

**Response to Historical
Institutional Abuse
Consultation by Queen's
University Belfast Human
Rights Centre and School
of Law**

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A. Introduction

It has been two years since the publication of the Hart Historical Institutional Abuse Inquiry (HIAI) into violations between 1922-1995. The passage of time has had a compounding effect on victims and survivors of historical institutional abuse, with redress now pressing as they are becoming older. This submission sets out some best practices from other jurisdictions dealing with historical institutional abuse, as well as human rights standards, so as to inform recommendations of the consultation on Historical Institutional Abuse Inquiry and government proposals.¹ As a whole we recommend that dealing with the consequences of historical institutional abuse requires a joined up approach, rather than a fragmented response and private redress. As such this submission begins by outlining the comparative context and transitional approach to these issues, before detailing the value of guiding principles, the role of a commission, symbolic measures of redress and compensation.²

1. Comparative context

This report draws upon comparative research to analyse the consequences of historical institutional and systemic abuse. In doing so, context and justification for comparative case studies will be provided, followed by discussion of compensation quantities, eligibility procedures, procedural structure, and reparative value. The main case studies considered will be the Indian Residential School Settlement Agreement (IRSSA) of Canada, various Stolen Generation reparations processes in Australia, and the Magdalene Restorative Justice Scheme and the Residential Redress Board Bill in the Republic of Ireland. These were selected because they represent inquiries on a comparable scale to Northern Ireland, with similar dynamics of victimisation and long-term consequences for survivors. We hope this comparison serves to improve upon past shortcomings of governments to repair harm to sufferers of systematic abuse, and emulate their strengths.

In Canada the Indian Residential School system (IRSSA) was responding to the nationwide removal of Indigenous children from their families, placing them in

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² Specific recommendations or important points are placed in bold.

institutions with an aim of assimilating them into ‘Canadian’ culture.³ The residential schools where children were taken were predominantly run by different Christian churches, with support from the Canadian government, and they often had strict rules prohibiting any Indigenous culture or language.⁴ The institutions were largely abusive, with many children suffering sexual, physical, and emotional abuse at the hands of school authorities.⁵ This was in addition to the trauma of abduction from their families and communities, and ultimately it was shown to be such a systemic and violent erasure of a people. The IRSSA was created as part of a larger government effort to reconcile with Indigenous peoples, which also included a Truth and Reconciliation Commission, Commemoration, Apology, and Health and Healing Services, in addition to the two compensation schemes.⁶ The IRSSA is used as the most significant system for comparison in this analysis because the institutions, experiences of children, and government failures had many commonalities from which lessons can be learned.

Much like Canada, Australia engaged in a system of forced assimilation of their Indigenous peoples, a major component of which is known as the Stolen Generation. This refers to the Australian government’s policy of removing Aboriginal and Torres Strait Islander children from their families and placed in ‘care’ or ‘guardianships’, where a significant portion of them experienced sexual, physical, and emotional abuse.⁷ The Federal Government was slow to accept responsibility for the Stolen Generation, its colonial context and was resistant to the idea of compensation. Only with reconciliation efforts of individual states, such as Tasmania, has a broader conversation been started about children being abused in institutions beyond the indigenous communities.⁸ As a result different states therefore have different compensation schemes on institutional abuse of children, with the federal government ultimately providing a supplementary policy for survivors who were not covered by distinct state redress policies, namely the

³ R. Green, Unsettling cures: Exploring the limits of the Indian residential school settlement agreement, *Canadian Journal of Law & Society/La Revue Canadienne Droit et Société*, 27(1) (2012), 129-148.

⁴ Green n.3.

⁵ See Konstantin Pethoukhay, Recognition, redistribution, and representation: Assessing the transformative potential of reparations for the Indian residential schools experience, *McGill Sociological Review*, (2013) 3, 73-91.

⁶ Green n.3.

⁷ See Maria Rae, When Reconciliation Means Reparations: Tasmania's compensation to the stolen generations, *Griffith Law Review*, 24(4) (2015) 640-656.

⁸ Rae, *ibid.*

Northern Territory and Australian Capital Territory. While there is comparative value from each of these states, Tasmania and the federal scheme will be focused on in this report, as it represents the most comprehensive effort to redress institutional abuse. As with the Indian Residential School, this institutional child abuse bears remarkable similarities to the testimonies of survivors from Northern Ireland, and can provide insight into the strengths and weaknesses of more fragmented efforts at compensation.

In the Republic of Ireland, the Irish Residential Institutional Redress Scheme was set up in 2002 following long-standing and widespread allegations of abuse against Christian religious orders against children in industrial schools, reformatories and other residential institutions. The Commission to Inquire into Child Abuse (the ‘Ryan Commission’) established that young boys in particular were targeted and suffered ‘endemic’ proportions of sexual, physical, emotional abuse and neglect.⁹ In addition, the Magdalene Laundries were institutions run by Roman Catholic orders, confinements intended to house ‘fallen’ women. Following the discovery of mass graves and allegations of abuse, there were calls for the Irish Government to begin an investigation. This led to the establishment of the Magdalene Restorative Justice Scheme, intended to provide redress and reparations for the women who had been coerced into forced labour, often in conjunction with state collusion, and suffered physical, emotional and sexual abuse. While we are aware of the socio-political differences underpinning these countries and cultures of abuse in each of these contexts, we believe that cumulatively they nonetheless provide valuable insight into how systemic institutional abuse is practicably addressed. Together these schemes, along with other efforts in providing services and memorialisation for survivors inform our findings below.

2. A transitional justice approach

The government of Northern Ireland has an obligation under human rights law to the victims and survivors of institutional child abuse to provide the fairest and most appropriate redress scheme.¹⁰ While monetary sums can never undo the harms of neglect,

⁹ Commission to Inquire into Child Abuse, *Report of the Commission to Inquire into Child Abuse* (The Ryan Report) (2009) <<http://www.childabusecommission.ie/>>.

¹⁰ See 2005 UN 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, A/RES/60/147.

mental and physical abuse, they hold reparative potential to acknowledge the harm suffered by survivors and alleviate their continuing suffering. We frame this report under the rubric of transitional justice and the comparative experience in other contexts facing similar institutional abuse. A transitional justice perspective provides a number of tools (truth recovery, reparations, memorials) that are victim-centric and encompass the broader trends and patterns of violence, beyond individual, separate cases.¹¹ In comparison to other jurisdictions addressing historical institutional abuse, responses to such violations in Northern Ireland have to be placed within the context of the Troubles/conflict in and around Northern Ireland, that ruptured social relations and fragmented trust in the state and public institutions, within a broader culture of fear and violence that prevented people from speaking out. While institutional abuse in Northern Ireland needs addressed, there was broader abuse and sexual violence conducted during this period that also needs to be redressed through legacy bodies when they are established.

Drawing from this transitional justice approach, we encourage the government to consider framing the response to institutional abuse in part as reparations. We adopt the UN parameters of reparation for gross violations of human rights as including restitution, compensation, rehabilitation, measures of satisfaction and guarantees of non-repetition.¹² These are applicable in historical institutional abuse given the widespread and systematic suffering that was caused to children in care, but more fundamentally with the passage of time and delay in the government addressing the harm of these survivors it requires more substantive measures to those affected and their families than money alone. Indeed these issues go beyond just individuals who suffered terrible abuse that has affected their lives, to also address the breakdown in trust with the state and society. As such reparations are intended to symbolise an acknowledgment and measure to atone by those responsible in a substantive way, as well as for the state more generally for failing to protect children and the vulnerable, but also to awaken society to these atrocities to guarantee that they do not recur.

¹¹ See James Gallen, Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice, *International Journal of Transitional Justice*, 10(2) (2016), 332–349.

