehensive, creative and responsive to the harms articulated by survivors.

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<sup>5</sup> Ibid, 119.

<sup>6</sup> Ibid.

<sup>7</sup> See for example the inclusion of a group based benefit, and other harms which were individually compensable under the Indian Residential Schools Settlement Agreement: Kathleen Mahoney, 'The Settlement Process: A Personal Reflection' (2014) 64 *University of Toronto Law Journal* 505.

<sup>8</sup> A good example here is the provision of tattoo removal under the Grandview Agreement. As some of the legally trained adjudicators admitted 'I would never have thought of it' as a benefit/ service that survivors might have been seeking: Reg Graycar and Jane Wangmann 'Redress packages for institutional child abuse: Exploring the Grandview Agreement as a case study in "alternative" dispute resolution', Sydney Law School Research Paper No 07/50 (July 2007), 13-14. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1001148](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1001148).

<sup>9</sup> See Mahoney, above n7; and Graycar and Wangmann, above n8.

<sup>10</sup> See Mahoney, above n7.

Continuing and extensive consultation with the wide variety of survivor groups involved would appear to be an essential requirement in the further implementation of any recommendation arising from the *Royal Commission* for a redress scheme. That is to say, that any recommendation made by the *Royal Commission* that there should be a national redress scheme must be seen as the first step in the process of designing and implementing such a scheme.

### 1.3. AN INTEGRATED, INTERDEPENDENT PACKAGE

**The integral and multifaceted nature of the redress components must be emphasised in any recommendation made by the *Royal Commission*.**

The *Royal Commission* articulates three key elements of redress that have emerged through its hearings:

- *A direct personal response* (for those survivors who want such a response). This would include a personal apology; an opportunity to meet with senior officials of the institution responsible for the harms, assurances by the individual institution of steps taken to prevent such harms from occurring in the future. The *Commission* notes that some institutions may go further and provide ‘spiritual support’ and other forms of direct assistance.<sup>11</sup>
- *Counselling and psychological care*. The *Commission* notes that this measure should be provided to survivors ‘throughout their lives’ and when they require it. The *Commission* emphasises that any measures in this area provided by any redress scheme should ‘supplement’ and not duplicate those services that already exist and are already accessed by some survivors.<sup>12</sup>
- *Monetary payments*. The redress scheme should provide a monetary payment ‘as a tangible means of recognising the wrongs they suffered’. Any monetary payment should reflect severity and impact of the abuse. The *Commission* emphasises that any monetary payment provided under a redress scheme will not be fully compensatory (as is the goal of the tort system – but we should note is also not achieved by that system) and not in the realm of what might be possible through a successful civil action.<sup>13</sup>

These three items succinctly describe the elements of redress, however, it is worth emphasising the more expansive approach articulated by the Law Commission of Canada<sup>14</sup> and the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (the van Boven principles).<sup>15</sup> Both of these are referred to in the work of the *Royal Commission*. The reason why attention is drawn to these statements is that they emphasise that **all** these components are required – they are integral and interdependent – the ‘success’ of one element in terms of achieving redress or reparations is dependent on the others also being implemented simultaneously. The separate treatment of ‘direct personal responses’, ‘counselling and psychological care’ and ‘monetary payments’ in the *Consultation Paper* may suggest to any

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<sup>11</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Redress and Civil Litigation* (2015), 50-51.

<sup>12</sup> *Ibid.*, 51.

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

<sup>14</sup> See the eight criteria articulated by the LCC set out at the beginning of this submission.

<sup>15</sup> This is referred to extensively in the *Commission’s* work, above n11, 51-52.

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government or institution seeking to respond in this area that these are separate and discrete steps, when they are, in fact, tied together if redress is to be meaningful.

The experience of the Stolen Generations and the Forgotten Australians provide good examples of the problems created by this piecemeal approach. In respect of both of these groups there were extensive dedicated inquiries, an apology issued some time later (and in the context of the Stolen Generations this apology was extensively delayed and hard fought for) and in both instances the possibility of a redress scheme has been dismissed by the Federal Government (with some limited action on a state level). The absence of a dedicated and equally accessible redress scheme in these cases has served to undermine the effectiveness and import of the apologies provided (that is to say, action must follow words and be consistent with the words proffered).<sup>16</sup>

### *ADDITIONAL COMMENTS ABOUT THE 'DIRECT PERSONAL RESPONSE' COMPONENT*

The description of the 'direct personal responses' is of concern; whilst it appears the *Commission* was seeking to articulate a range of flexible options, the risk is that these items are read as optional 'extras' rather than essential components. It is also of concern that it is only here, in respect of 'direct personal responses', that mention is made of the need for collective forms of redress for Aboriginal and Torres Strait Islander survivors – such collective mechanisms must be made available not only here, but throughout all other components.<sup>17</sup> As Dr Terri Libesman and Dr Trish Luker have argued:

It is anomalous that the Commission endorses the evidence from Aboriginal survivors and organisations with respect to the need for collective redress, including culturally appropriate healing services, land connection and...housing, but that this is then relegated, in terms of redress, to direct personal responses...A direct personal response individualises the experience and then dilutes the ongoing recognition of the systemic and institutional nature of the harms and the capacity to provide appropriate redress. Relegating redress for collective harms to private negotiations would result in further disempowerment of the most vulnerable.<sup>18</sup>

One of the difficulties created to date by the Australian responses to revelations of institutional abuse has been its piecemeal, step-by-step approach. Australian responses in this area have tended to be characterised by a 'carve-off' approach in which the various steps or components of redress are taken as discrete steps often far apart in time (for example, a far-reaching inquiry as one part, an apology as another part, a memorial as another, and perhaps monetary compensation facilitated through a specially designed scheme as another). These separate components have frequently been fought for by survivors over significant periods of time before they have eventuated. Such a piecemeal approach effectively means that the full potential of what might be offered as 'redress' is lost, and is undermined by the absence of another step until a later point in time (if at all).

