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Report of the Law Commission of Canada

1. INTRODUCTION

In March 2000, the Law Commission of Canada released a Report entitled *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*. In 1997, the federal Minister of Justice, the Honourable Anne McLellan, had requested that the Law Commission prepare “a report on the means for addressing the harm caused by physical and sexual abuse of children in institutions operated, funded or sponsored by government.” The Commission was to furnish “governments, and Canadians generally, with an inventory and comparative assessment of approaches available” for providing redress for the adult survivors of institutional abuse.

I have read the 455-page Report, together with a number of research and background papers prepared for the Commission. The Report provides a useful articulation of the effects of child sexual and physical abuse upon survivors, and criteria for evaluating the adequacy of various models or approaches which address institutional abuse. Most important, the strengths and shortcomings of different processes which can address institutional abuse are outlined: the criminal justice system, civil actions, criminal injuries compensation programs, *ex gratia* payments, ombudsman offices, children’s advocates and commissions, public inquiries, truth commissions, community initiatives and redress programs. Recommendations respecting each process are also made. The Report identifies fairness to alleged abusers and an appropriate validation process as criteria for evaluating a government’s response to reports of institutional abuse. However, its prime focus is on the needs of true victims of abuse and on how various models or approaches may be responsive to those needs.

In the pages that follow, I have summarized in some detail the contents of the Report. It assisted me in framing the issues and in formulating my own recommendations. It also provided a useful analytical framework for evaluating the Nova Scotia Compensation Program as a “redress program.”

2. GENERAL OBSERVATIONS BY THE LAW COMMISSION

(a) Why Abuse Occurred

The Law Commission offered some insights into why abuse has occurred at institutions for children. It referred to three critical factors: the vulnerability of the residents, the unquestioned authority of the care givers, and the lack of external oversight.

Children who were placed in institutions generally came from marginalized groups or communities in society (the poor, racial and ethnic minorities), whose very marginalization meant they had neither the financial means nor the political clout to exercise control over their lives. Residents also frequently did not fall within what society considered the norm; they included children with disabilities, orphans, and sometimes even those born outside of marriage. Furthermore, those in youth detention facilities also carried the stigma of a conviction. All this made it easy for officials to discount, disbelieve or deny the children's complaints of the treatment they received.¹

In contrast, those who ran the institutions often came from groups that were powerful and respected: government, churches and their lay orders. For many, the idea that ministers, deacons, priests, nuns, or members of lay orders could commit acts of physical and sexual child abuse was unthinkable. Even today, to accept the extent of abuse that was perpetrated, and the failure of those in charge to prevent or stop it, is to have one's faith in governments and churches seriously undermined. Many would rather believe the abuse did not occur or, when it did, was wildly exaggerated.

Finally, society adopted a kind of 'out of sight, out of mind' attitude towards children in institutions. External oversight was lacking, allowing the abuse to go unseen and unchecked.

¹The Report noted that what was particularly disturbing about youth detention facilities is that many children who were incarcerated in them should never have been incarcerated at all. Minor offences such as truancy were sufficient to land a child in one of these facilities. Girls were often placed there for behaviour that was considered difficult or socially unacceptable. In other words, many children were made to feel like criminals for behaviour that should not have been judged so harshly.

(b) Types of Abuse Suffered

The Commission identified the types of abuse suffered by survivors. Physical and sexual abuse were the most obvious, but they were not the only types. Survivors also endured emotional, psychological, spiritual, racial and cultural abuse. The Commission wrote:

[S]ome children lived in an atmosphere where they were frequently demeaned and psychologically degraded, and where their upbringing, spiritual practices and culture were scorned and repressed. Some children were exposed to these conditions for years on end. The effects of such suffering can be as enduring as those of physical and sexual abuse. Minds and spirits can be damaged as deeply as bodies, and in a wide variety of ways.

Insofar as physical abuse was concerned, the Commission commented as follows:

Determining the point at which physical punishment crosses the line from discipline to abuse is not easy. Reasonable people differ as to whether physical punishment is a necessary disciplinary tool and, if so, what the appropriate amount is, and how it should be administered. Whatever divergent views people may have on the subject of physical discipline, however, one thing should be clear. If physical punishment in an institutional setting is to be tolerated at all, it must be a regulated, moderate, measured form of response, used only to discipline serious behaviour that is in clear breach of an established code of conduct. In theory, this approach to physical punishment has long been official policy.

3. THE APPROACH OF THE LAW COMMISSION

In its approach, the Commission identified and focussed on the needs of those who have suffered abuse as children. It resolved to keep the interests of survivors foremost for three reasons:

First, the needs of survivors are the necessary starting point for assessing the adequacy of redress. After all, it is they who have suffered harm and they who are best able to articulate that harm. Second, of all the parties involved in allegations of institutional child abuse, survivors have by far the weakest voice. They often lack the resources, the organisation and the expertise to make their case strongly and convincingly. Third, too often the needs of survivors have been seen as incidental to other concerns, such as punishing perpetrators. By focussing on survivors, the Commission hopes to change the way responses to abuse are developed and assessed.

The Commission identified certain recurring themes in the manner in which the needs of survivors are expressed:

Survivors seek: an acknowledgment of the harm done and accountability for that harm; an apology; access to therapy and to education; financial compensation; some means of

memorializing the experiences of children in institutions; and a commitment to raising public awareness of institutional child abuse and preventing its recurrence.

The Commission concluded that two fundamental values should guide any attempt to understand and respond to the needs of survivors:

First, one must respect survivors and engage them to the fullest extent possible in any redress process. Second, survivors must be given access to information and support so that they can make informed choices about how to deal with their experience of abuse.

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Ideally, a process for providing redress should take into account the needs of survivors, their families and their communities in a manner that is fair, fiscally responsible and acceptable to the public.

The Report reflected that a child who is abused in an institution experiences profound powerlessness and isolation. This reinforces the importance of a process that permits them to exercise real choices about what redress options to pursue and about strategic decisions relating to those options. It was said that

imposing ‘solutions’ on survivors without consulting them as to their needs or taking account of those needs can be as offensive as refusing to offer redress altogether. In such cases, once again, others who have more power are making important decisions affecting their lives ... Engagement also may mean full consultation on the design and implementation of any programs of redress directed to particular groups of survivors.

The Report concluded that engaging survivors to the fullest extent possible in any approach to redress demonstrates respect for them and acknowledgment that they know what is needed to undo the harm done to them.

Survivors also need to feel that they are given enough information to enable them to understand any available process and to make informed decisions that may be required. The information must be provided by someone who can be trusted. As well, many survivors express the need for support during any process of redress. Their involvement in such processes, whether as witnesses in court proceedings or as applicants in a redress program or otherwise, can be traumatic and compel them to confront daily their abusive past.

The needs of survivors primarily identified by the Commission were:

1. Establishing an historical record; remembrance

Many survivors wish to ensure that their experiences are not forgotten. As a result, some wish to see a memorial created. This need not be a physical structure but, rather, could be a place where survivors record their experiences or those of friends no longer alive to ensure that future generations will know what they endured.