¹² The 2005 UN 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. Hereafter the ‘2005 UN Principles’.

The experience of other historical institutional abuse schemes in other contexts has taken a more comprehensive approach to reparations, looking beyond compensation, to include other forms, such as services, apologies, commemorations and memorialisation projects.¹³ Indeed the findings in other contexts has found that victims do not speak with one voice, each having their own unique experience of suffering, that awarding compensation alone would be insufficient, requiring a ‘wide range’ of redress.¹⁴ The Australian National Redress Scheme captures this shared ownership of responsibility and redress, which besides providing compensation, also includes the provision of counselling and psychological services, as well as a framework for ‘direct personal responses’ from responsible institutions.¹⁵ Direct personal responses provide a framework, guided by principles, that allows a responsible institution to take reasonable steps to provide an apology, statement of acknowledgment of regret, assurances to prevent abuse from recurring and/or an opportunity to meet a senior official within the institution.¹⁶ In light of this context, it is worth looking at more specifically at how this could be applied to Northern Ireland.

B. Guiding Principles

Redress schemes are arguably the most victim-centred justice mechanism currently available and the most significant means of making a difference in the lives of victims.¹⁷ Therefore, it is imperative that the Commissioner for Survivors of Institutional Childhood Abuse, Historical Institutional Abuse Redress Board and Compensation Scheme strive to achieve best practice for victims and their families. We have collated six guiding principles that were recurring and recognised as instructive in delivering a successful and victim sensitive redress scheme.¹⁸ However, it is important to recognise that these

¹³ Kathleen Daly, Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse Re Redress Schemes, Australia: Griffith University.

¹⁴ Law Commission of Canada p9; and J. Skold, E. Foberg and J. Hedstorm, Conflicting or complementing narratives? Interviewees’ stories compared to their documentary records in the Swedish Commission to Inquire into Child Abuse and Neglect in Institutions and Foster Homes *Archives and Manuscripts* 40(1) (2012) 15-28.

¹⁵ Sections 51-56, National Redress Scheme for Institutional Child Sexual Abuse Act 2018.

¹⁶ Section 54(2), National Redress Scheme for Institutional Child Sexual Abuse Act 2018.

¹⁷ See Pablo de Greiff, *The Handbook of Reparations*, Oxford University Press (2009).

¹⁸ See similar guiding principles in Australia - Section 10, National Redress Scheme for Institutional Child Sexual Abuse Act 2018.

principles are interlinked and can only achieve best practice when they are all fully and effectively implemented. The Guiding Principles we suggest are:

1. Participation
2. Accessibility
3. Privacy
4. Dignity and Non-Discrimination
5. Support
6. Protection

1. Participation

Victim participation tends to be understood narrowly as giving testimony and/or ‘telling one’s story’.¹⁹ The understanding of victim participation needs to be much broader and deeper to ensure meaningful and effective participation of survivors whose rights are affected.²⁰ The 1985 UN Principles on Justice for Victims stresses the importance of informing victims of their rights and responsibilities and keeping them informed of developments relating to their case. Research shows that victims treated well and able to voice their concerns, which are considered and respected by decision makers, are more likely to be satisfied with the process, even if the outcome is not what they wanted.²¹ For redress to be truly meaningful, victims and survivors need to take part in the initiation, design and implementation of reparative measures. Indeed, research has suggested that the absence of victim and survivor input led to HIAI redress recommendations falling short of what is required.²²

Victim and survivor participation in redress schemes is key in ensuring that their views, concerns and interests are effectively conveyed to decision makers. Having a victim-centred approach can help to ensure the credibility and legitimacy of the redress

¹⁹ See e.g. A.M. McAlinden and B. Naylor, Reframing Public Inquiries as “Procedural Justice” for Victims of Institutional Child Abuse: Towards a Hybrid Model of Justice, *Sydney Law Review*, 38(3) (2016) 277-308.

²⁰ Amnesty International, Response to Historical Institutional Abuse Inquiry Redress Recommendations - Position paper and recommendations, April 2017.

²¹ John Thibaut and Laurens Walker, A Theory of Procedure, *California Law Review* 66 (1977) 541- 566; Tom R. Tyler, Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test of Four Models, *Journal of Personality and Social Psychology*, 52(2) (1987) 333-344, p342; and United Nations, *Handbook on Justice for Victims*, (UNODCCP 1999), pp. 4–9.

²² See Panel of Experts report (2016).

scheme,²³ as well as the confidence of survivors that they will not be retraumatised.²⁴ Victim participation can encourage victim ownership, ‘buy-in’ and positive outcomes where it includes them,

‘being informed of options and developments in a case, including different types of justice mechanisms available; active participation in shaping the elements of redress, including optimal modes of implementation; being informed of negotiations and having a say (or vote) in ratifying a redress scheme (or settlement agreement); and understanding how the process works’.²⁵ For instance, in Australia, the adjudication processes for ratifying claims by victims/survivors of institutional abuse at St John’s and St Joseph’s, Grandview was found to provide survivors with a ‘voice’ to tell their story, ‘validation’ by being believed and ‘vindication of the law’ through confirmation that there was wrongdoing.²⁶ In other schemes, which were not victim-centred, victims were cross-examined, questioned, and in front of a number of officials, which made the claimant feel like they have not been listened to.²⁷ The Law Commission of Canada suggested that redress schemes should respect and engage survivors, providing them with information so as to enable them to make ‘informed choices’ about their redress options.²⁸

Processes should enable victims and survivors, or those acting in their interests, to determine for themselves what forms of reparation are best suited to their situation and they must be consulted in every stage of the decision making process.²⁹ The UN Guidance Note of the Secretary-General for Reparations for Conflict-Related Sexual Violence recommends that the meaningful participation and consultation of victims in the mapping, design, implementation, monitoring and evaluation of reparations should be supported. Such participation and consultation will ensure that reparations have the intended impact, are perceived as such, and that there is ownership of the process. This is

²³ Bill Rolston and Phil Scraton In the Full Glare of English Politics: Ireland, Inquiries and the British State, *British Journal of Criminology* 45 (2005), 547-564, p560.

²⁴ Leneen Forde, Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions Brisbane: Queensland Government, (1999), p5.

²⁵ Kathleen Daly, *Redressing Institutional Abuse of Children*, Palgrave (2014), p162.

²⁶ Daly n.25, p172.

²⁷ Marie Keenan, *Sexual Trauma and Abuse: Restorative and Transformative Possibilities? A Collaborative Study on the potential of Restorative Justice in Sexual Crime in Ireland* Dublin; University College Dublin, 2014, p88.

²⁸ Law Commission of Canada 2000, p3.

²⁹ *Ibid.*

also important to ensure that reparations are accessible and that they do not exclude or marginalize any group of victims or survivors.³⁰

The voices of victims and survivors are an important source for evidence-based policy; without them, reparative measures are unlikely to be appropriately attuned to redressing their ongoing harm. As such, there are practical reasons why victims and survivors should be given the space to articulate their needs and priorities and to respond to recommendations for redress. International experience suggests that it is essential to involve victims in the process of designing and implementing reparations programmes. Moreover, international standards on involvement in decisions, which affect rights, require involvement at the time when ‘all options are open’³¹ and there is a genuine opportunity to influence outcomes. Victim participation should be in person, through a legal representative, or person designated by them with their consent to convey their views and concerns. Choice is key in enabling victims to voice their interests, but also being flexible to ensure especially older, illiterate or psychologically traumatised survivors can best engage in a redress system.