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<sup>16</sup> See Thalia Anthony, 'Reconciliation Requires Reparation', *The Drum* (ABC), 29 September 2010. Available at <http://www.abc.net.au/news/2010-06-01/36346>.

<sup>17</sup> I thank my colleagues Dr Terri Libesman and Dr Trish Luker for highlighting the limitations of the approach of the Commission in relegating the need for collective redress to the 'direct personal response' component.

<sup>18</sup> Dr Terri Libesman and Dr Trish Luker (Faculty of Law, UTS) Email communication, 6 March 2015.

### *ADDITIONAL COMMENTS ABOUT THE COUNSELLING AND PSYCHOLOGICAL CARE COMPONENT*

The *Commission* provides a lengthy discussion in its consultation paper of the need for any redress to include the provision of long term counselling and therapy. This is a vital component of redress. The *Commission* notes the need to not duplicate existing services and to enable survivors to continue to be able to choose who they wish to seek support from (rather than it being dictated by a redress scheme). As the *Commission* notes such supports should not be time limited and should be available when survivors need this support. This approach is supported.

However, questions also need to be raised about the viability of this approach in the current environment which has seen a number of social support services have their funding cut by both state and federal governments. The existing service system needs additional and sustained funding if it is to be able to continue to support some of the most vulnerable members of our community. The recent study by Monash University should also raise concerns about the extent to which mental health services are accessed equally across the Australian community. That report found that ‘people who lived in disadvantaged parts of metropolitan areas, rural and remote areas accessed the least number of services despite needing them the most’.<sup>19</sup> This raises concerns about the extent to which the Medicare supported mental health services are being accessed by those who are most in need of those services. Funding cuts and accessibility concerns suggest that more work needs to be done in this area if this important component of redress is able to be adequately supported through existing services.

## 2. THE PARAMETERS OF THE PROPOSED NATIONAL REDRESS SCHEME

### 2.1. RECOGNISING THE CHALLENGE OF DIVERSITY OF CONTEXT CREATED BY THE BROAD APPROACH TO ‘INSTITUTION’

**Any national redress scheme must have within its mechanisms, and benefits made available under the scheme, sufficient flexibility to enable it to adequately and appropriately respond to the diversity of harms and experiences that arise as a result of the differences in institutional contexts and experiences of survivors.**

One of the difficulties faced by the *Royal Commission* in its work is the broad range of institutional contexts in which the abuse of children has taken place. This broad definition of institution is beneficial in that it recognises the wide range of institutional contexts in which children are, and have been, abused. It does not create artificial boundaries (that have little relevance to children) between residential care settings, day care settings, church settings and recreational settings. However, this wide variety of contexts creates a number of challenges for the design of an adequate and appropriate redress scheme. Most inquiries and redress schemes have not had such a broad focus – instead being focused on either a single institution, or a single institutional style setting (for example a residential setting). Any redress scheme recommended

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<sup>19</sup> See media report of the study from Monash University - <http://www.abc.net.au/news/2015-03-02/study-highlights-divide-in-access-to-mental-health-services/6269920>

by the *Royal Commission* must be able to have enough flexibility and scope to be able to adequately respond to these differences in context.

Differences emerge in whether abuse has taken place in a day-setting, a recreational setting, a residential setting or in a residential setting also overlaid with particular policy or discriminatory frameworks. This statement is not intended to discount or minimise the abuse that took place in different settings – rather it is intended to focus attention on the complexity of the task of designing any response that is framed as providing redress or reparations. Any redress scheme must have sufficient flexibility and nuance to be able to account for the wide variety of institutional contexts in which the abuse of children has taken place.

Kathleen Daly's work on typologies of institutional child abuse cases may prove useful to the *Commission* in its recommendations for the design of a redress scheme.<sup>20</sup> Daly articulates three categories of institutional child abuse cases that have emerged across multiple jurisdictions: 'core' cases, 'core-plus-one' cases, and 'core-plus-two' cases.<sup>21</sup> Core cases refers to those which involved the 'failure of government or church authorities to protect and care for children' (for example, institutional abuse highlighted in many institutions through the Queensland Forde Inquiry); 'core-plus-one' cases refer to those where the context of institutional child abuse was committed within a 'policy or practice' against 'certain groups of children' (for example Child Migrants in Australia); and 'core-plus-two' cases refer to those in which the institutional abuse of children was further 'embedded in a more general discrimination against a group' (for example, Stolen Generations).<sup>22</sup>

This recognition of differences in groups of cases raises important questions about how to design a redress scheme that is able to respond to such differences. This will require additional complexity and options available in terms of assessing monetary compensation and other benefits, such as the streaming or grouping of applications from particular institutions, the availability of group benefits, and the availability of benefits beyond money that more fully recognise the scope of harm (such as education and training, dental and other medical, and support for families). Possible approaches are raised under 3.1 and 3.3 below. In some instances it may well be preferable for a dedicated scheme to be established for certain harms suffered by a particular group (see discussion regarding the Stolen Generations in 2.2).

**2.2. IMPLEMENT THE RECOMMENDATIONS MADE IN THE BRINGING THEM HOME REPORT**  
**The preferred response to the Stolen Generations is to act on the recommendations for a National Compensation Fund made in the Human Rights and Equal Opportunity Commission report, *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).**

This would appear to be the most appropriate response to the harms arising from the Stolen Generations which, whilst they include allegations of child sexual abuse in institutional settings, extend far beyond this. To fail to recognise the broader harms and context suffered by members of the Stolen Generations would mean that the redress scheme is partial and inappropriate: in

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<sup>20</sup> Kathleen Daly, 'Conceptualising Responses to Institutional Abuse of Children' (2014) 26 *Current Issues in Criminal Justice* 5.