2. Acknowledgment

Many survivors are unable to freely describe their experiences to others. Sometimes, this inability is motivated by fear of disbelief, blame, indifference or annoyance. Of course, this may particularly be so where their earlier complaints were met with denial or minimization. Not surprisingly, many survivors therefore want the abuse and the harm it caused to be publicly acknowledged. The Report stated that acknowledgment is “naming the acts done and admitting that they were wrong.” It must have three features: it must be specific and forthright, involving a detailed and candid description of persons, places and acts; it must demonstrate an understanding of the impact or harm caused by the abuse; and it must not shift blame for the abuse onto the survivors.

3. Apology

Some survivors identify receiving an apology as one of the highest priorities. Of course, acknowledgment of the wrong may form a component of an apology. An apology is also said to entail acceptance of responsibility for the wrong; the expression of sincere regret or remorse; assurance that the wrong will not recur; and reparation through concrete measures. The Report noted that, even where the abuse is historically distant, its fallout continues to exist through the intergenerational effects of poor parenting or domestic violence, the low educational levels and diminished life skills of many survivors; and the disproportionate numbers of survivors who spend time in correctional facilities. In this context, an apology “is a step in the healing process, and should be understood as a move towards a better future, rather than as a fruitless hearkening back to an unhappy but unchangeable past.”

The Report suggested that the apology should, if at all possible, be based on first-hand knowledge and involve an explicit naming of the harms suffered by an individual or a group. It should be in the form that the person or group desires (e.g., private, personalized, written, public). It should be delivered by the person the recipients believe is the most appropriate one to do so. An apology delivered in a representative capacity is best coming from the highest level. Apologies must be delivered in a timely way, given the passage of time that has already taken place since the abuse occurred. They should be culturally sensitive and otherwise appropriate to the person or group to whom they are addressed. Finally, it is not up to the person delivering the apology to decide what should be the appropriate reaction of the person to whom the apology is offered. A true apology can succeed in shifting the power between the parties, restoring the dignity of the survivor and opening the way to reconciliation.

An acknowledgment and an apology can be made without identifying who actually committed the abuse.

4. Accountability

Some survivors need to see individuals held to account – the actual abusers, co-workers who permitted the abuse to continue, supervisors or heads of institutions that failed to

appropriately respond to complaints, or those who permitted institutions to operate without adequate oversight. This may involve findings of accountability without legal liability. Or this may involve the imposition of liability or punishment. The Report expressed this caution:

Where the model of accountability without liability is chosen, care must be taken to ensure that clear criteria are used to establish accountability. This is because people falsely or unjustly linked to child abuse will suffer the serious social stigma of those accusations, even if they are never exposed to legal liability.

Some survivors believe that the punishment of abusers is a part of their own healing process.

5. Access to therapy or counselling

Abuse often has profound consequences for survivors. The nature and extent of those consequences depend on many factors. The Report identified the need for two kinds of therapy or counselling: immediate support and long-term support. It said:

Events sometimes thrust survivors into a direct confrontation with their past for which they may not be ready, as when a police investigator unexpectedly arrives at their doorstep, or when they are called to testify at a criminal trial. In such circumstances, survivors may need access to immediate and ongoing support to deal with the memories triggered by the investigation, by a public inquiry, or by facing an abuser in court and being cross-examined about the abuse. Support is necessary from the moment survivors are drawn into an investigation or inquiry. It cannot await the outcome of a judicial proceeding or the conclusion of negotiations for a compensation package

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In addition to these situational needs for therapy, survivors need access to long-term therapy and counselling in order to work through the emotional, psychological and other consequences of child abuse. This need is not necessarily linked to or triggered by any legal proceeding or redress program. It is simply part of the healing that survivors require in order to overcome the harm caused by the abuse.

6. Access to education or training

One demonstrated consequence of institutional abuse is that some children did not receive an adequate education, perhaps because the abuse occurred in the school setting or because those who suffered abuse found it hard to concentrate in class or to study. Many survivors see education as a significant step towards asserting greater control over their lives and overcoming some of the harm caused by the abuse.

7. Financial Compensation

As the Report noted, some descriptions of survivors' needs downplay the importance of financial compensation, emphasizing instead acknowledgment, apology, accountability, therapy and education. However, "money is the way the Canadian legal system compensates people for

injuries wrongfully caused by others.” As well, money can provide for a range of other needs, such as therapy and education.

A process that involves financial compensation brings with it certain difficulties. It is not easy to establish the right amount of compensation for injuries that cannot be compensated by money in any true sense. Consistency in the amounts awarded to survivors is difficult to achieve. Conversely, attempting to achieve consistency by putting a monetary value on the different kinds or degrees of abuse can dehumanize survivors by subjecting them to formulae or tables for compensation that do not really reflect their unique experiences. Finding the appropriate framework for paying compensation has also proven difficult – whether, for instance, it should be paid as a lump sum or in installments. Survivors also have a need to receive appropriate information and financial counselling about savings and investment options open to them.

8. Prevention and Public Awareness

Many survivors find it important to ensure that they be instrumental in preventing abuse of other children. Active involvement in advocacy, education and other preventive strategies can contribute to an individual’s personal healing.

9. Needs of Families

Families can feel guilt, particularly where they have been involved in sending their children to institutions where abuse occurred. Survivors become alienated from their parents. Children who have been physically or sexually abused frequently become abusers themselves. As a result, counselling that extends to family members may fulfill an important need of the families.

10. Needs of Communities

Entire communities may be affected by institutional child abuse. Small or tightly-knit communities are especially vulnerable to the ripple effects of such abuse. They must integrate victims back into a community that may already contain victims who later became offenders. Small or close-knit communities have needs much like those of families.

11. Societal Needs: Prevention and Public Education

Society's primary needs today are for greater public awareness of the risk of abuse that children in out-of-home care face, and for better strategies to prevent this abuse. While Canadians are familiar with the most notorious occurrences of institutional child abuse, they tend to see it as a pathology of the past and the result of the actions of a few 'bad apples,' rather than as a continuing and systemic problem. Public perceptions need to change. Support must be given to education and prevention.

4. CRITERIA FOR ASSESSMENT OF REDRESS OPTIONS

The Commission saw the needs of survivors as the foundation for its assessment of the various approaches to redress. However, it also argued that it is not sufficient to evaluate an approach solely by how well it meets those needs. The Report noted that:

A key concern is also to find or create appropriate remedies that will promote reconciliation and healing. Other considerations that must be built into the assessment process include equity and procedural fairness for everyone involved in allegations of abuse, as well as public acceptability, fiscal responsibility, and goals of prevention and public education.

The Commission put forward the following as criteria by which various redress options may be assessed:

- ! Respect, engagement and informed choice** – does the process respect and engage survivors, as well as offer them comprehensive information about the process itself?
- ! Fact-finding** – can the process uncover the facts necessary in order to validate whether abuse took place and what circumstances allowed it to occur?