2. Accessibility

Access to justice and fair treatment is a vital part of providing a redress mechanism to victims and survivors; procedures should be expeditious, fair, inexpensive and accessible. Victims and survivors should be informed of their rights in seeking redress, as well as the scope, timing and progress of proceedings and the disposition of their cases, especially where serious crimes are involved and where they have requested such information. Ensuring accessibility will include taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf.³² In ensuring maximum accessibility, victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means (where appropriate). They should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them. Accessibility requires

³⁰ UN Guidance Note of the Secretary-General, Reparations for Conflict-Related Sexual Violence, June 2014.

³¹ Ibid.

³² McAlinden and Naylor n.19.

taking all necessary measures available to protect victims and survivors, which may require closed private proceedings or the presentation of evidence by electronic or other special means. This is specifically important due to the context of historical institutional abuse, as victims and survivors may have a range of vulnerabilities that may require special measures.

The use of a time periods can restrict accessibility. Reparation processes must allow victims to come forward when they are ready, within a reasonable time period, unless there are exceptions. Support structures are needed to assist victims in the process of speaking out and claiming reparation.³³ Not all victims are the same. Many survivors are elderly and even outside the jurisdiction, which requires a range of measures to inform them of the opportunities of the redress scheme and associated services. Ensuring accessibility requires adequately identifying the legal, cultural economic and other obstacles found by victims, as well as their concerns. To this end, information about reimbursement of expenses should also be provided, from the time of the first contact with a competent authority, such as in a leaflet, SMS messaging, TV advertising and newspaper advertisements. This will ensure that the scheme does not exclude victims and survivors on financial grounds. Having regional centres around the province, rather than just in Belfast, can help to mitigate expenses for survivors.

3. Privacy

Protecting the privacy of survivors is essential in mitigating any risk of secondary or repeat victimisation, intimidation or retaliation. Maintaining victims' privacy can be achieved through a range of measures including non-disclosure or limitations on the disclosure of personal or identifiable information concerning the identity and whereabouts of the victim. Survivors can suffer considerable mental anguish by having repeatedly to relive events. Therefore, necessary measures need to be taken to ensure the confidentiality of information or the protection of any person. Confidentiality at all stages of the reparation process is essential to encourage victims and survivors to come forward, to have faith and engagement in the process, and to protect them from further harm. Providing confidentiality can assist in preventing stigma, ostracism and discrimination against victims and survivors. Privacy should also be maintained through data protection.

³³ See Panel of Experts report.

Any scheme should not be obliged to provide information where disclosure of that information could affect the proper handling of a case or harm a given case or person, or if they consider it contrary to the essential interests of their security.

4. Dignity and Non-Discrimination

All victims and survivors should be treated in a courteous, dignified, respectful, sensitive, tailored, professional and non-discriminatory way. They should be treated without discrimination of any kind based on any ground such as race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, disability, age, gender, gender expression, gender identity, sexual orientation, residence status or health. In assessing individuals and providing services, appropriate consideration should be given to:

- (a) The specific protection needs of individuals.³⁴ Victims and survivors have a right to understand and to be understood, and a right to interpretation and translation.³⁵ Justice cannot be effectively achieved unless victims can properly explain the circumstances of the crime and provide their evidence in a manner understandable to the competent authorities. Interpretation should therefore be made available, free of charge, during questioning of the victim and in order to enable them to participate actively in court hearings, in accordance with the role of the victim in the relevant criminal justice system.³⁶ Also, it is recommended that in the interests of demonstrating goodwill and compassion for the needs of victims and survivors, such a payment could be awarded on an interim basis following an expedited procedure, especially for the elderly and the sick.
- (b) Cultural and religious mores must be taken into consideration and treated with sensitivity when collecting evidence of violence against victims and survivors of sexual abuse. The board should hire staff with this type of experience and sensitivity if cases involving rape and sexual abuse are to be successfully addressed without causing unnecessary trauma for the victims and their families.

³⁴ Article 22 of Directive 2012/29/EU, 'Establishing minimum standards on the rights, support and protection of victims of crime' 25 October 2012.

³⁵ Article 3 and 7, Directive 2012/29/EU.

³⁶ Article 7 *ibid.*

- (c) In compliance with treating victims with dignity and applying a tailored approach to their specific context, there will need to be a sexual-abuse victim sensitive approach. Under UN guidance for reparations for conflict-related sexual violence it is proposed that collective reparations could help to prevent stigma given that they do not require naming individual victims and the violations suffered. However, individual victims and survivors should, directly benefit from collective reparations and not feel excluded or marginalized, or even further stigmatized by these measures.³⁷ There may be instances when collective measures that honour victims and survivors of sexual violence may both diminish stigmatization within a community as well as encourage victims to speak openly about their experiences.
- (d) The age of the individual, both in terms of when the abuse occurred and the age they are now. In terms of providing a victim sensitive approach, the generational differences need to be taken into account when providing best processes and outcomes for sexual abuse victims. It has been recommended that the differences in the perceptions of rape for elderly people need to be acknowledged.³⁸ Views about sexual violence have changed dramatically in the last three decades due to the anti-sexual violence movement and other factors.³⁹ Elders may still hold generational beliefs and childhood sexual assault may not have been recognised or discussed, especially within the family or by influential members of society such as teachers or clergy. Conditions such as dementia can make an individual more sensitive to triggers and/or bring up recessed memories.⁴⁰ Therefore, victim sensitive approaches need to be implemented to avoid re-traumatisation of the victim.

5. Support

A holistic and comprehensive response is required when providing support to victims and survivors of historical institutional abuse. It has been found that child abuse and neglect

³⁷ See Friedrich Rosenfeld, Collective Reparations for Victims of Armed Conflict, *International Review of the Red Cross*, 92(879) (2010), 731-746.

³⁸ See e.g., Technical Assistance Manual – Elder Sexual Assault – Pennsylvania’s Sexual Violence Centre. Available at http://www.pcar.org/sites/default/files/resource-pdfs/elder_sexual_assault_technical-assistance-manual.pdf (accessed 07/01/19).

³⁹ Ibid.

⁴⁰ Ibid.

can have severe long-term consequences, affecting the victims physically, psychologically, and behaviourally.⁴¹ Therefore, in line with trauma-informed practice, medical treatment and long-term care for past injuries should be appropriately funded, including psychiatric care.⁴² This would mean providing additional resources to ensure adequate provision of medical treatment and services for past injuries and future care.⁴³ In recognition of the ongoing harms of historical institutional abuses the Executive should commit to recognising and providing redress for the ongoing needs of victims and survivors.

Consideration must also be given to how support services will be provided to those who live outside of the Northern Ireland. In addition, secondary victims (parents, siblings, spouses and children of victims) should be ensured access to benefits and programmes to address intergenerational and transgenerational harms caused as a result of historical institutional abuse, such as counselling.⁴⁴ As has been noted, there are potential consequences of childhood abuse in adulthood, including effects on parenting, on the child of the survivor and difficulties in spousal relationships.⁴⁵

6. Protection

To achieve best practice for victim sensitivity the notion of “victim” must be broadly defined, so as to accurately reflect and incorporate the perspectives of victims and their advocates.⁴⁶ Establishing minimum standards on the rights, support and protection of victims of crime are essential in preventing re-traumatisation. Victims of crime should be protected from secondary and repeat victimisation, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice.⁴⁷ Particular attention should be paid to the potential for traumatisation where a victim is required to give oral evidence. Provision should be made for oral evidence to be introduced as a matter of choice; it should not be

⁴¹ See e.g., Child Welfare Information Gateway, Long-Term Consequences of Child Abuse and Neglect. Available at https://www.childwelfare.gov/pubpdfs/long_term_consequences.pdf (last accessed 19/01/19).

⁴² Ibid.

⁴³ Patricia Lundy, ‘Historical Institutional Abuse: What Survivors want from Redress’ (2016) Ulster University, Panel of Experts, p8.