<sup>21</sup> *Ibid*, 7.

<sup>22</sup> *Ibid*, 7. The examples provided are those highlighted and discussed in detail in Daly's article.

short, it would not succeed in providing ‘redress’. In the context of the Stolen Generations, the *Royal Commission* process needs, in particular, to take into account the failure of the government to implement a federal reparations scheme despite the recommendation of *Bringing Them Home*.

If the recommendation for a National Compensation Fund made by HREOC continues to be a site for government inaction – then the recommendation made above about the need for sufficient flexibility and scope within a redress scheme to address institutional child abuse is vitally important. It is important that any redress scheme is able to address the additional context and harms suffered by members of the Stolen Generations that require additional measures within any proposed redress package.

It must however be recognised that the past and present sexual abuse of Aboriginal and Torres Strait Islander children in institutional settings is not confined to the Stolen Generations and as a result any general redress scheme for institutional child abuse must be responsive to the cultural needs of Aboriginal and Torres Strait Islander survivors.

### 2.3. RECOGNISING ALL HARMS SUFFERED BY CHILDREN IN INSTITUTIONAL CONTEXTS (IE REMOVING THE NARROW FOCUS ON CHILD SEXUAL ABUSE

**The *Commission’s* broad approach to institutions necessitates a broad approach to the types of harms for which a redress scheme might be established; to not do so will mean that any redress scheme is inappropriate, partial and inadequate.**

**Any redress scheme must recognise additional harms such as physical abuse, psychological and emotional harms, and neglect.**

The *Commission* has noted that it is restricted by its Terms of Reference and as a result ‘it would not be appropriate ... to consider making recommendations about redress for physical abuse or neglect that is unrelated to sexual abuse’.<sup>23</sup>

The narrow focus on child sexual abuse has consequences for whether any redress scheme that is established is viewed by victims as providing ‘redress’ in a full and adequate sense. For those potential applicants who were held in what have been referred to as ‘total institutions’ where there are substantial allegations concerning physical abuse, neglect, psychological harm, wrongful confinement and so on<sup>24</sup> – to only compensate part of the harm suffered (sexual abuse, and sexual abuse that was accompanied by ‘other unlawful or improper treatment of children’<sup>25</sup>) will represent a partial and incomplete system of redress. To provide only partial redress will undermine the extent to which it can be said that the proposed scheme achieves its stated aims. Such potential claimants will end up with a partial compensatory payment, and still have to approach the civil litigation system if they seek full compensation for the harms suffered in an institutional setting. We note that the *Commission* has received a number of submissions in

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<sup>23</sup> Royal Commission, above n11, 163.

<sup>24</sup> See for example the range of harms documented in the *Forgotten Australians*, Chapter 4: Treatment and Care of Children in Institutions’.

<sup>25</sup> Royal Commission, above n11, 49.

response to *Issue Paper 6* which have also emphasised the need to provide redress for harms in addition to sexual abuse.<sup>26</sup>

A further practical complication for any national redress scheme that only addresses sexual abuse is how it will treat past compensation payments (whether made through a state redress scheme, an institutional scheme, or at common law). Many of those past redress schemes, for example, had a wider remit (Redress WA provided compensation for physical, sexual, emotional or psychological abuse or neglect; the Queensland ex gratia scheme provided compensation for physical injuries, sexual abuse, neglect, physical illness, psychological injury/ psychiatric illness, systems abuse, loss of opportunity; the Tasmanian ex gratia scheme provided a payment for people who suffered sexual abuse, physical abuse and mental or emotional abuse when in State care). These differences would appear to create a challenge as to how 'previous monetary payments' (for more than sexual abuse) can be taken into account and deducted from any new award made under the proposed redress scheme.<sup>27</sup> So whilst **it is agreed that past monetary payments should be taken into account – we are concerned that it may not be possible to determine which portion of the redress payment from a state based scheme responds to the discrete harm of sexual abuse?** Such a difficulty would not be encountered if the proposed redress scheme more adequately defined the harms for which redress would be available.

### 2.4 CONNECTION BETWEEN THE INSTITUTION AND THE ABUSE

**A potential applicant should not be required to establish any more detailed connection between the institution and the abuse – other than that the abuse for which financial compensation is claimed took place in an institutional setting which was responsible for the care, development or welfare of children.**

Care needs to be taken in establishing eligibility for compensation under a redress scheme that that criteria employed do not replicate the limited approaches already evident in the civil litigation system. The present discussion in the Consultation paper on the need for a connection between the institution and the abuse risks doing just that. It would seem that the three suggested approaches to connection will lead to unnecessary legal argument about whether certain applications are 'in' or 'out'. Such arguments would go against the facilitation of redress and clarity of process

It should be noted that rather than putting in place requirements of some 'connection' in this way, other schemes have adopted different approaches, such as listing institutions for which compensation is available (which may be added to as evidence emerges). This may be possible for some of the institutional contexts that the Commission has investigated to date, however, such a straightforward approach may not be possible for all institutional contexts covered by the Commission's terms of reference or the proposed redress scheme.

In the event that a connection needs to be demonstrated in order to be eligible for compensation in the three ways nominated by the Commission, it is recommended that the onus should be on the institution and not the applicant that this connection did not exist.

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<sup>26</sup> See for example Submission 2 (name withheld); Submission 7 (Frank Golding); Submission 30 (Alliance for Forgotten Australians); Submission 46 (Open Place); Submission 50 (Uniting Church); Submission 51 (Victorian Aboriginal Legal Service); Submission 74 (knowmore).