- ! **Accountability** – do those administering the process have the authority to hold people and organizations accountable for their actions?
- ! **Fairness** – is the process fair to survivors as well as all other parties affected by it?
- ! **Acknowledgment, apology and reconciliation** – does the process provide for acknowledgment, apology and reconciliation where abuse has occurred?
- ! **Compensation, counselling and education** – can the process address the needs of survivors for financial compensation, counselling and education?
- ! **Needs of families, communities and peoples** – can the process meet the needs of the families of survivors as well as their communities and peoples?
- ! **Prevention and public education** – does the process contribute to public awareness and prevention?

5. PRINCIPLES APPLICABLE TO RESPONSES TO INSTITUTIONAL ABUSE

The Report also formulated five general principles to govern the manner in which cases of institutional abuse should be handled. These principles are said to be applicable to all approaches and are addressed to everyone who is involved in attempts to respond to institutional abuse: governments and courts, professional associations and their members, religious organizations, survivors and their families and the groups that represent them, and the public, whose support and understanding are vital to assuring that survivors receive appropriate and adequate redress.

- ! **Former residents of institutions should have the information they need to make informed decisions about which redress options to participate in.**

Information about redress options needs to be presented in an understandable, comprehensive and impartial manner. Therefore, the information should not be provided by someone who has a personal professional stake in representing these potential plaintiffs in a civil action, who relies on them as witnesses in a criminal prosecution, or who counsels them as private clients in a therapeutic setting. Ideally, existing public agencies that offer services to victims (for example, sexual assault centres) could be used as vehicles for dispensing this information.

- ! **Former residents need support through the course of any process.**

Survivors confronting a difficult and sometimes traumatic past need proper psychological and emotional support so that their participation in the process does not unduly exacerbate the harm they have already suffered. The public interest in discovering wrongdoing, prosecuting the guilty and validating claims justifies providing this support.

- ! Those involved in conducting or administering different processes must have sufficient training to ensure that they understand the circumstances of survivors of institutional child abuse.**

To the extent that officials are able to understand the needs of survivors, they can help reduce the negative impacts of adversarial proceedings or the inquisitorial processes of other types of inquiries and investigations.

- ! The response to institutional child abuse must be integrated, coordinated and subject to ongoing assessment and improvement.**

The desire to respond to institutional abuse must be translated into action across the entire range of legal and social services systems. Those involved in providing redress must coordinate their efforts to meet all the needs of survivors. Furthermore, experience with existing approaches to redress must be used to improve those approaches.

- ! Every effort must be made to minimize the potential harm of redress processes themselves.**

In view of the pain already suffered by survivors, it is imperative that every process for providing redress or punishing wrongdoers is carefully scrutinized to avoid compounding the harm done. Legal processes must be examined to determine whether existing practices and procedures are unduly prejudicial to survivors for very little gain in the rights of alleged abusers. The specific context of child abuse may lead to the conclusion that the balance of interests may need to be readjusted.

6. RESPONSES TO INSTITUTIONAL ABUSE

The Law Commission examined the relative merits of various existing options for redress according to the foregoing criteria and principles. Its conclusions regarding five of those options are summarized here.

(a) The Criminal Justice Process

The Commission contended that the criminal justice process is well-suited to identifying individual perpetrators of abuse and holding them liable. It is, however, less effective in shedding light on the systemic problems that may have allowed the abuse to occur in the first place. It is also unable to respond to forms of institutional abuse which do not constitute criminal offences.

A criminal trial can be a re-victimizing event for a survivor. Witnesses do not control any aspect of the process, and may not be kept fully informed of its progress and consequences. Furthermore, the process can only provide for a limited range of survivors' needs. It does not promote acknowledgment, apology or reconciliation.

The Commission concluded:

The criminal justice system seeks to achieve a balance between the rights of the accused and the power of the State. The system requires the cooperation of victims in order to achieve its aims. This cooperation comes at a personal cost to victims, however willing they may be to assist.

Despite the emergence of restorative justice as a way of responding to criminal conduct, the criminal justice process is still essentially adversarial, reactive and punitive. Some changes have been made to facilitate the participation of victims in the process. These include procedural changes relating to the manner in which police investigate, prosecutors involve and prepare victims, and judges conduct trials. But the central goals of the system have not been, and likely will not be, modified in the near future. The criminal justice process offers a good, although narrow, fact-finding capacity, and does produce accountability – at least upon a guilty plea or a conviction.

Fundamentally, the criminal justice system is designed to ensure a fair trial for accused persons and to punish those who have been properly convicted. It does not provide an instrument for victims to exact vengeance or to achieve redress that meets their other needs.

(b) Civil Actions

The Commission's conclusions regarding civil actions were well summarized in its Report:

The civil litigation process is, in theory, well-suited to meeting most of the needs of survivors, while respecting other concerns such as fairness, responsibility, prevention and public education. It is a public, neutral process initiated by survivors that is consistent with the principles of respect and engagement. The requirement of proof in an adversarial setting promotes, although it does not guarantee, the emergence of all the facts relating to the particular wrongs alleged. This fact-finding capacity is an acknowledged strength of the civil litigation process. A judgment in favour of the plaintiff in a civil action is also an effective means for holding defendants accountable since the judgement and the amount of damages awarded are on the public record.

The procedural rules of the civil justice system ensure that the formal process is fair to all parties. As an adversarial process, however, the civil action is an unlikely forum for the promotion of acknowledgment, apology and reconciliation. It is, of course, quite effective at responding to the financial claims of survivors, but is less suited to meeting their other needs, or the needs of families, communities and peoples. Finally, the public nature of a civil action means that it can serve both a preventive and an educational role.

The principal difficulties with the civil action relate to access to justice issues, and to incidental consequences of the adversarial system. Many survivors do not have the financial resources to mount a successful civil action. Others do not have the emotional resources, or the support systems in place that would enable them to pursue an action successfully without being revictimised. These significant differences in financial and other resources of victims and defendants can lead to a perception that the civil justice process is not entirely fair.

When survivors settle a pending lawsuit or opt into an alternative dispute resolution process, a different evaluation of the civil justice system must be undertaken. The goals of respect, engagement and informed choice will usually be met, although the extent to which the facts are revealed depends on the nature of the process adopted. Since the alternative process will be negotiated, it is likely to be fair to all parties. Whether a form of alternative dispute resolution achieves clear and public accountability depends on the terms of the agreement. These may not speak to acknowledgment, or conversely, may provide for both acknowledgment and apology. The same is true of remedies. The amount of financial compensation is likely to be less in a settlement or alternative process. However, other remedies like therapy and education can be included in the agreement. Finally, alternative dispute resolution processes can serve both a preventive and an educational role if they lead to public settlements or explicit preventive and educational programs.

On the whole, the Commission contended that it is inadequate to address widespread, systemic abuse solely through the criminal process and civil actions brought by individual complainants against government or their alleged abusers. Other forms of redress are also required.