⁴⁴ Ibid, p14.

⁴⁵ Margaret Urban Walker, The inter-generational transmission of trauma: The effects of abuse on the survivor's relationship with their children and on the children themselves, *European Journal of Psychotherapy and Counselling*, 2 (2007), 281-296.

⁴⁶ See Principle 1, 1985 UN Principles on Justice for Victims.

⁴⁷ Article 18 of Directive 2012/29/EU.

mandatory. Given the initial silence, secrecy and cover-up that has plagued the issue of historical institutional abuse, there are good reasons why some victims may now wish to give evidence and tell ‘their story’ to a redress board. If a victim opts to give oral evidence, it should be taken in an inquisitorial fashion, not an adversarial one. Victims making a serious abuse claim should be allowed to introduce new evidence over and above that gathered by the HIA Inquiry, especially those who did not appear before it.

C. The Proposed Commissioner for Survivors of Institutional Childhood Abuse Bill

The proposed bill on the Commissioner for Survivors of Institutional Child Abuse (COSICA) sets out the scope, duties, and powers of the proposed Commissioner. Drawing from comparative experience on the use of other commissioners to reflect and represent the situation of victims and survivors, we outline the possible role and shape of such a commission for Northern Ireland in responding to historical abuse.

1. Implementing Guiding Principles

It is crucial that the Commissioner be guided by the victim-centric principles of participation, accessibility, privacy, dignity and non-discrimination, support and protection identified above. Enabling meaningful victim and survivor access to and participation in the work of the Commissioner will be central to ensuring the Commissioner’s work reflects the needs and wishes of individuals impacted by institutional childhood abuse. To this end, the Commissioner must broadly interpret the ‘reasonable steps’ permitted in his/her duty to ensure victims and survivors are aware of the Commissioner’s existence and powers. In this regard, particular consideration must be given to those who may live more isolated lives, whether as a result of living in rural communities or through the isolation that aging can bring to many within our society. **Thus, information about the Commissioner should be shared in a mixed dissemination strategy, which may feature radio, print media, television and spreading information through civil society networks.**

In facilitating meaningful participation, it is important that the Commissioner and the attached Advisory Board consider how they can ensure that victims and survivors with diverse views and opinions are given voice, but also how they can demonstrate that

those voices have been heard and linked to meaningful action. Victims and survivors may receive psychological benefits from participation, but these can be undermined if their lasting sense is that they have been ignored in practice. The provision of information and updates, as advocated for within the general principles, can contribute to fostering a sense of dialogue and respect. In implementing the principles of dignity, non-discrimination and support, the Commissioner should be mindful of intersecting identities which may cause additional vulnerability amongst certain victims and survivors. For example, when coordinating service provision the Commissioner may wish to consider whether victims and survivors within the LGBTQI+ or ethnic-minority populations may require additional or different types of services and forms of support. Recognising the equal rights but potentially varied needs of victims and survivors will enable services to be provided in non-discriminatory ways, respecting the dignity of all victims and survivors.

2. Comparative Perspectives

Although the proposed duties and powers of the Commissioner are welcomed, when considered alongside research into what survivors of historical institutional abuse want from redress and comparative practice, there is room for improvement. For instance, in a study carried out by Lundy involving workshops with survivors of historical abuse it was noted that many of the participants expresses a desire for legal advice as a way to ensure that survivors knew their rights.⁴⁸ Indeed, in terms of redress it was noted that a ‘package of measures’ were required, going beyond compensation and in some instances prosecution.⁴⁹ As such, consideration should be given to whether the power of the Commissioner to provide advice and information on matters concerning the interests of victims and survivors should include advice regarding the legal process of seeking prosecution for crimes of childhood abuse.

While the Commissioner has the power to compile information concerning the interests of victims and survivors more specification could be given in relation to what this compilation of information might be used for. In this regard, victims and survivors should be consulted so as they have ownership of any information that is related to them.

⁴⁸ Lundy n.43, p31.

⁴⁹ Ibid. 22.

However, a key concern of victims and survivors was that their experiences were being silenced and would be forgotten. As noted by one,

“The institutions have to be permanently reminded. This society has to be permanently reminded of its failings. Most of the people responsible for the institutions are dead. But there are children who will ask the question, what’s that about? And somebody will have to say, this is a legacy that the state failed.”⁵⁰

In this regard, some desired a means of archiving survivor stories so that their experiences would be remembered, raise awareness and educate the public.

The Republic of Ireland’s Commission to Inquire into Child Abuse (CICA)⁵¹ may provide a useful comparator in relation to the purpose of the information gathered by the Commissioner. One of the principle functions of CICA was to provide a forum to sufferers of institutional childhood abuse to recount their stories through submission to the committee. The Commission was tasked with inquiring into the circumstances of abuse including the manner in which children were placed in institutions, and the extent, nature and causes of abuse. CICA was also responsible for determining the extent to which institutions themselves, systems of management administration, and the manner in which institutional functions were performed were responsible for abuse. The CICA’s mandate included preparing and producing reports on institutional child abuse. CICA consisted of ‘an Investigative Committee (IC), tasked to compile a factual historical account, and a Confidential Committee (CC), a story-telling forum with a therapeutic objective’.⁵²

By soliciting oral and written submissions from survivors of institutional child abuse, the commission provided a repository for the personal stories of victims and survivors. Irish politicians explicitly cited the truth commission model as an inspiration for CICA.⁵³ The truth commission model has legal implications for prosecution, given that it is generally based on establishing facts on the basis of precluding prosecution for those who testify before it. These facts usually consist of ‘human rights abuses under an

⁵⁰ Ibid, p26.

⁵¹ The Commission to Inquire into Child Abuse, ‘Establishment of the Commission to Inquire into Child Abuse’ (2001) <http://www.childabusecommission.ie/rpt/pdfs/CICA-VOL1-01.PDF>

⁵² Carol Brennan, *When Apology is Not Enough: Ireland’s Ryan Commission*, (2012) University of Wolverhampton; and Anne-Marie McAlinden (2013), *An Inconvenient Truth: Barriers to Truth Recovery in the Aftermath of Institutional Child Abuse in Ireland*, *Legal Studies* 33(2): 189-214.

⁵³ Brennan *ibid*, p6.

earlier regime or set of governmental practices'.⁵⁴ This could apply to Northern Ireland depending on the extent to which the government is found to have been complicit in facilitating or covering up institutional child abuse. The IC was tasked with truth recovery through mechanisms including the subpoena of witnesses and receiving testimony or evidence under oath. The IC initially retained the power to publicly name not only institutions in which abuse occurred but also individual abusers.⁵⁵ The 2009 Report issued by CICA was well received by victims and survivors in Ireland. Crucially, it recounted not only testimony from those who suffered abuse but also religious Congregations attendant to the institutions as well as testimony from the government, historians, psychologists, forensic analysts, and others.

The proposed COSICA does not integrate elements of the truth commission model into its mandate. The outlet through which victims may provide testimony of their abuse is in the context of seeking compensation through the proposed Historical Redress Board. In other contexts, including reparations for victims of armed conflict, tying truth recovery processes to financial compensation may lead to victims and survivors to feel morally conflicted, as though they were putting a price on their suffering.⁵⁶ Research into matters concerning the interests of victims and survivors, as mandated in the COSICA draft bill, might very well need to incorporate elements of truth recovery in the form of a formal report in order to satisfy the emotional needs of victims and survivors. Like the CICA report, **any report issued by COSICA should be both 'backward looking' (covering the abuse which took place) and 'forward looking' (issuing recommendations to curtail contemporary child abuse).**

The latter point links to the Commissioners power to make recommendations to the Regulation and Quality Improvement Authority and Northern Ireland Social Care Council in relation to contemporary residential care as provided in the proposed Bill. Such a recommendation is similar to the terms of reference of Australia's Royal Commission,⁵⁷ which was required to make forward-looking recommendations regarding

⁵⁴ Ibid.