<sup>27</sup> Royal Commission, above n11, 159.

### 3. BENEFITS MADE AVAILABLE UNDER THE PROPOSED NATIONAL REDRESS SCHEME

#### 3.1. LOOK BEYOND MONETARY PAYMENTS

**It is recommended that the Commission give further consideration as to how the following items might be accommodated within any proposed redress scheme:**

- **The provision of education and training (either for the survivor or their children);**
- **Access to additional funding for dental care, assistance with addiction issues, other health issues not adequately covered by the scheme (or other services);**
- **Provision of benefits to families and communities to reflect that the harms suffered by individuals has impacts beyond the primary survivor;**
- **Assistance with family reunions;**
- **The creation of a public record and memorialisation;**
- **The payment of legal costs in addition to any monetary award.<sup>28</sup>**

Redress schemes provide an important opportunity to look beyond the constraints of the tort system – both in the types of harms that are compensable, and in what circumstances, but also to look beyond financial compensation as the method of redress. While the components of ‘direct personal responses’, long term counselling and therapy and financial compensation are welcome components of any redress scheme, it must be also be remembered that a redress scheme provides an important opportunity for creativity and innovation to respond more adequately to the needs of survivors, rather than continuing to be constrained by the parameters of the law. Indeed, we know from some prior schemes some of the more novel benefits reflected the genuine involvement of victims in defining their harms and their needs in respect of those harms.<sup>29</sup>

A number of submissions to *Issues Paper 6* made innovative suggestions that are worthy of consideration (for example the provision of funeral issuance plans; private medical insurance; a government benefit card<sup>30</sup>; and the provision for families members of those survivors who are now deceased<sup>31</sup>).

#### 3.2. THE CALCULATION OF MONETARY PAYMENTS

**A table or matrix approach that takes ‘account of the severity of abuse and the impact of abuse’ is generally supported.<sup>32</sup>**

While there are a number of problems that have been identified with such approaches, it has some key advantages in terms of transparency for survivors, and an ability to take account of

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<sup>28</sup> See also Daly, above n4, 115.

<sup>29</sup> A good example here is the provision of tattoo removal under the Grandview Agreement. As some of the legally trained adjudicators admitted ‘I would never have thought of it’ as a benefit/ service that survivors might have been seeking: Graycar and Wangmann, above n8, 13-14.

<sup>30</sup> Submission 43 (Kelso’s The Law Firm). See also Submission 74 (knowmore).

<sup>31</sup> Submission 66 (CLAN). It is worth noting that the Tasmanian Stolen Generations Ex Gratia payment scheme did make such a provision.

<sup>32</sup> Royal Commission, above n11, 147.

some differences in experiences between survivors. This approach also appears to be favoured by many submissions received in response to the *Commission's* earlier Issues Paper on redress.

**3.3. ADDITIONAL FEATURES SHOULD BE INCORPORATED IN THE PROPOSED MATRIX**  
**In addition to the common features of matrixes utilised in existing redress schemes (ie severity of harm, its impact and other aggravating factors), it is recommended that the *Commission* incorporates further categories/ features/ or tiers to enable the scheme to be more responsive to the diversity of institutional contexts for which redress will be claimed.**

In this regard it is recommended that the Commission continue to explore:

- the provision of a **group benefit** (or common experience payment<sup>33</sup>) for survivors of residential institutions (and other approved institutions in which the culture of abuse was widespread and impacted on all who attended or resided in the institution). As the Geraldton Community Legal Centre commented in their submission to the *Royal Commission*:

We believe that there should be group benefits available to all former residents of an institution where abuse was widespread because, even if a person in an institution wasn't directly abused, they were still affected by the abuse of those around them.<sup>34</sup>

The group dimensions of the harms suffered is an important component of any effective redress scheme; it assists the scheme in moving beyond the individualised response of the traditional adversarial legal system. This need to recognise the group dimensions of the harm of some institutional settings may be addressed through a deeper exploration of how any redress scheme might be able to address 'distinctive institutional factors' that not only 'exacerbate the impact of institutional child abuse'<sup>35</sup> but are experienced as a form of abuse by children with or without sexual abuse.

- taking account of **aggravating factors** which may include the institutional response when the abuse was reported;
- how **multiple forms of abuse** may be recognised (this is discussed above at 2.3);
- in more detail how some of the **more complex harms** – that is those that also involve government policy and discriminatory frameworks – such as the Stolen Generations and Child Migration schemes can be addressed within the proposed redress scheme.<sup>36</sup> This may involve a consideration of a separate stream in which these more complex harms are provided with additional responses including additional amounts in monetary compensation.

It is important to note that the provision of these additional elements of financial redress does not mean that different groups of survivors are not being treated equally – rather it recognises

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<sup>33</sup> Modelled on the CEP available under the Indian Residential Schools Agreement.

<sup>34</sup> Submission 17 (Geraldton Community Legal Centre), 6.

<sup>35</sup> Royal Commission, above n11, 149.

<sup>36</sup> Senate Standing Committee on Community Affairs, *Lost Innocents: Righting the Record: Report on Child Migration* (2001).

the great differences in experiences that require redress. It is important in this context that the emphasis on fairness and equality is not misconstrued through a framework of formal equality.

### 3.4 THE MONETARY AMOUNT AND THE NEED FOR IT TO BE MEANINGFUL

I do not provide any comment on the appropriate amount for the minimum and maximum payments available under the proposed redress scheme (I am of the view that survivor groups are better placed to provide comments in this area). I do however **note the extreme inadequacy of the previous amounts made available under Australian state based redress schemes – and hence that any new scheme must provide more adequate amounts as compensation.**

As survivors have made clear to the *Commission*: ‘any payment should be meaningful, in the sense that it would provide a means to make a tangible difference in their lives’.<sup>37</sup> In this regard we note that ‘meaning’ is not only gained from the numerical figure but also what the scheme articulates as the purpose of the award and the statements provided to each individual claimant when their award is assessed (see discussion below about the importance of a written decision).