(c) Public Inquiries

The Commission saw both positive and negative aspects to the option of holding public inquiries:

As recognized by the Royal Commission on Aboriginal Peoples and others, public inquiries have significant potential as a means of investigating the incidence, causes and effects of institutional child abuse. They can examine the past without the restrictions placed on courts. They can commission their own research and listen to survivors in a non-adversarial setting. They can be concerned not only with survivors, but with the effects that the abuse had on families and communities. They can be an effective vehicle for public education.

Public inquiries can be both expensive and time-consuming. These are potential drawbacks to consider when choosing this process to redress historical cases of child abuse. Survivors may feel the money directed to an inquiry would be better spent directly on helping them to heal. They may also be sceptical of a process that could delay the opportunity for individuals to access immediate and more tangible forms of redress. In addition, the inquiry process can be unfair to alleged abusers if care is not taken to protect their rights. Public inquiries are most likely to make their distinctive contributions by holding organisations and governments (not individuals) accountable for abuse, and by raising public awareness about abuse and its prevention.

(d) *Ex Gratia* Payments

Governments may choose to provide voluntary (*ex gratia*) payments as compensation for losses or injuries when they are not legally obligated to do so, but when it is deemed in the public interest to do so. The Commission saw some benefits to such a payment program. Since the process involves no attribution or admission of wrongdoing, fairness to alleged perpetrators is not in question, and issues of legal liability need not be resolved. Once a government decides to establish an *ex gratia* payment program, claimants will usually receive compensation sooner than if they had brought a civil action. The ability to fast-track payments may offer a significant advantage to many aging survivors of institutional child abuse. However, the amount of compensation provided will usually be much less than what could be obtained through a court-ordered award of damages. Furthermore, the option as a whole is quite limited in scope. The primary object of the program is financial compensation, and thus many of the other needs of survivors and their families and communities may not be directly addressed. It is preferable to use such a program in combination with other forms of redress.

(e) Criminal Injuries Compensation Programs

Most provinces have established criminal injuries compensation programs to provide financial compensation to victims of violent or personal crimes. The process is generally intended to be simple, effective, inexpensive and quick. It is also designed to be respectful of victims. However, the Commission noted that such programs have their own drawbacks:

Although criminal injuries compensation programs reflect a concern for most of the evaluation criteria, they do so at a rudimentary level. Survivors are not engaged in the design of the process, even if its non-adversarial character shows respect for them. The process is voluntary and does not require survivors to give up the right to pursue other options. It permits many facts to be revealed. But the limited scope of inquiry offers little chance to understand systemic problems and the organisational context of abuse. There is a general acknowledgment of wrongdoing but there is little opportunity for achieving accountability, and almost none for apology and reconciliation.

The process is fair to all parties. However, the needs of survivors for counselling and education are not addressed, and the level of compensation itself is quite low. Criminal injuries compensation programs are not designed to meet the needs of families, communities and peoples and have no direct preventive or educational component.

7. REDRESS PROGRAMS

The Commission noted that the features of the different approaches to reports of institutional abuse need not remain forever fixed, particularly when it is acknowledged that each does not address all of the needs of survivors. However, the Minister of Justice's fundamental question to the Commission remained: is there some other approach (or approaches) that would better "address wrongdoing, while affording appropriate remedies, and promoting reconciliation, fairness and healing?"

As the Report noted, "[t]he desire for another type of process to resolve past cases of institutional child abuse has already led to the creation of innovative 'redress programs'." This is the term the Commission chose to describe programs designed specifically to provide financial compensation and complementary non-monetary benefits to survivors and others harmed by institutional child abuse. Governments often sponsor these programs in whole or in part; but the programs do not involve proceedings before the courts or any existing administrative agency.

[T]hey are ... official responses to the threat of civil liability. They typically find their legal foundation in a governmental policy decision and they need not be formally established by legislation. Consequently, these redress programs can be as expansive and innovative as the imagination and resources of their creators allow.

There is no single model or legislative template for the design or administration of redress programs. ... Nevertheless, they all share an overriding 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. Every time such a program is contemplated,

it is necessary to consider the following basic questions:

Input:	Who will design the program, and how?
Beneficiaries:	Whom will the program serve?
Harms:	For what harms will the program provide redress?
Redress:	What compensation and benefits will be offered?
Validation:	How will claims be validated?
Outreach:	How will the program be made known to potential claimants?
Duration:	How long will it last?
Administration:	Who will administer the program?

The answers to these questions will determine the credibility, effectiveness and success of any given redress program. More than this, the processes by which these questions are developed and negotiated can make or break a redress program.

The Commission examined a number of existing and contemplated redress programs for dealing with institutional child abuse from across Canada. It suggested that such programs are the official response that can be most effectively designed to meet the complete range of goals identified above:

A well-designed redress program can be an attractive option both for those seeking redress and for governments and organisations attempting to respond to the harm caused. Those offering the program can avoid the costs of having to defend numerous civil actions (participants in a redress program are usually required to give up their right to sue as a condition of their participation). These organisations are also better able, at least in theory, to manage and control the costs of the compensation and benefits to be awarded. They are usually aware of the number of potential claimants and the aggregate cost of paying these claims. In addition, by seeking a comprehensive settlement, the organisations are in a position to marshal non-financial benefits such as counsellors, therapists and education or training programs more efficiently. Finally, they might genuinely feel that to be proactive in trying to meet the claims of survivors and facilitate healing is simply the right thing to do. Acknowledgment and apology can be as important to those who are wrongdoers (or who employed wrongdoers) as to those who are wronged.

Survivors may also find a redress program to be a desirable option. They may prefer a less adversarial, more rapid process that offers a wider range of benefits, meeting more of their needs. They may wish to avoid both the risk of being disbelieved in a civil action for damages because they are not “good witnesses”, and the pain of a second victimisation. In return, they may be willing to give up the potential for a higher monetary award from the court. They may also wish to embark on a program that engages them in its design, that is inclusive and respectful, that provides an acknowledgment and an apology, and that has a public education and prevention component.

The Commission stated that negotiating a series of focussed redress programs with survivors and their communities should be a preferred, although not exclusive, response to institutional child abuse. They are an effective complement to existing judicial and administrative

options.

8. THE OPERATION OF REDRESS PROGRAMS

The Commission examined the details of how redress programs can operate. Their observations are summarized under the various headings below.

(a) Input

It is important to the success of a redress program that it respond to the needs of its intended beneficiaries. The most direct way to do so is to permit the beneficiaries or their chosen representatives to negotiate the terms of the program. In contrast to many other approaches, all features of a redress program are negotiable. This allows for involvement of survivors from the outset. Redress programs which involve survivors or those who represent them to the extent of consultation only do not engage survivors as fully as comprehensive negotiations with those individuals; the program is presented on a take-it-or-leave it basis. A truly responsive redress program can emerge only from a negotiating process that reflects the basic principles of respect, engagement, choice and fairness. Various programs in Ontario, such as those in connection with the Grandview and St. John's/St. Joseph's schools, were established after negotiations with former students.

To ensure that survivors effectively participate in negotiations, it may be necessary to ensure that the cost of obtaining professional assistance is reimbursed, given the disparity of resources between those offering redress and survivors.