⁵⁵ Ibid. p9

⁵⁶ Simon Robins, Towards Victim-Centered Transitional Justice: Understanding the Needs of Families of the Disappeared in Post-Conflict Nepal, 5(1) (2011) *International Journal of Transitional Justice*, 75.

⁵⁷ Royal Commission into Institutional Responses to Child Sexual Abuse, 'Final Report: Our Inquiry' (2017) https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_1_our_inquiry.pdf

what institutions and governments should do to better protect children in institutional care and provide recommendations for best practice in the reporting of, response to, and service provision for child sexual abuse. The Commissioners heard from victims and survivors, advocacy and support groups, institutions, members of the public, support services, members of parliament, government ministers, academics, and professional associations to inform its reporting. Opportunities were held for public hearing, private sessions, inmate engagement, and community engagement. The proposed COSICA may benefit from a casting a similarly wide net for consultation and engagement with victims and survivors through various forums.

Further to this, in Australia, the Royal Commission demonstrated good practice in releasing a comprehensive set of recommendations addressed, not only by theme, but institution-specific recommendations encompassing schools, sport, recreation, arts, community, culture, and hobby groups, contemporary detention environments, and religious institutions. Volume 16 of the report, which addressed religious institutions specifically, issued denomination-specific recommendations to the Anglican and Catholic churches, Jehovah's Witness groups, and Jewish institutions, in addition to general recommendations to religious institutions.⁵⁸ These recommendations may be taken into consideration for guidance in addressing third party religious institutions through the proposed COSICA.

D. Services

Studies have demonstrated that inquiries into historical institutional abuse are 'influenced by one another' and that redress is a consistent feature of attempts made internationally by governments to address such historical injustice, creating what has been referred to as 'a transnational flow of ideas.'⁵⁹ Drawing from previous and ongoing attempts at reparative programmes in other nations where historical institutional abuse has been a blight on their past, this section employs a comparative analysis to inform recommendations to the NI Executive in how best to co-ordinate and implement services designed to repair the harm experienced by victim-survivors. The ultimate aim of any redress scheme should be to meet the expressed and potential needs of victim-survivors,

⁵⁸ Australian Royal Commission.

⁵⁹ J. Sköld, (2017) Inquiries into child abuse and neglect in institutions and foster homes, Available at: <https://liu.se/en/article/vanvarldsutredningar-i-ett-komparativt-perspektiv> Accessed: 13 January 2019 .

who should be a central focus and should be meaningfully consulted with at all stages of service planning, implementation and delivery. Relevant health and social care professionals complement victims' views on service provision by providing insight into the possibilities of service options, that may or may not be within the capacity of the current public health system in NI.

The need for comprehensive legislation detailing the Government's commitment to providing a co-ordinated, evidenced based package of care to victim-survivors and, if appropriate, their family to help ameliorate the effects of the harm.

The Hart Report notes that a consistent theme, which emerged from applicants' accounts of institutional abuse, was that the trauma experienced during their childhood had an enduring impact throughout their life. There was a common feeling amongst victim-survivors that there was a need for adequate and appropriate services to be made available to help them build the capacity to cope with these effects.⁶⁰ Judge Hart specified that the main concerns highlighted throughout the Inquiry hearings were that of mental (and other) health problems, that could feasibly lead to significant comorbidity,⁶¹ addiction, literacy and numeracy skills, access to education, employment and counselling services.⁶²

In analysing the draft legislation, there does not appear to be any specific provisions proposed that explicitly deals with service provision and its' implementation. Whilst the draft legislation does include the role of a Commissioner - which includes, but is not limited to acting as an advocate for victim-survivors; co-ordinating services and identifying any gaps in existing service provision - there is limited information as to how this service will function in practice.⁶³ As acknowledged in the Hart Report, co-ordinating a range of services intended to address the complex myriad of issues that victim-survivors experience is not an easy task.⁶⁴ This would likely be made easier if comprehensive legislation was introduced to deal with the specifics of how this service

⁶⁰ A. Hart, (2015) *Report of the Historical Institutional Abuse Inquiry*, UK: The Executive Office, p231.

⁶¹ Chouliara, Z. *et al.* (2012) 'Adult survivors' of childhood sexual abuse perspectives of services: A systematic review, *Counselling & Psychotherapy Research*, 12(2), pp. 146–161, p146; and Quantifying Selected Major Risks to Health In: *The World Health Report 2002: Reducing Risk, Promoting Health Life*. World Health Organization, p80-81.

⁶² Hart n.60, p15.

⁶³ Commissioner for Survivors of Institutional Childhood Abuse Bill [2018].

⁶⁴ See Hart n.60.

will operate and what type of funding will be made available for the Commissioner to exercise their duties. For example, the Hart Report advises that the role of the Commissioner should not just involve co-ordinating existing services, but should also involve identifying gaps in service provision so that this can be remedied. Whilst the draft legislation makes provision for the role of the Commissioner and identifies this as a function of its' role, the legislation does not make clear *how* the gap in service provision will be identified or remedied. As such, mapping out existing services and expertise in the voluntary sector and National Health Service is imperative to this aim. Expertise can also be drawn from multi-agency response teams for childhood abuse at a national and international level, to minimise oversight of certain beneficial services. Given the requirement of funding and resources to make additional services available to victim-survivors, this gap in the legislation arguably dilutes the original vision of the Commissioner's role in ensuring that victim-survivors' needs are identified and addressed.

Whilst co-ordinating services can be a complex and difficult task, there is a wealth of examples to draw upon. Specifically, where countries affected by historical institutional abuse have implemented co-ordinated services and; more generally; within healthcare, the holistic approach is adopted by various multidisciplinary teams. In Northern Ireland, a similar model can be found in the Victims and Survivors Service, a service set up to assist victim-survivors who have been injured or bereaved as a result of the conflict in Northern Ireland. This innovative service delivers support to victim-survivors of the conflict on behalf of the Executive Office by partnering with the Commission for Victims and Survivors, the Victims and Survivors Forum⁶⁵ and a number of voluntary organisations that can provide services and support to victim-survivors.⁶⁶

The Commissioner, if it is to effectively perform its role as a service co-ordinator, will be required to liaise with other relevant professionals and services to meet the needs of victim-survivors. As instructed in the Inquiry's recommendations, they should be

⁶⁵ Victims' & Survivors Service (2019) *Our Partners* , Available at: <http://www.victimsservice.org/about-us/our-partners/> (Accessed: 14 January 2019).

⁶⁶ Victims' & Survivors Service: *Funded Organisations 2018/19*, Available at: http://www.victimsservice.org/site/wp-content/uploads/2018/12/VSP_PIV_Funding_2018-19.pdf (Accessed: 14 January 2019).

‘assisted by the necessary staff.’⁶⁷ These providers could include, but are certainly not limited to: the Health and Social Care Trusts; the Advisory Board consisting of appointed victim-survivors; the Northern Ireland Housing Executive; the Department of Education; and voluntary sector organisations involved in the provision of support services. **A representative or spokesperson from each of the organisations or sub-sectors involved will help secure a co-ordinated and consistent response to the provision of services to victim-survivors.** Research indicates that a similar approach was implemented by the Caranua Redress Scheme in the Republic of Ireland (ROI) through the Residential Institutions Statutory Fund Act (2002), wherein public bodies were obliged to appoint a ‘liaison officer’ to assist in effectively coordinating services.⁶⁸ Representatives will need to be *au fait* with the services deemed most relevant in their area/body, as well as consider the possibilities of other services not anticipated at the outset. Upon regular meetings, these representatives may also report back to the commissioner and advise them to consider the totality of services required. This approach provides a mechanism of accountability and monitoring that may be reflected in the Commissioner’s annual reports to the NI Executive. In essence, such a co-ordinated response involving the relevant sectors will be imperative in accounting for what services have been implemented and how effective they have been.