## 4. THE IMPORTANCE OF PROCESS

The importance of process has been emphasised through research on past redress schemes.<sup>38</sup> Attention must be paid to all elements of the processes that need to be navigated in order to obtain the benefits (including financial payments) and services that are made available under any redress scheme.

### 4.1 PROMOTION OF THE SCHEME AND THE PROVISION OF INFORMATION

**Adequate and appropriate information is a powerful resource for survivors. This is emphasised in the *Royal Commission’s* consultation paper and we endorse the measures that the *Commission* notes will be required to be explored and put in place for any redress scheme to reach the wide range of potential applicants.**<sup>39</sup>

The need for adequate information extends across all levels of the design and implementation of a redress scheme so that survivors are able to make an informed choice about whether to engage with the scheme, how to engage with the scheme, what is required, what types of awards and decisions are being reached, how to find out where their application is up to, how to appeal or review a decision, and the overall outcomes of the scheme.

The various Australian schemes have tended to provide minimal information to potential claimants across all these dimensions. In comparison regular and updated information has been publicly available concerning the work of the Irish Residential Institutions Redress Board (newsletters, annual reports, various updates) and the Indian Residential Schools Settlement

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<sup>37</sup> Royal Commission, above n11, 151.

<sup>38</sup> See 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; Daly, above n4; LCC, above n1, esp 109-112; Graycar and Wangmann, above n8; John Ellis and Nicola Ellis, ‘A new model for seeking meaningful redress for victims of Church-related sexual assault’ (2014) 26 *Current Issues in Criminal Justice* 31, 36.

<sup>39</sup> Royal Commission, above n11, 166-167.

Agreement in Canada. This level of transparency and openness is an important feature that should be replicated in any scheme implemented in Australia.

**4.2 PROVIDE CULTURALLY APPROPRIATE INFORMATION, SUPPORT AND SERVICES**  
**Any redress scheme instituted in Australia will need to consider how to put in place culturally appropriate supports for Aboriginal and Torres Strait Islander survivors who wish to engage with the redress scheme.<sup>40</sup>**

This includes:

- involvement in the design of the scheme;
- the provision of information;
- the employment of Aboriginal and Torres Strait Islander staff (including in adjudicative positions);
- training for non-Indigenous staff; and
- consideration of changes to any hearing process that enables Aboriginal and Torres Strait Islander survivors to feel that the process will be respectful of their culture and background.

The Grandview Agreement (Ontario, Canada) provides a useful example of the benefits that can be gained from putting in place culturally appropriate measures; as well as the problems that might occur if input for Indigenous survivors does not happen from the outset.<sup>41</sup> In this scheme a First Nations woman was appointed as one of the adjudicators. Once appointed this adjudicator introduced culturally appropriate measures such as commencing hearings with a 'smudging ceremony', providing for the involvement of elders, and allowing for different modes of oath taking such as allowing claimants 'pledge their truth telling with an eagle feather, a traditional way of giving such an undertaking'.<sup>42</sup> The Aboriginal adjudicator also noted the importance of her position with a number of claimants reporting in the evaluation of the Grandview Agreement that the availability of an Aboriginal adjudicator was 'very important'.<sup>43</sup> However problems and gaps in the responsiveness of the Agreement to the needs and concerns of Aboriginal women survivors were created by their lack of involvement in the design of the Agreement:

...the lack of representation of Aboriginal women on the GSSG [Grandview Survivors' Support Group] may have led to a general failure to consider the specific needs of Aboriginal claimants and the possibility that they experienced harms that were qualitatively different, or that Aboriginal women may have experienced different, racialised dimensions of harm.<sup>44</sup>

Another useful model for effective involvement of Indigenous survivors is found in the Canadian Indian Residential Schools Settlement Agreement. Indigenous survivors were actively involved

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<sup>40</sup> See submission 51 (Victorian Aboriginal Legal Service), 26.

<sup>41</sup> See discussion of problems Graycar and Wangmann, above n8, 37.

<sup>42</sup> Grandview Adjudicators Report, p. 11 as cited in Graycar and Wangmann, above n7, 23.

<sup>43</sup> Graycar and Wangmann, above n7, 24.

<sup>44</sup> Ibid, 16.

in driving the design of the Settlement Agreement,<sup>45</sup> and this can be clearly seen in the following elements and processes:

- inclusion in that agreement of the ‘common experience payment’ which has largely been seen as acknowledging the group based dimension of the harms arising from the Residential School System including loss of language and culture, and destruction of family;
- representation on the oversight committee; and
- qualifications for adjudicators include ‘knowledge of and sensitivity to Aboriginal culture and history as well as to sexual and physical abuse issues’.<sup>46</sup>

### 4.3 APPROPRIATE QUALIFICATIONS AND TRAINING OF ALL PEOPLE INVOLVED IN THE REDRESS SCHEME

**It is important that all people involved in a redress scheme – from the administrative staff through to the adjudicators – are trained and/or appropriately qualified to respond to survivors of complex harms such as child sexual abuse.**

This need for training of all staff was also emphasised by the Care Leavers Australia Network (CLAN) in their submission to *Issues Paper 6*.

