



School of Criminology and
Criminal Justice

Mt Gravatt Campus
Griffith University
176 Messines Ridge Road
Mt Gravatt QLD 4122
Australia

TO: Royal Commission into Institutional Responses to Child Sexual Abuse

FROM: Professor Kathleen Daly, School of Criminology and Criminal Justice,
Griffith University. k.daly@griffith.edu.au 07/3735-5625
www.griffith.edu.au/professional-page/professor-kathleen-daly/publications

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RE: Submission on Redress Schemes

Background

In 2013 I had several conversations with Trish Malins about my research project on institutional abuse of children and how my findings could assist the Royal Commission. I had hoped to carry out research for the Royal Commission in February this year (an analysis of data on financial payments). However, with reluctance, I had to decline because I had to meet a book completion deadline.

My book, *Redressing Institutional Abuse of Children*, was submitted to the publisher (Palgrave Macmillan) on 16 May 2014 and is now in production. I understand it will be out some time the end of this year, but I do not have a precise date.

After several preliminary chapters, the book devotes four chapters to redress, with a focus on redress schemes, drawing from the literature. My analysis is of all the major Australian and Canadian cases of institutional abuse, typically in residential care (not in community settings). There are 19 cases. It differs from others by documenting the actual redress processes and outcomes. In addition, I analyse survivors' experiences with redress schemes (and in a more limited fashion, with litigation and public inquiries). Unfortunately, all the data on redress schemes and survivors' experiences of them comes from Canada; no studies have been conducted in Australia that I am aware of.

I am familiar with other redress schemes, in addition to those in Australia and Canada. New ones continue to pop up. However, my expertise to date does not include processes and outcomes in *Toward Healing* or the *Melbourne Response*.

Draft book chapters

I would like to provide the relevant book chapters and appendices to the Royal Commission to inform its deliberations. I am seeking advice from the publisher on how this can occur in light of my contractual arrangements. With clear stipulations placed on its use, this should be possible. I will advise what I learn from the publisher.

The questions

Of the 12 questions, there is evidence for Qs 2, 7, 10, 11, and 12, based on my review of the literature and analysis of the cases. Answers to the remaining questions would be a matter of opinion or require more discussion and data.

Q1: Claims are made about the relative advantages of redress schemes over litigation, although much depends on whether criminal prosecution and convictions are likely (or have resulted). The pros and cons can be (and have been) itemised by the Law Commission of Canada's (2000) report and others in submissions to Australian Senate inquiries. Governments or organisations responding to law suits calculate whether they are in a better position to negotiate a redress scheme or continue to litigate. Evidence is too scant of survivors' comparative experiences with litigation and redress schemes to draw a clear view.

Significant redress packages (as compared to a more pared back 'scheme') can be a negotiated outcome of major civil settlements. This occurred in *Indian Residential Schools*, the largest out-of-court settlement in Canadian history. Another Canadian case (*Jericho Hill*) had a redress scheme and an out-of-court settlement that resulted in a significant redress package. Thus, the two can be combined.

Q2: What is effective or not effective is described in significant detail in my book and cannot be easily encapsulated in several sentences.

Q3: The design of a redress scheme can take many forms. This is one of several questions to ask about an optimal design. Much depends on context, what is being redressed, and the like. Most have financial payments and services; some have benefits, in addition. Most have apologies; some have other outcomes such as memorialisation, commemoration, and a variety of memory projects. Of the 19 cases in my study, there was just one (*Grandview*) that used the terms 'group' and 'individual' benefits. But perhaps Q3 is asking another kind of question about different payment levels that one could have in a redress scheme; or a wider range of services for all, but financial payments only for some? In one of the book's appendices, I show all the major elements in the redress schemes. This helps to see variation and similarities across the schemes in a compact way.

Q4: This is a huge policy question, and more data would need to be gathered to model differing scenarios. Others have suggested a national scheme with contributions by the relevant jurisdictions. However, the detail of what that would look like has not been put forward. There would need to be a working party established to consider all the elements in this question.

Q5: Reflecting on the 19 cases (14 of which had redress schemes; others had public inquiries or civil settlements, without redress schemes), there were a variety of approaches taken. None of the decisions on financial payments, services, and benefits was fully independent of those who were paying for the scheme. There were appeals processes in some, but I do not believe there was ‘external oversight’ of the design, process, and outcomes by another body. I cannot recall any redress scheme to date that has had this. That does not mean it is not appropriate, but to date, it has not been done as far as I know. With a national scheme, there may be reasons to consider such oversight.

One area that calls for oversight, particularly for schemes that are closer to a civil damages model, is legal fees. This was (and is) subject to court review in *Indian Residential Schools* because some lawyers were taking advantage of the situation.