As discussed, the multi-disciplinary approach is central to fulfilling the Commissioner’s roles outlined in the Inquiry’s recommendations. Effective multi-disciplinary working could be achieved through established team-working methods. A regular multi-disciplinary meeting enables issues affecting victim-survivors - individually and collectively – to be raised and strategies to address them can be developed using the skills and expertise of all agencies present. Meetings may occur on a regular basis, the greatest frequency occurring during the establishment period. For instance, initially these may be at monthly intervals, then reviewed after a six-month period to evaluate its effectiveness and establish whether and to what extent there remains an ongoing need for such meetings. It may be appropriate to consider reducing the frequency, particularly if for example the professionals and services involved are more aware of their respective

⁶⁷ Hart, n.60, p232

⁶⁸ Caranua (2016) *Caranua Support for Survivors of Institutional Abuse: Annual Report 2016*, Dublin: Caranua Support for Survivors of Institutional Abuse. [Online] Available at: http://caranua.ie/wp-content/uploads/2018/01/Annual_Report_2016.pdf Accessed: 13 January 2019, p10.

roles, have developed effective working relationships with one another and would be therefore be capable of co-ordinating a response outside of a formalised meeting. However, if these meetings are deemed effective and valuable, they could be maintained or increased as necessary to meet the needs of victim-survivors. As part of the Commissioner's necessary staff, there should be an appointed person responsible for administrative tasks whose role encompasses documenting the minutes of multi-disciplinary meetings, communicating the itinerary and disseminating details relevant to the caseload.

Effective partnership working with key services in this way has been shown to avoid the duplication of services, ensuring that service provision is efficient and cost-effective and allowing funds to be directed towards a broader range of services to meet the expressed needs of victim-survivors.⁶⁹ Consideration may be given to the potential for the current Victims and Survivors Service (VSS) to support the Commissioner in an advisory capacity during the initial implementation of a co-ordinated service for those affected by historical institutional abuse. It may also naturally follow that the Commissioner maintains a close working relationship with the VSS to enable a process of shared learning and support.

1. Accountability

Whilst the draft legislation refers to the need for the Commissioner to report on its' work to the NI Executive at the end of each financial year⁷⁰, **the service should also be subject to independent review to evaluate its effectiveness and ensure accountability.** In theory, input from representatives in the multi-disciplinary team should facilitate the Commissioner's annual report and independent review of services. An example of the potential damage arising from a failure to appropriately monitor support services can have is that of Caranua Redress Scheme in the Republic of Ireland, which was designed to oversee the effective spending of €110 million pledged by religious congregations to repair the damage caused by historical institutional abuse. The service was subject to significant and consistent criticisms from victim-survivors since its inception, who felt

⁶⁹ Ibid 19.

⁷⁰ Commissioner for Survivors of Intuitional Childhood Abuse Bill [2018].

their views had been ignored and marginalised in the process of service delivery.⁷¹ It was further criticised for mismanagement of funds whereby the service paid upfront for applicant's funerals without any controls or checks, resulting in a small number of cases whereby applicants requested the amount in cash from the funeral directors involved.⁷²

In addition to an independent evaluation, **the Commissioner should engage with the culture of reflection which regularly seeks out service user feedback on the provision and delivery of services.** This will ensure that any difficulties or aspects of the service that are not working well can be addressed in a timely and appropriate manner to ensure victim-survivors are provided with a high quality service that is sensitive to their needs. As such, the Commissioner's own self-reflective practice will be evident in the responses to any concerns from victim-survivors. The process of seeking out feedback should be done both formally and informally. The process should be open and transparent and victim-survivors should be made aware of the services' complaints procedures. **Service provision needs to be informed by the extent, nature and impact of the harm on individuals and their families**

A consistent theme emerging from research evaluating victim-survivors' concerns was the frustration that those involved in supporting them were not adequately informed about 'the horrific realities of intuitional abuse' and that this lack of understanding had a detrimental impact on the service they received.⁷³ There needs to be a baseline of sensitive practice⁷⁴ and where necessary training to service providers to minimise negative experiences during service provision.⁷⁵ Training should be informed by experts in Childhood Sexual Abuse and complex trauma, and encompass those having significant direct contact with victim-survivors. An e-learning module or face-to-face training may

⁷¹ C. Finn, Some abuse survivors say Caranua redress scheme isn't working, but it's paid out €5m so far', *The Journal* (2014), 13 November 2014. Available at: <https://www.thejournal.ie/abuse-survivors-caranua-protest-funds-1778717-Nov2014/> Accessed: 14 January 2019.

⁷² K. Holland, Survivors tell of 're-abuse' by State redress group Caranua, *The Irish Times*, 20 March 2017 Available at: <https://www.irishtimes.com/news/social-affairs/survivors-tell-of-re-abuse-by-state-redress-group-caranua-1.3016525> (Accessed: 14 January 2019).

⁷³ Moore, J., Thornton, C. and Hughes, M. On the Road to Resilience: The Help-Seeking Experiences of Irish Emigrant Survivors of Institutional Abuse, *Child Abuse Review*, 26 (2017) 375–387, p382.

⁷⁴ Schachter, C. L., Stalker, C. A., Teram, E., Lasiuk, G. C., and Denilkewich, A. Handbook on Sensitive Practice for Health Care Practitioners: Lessons from Adult Survivors of Childhood Sexual Abuse. Ottawa: Public Health Agency of Canada, (2008), 17-31.

⁷⁵ Chouliara, Z. et al. 'Adult survivors' of childhood sexual abuse perspectives of services: A systematic review, *Counselling & Psychotherapy Research*, 12(2) (2012), 146-161.

be required where services are being expanded or a greater range of practitioners are becoming involved in assessing or delivering redress.

A lack of understanding of the 'size of the problem and the extent and seriousness of the need for services' has also been identified as a significant factor contributing to the failure of government responses to historical institutional abuse.⁷⁶ If service provision is to be effective therefore, those involved in its planning, implementation and delivery need to be cognizant of the scale, nature and impact of the abuse on victim-survivors. Another benefit of a multidisciplinary team of staff, is that the Commissioner can engage with key professional actors who are not only familiar with harm in the NI context, but are usually in a knowledgeable position to propose services to redress the various harms utilising high quality evidence where it exists. Whilst it is difficult to determine the exact extent to which negative outcomes have been caused directly by child sexual abuse (CSA), there are common themes that have emerged in studies which demonstrate that the experience of CSA 'is associated with an increased risk of adverse outcomes in all areas of victims and survivors' lives' and that this can have a long-term impact on outcomes for victim-survivors.⁷⁷

Research studies have identified difficulties within interpersonal relationships, poor relationship stability and negative parenting practices which can 'manifest as a result of victims and survivors' internal lack of belief or confidence in their own parenting capability'.⁷⁸ The impact of trauma on victim-survivors' ability to form stable interpersonal relationships is an area which is discussed further in highlighting the need for family members to be considered as potential victim-survivors eligible for services. **A clear definition of who qualifies as a 'victim-survivor' so there is no ambiguity over who is eligible for services.**

⁷⁶ Bringing them home: report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997) , [Commissioner: Ronald Wilson] Commonwealth of Australia : Human Rights and Equal Opportunity Commission. [Online]. Available at: https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf Accessed: 14 January 2019, p275.