The importance of this from the point of first contact cannot be underestimated. Bruce Feldthusen and colleagues who compared the outcomes of three methods of receiving some response for sexual abuse (tort action, criminal injuries compensation and a redress scheme) made insightful comments about how all stages of contact with a redress scheme work together (or potentially against) each other to generate a therapeutic response. For example Feldthusen and colleagues noted some very negative views that claimants that went through the criminal injuries compensation process had of the administrative staff that they dealt with: ‘I couldn’t believe that she [the receptionist] was talking to victims of crime like that ... I thought I’d never call again.’<sup>47</sup> This experience stood in stark contrast to the claimants who went through the redress scheme (Grandview) interviewed by Feldthusen and colleagues who commented on the sensitivity and caring nature of all staff employed to administer the scheme.<sup>48</sup>

In terms of those who are appointed to adjudicate/ assess or validate applications qualifications should include the broad range mentioned in the consultation paper: ‘A mix of legal, medical, psychosocial and similar skills, including experience in issues relating to institutional child sexual abuse’.<sup>49</sup>

Even with such qualifications – training should be mandatory for all adjudicative staff. The comments made by adjudicators appointed under the Grandview Agreement concerning the training they were required to undertake is illustrative here<sup>50</sup> – despite expertise in law (across

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<sup>45</sup> Eg see Assembly of First Nations, *Report on Canada’s Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools* (no date); and Mahoney, above n 7.

<sup>46</sup> Mayo Moran, ‘The role of reparative justice in responding to the legacy of Indian Residential Schools’ (2014) 64 *University of Toronto Law Journal* 529, 559.

<sup>47</sup> Feldthusen et al, above n38, 87.

<sup>48</sup> Ibid, 88. See also comments in Graycar and Wangmann, above n7, 31.

<sup>49</sup> Royal Commission, above n11, 171.

<sup>50</sup> It should be noted that this scheme involved oral hearings for all claimants.

a broad spectrum of areas), violence against women, human rights, and adjudication – all were required to undertake training. This training conducted by a feminist therapist (who had also assisted women who had attended Grandview) provided information about how to respond to claimants with mental health issues, not to interrupt testimony, how to ask questions about inconsistencies, how to be respectful in asking questions as well as more practical issues such as setting up the hearing space and ‘what to wear to make claimants feel more comfortable’.<sup>51</sup> Perhaps one of the most significant features of this training, and one that the women survivors of Grandview commented on positively, was that the adjudicators never said to the claimants: ‘I understand what you are going through’ as someone who did not attend that institution ‘could not possible “understand”’.<sup>52</sup>

#### 4.4. AVAILABILITY OF PAYMENT BY INSTALMENTS

**Survivors should be provided with an option to receive any financial award as a lump sum payment, or in instalments.**

A key component of any redress package should also be the provision of independent financial advice<sup>53</sup> to assist claimants with options regarding how to use the sum awarded (as the *Commission* notes survivors have stated that they need the award to ‘pay off debts or pay medical expenses; some need to secure more stable housing; and some would like to provide assistance to their families...’<sup>54</sup>).

Such benefits (financial advice/ counselling) and payment options (periodic and lump sum) were made available under the Grandview Agreement (Ontario, Canada).<sup>55</sup>

#### 4.5. THE APPLICATION PROCESS

**The application process for redress should be ‘as simple as possible to minimise the risk of re-traumatisation’.**<sup>56</sup>

**Applicants will require support to complete the application forms – however questions need to be raised about the capacity of already stretched services to take on this work (even if additional funding were provided through the redress scheme). This is particularly critical in the current environment in which many community legal centres, Aboriginal legal services and legal aid commissions have had their funding cut.**

The *Commission* recommends that the redress scheme should fund ‘a number of community support services and community legal centres to assist applicants to apply for redress’.<sup>57</sup> Applicants will require support to complete the application forms – however questions need to be raised about the capacity of these already stretched services to take on this work (even if additional funding were provided through the redress scheme). This is particularly critical in

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<sup>51</sup> Graycar and Wangmann, above n7, 20.

<sup>52</sup> Ibid, 20. See also Feldthusen, above n38, 87, 88 and 107.

<sup>53</sup> For example, one of the benefits available under the Grandview Agreement was ‘access to financial advice services including financial counselling, establishing a trust fund for children, and receiving the award by way

<sup>54</sup> Royal Commission, above n11, 151.

<sup>55</sup> Graycar and Wangmann, above n7, 18.

<sup>56</sup> Royal Commission, above n11, 167.

<sup>57</sup> Ibid, 168.

the current environment in which many community legal centres, Aboriginal legal services and legal aid commissions have had their funding cut. Such services require additional sustained funding not only for work in supporting survivors in any application process (but also in order to be able to provide such survivors with advice in other areas of legal need).

Survivors should also have the choice to seek advice from a lawyer of their choice. The fees that can be charged and are paid for under the redress scheme should be made explicit in the scheme itself.

The literacy levels of potential claimants will vary considerably (often as a direct result of their experience with a particular institution). This needs to be taken into account not only in the wording and structure of the form, but also the level and extent of support available to assist in the completion of the form.

In addition, for many the completion of the form ‘can create emotional difficulties, when claimants relive memories of what happened to them’.<sup>58</sup> Recognising this means that counselling and other support beyond steps to ‘fill in’ the form is also required.

As far as possible evidence and documents should be required to be produced and provided by the institutions concerned rather than by the applicant.

### 4.6. THE VALIDATION PROCESS

**It is recommended that in determining applications under the proposed redress scheme that:**

- **survivors should have a choice of their application being determined on the basis of a written application or an oral hearing;**
- **claims should be determined on the basis of plausibility;**
- **claims from the same institution should be grouped together and considered by the same adjudicator(s);**
- **attention should be paid to the written decision provided to applicants.**

***Survivors should have a choice of a determination on their written application or via an oral hearing.*** Any redress scheme should have the capacity to provide different modes of validation – and that applicants (subject to the need for further evidence or clarification via an oral hearing) should be able to select whether they want their application to be determined on the basis of the written application and any documentary evidence to support that application, or whether the applicant would like to supplement their written application in an oral hearing.