(b) Beneficiaries

Benefits may be limited to those who directly suffered abuse or may be available more broadly, for example to witnesses to the abuse, or all former residents, or even beyond the former residents to the survivor's own victims (i.e., those who have suffered directly from the survivor's aggressive or destructive behaviour). The St. John's/St. Joseph's program is an example of a redress program which provided counselling for family members.

(c) Harms

A redress program can be designed to accommodate the fullest range of harms, or only more narrow categories of harm. For example, the Jericho program in British Columbia offered compensation for sexual but not physical abuse. For the non-compensable harms, survivors would have to seek redress through traditional processes.

(d) Range of Benefits

A variety of benefits can be offered as part of a redress program. Money is the most basic one. It is usually intended to compensate for pain and suffering, but it can be extended to cover loss of income and loss of enjoyment of life flowing from the abuse. Usually a program will set a scale of payments that is meant to correspond to the duration and severity of the abuse suffered. The money can be paid either in a lump sum or on a periodic basis.

Some redress programs also offer financial counselling. There may be a need to provide potential beneficiaries with information about the financial advantages and disadvantages of seeking redress through the compensation program as compared to bringing a civil action. This enables survivors to make meaningful choices. Financial counselling is also usually intended to provide survivors with a broad range of services, including assistance in determining whether to take a lump-sum or periodic payment, and in managing and investing the money received.

Other possible benefits tend to address more specific needs of claimants. Therapy is often identified as a primary need. Programs may allocate a specific amount for such services or may undertake to pay a therapist directly. Some programs allow survivors to choose the therapist and the form of therapy they prefer. Others designate those therapists whose services will be remunerated. Frequently there is a ceiling either on the amount allocated to therapy or on the period for which funding will be provided.

Where failure to provide a proper education is identified as a harm suffered, some programs offer to pay for educational counselling, the costs of educational upgrading or vocational training. For example, the Grandview program included vocational and educational training.

Some benefits cannot be measured in dollars. Primary among these is the offering of an apology – an acknowledgment of the harm done and the fact that it was not the fault of the survivor; an expression of regret; and an undertaking to make all possible efforts to prevent such abuse from recurring. This kind of statement, addressed privately to the survivor or publicly to a particular group of survivors (or both), can be a central part of a redress program. The St. John's/St. Joseph's program offered a personal, written apology expressed in terms set out by the survivor. As well, the Archdioceses of Ottawa and Toronto (where the schools were located) published a joint pastoral letter. In the Grandview program each beneficiary was entitled to receive an individual acknowledgment from the Ontario Government in a form to be agreed upon by the individual, the Grandview Survivors' Support Group and the Government, after the conclusion of criminal proceedings. The Attorney General of Ontario also undertook to read out a general acknowledgment in the legislature.

Another benefit sought by many survivors is the recording of their experiences. A recorder is selected and given the task of interviewing survivors about their experiences at the institution in question and about the subsequent course of their lives. The report is then published and distributed to all the survivors, and more broadly, if desired. A recorder's report was

produced in connection with the St. John's/St. Joseph's program. A video and booklet were produced as a result of the Grandview Agreement. The experiences at Jericho Hill were the subject of a CBC television documentary. Other forms of recording experiences include 1-800 numbers with answering machines, and mail-in registers for audiotapes. The Commission contended that collecting and archiving survivors' experiences – and making them available to other survivors, researchers and to the general public under conditions agreed to by survivors – is a significant non-monetary benefit that can be incorporated into any redress program.

Redress programs can also provide for memorials. Memorials can serve many functions. They can provoke reflection among the general public. They can symbolize a commitment to preventing harm from recurring. They can acknowledge the harm done to those who are no longer alive. The type of memorial, and conditions for its ongoing maintenance, can be negotiated on a case-by-case basis in each particular redress program.

(e) Level of Benefits

An accurate estimate of the number of potential claimants and the level of benefits to be paid out is an essential element in the design of a redress program. If the estimate is too low, a fiscal crisis for the funding organization can result. If the number is too high, negotiators may be inappropriately discounting their calculations in individual cases, based on an inaccurate assessment of the total impact of a settlement. The Commission noted that estimating the number of claimants is not an easy process. It gave the example of the Nova Scotia Compensation Program, which (as reflected in earlier chapters) was based on an initial estimate of 350 claimants, whereas 1,450 claimants eventually filed applications.

Deciding how much money to allocate to each type of benefit offered, and to each type of harm suffered, will be influenced by the amount of money available for the program as a whole, what types of benefits have priority and how many claimants are anticipated. Financial benefits also need to be calculated in light of the awards likely to be made in civil proceedings. The level of benefits must be attractive enough to cause claimants to opt for the program, rather than launch a civil action, but may reasonably be expected to reflect the lower cost and greater certainty of recovery for claimants under a redress program.

Many programs have been preoccupied with finding appropriate mechanisms to ensure consistency and fairness among claimants, in view of the large number of claims likely to be forthcoming in a short period of time and the desire to deal with these claims quickly and with a minimum of administrative costs. The tendency has been to establish a sliding scale of awards according to a negotiated grid. Both the Jericho and Grandview programs, as well as the Nova Scotia program, employed one. Among the considerations factored into these grids have been: the types of harm to be compensated; the degree of severity of the harm suffered; and the duration of the harm. Each category on the grid is then attributed a corresponding range of monetary compensation. The Commission commented:

A grid permits those funding a redress program to estimate and to control its total cost.

The ranges within each category allow some discretion to adjudicators to tailor their awards to the circumstances of each individual claimant. The premise is that within the established ranges some differentiation of claims to recognise the unique situation of each claimant is possible, but that the cost and time required to establish anew the amount of every claim would be not justifiable given the desire to make compensation available in a timely and efficient manner.

(f) Validation

The Commission began its observations on the procedure for validating claims with the following comments:

The procedure for determining which claimants are entitled to the compensation and benefits offered is a difficult element to design in a redress program. In order to receive the support of survivors, funders and, ultimately, the public (particularly when compensation is paid partly or wholly by the State), a redress program will have to be founded on a process to validate claims that strikes a delicate balance. The process must be sufficiently rigorous that it has credibility with program funders, survivors and the public by minimising the potential for exploitation of the program through fraudulent claims. But it must not put applicants through a procedure that simply duplicates the adversarial and formal legal process of a criminal or civil trial.

Striking this balance is an art, not a science ... [N]o validation process (including those of the civil and criminal justice systems) is, or can be, perfect. This acknowledgment is especially important since there are those who believe that the judicial process is the gold standard and that its procedures for testing the validity of claims should always be used.

How elaborate and demanding the validation process should be may depend on the number of claimants involved; the physical, emotional and psychological capacity of claimants to sustain the procedure; the nature and level of compensation and benefits being offered; the existence of other, independent procedures for confirming the claims; and the amount of time and resources available to devote to the process.