⁷⁷ Fisher, C., Goldsmith, A., Hurcombe, R. and Soares, C. (2017) *The impacts of child sexual abuse: A rapid evidence assessment*, UK: The Independent Inquiry into Child Sexual Abuse . [Online]. Available at: <https://www.iicsa.org.uk/key-documents/1534/view/iicsa-impacts-child-sexual-abuse-rapid-evidence-assessment-full-report-english.pdf> Accessed: 14 January 2019, p10-11.

⁷⁸ Ibid p13

A further gap in the proposed legislation is the absence of a clear definition of who will be eligible for service provision. Research into other reparative programmes highlights a tendency for service provision to be limited to those who have applied for and received compensation through a national redress scheme.⁷⁹ Such an approach to the delivery of support services however is likely to lead to further victimisation as it negates the fact that for some victim-survivors, they will be unable to engage in the process of making an application for compensation without adequate and appropriate emotional support when revisiting their experience of trauma. Without the provision of such services, the capacity for the legislation to have a truly meaningful and transformative impact on victim-survivors' lives will be significantly reduced. **Hence, the provision of emotional support to victim-survivors via counselling services be made available prior to, during and after applications for compensation.**

Services required for victim-survivors during the application may not be limited to counselling services. To ensure an unbiased process, the guidance needs to be easily accessible and user-friendly. These modalities include but not limited to audio, visual and large font documents. For many victim-survivors, they may be elderly or have disabilities including manual dexterity difficulties, which requires specific support in making their application. Support may range from audio-typist or transcriber service, telephone advice as listed in the Hart report and one-to-one support if necessary. Where a victim-survivor prefers to complement their application with oral testimony this should be respected but requires specific support at a level at least equivalent to legal proceedings. Whilst oral testimony provides another platform for a person to tell and exercise autonomy over their story, support measures should aim to minimise the risk of or impact of re-traumatisation. Oral testimony may be recorded or transcribed in their application, particularly where it is difficult or unsuitable for health reasons, for a victim-survivor to travel. In sum, support services need to begin with the application process and continue throughout the process including any appeals.

⁷⁹ See Caranua Redress Scheme (n8) and; National Redress Scheme for Institutional Child Sexual Abuse Act, 2018. [Online]. Available at: <https://www.legislation.gov.au/Details/C2018A00045> (Accessed: 13 January 2019).

2. Emotional support during applications for financial redress

‘The process should not cause further harm to survivors. The process must acknowledge that confronting a painful, even traumatic past is far from easy’.⁸⁰ Research exploring the experiences of victim-survivors of historical institutional abuse in the ROI in giving evidence to the Residential Institutional Redress Board found that a number of participants ‘described it as a distressing experience’ and a smaller number spoke of their reluctance to seek future help as having stemmed ‘from negative experiences’ of the Redress Board.⁸¹ Whilst this was a small study and not necessarily representative of the wider victim-survivor population in the ROI, it nonetheless highlights the potential for these processes to be experienced as oppressive and damaging. A Redress Board that follows a similar multidisciplinary form, to that of the Commissioner’s support staff, may be helpful in reducing intimidation and a negative harmful experience.

There are key differences between a formal, legalised process of having to present evidence that proves you were subject to abuse that has caused you harm and the process of receiving unconditional positive regard and validation of your experiences through therapy and counselling. The difference cannot be understated. For some victim-survivors, engaging in an invasive process whereby they are challenged to 'prove' their experience of abuse could be 'triggering'⁸² and could subject them to further victimisation and re-traumatisation. To stipulate that an individual must prove they have been subjected to harm in an institutional setting before they can be considered eligible for support to access services for such harm would be a further abuse and would arguably marginalise and exclude some victim-survivors who for whatever reason feel unable to engage in the compensation redress scheme.

The Residential Institutions Redress Act (2002)⁸³ in the ROI stipulated a three year window for applications to the Redress Board and further provided the Board with the power to consider exceptional circumstances at its own discretion to extend this period if 'it is satisfied that an applicant was under a legal disability by reason of unsound

⁸⁰ Law Commission of Canada (2000) *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*, Canada: Minister of Public Works and Government Services. [Online] Available at: https://www.attorneygeneral.jus.gov.on.ca/inquiries/cornwall/en/hearings/exhibits/Peter_Jaffe/pdf/Restoring_Dignity.pdf (Accessed: 14 January 2019), p10.

⁸¹ Moore et al. n.73, p381.

⁸² Fisher et al. n.77, p16.

⁸³ Residential Institutions Redress Act 2002.

mind at the time when such application should otherwise have been made and the applicant concerned makes an application to the Board within 3 years of the cessation of that disability.' This longer time period, along with the discretionary powers of the Redress Board arguably provides victim-survivors with greater flexibility and time to consider their application and, if they feel they wish to make a claim, to engage with appropriate services to support them during the process.

The draft legislation published by the NIO proposes a shorter two year time limit for applications for financial redress. Given the potential emotional impact and personal difficulty victim-survivors could experience in revisiting their trauma, as outlined above, **the proposed two year time frame for receiving applications should only begin when there are sufficient services in place with the capacity to provide emotional support to those in need. In addition, it is recommended that provisions be made for exceptional circumstances to be considered in the event that applicants do not have the mental capacity to make a claim within the two-year time frame specified.** Failure to provide emotional support services to help victim-survivors negotiate the potential re-traumatisation surrounding a decision to come forward and apply for compensation could significantly disadvantage people who require additional support to engage with the process.

3. Service Provision for Indirect Victims

The notion that the term 'victim' could be conceptualised to include family members and/or carers of direct victims is provided for in the UN 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.⁸⁴ These guidelines stipulate that 'where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization'.⁸⁵ Whilst these guidelines are generally used to inform conflict-related

⁸⁴ Principle 8, UN 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, A/RES/60/147 (2005).

⁸⁵ Ibid.

redress, it is nonetheless useful to consider its applicability to the redress of historical institutional abuse.

Recent research exploring the views of victim-survivors of historical institutional abuse in Northern Ireland demonstrated that ‘the majority of participants felt that counselling should be available to them and their families’.⁸⁶ Some participants talked of the intergenerational impact their trauma experiences have had on their family and one commented on the need for ‘a holistic look at supporting the family.’⁸⁷ Whilst this is not necessarily representative of the majority of the victim-survivor group, it does suggest that for some victim-survivors, the impact of their experiences on family has been significant and requires further support. The adoption of a broad definition of what constitutes a ‘victim-survivor’ which should include family members and carers as potential indirect victims of the direct trauma experienced by victim-survivors. Such a broad definition is reflected in The Victims and Survivors (Northern Ireland) Order 2006 which gives recognition to ‘carers’ of those who have been ‘physically or psychologically injured as a result of or in consequence of a conflict-related incident’ as ‘victim-survivors’ in their own right, eligible for services and support. In practice, the VSS is also cognisant of the intergenerational impact of conflict-related trauma and reflects this in its provision of services.⁸⁸

4. The need for services to be individualised and responsive to the applicant's needs

The Draft legislation's inclusion of the Commissioner's duty to establish a hotline and internet advice for victim-survivors is a useful support adjunct, as this will ultimately serve to ensure victim-survivors have access to the information required to make full use of the service. To ensure support is accessible to all, further consideration should be given to alternative methods of corresponding with victim-survivors, such as the development of information pamphlets and, if appropriate a monthly newsletter outlining the work of the Commissioner or upcoming activities and events to be circulated via

⁸⁶ Lundy n.43, p25.

⁸⁷ Ibid p29.