While the provision of an oral hearing will increase the administrative costs of a redress scheme, this is balanced by the ‘redress’ needs and aims of any scheme. In those schemes in which the oral hearing process was survivor-focused and designed with sensitivity, many claimants have reported the positive effect of being listened to and believed by someone in a position of authority. This is one of the key achievements reported by survivors who have given evidence both in public and private hearings before the *Royal Commission*.<sup>59</sup> It must be

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<sup>58</sup> Daly, above n4, 167.

<sup>59</sup> See various comments made by survivors reported in the CLAN newsletters.

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remember that not all potential claimants will have presented evidence to the *Royal Commission* and hence had the opportunity to have their experience validated in this way – this too should be seen as an essential and therapeutic component of any redress scheme. Of course this is only the case if care is taken in the design and implementation of any hearing process which is survivor-focused.

**Standard of proof.** The standard of proof that should be used by the proposed redress scheme should be that of ‘plausibility, which requires the decision-maker be satisfied that the allegations are plausible and may be true’.<sup>60</sup>

**Grouping of claims.** The validation process may be assisted by the grouping of claims arising from the same institution. This would enable the adjudicator(s) to build up a comprehensive picture of what took place within a particular institutional setting (similar to the *Commission’s* case study approach) – so rather than allegations appearing isolated or difficult to comprehend, each application would build together a comprehensive picture of the abuse that took place within an institution. This is not meant to suggest that each application is not determined as an individual application – but rather that considering all applications from a single institution will enable a systemic picture to be built which will assist the adjudicator in satisfying the relevant standard of proof.

This will be particularly important in those cases where institutions appear to have destroyed the records that would support the claims made by survivors.<sup>61</sup> Provision needs to be made in cases where documents have not only been destroyed by the institution, but are no longer available or provide an inaccurate account of events. It is noted that Redress WA made it clear that applicants would not be disadvantaged if there was no records available to verify that a person was held in a particular institution.<sup>62</sup>

**The written decision.** Each claimant should be provided with a written decision detailing the outcome of their application and the reasons for the decision.<sup>63</sup> It is not sufficient for a claimant to simply receive an ‘outcome’ letter which advises whether the application was successful or unsuccessful and the amount awarded (if any). Attention must be paid to the need to provide meaning to any financial payment. Whilst it is agreed that any written decision should only contain sufficient information to explain the decision and the award to minimise the risk of re-traumatisation,<sup>64</sup> a written decision should still be able to be individualised so that claimants know that it is personal to them, that their application has been read, listened to and assessed. This does not necessarily require extensive detail.

The adjudicators in the Grandview Agreement paid attention to the writing of decisions and it is significant that almost 87% of women reported in the evaluation of that Agreement that the written reasons were ‘very important’ to them.<sup>65</sup> The adjudicators under this Agreement wrote

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<sup>60</sup> Royal Commission, above n11, 170.

<sup>61</sup> This has been reported in the media as having taken place in the current case study being explored by the Commission concerning Knox Grammar School.

<sup>62</sup> Royal Commission, above n11, 235.

<sup>63</sup> See also Daly, above n4, 135.

<sup>64</sup> Royal Commission, above n11, 172.

<sup>65</sup> Graycar and Wangmann, p.28-29. See also the discussion in Daly, above n4, 173.

two decisions – one for the government setting out the legal requirements, and the second for the applicant. This second decision was written in clear and accessible language and was ‘designed to reflect...the woman’s experience at Grandview’. This decision was approximately 10 pages in length and was intended to convey that the individual woman had been heard and how the decision had been reached. The importance of a written decision is perhaps most clearly seen when certain harms are not compensable under a redress scheme – while a smaller monetary payment would make it clear to an applicant that not all the harms were recognised, the capacity and scope for a written decision to recognise a harm but also explain why it is not compensable under the terms of a particular scheme would appear to be respectful and informative to applicants.

A written decision also performs an important function in terms of conveying meaning beyond the monetary amount awarded.<sup>66</sup> If one of the key benefits of a successful civil case is that a person receives a written decision by a judge outlining the claim made, the decision reached and how it is reached<sup>67</sup> – then consideration needs to be given as to how meaning behind an award made through a redress scheme is conveyed. As Sunga Seetal has warned

...unless there is a clear articulation that a monetary award does not signify a market transaction, money will tend to indicate some form of exchange for abuse injuries.<sup>68</sup>

This would appear to have been the case with some of the past redress schemes operative in Australia and elsewhere.<sup>69</sup> Whilst the provision of an individualised written decision will go some way to address the limits of monetary awards as a symbolic gesture it does not mean that survivors will still experience the monetary award as a financial transaction.<sup>70</sup>

## 5. OTHER MATTERS TO CONSIDER IN THE DESIGN OF A REDRESS SCHEME

### 5.1 PRIORITISING APPLICATIONS FROM OLDER SURVIVORS AND THOSE WITH SERIOUS HEALTH CONDITIONS

**Any redress scheme should prioritise claims by elderly applicants and those who have serious health conditions.**

A useful model for this approach can be seen in both the Irish Residential Institutions Redress Broad which made available an interim award for the aged and infirm (not more than €10,000); and Canadian Indian Residential Schools Agreement which implemented an ‘advance payment program’ for applicants who were over the age of 65 years. Under the Canadian scheme after initial verification such applicants received a small amount (\$CAD 8000) as a payment in

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<sup>66</sup> See also discussion in Daly, above n4, 176-183.

<sup>67</sup> Sunga Seetal, ‘The meaning of compensation in institutional abuse programs’ (2002) 17 *Journal of Law and Social Policy* 39, 41.