Those offering redress must be careful to design a validation process that is proportionate to the compensation and benefits being offered. For example, if the benefit replicates services available through other government programs, the process may not need to be as rigorous as in cases where monetary awards are being made ... [I]t is essential that the validation process be sufficiently credible that workers at institutions do not have their reputations unfairly impugned. This may even require that they be provided with an opportunity to clear their names should a claimant identify them, even confidentially, as an abuser or a passive but knowing bystander.

The validation process may take a variety of forms. It may be founded exclusively upon a documentary record, i.e., a written application accompanied by supporting documents (as in many criminal injuries compensation board hearings). The supporting documents could include

materials such as medical records, school report cards and attendance records, police reports, personnel records, and institutional correspondence.

The more serious and detailed the allegations, the more substantiation may be required. Conversely, where a claim does not rely on a specific allegation (for instance, when it is for the loss of culture and language at a residential school for aboriginal children), only minimal documentation should be necessary. In these types of cases, validation need require nothing more than simply establishing that a claimant attended a particular institution, and for what period of time.

The degree of validation required may also depend on the nature of the benefit being sought. Given that therapy is a general social good, regardless of the reason that the therapy is needed, a validation process for persons only seeking therapy should not be excessive. British Columbia established the Residential Historical Abuse Program in 1992. It provides intensive counselling and therapy to individuals who claim they were sexually abused in a provincially-operated institution or a provincially-supervised form of care, based on a simple application and verification of the person's residency at the time of the disclosed abuse.

A validation process may involve an oral hearing. Such a hearing provides an opportunity for claimants to describe directly in their own words the abuse they suffered and the impact it has had on their lives. For adjudicators, it provides an opportunity to directly assess a claimant's current circumstances and his or her credibility. At an oral hearing, experienced adjudicators are often able to validate claims with a minimum of intrusive questioning.

Redress programs do not generally provide for appeals from decisions to reject a claim. A formal appeal process blurs the distinction between a redress program and a formal court proceeding, and may defeat the goal of resolving claims more rapidly than the court system would allow. Ordinarily, those funding a redress program should have no particular reason to seek a review of any compensation granted, since the validation process is one they themselves created or agreed to in negotiations. Moreover, since the objective of the program is to provide redress, it is more consistent with that objective to err occasionally on the side of over- rather than under-compensating. However, some validation processes provide for a rehearing where new evidence has come to light or a summary reconsideration of the first decision by a panel of other first-instance decision-makers. An appeal procedure should not be designed to let claimants simply choose the forum or the adjudicator they wish.

It is not possible to predict precisely all the contingencies that may arise once survivors come forward with claims. Allowances must be made and flexibility must be built into the program. Furthermore, where a process is poorly designed or administered, or where completely unforeseeable events unfold, funders may be forced to revise the validation or appeal process in midstream. This is unfortunate because it undermines the goodwill that the program may have fostered in survivors. More dangerously, it can harm survivors by casting doubt on the legitimacy of the claims of all those who have already received an award under the flawed program.

Designers of redress programs have generally sought adjudicators whose skills are suited

to some aspects of the expected claims. Adjudicators are often chosen from among those with legal training. Therapists may also have an important role, given their understanding of the effects of abuse on survivors. Those experienced in personal injury claims adjudication can also be good choices. Beyond ensuring professional expertise, some programs have tried to ensure that the personal characteristics of adjudicators are likely to ease the stress of the process for applicants. For example, in recognition of the fact that all Grandview claimants were women, all adjudicators were women and one was an aboriginal woman. Sometimes, adjudication is simply carried out by employees of the government that funds the program, but this may lead to a perception of a conflict of interest. Care must be taken to choose adjudicators who also have credibility with program funders and the public, and to design the process by which they are assigned to individual cases in a manner that is fair and impartial. Two- or three-person panels should be preferred because the claims process is non-adversarial in nature and because adjudicators will not normally have the benefit of argument from lawyers to assist them in sifting through the facts.

(g) Outreach

A redress program must provide for effective and comprehensive outreach to former residents of targeted institutions to ensure, as far as possible, that all potential claimants are made aware, in a timely way, of the program and provided with the necessary information to make an informed decision whether to participate. How to contact former residents is a troublesome issue. Attendance records are usually in the hands of the authorities who were in charge of the institution, and they may be somewhat less zealous than survivor groups in seeking out the greatest number of former residents possible. Furthermore, even if accurate attendance records can be obtained, they will give no indication of the present whereabouts of former residents. Some net-casting process must be developed.

Additionally, consideration must be given to contacting former residents in a manner that is least likely to cause harm to them. For example, a letter sent to the former resident's home may be opened by a spouse who may then learn, for the first time, about a hidden aspect of the resident's past. The use of popular media is one way of heightening public awareness of a redress program without directly intruding in the lives of survivors. Advertisements can also be posted in community centres, doctor's offices and post offices.

(h) Duration

Former residents must have adequate time to consider the offer of a redress program and to decide whether they wish to participate. The duration of the period for filing a claim must be realistic given the sensitive nature of the abuse and the importance of this decision. The period for filing claims must take into account the difficulties in contacting former residents. Program deadlines must be administered flexibly. Furthermore, in view of the particular emotional and other challenges facing adult survivors of institutional child abuse, the time period within which to apply for benefits should be relatively lengthy. Out-of-time applicants should not have their

claims automatically dismissed without at least a summary inquiry into the reasons for the delay.

(i) Administration

The body funding a redress program often takes primary responsibility for administering it. This may create a perception of a conflict of interest. It also requires survivors to place their trust in the hands of the body that they assert betrayed that trust. These difficulties may be resolved or minimized in a number of ways. Extensive negotiations in establishing the program may build a level of trust. Those involved in the negotiations may remain involved in the administration of the program. Alternatively, an independent body may be created to administer the program (although this has not been tried with any redress program yet).

9. ASSESSING A REDRESS PROGRAM

The Commission assessed the option of redress programs against its own criteria for assessing redress options, outlined above.

(a) Respect, Engagement and Informed Choice

The Commission's first criterion was whether the process respects and engages survivors, and offers them comprehensive information about the process itself. Awareness of the needs and particular sensibilities of survivors should therefore be demonstrably reflected in the design of a redress program and the manner in which it is operated. From a procedural perspective, respect in the design of a redress program can be gauged by answering questions such as these:

- ! To what extent were former residents involved in the design of the program?
- ! Was a concerted effort made to inform former residents of the existence of the program and to explain its key points?
- ! Were resources provided so that survivors could form their own support group to provide input into the development of the program and support each other through the redress process?
- ! Were the survivors able to consult with those who have been involved in other redress programs, to get an idea of what elements of the program proved successful, and which proved problematic?

From a substantive perspective, the crucial determinants of how well the process respects survivors are:

- ! Do the benefits offered relate closely to the needs expressed?

- ! Is the compensation offered proportionate to the harm done?
- ! Are those conducting the validation process familiar with the particular circumstances of child abuse survivors?
- ! How are survivors treated throughout the application and validation processes, and in the delivery of benefits?