Q6: I am not sure what is being asked. If it is in connection with Q4, more deliberation is required to determine what the financial contribution of specific institutions would be in a national scheme and the basis for that.

Q7: In all the Canadian and Australian cases, survivors had the option to litigate. Thus, redress scheme participation has been (and should be) optional.

Q8: A striking finding from my research is variability in the average financial payments to claimants, along with other elements, in redress schemes. The source of variability is not ‘institutions’ but the particular design of the redress scheme and its ‘money logic’ (my term for the basis for a financial payment). I am uncertain what ‘no clear successor institution’ means. In most of my cases, the institutions have since closed down, and the government (or government and church together) created a redress scheme. There may be other types of institutions the Royal Commission has in mind.

Q9: This question goes to the heart of the ‘money logic’ used and the rationale for it. I have ideas on the optimal design of a redress scheme for institutional abuse with respect to financial payments. A good deal depends on how much money there is to spend, how many claimants there are, and what seems a good use of time in reviewing and evaluating claims. A civil damages logic can be applied in a generous or more restricted fashion. Examples of the generous approach are *Indian Residential Schools* (Independent Assessment Process) and the *Irish Residential Redress Board*. The costs are high, about \$90,000 to \$100,000 per claimant, on average, after legal fees. I have not seen data on survivors’ experiences with this type of scheme. The more typical approach is a restricted or ‘capped’ model that uses a civil damages logic. There is data on survivors’ experiences with this type of scheme (all from Canada); and in the main, it is mixed or negative. The principle problem is the meaning of money; it needs to be tied to a symbolic meaning, but it is not. I discuss this point in depth in the book.

Q10: We have some evidence on this question, in the reports written by redress scheme chairpersons about how they assessed or validated applications. In Canada, the typical standard of proof was the balance of the probabilities. In Australia, balance of probabilities is used in *South Australia’s* scheme; and in *Redress WA*, a claim was ‘accepted unless there was evidence to the contrary’; however, the other jurisdictions with redress schemes did not give their standard of proof. States that have had redress schemes (Tasmania, Queensland, Western Australia, and South Australia) have experience that needs to be brought to the table. However, with the exception of Tasmania, there have been no reflective reports on validation or other dimensions of implementing redress schemes. The lessons learned in implementing

redress schemes should be sought from staff in all the relevant jurisdictions. In addition to two reports from Tasmania, there are several reports from cases in Canada.

Q11: Counselling should be provided as early as possible, from day one, even for those whose claim is not validated for a financial payment (that is, interim counselling). Survivors often say that counselling was one of the most important outcomes for them. In Australia, counselling has been provided as a service, and I have not seen published data on its costs. *Tasmanian Institutions* had a more open ended approach in phases 1-3 of its redress scheme, but it was limited in phase 4. *Redress WA* restricted counselling as well (although claimants could request more). The experience of previous Australian redress schemes should be used to calculate costs and set reasonable limits. In Canada, the range offered in benefits for counselling was \$5,000 to \$10,000 per validated claimant (this was in the 1990s, so an adjustment for inflation would need to be factored in).

For legal services, almost all schemes provided support to pay for legal advice, when it would be relevant (that is, before signing a document to waive rights to future litigation, if you wished to accept a payment offer). In general and with a few notable exceptions, the amounts were modest and capped, ranging from \$300 to \$1,000.

I would like to see lawyers publish the legal fees they collect in their work on redress schemes and litigation (averages, not at the individual level). There is too little information on this aspect of the redress process. The area should be monitored closely.

Q12: If a person has already received a financial payment for abuse (or another criterion for the payment such as time in an institution), then they should not receive double recovery. There should be an option for a survivor to receive a 'gap' payment between what they have already received, if a new type of payment is higher.

Other considerations

1. It is important to bear in mind that historical institutional abuse of children can arise from policy wrongs against children or a more general discrimination against a group, which subsequently led to their placement in an institution or foster home. I discuss this in a paper to appear in *Current Issues in Criminal Justice* (a special issue on historical institutional abuse that should be out in July 2014). The relevant Australian cases are *Child Migrants* and *Stolen Generations*. These types of cases may need to be thought of differently because the abuse can be secondary to the initial policy/practice wrong. The legislation for the *Tasmanian Stolen Generations* payment was for the redress of a policy/practice wrong of forcible child removal of certain Indigenous children, not for abuse that may have taken place in an institution or foster care.

2. Australia's approach to redress schemes for institutional abuse has been government-stipulated, with little or no victim/survivor advocacy group participation. Such participation should be considered in the design and elements of a redress scheme.

I will be pleased to supply more information on any of these matters. Feel free to ring or email me.

With best wishes,