<sup>68</sup> *Ibid*, 40.

<sup>69</sup> See Submission 43 (Kelso’s The Law Firm) [14].

<sup>70</sup> See for example the negative experience of some survivors of Grandview who identified the financial payment as ‘blood money’ and that ‘no amount of money ...could make up for what they experienced at Grandview’: quoted in Seetal, above n67, 52. See Jennifer Henderson, and Pauline Wakeham, eds. *Reconciling Canada: Critical Perspectives on the Culture of Redress*, (University of Toronto Press, 2013).

advance of the full consideration of their claim. This amount would then be deduced from the final amount awarded as part of the Common Experience Payment.<sup>71</sup>

This is an important recognition of the health impacts that being institutionalised may have had on some potential applicants, the more difficult lives some applicants have gone on to live given their negative experiences in institutional settings, and for some groups a general lower life expectancy.

### 5.1. OVERSIGHT OF THE REDRESS SCHEME

**Any redress scheme – whether established at a national or state/territory level – should be established with an oversight committee to ensure the proper implementation and conduct of the redress scheme (particularly over time).**

A useful model can be found in the Indian Residential Schools Settlement Agreement. Under that Agreement a National Administration Committee (NAC) was established to ‘oversee[] the proper implementation and administration of the Settlement Agreement’.<sup>72</sup> The NAC in Canada has seven members with voting rights (one representing the churches, one representing Canada, and five representing former students). While there are differences between the Canadian context (as the Settlement Agreement arose in the context of a class action – and as a result the Agreement is ‘subject to the supervision of the Courts’) and the proposal for a redress scheme in Australia, it would seem that an oversight committee could prove a useful structure to ensure continued involvement and input from survivors.

Such a committee may be useful, particularly over time, as questions might arise about the terms and process of the redress scheme as it gets implemented, and potential changes that the government might seek to make in terms of funding. It would be hoped that an oversight committee could assist in avoiding the significant changes that were made to some redress schemes mid-stream (such as took place under Redress WA).

### 5.3 THE EVALUATION OF THE SCHEME

**An evaluation should be built into the proposed redress scheme. This will enable us to learn about the provision of redress; its strengths and weakness and whether it ultimately responds adequately to survivors needs.**

**The inclusion of an evaluation address, in part, the requirements of prevention and public education that are also necessary parts of an effective redress scheme.<sup>73</sup>**

It is important that evidence about the relative strengths and weakness of a redress response from the perspective of the claimants is assessed and documented. Without such research we lose an important opportunity to document and learn from the processes that have been put in

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<sup>71</sup> See <https://www.aadnc-aandc.gc.ca/eng/1100100032367/1100100032368>

<sup>72</sup> [http://www.classactionservices.ca/irs/NAC/nac\\_main.htm#WhatistheNAC](http://www.classactionservices.ca/irs/NAC/nac_main.htm#WhatistheNAC)

<sup>73</sup> This is the last of the eight identified criteria articulated by the LCC, above n1, 106; and is also included within the van Boven principles under guarantees of non-repetition (ensuring that all proceedings abide by standards of due process, fairness and accountability, providing continuing education and training; reviewing and reforming laws contributing to or allowing violations): as discussed in Royal Commission, above n11, 52.

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place.<sup>74</sup> There are many examples of redress processes in Australia and overseas yet very little is known about whether they achieved their aims, whether survivors gained the redress that they needed, whether survivors would make any recommendations for future redress schemes.

As is well recognised, survivors of institutional child abuse have multiple and complex needs and desire when they seek a response to the harms suffered. While these needs are recognised and there has been a proliferation of redress responses across jurisdictions, there is ‘scant empirical and qualitative data...about the therapeutic expectations and outcomes of redress’.<sup>75</sup> It would seem vitally important to know how survivors experience processes that are set up to provide redress – do they meet survivor’s needs? If so, why? What were the key components that assisted? If not, why? What components and processes impeded redress? Did different groups of survivors (for example in terms of gender, disability, race, sexual orientation) experience the redress process differently?

The Grandview Agreement included within its terms an evaluation which was conducted by Deborah Leach in 1997. While this evaluation provides useful insights into that scheme it took place too early in the implementation of the scheme. Information about the experiences of redress agreements can also be found through various research projects which have interviewed usually a small number of survivors about their experiences.<sup>76</sup>

Such an evaluation is important to move any assessment of the relative strengths of a scheme away from how much money was paid on average to claimants (while this is also an important feature it tells us little about survivors experience and satisfaction with a process) and allows a focus on the other benefits and services that were made available under a redress scheme, and an assessment as to how well the processes put in place were experienced by survivors.

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<sup>74</sup> Submission 51 (Victorian Aboriginal Legal Service) recommended that a ‘review of the existing schemes...should be conducted to examine the effectiveness of each scheme and learn from those processes’ (p. 19).

<sup>75</sup> Lupin Battersby, Lorraine Greaves and Rodney Hunt, ‘Legal redress and institutional sexual abuse: A study of the Experiences of Deaf and hard of hearing survivors’ (2008) 10 *Florida Coastal Law Review* 67, 69.

<sup>76</sup> See Feldthusen et al, above n38, who interviewed 26 survivors of Grandview; Lupin Battersby, Lorraine Greaves and Rodney Hunt, ‘Legal redress and institutional sexual abuse: A study of the Experiences of Deaf and hard of hearing survivors’ (2008) 10 *Florida Coastal Law Review* 67 who interviewed 20 survivors who had accessed the Jericho Hill Compensation Program. See also the detailed work by the Institute for Human Resource Development (for the Law Commission of Canada), *Review of the Needs of Victims of Institutional Abuse: Final Report* (1988)