(b) Fact-finding

The Commission's second criterion was whether the process can uncover the facts necessary to validate whether abuse took place and can determine the circumstances which allowed it to occur. The Commission stated:

A redress program is meant to be a clear alternative to proceedings before courts. It is intended to focus on helping survivors, without making this help dependent on the complex process of assigning legal fault. Consequently, fact-finding about individual cases is not a primary goal of a redress program, at least not in the precise way that goal is pursued in a civil or criminal action.

Some fact-finding is, however, essential to the validation of a claim for redress. To be credible, a redress program must be able to substantiate the accuracy of the claims submitted.

.....

This type of fact-finding has a very specific and, in a sense, private purpose. Its aim is to verify the legitimacy of the claim of an individual survivor. Once that is done, or once a claim has been accepted, the factual basis on which it has been accepted does not become a matter of public record. Details of individual claims and awards are kept confidential. This is necessary because redress programs are designed to be non-adversarial. This means that the alleged perpetrators of abuse do not have an opportunity to counter the allegations, because the basis for compensation is the evidence of harm done, not the identification of the wrongdoer.

(c) Accountability

The Commission's third criterion was whether those administering the process have the authority to hold people and organizations accountable for their actions. It commented:

[R]edress programs are not designed to name names and hold specific individuals to account for specific instances of abuse. In fact, redress programs may be seen as a way to set aside the difficult issues involved in assigning individual accountability in favour of providing compensation on a collective basis. In such cases, a redress program reflects a choice by the organisation that administered or funded an institution for children to compensate survivors of abuse at that institution without admitting legal liability or requiring proof of the legal liability of specific perpetrators. Therefore, while the redress program does not assign accountability to individuals as part of its process, its very existence represents a form of institutional accountability.

(d) Fairness

The Commission's fourth criterion was whether the process is fair to survivors as well as to all other parties affected by it. Its comments came in two parts. In its Overview, it stated:

The fairness of a given redress program will depend largely on the validation process. A redress program should be considered fair to survivors where its validation process is based on objective, consistent and relevant criteria. As long as adjudicators are carefully selected and the validation is agreed upon in advance, the process is also fair to those who fund the program. Employees and former employees of institutions may, however, feel that the private nature of the process and their exclusion from it means that the process is not fair to them.

It later continued its comments:

A redress program awards compensation and benefits to those whose claims have been validated. Invariably, this validation process is not adversarial. In other words, claimants do not have to personally confront those whom they allege abused them.

The absence of alleged perpetrators from redress programs has caused a concern about the fairness of these programs. Persons associated with the institutions where abuse is alleged to have occurred have protested, in some cases, that their reputations are being undermined through a process which allows them no opportunity to counter the allegations that have been made. To put it simply, they do not have an opportunity to tell their side of the story. How damaging is this to the legitimacy of redress programs?

Redress programs do not balance the interests of all parties in the way that civil and criminal processes do because they do not have the same purpose as those processes. No individual will be convicted of a crime or ordered to pay damages as a result of a redress program. It is true that redress is based on a claim of wrongdoing, and where that claim alleges physical or sexual abuse, it must be based on an allegation against an individual wrongdoer. That alleged wrongdoer does not then have an opportunity to respond to the

allegation.

There is a trade-off, however. The redress program is confidential. The alleged perpetrator does not have an opportunity to reply, but neither is he or she called to account or made legally liable for the wrongs he or she is alleged to have committed.

One may argue that the reputation of those who were employees at these institutions is tarnished by the fact of a redress program. There are two aspects of this concern. First, totally innocent employees may have no way of publicly clearing their names. Second, employees collectively have no way of refuting general allegations. To a large extent, however, this is unavoidable. The reputations of an institution and its former employees are tarnished once widespread allegations of abuse emerge, whether or not there have been criminal convictions or judgements in civil actions. The public judges much more rapidly and harshly than the courts, and does so regardless of the existence of a redress program. Recovering from allegations that may never be proven (or disproven) is a big hurdle for institutions as well as individuals.

The fairness that operates in a redress program is a kind of collective fairness. It says, “harms were done to innocent children – we will provide redress for those harms”, without further burdening victims with the rigours of a civil action. In turn, they will accept lesser compensation than that to which they may be entitled under the law. Redress programs should be considered fair when they incorporate a validation process that is based on objective, consistent and relevant criteria. Fairness in our society does not begin and end with the adversarial processes of civil courts.

(e) Acknowledgment, Apology and Reconciliation

The Commission’s fifth criterion was whether the process provides for acknowledgment, apology and reconciliation. The establishment of a redress program, funded by those who were responsible for the institution, is in itself a form of institutional accountability and acknowledgment, although the program itself will not point the finger at individual abusers. Redress programs also generally involve an offer of an apology of one kind or another. How well they promote reconciliation may depend upon a number of factors, including the existence of a sincere and mutual desire for reconciliation. A redress program that responds to key survivor needs may pave the path to reconciliation.

(f) Compensation, Counselling and Education

The Commission's sixth criterion was whether the process can address the needs of survivors for financial compensation, counselling and education. Redress programs have the flexibility and scope necessary to respond to these needs. The only constraints on them are the priorities and objectives of the program, the creative and financial resources of those funding the program, and their moral and political will.

(g) Needs of Families, Communities and Peoples

The Commission's seventh criterion was whether the process can meet the needs of the families of survivors as well as their communities and peoples. A redress program can be designed to address the needs of families for the same reasons and within the same constraints as set out above. Furthermore, where an affected community can be defined with some precision, a redress program can offer services like counselling programs to the community as a whole.

(h) Prevention and Public Education

The Commission's final criterion was whether the process contributes to public awareness and prevention. It wrote:

Redress programs are generally not well-publicised outside the community of former residents for whom they are designed. The validation processes, unlike in criminal and civil trials, are not public events. The individual awards themselves remain confidential, with only the ranges being made public

.....

Redress programs to date have generally not dealt with prevention explicitly. One could say that the mere fact of having a government or other body make the public gesture of acknowledging the harm that was done in an institution for which it was responsible may well lead to measures being taken to prevent a recurrence of such events ... [R]edress programs usually do not have a research and recommendation component. Recommendations on how to avoid a recurrence of abuse emerge, if at all, from the efforts of those who are funded under a community-based benefit included as part of a redress program.

(i) Conclusion

The Commission concluded its assessment with the following comments:

The Commission views redress programs as only one of several options available to survivors of institutional child abuse. They are not a perfect solution. But given the wide diversity of circumstances and needs of survivors, negotiated redress programs offer the best opportunity to meet these needs while respecting the other goals that any approach to providing redress must pay attention. This said, the situation of different groups of survivors are simply too diverse to be satisfied by any single template for redress programs.

One of the main attractions of redress programs, for all parties, is that they are meant to be more expeditious, less costly (both for claimant and for compensator) and less emotionally difficult for survivors than established legal procedures. Because they can be designed and administered on a case-by-case basis, they have the capacity to respond to a greater range of needs and a wider category of victims than do the civil and criminal justice processes.

To be successful, redress programs must be carefully planned to respond to the particular needs of the survivors they are intended to serve. Equally, they must be fiscally responsible and realistic, particularly where they are funded through the public purse. With the experiences of past redress programs as guides, institutions, governments and survivors should now be in a position to fashion responsive and responsible redress programs that can be supported by all affected parties and by the public.

10. RESPONSE TO CRITICISMS OF REDRESS PROGRAMS

The Commission recognized that redress programs are not free from controversy. It pointed to three types of objections: the perception of special treatment, problems of validation, and the additional cost. Near the end of its Report, it responded as follows:

The Commission wishes to emphasize ... that neither the redress programs it proposes, nor other attempts to negotiate the settlement of civil claims, should be construed as an attempt to create a special system of justice for the survivors of institutional abuse alone. Put more precisely, whenever large numbers of people are harmed in significant ways as a result of the policies, acts or omissions of public authorities or large organisations, the response should not necessarily be restricted to traditional processes

.....

Many people are sceptical of non-judicial redress programs because of their perception that there will be insufficient control over fraudulent claims. It is true that the standard of proof for civil, and especially criminal, trials reduces the likelihood of fraudulent claims or charges to succeed. But there are many other, existing compensation programs that do not require claimants to undergo extensive cross-examination in an adversarial setting. The

criminal injuries compensation process is an example. Those who hear and determine criminal injuries compensation claims have acquired expertise and experience that helps them detect unfounded claims. There is no reason to believe that similar processes for filing and supporting claims, and similar techniques for achieving validation cannot be incorporated into any redress program.

In addition, it must be accepted that just as no judicial process is error-free, no redress program will be error-free. Providing compensation to survivors is a quite different objective from ensuring that no person is ever wrongfully convicted. Given this purpose, it is better to err on the side of making payments to some who may not be entitled to compensation, than to exclude legitimate claimants, or to oblige survivors to go through a re-victimising fact-finding process. In all events, survivors themselves have every interest in ensuring that an appropriate validation mechanism is put into place. It will benefit them in that it will ensure that the legitimacy of the awards is widely accepted, and it will mean that whatever resources are made available in a redress program are not dissipated by the payment of fraudulent claims.

Finally, some people have expressed concern about what they perceive to be the costs of comprehensive negotiated redress programs. It may be true, although the evidence is far from conclusive, that more claimants will come forward to participate in a non-adversarial redress program than would launch a lawsuit against perpetrators and their employers. However, the types of settlements that are usually agreed upon within such programs invariably are somewhat less than the sums that would be awarded as damages by the civil courts. In addition, the cost of litigation will always be substantially higher than the cost of negotiating and administering a comprehensive redress program. After all, defendants who are condemned to pay damages are also required to pay a portion of the plaintiff's legal costs, as well as their own lawyer's fees.

But this is not the real issue. Whatever the monetary cost of negotiating a redress program and providing compensation to those who meet the criteria of eligibility, this cost is small when compared to the cost of not acting. The secondary and ongoing damage – to survivors, to their families and to the community – caused by failing to address harms arising from institutional child abuse is incalculable. In view of this fact, it seems misguided and short-sighted to suggest that redress programs are too costly to undertake.

11. RECOMMENDATIONS

The Commission made a number of recommendations throughout its Report in connection with all the various options for redress. Its recommendations in relation to redress programs are reproduced below, along with some of the Commission's commentary, where helpful. The Commission also made six more general recommendations to frame the way the specific recommendations are read. They are reproduced following the recommendations concerning redress programs.

(a) Recommendations Respecting Redress Programs

- ! A redress program should be designed with input from the group it is intended to benefit.**

The most credible form of input is negotiation directly with former residents or their representatives. The circumstances of negotiations should ensure, to the extent possible, that the former residents are on an equal footing with those offering redress. It may also involve funding a survivors' group so that information is disseminated to as many residents as possible, and they are aware of the progress of the negotiation.

- ! A redress program should offer compensation and benefits that respond to the full range of survivors' needs.**
- ! Redress programs should offer a wider range of benefits than those available through the courts or administrative tribunals.**

The categories of benefits or services which may be offered through a redress program should not be considered closed. Former residents should have the opportunity of receiving those benefits which are best suited to their needs.

- ! Family members should be entitled to certain benefits of a redress program.**
- ! Best efforts should be made to contact as many former residents as possible to inform them of the redress program in a timely fashion, while respecting their privacy.**

Outreach efforts should protect the privacy of former residents. Initial contact by mail, for example, would be preferable. General outreach (i.e., notices and advertisements) can target settings where survivors are likely to see them. Outreach should be made to the prisons to ensure that former residents serving time in custody are given an equal opportunity to participate in redress programs. The information provided in outreach letters or advertisements should be in clear and accessible language. Verbal outreach (e.g., by radio) is as important as written communication.

- ! The claims period should be designed to ensure that the maximum number of claimants has an opportunity to apply.**

Termination of a claims period should only occur with reasonable notice.

- ! A redress program must be based on a clear and credible validation process.**

The focus of the validation process should be on establishing what harms were suffered at the institution, the effects of those harms, and the appropriate level of compensation. The standard of proof should be commensurate with the benefits offered. Those determining the validity of claims should be impartial decision makers. Members of adjudication panels should

have the appropriate professional background, training or life experience to recognize the harms of institutional child abuse. They should have experience with a compensation process, rather than only a fault-finding process. The onus should be on those organizing the redress program to corroborate, to the extent possible, the experiences recounted by those claiming compensation. All possible sources of corroboration should be canvassed, including institutional archives, school performance and attendance records, contemporaneous medical, social service or police reports, and the verdicts of criminal proceedings, if any.

! The administration of a redress program should have the confidence of both funders and beneficiaries.

Where possible, those administering the program should be independent of those funding it.

! Best practices in redress programs should be assembled by an independent body, such as a university department or research institute, for the benefit of society as a whole, as well as survivors.

Programs to train survivors or their representatives in the negotiation of redress programs should be established. Those who negotiate on behalf of governments should receive training or have knowledge about the circumstances and effects of institutional child abuse.

! There should be a place (or places) where those who lived in institutions can record their experiences and where historical materials concerning these institutions can be gathered.

The recording of experiences could be done in a variety of formats. Procedures should be in place to ensure that no allegations or accusations are made against named or identifiable individuals.

(b) General Recommendations

- ! 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.**
- ! Every survivor has unique needs. All attempts to address these needs should be grounded in respect, engagement and informed choice.**
- ! The processes of redress should not cause further harm to survivors of institutional child abuse, their families and their communities.**
- ! Community initiatives should be promoted as a significant means of redressing institutional child abuse.**
- ! Redress programs negotiated with survivors and their communities are the best official response for addressing the full range of their needs while being responsive to concerns of fairness and accountability.**
- ! In addition to specific programs designed to meet the needs of survivors, it is crucial to establish programs of public education and to continue to develop and revise protocols and other strategies for prevention.**

In the following chapter, I draw upon the analysis and recommendations of the Law Commission Report in making my own recommendations.