⁸⁸ Victims and Survivors' Service (2019) *Transgenerational Services*, Available at: <http://www.victimsservice.org/support-for-individuals/transgenerational-services/> Accessed: 14 January 2019.

subscription email and/or post depending on the expressed communication needs of the victim-survivor

A particular challenge encountered by the Australian National Redress Scheme for historical institutional abuse was the difficulties faced by those living in remote, rural locations in accessing specialised psychological support for sexual abuse trauma.⁸⁹ Whilst Northern Ireland, by virtue of its size, is not likely to experience this issue to the same extent, it is important to acknowledge that some victim-survivors, particularly those who are older or have specific health conditions or disabilities may encounter similar difficulties or incur an additional cost in accessing support. **In such cases it is recommended that victim-survivors be compensated for the cost of their travel to access services or to provide testimony in front of the Redress Board.**

It also worth noting that there is likely to be a significant amount of people applying from elsewhere in Ireland, the UK and overseas and by virtue of the fact that they are not residing in Northern Ireland, may not find that psychological support is accessible to them. **In such cases, it is recommended that those residing outside of Northern Ireland be supported with the practicalities of sourcing psychological support and provision by way of advocacy and additional funding if the necessary supports are not available to them free of charge in their locality.** The amount provided should be determined by an assessment of need and could be modelled on the Direct Payments programme used in NI for those who require personal social services.⁹⁰

Australia's National Redress Scheme for Institution Child Sexual Abuse Act (2018)⁹¹ stipulates that a condition for entitlement to counselling and psychological services is that the person applied for and received financial compensation. The legislation provides that if the person resides in an area that is a provider of counselling and psychological services under the redress scheme then the individual will be referred

⁸⁹ Cassidy, T. (2018) 'National redress scheme for sex abuse survivors 'out of touch' in regions', *ABC Tropical North*, 12 June [Online]. Available at: <https://www.abc.net.au/news/2018-06-11/abuse-survivor-says-redress-scheme-out-of-touch-in-regions/9853366> Accessed: 14 January 2019.

⁹⁰ Department of Health, Social Services and Public Safety (2008) *A Guide to Receiving Direct Payments*, Northern Ireland [Online]. Available at: <https://www.health-ni.gov.uk/sites/default/files/publications/dhssps/guidance-for-receiving-direct-payments.pdf> Accessed: 14 January 2019.

⁹¹ National Redress Scheme for Institutional Child Sexual Abuse Act, 2018. [Online]. Available at: <https://www.legislation.gov.au/Details/C2018A00045> Accessed: 13 January 2019. See Chapter 2, Pts 2-5 Div3, Ss 51-53.

to such services for the provision of support. However in the event that the applicant does not reside in an area where such provision is available, then the applicant is deemed eligible for what the legislation refers to as a ‘counselling and psychological services payment’, which is not to be treated as a payment of compensation or damages and is not to affect the person's eligibility for any ‘payments that may be payable to the person under legislation.’ The person can then seek out similar services, such as those in the private healthcare sector. The principle of minimal delay for the referrals to and the provision of psychological support runs throughout this legislation. A similar scheme for the provision of services to applicants' may be applied to Northern Ireland and could address the potential difficulties faced by applicants living in rural areas or outside of Northern Ireland. In the case of the Australian National Redress Scheme, some victim-survivors faced difficulties in sourcing their own counselling and psychological services⁹² and would therefore **recommend that service users are given support to source services that will meet their needs.** During the mapping process of existing services, victim-survivors in Northern Ireland (and potentially ROI) could be given information on their closest services including those in neighbouring Health and Social Care Trusts, if a particular support is not available in the Trust they reside in. This approach could allow for greater flexibility and control over service provision, it is recommended that service users will require support to navigate this process if it is to be truly empowering.

Where a person has accessed a service outside of NI or in the private sector for their harm and before the implementation of service provision, then the Redress Board should consider reimbursing the victim-survivor for the material and emotional expense of having to do so. This should be separate to the standard compensation payment and the enhanced payment for those more significantly affected. The Redress Board should consider that private service provision may provide evidence on the seriousness and urgency of their harm when applying for enhanced payment, but could have also mitigated some of the complications of their harm that the state originally failed to provide. Given that harms arising from CSA are variable over time and dependent on the consequential nature of the harm, there should be no time-limit on the reimbursement of this financial claim. Some services may have been sought shortly after the abuse, others

⁹² Cassidy n.89.

may have been accessed decades later. The reasons for victim-survivors seeking assistance elsewhere may be numerous, such as those with a lack of faith in state institutions given the site of their abuse; services may not have been available in NI or could not be accessed within a reasonable time period for that person's harms.

5. Services need to be inclusive and non-discriminatory

An example of how damaging an exclusive approach to victimhood can be is observed in the case of the Australian National Redress Scheme which did not include day students attending residential schools in the redress and reconciliation process. This exclusion arguably served to silence those victim-survivors and created the perception that the government did not take seriously the extent of the harm they experienced while attending school.⁹³ Sir Anthony Hart acknowledged that the terms of reference for the 'Inquiry did not allow for all applicants to share their experiences and his recommendation that 'consideration be given to expanding the functions of [The Commissioner] as necessary to include other forms of abuse suffered by children, such as clerical abuse, abuse in schools or abuse suffered whilst in foster care'.⁹⁴ This submission endorses the inclusion of such victims, as failure to expand the functions to reach those unheard victim-survivors is a significant injustice and serves to create a 'victim hierarchy' wherein only some victims of abuse are provided with redress.

Studies show that despite evidence which suggests men experience 'more sexual abuse and physical abuse in institutional care and significantly higher rates of a lifetime diagnosis of alcohol dependence' male victim-survivors remain more difficult to engage.⁹⁵ To ensure service provision is inclusive, **this response further recommends that the Commissioner undertake research into how services can be made more accessible and less stigmatising, particularly in respect to male victim-survivors (and those of any gender-based identity or sexuality), who tend to find it more difficult to access emotional supports.**

⁹³ CBC, Residential day school survivors who lost language and culture seek redress, Available at: <https://www.cbc.ca/news/indigenous/residential-day-school-survivors-who-lost-language-and-culture-seek-redress-1.3032862> Accessed: 13 January 2019.

⁹⁴ Hart n.60, p233.

⁹⁵ Moore et al. n.73, p385.

6. Services need to be Victim-Survivor Centred in their Approach

Despite the aim of reparative programmes to repair the harm caused to victim-survivors, their 'needs are significantly underrepresented in practices of redress'.⁹⁶ The views and perspectives of service users are essential for evidence-based policy and practice and it is argued that without meaningful involvement of victim-survivors in the planning and implementation of redress programmes, they are 'unlikely to meet the needs of survivors and could fail'.⁹⁷

The Hart Report recommends that "the Commissioner should be assisted by an Advisory Panel consisting of individuals who as children were resident in residential homes in Northern Ireland."⁹⁸ This recommendation in the draft legislation has the potential to serve as a mechanism for including victim-survivors in decision making processes that affect them whilst also complying with the international principles of 'victim-centred' reparation. There may be a significant proportion of victim-survivors who reside outside Northern Ireland and so it is **recommended that they are appropriately and adequately represented on the Advisory Panel**. Whilst acknowledging the logistic difficulties with this proposal, creativity around how and in what ways they are involved could still facilitate meaningful consultation e.g. video conference calling and perhaps, depending on their location and availability, payment to cover the costs of travel and accommodation to attend important or significant meetings and events.

Those living outside of Northern Ireland and the wider UK will likely face unique difficulties in having their needs advocated for and met; to exclude them from the opportunity to be meaningfully involved in the implementation and provision of reparative programmes would be significantly disadvantageous and would likely lead to

⁹⁶ P.Lundy and K. Mahoney, 'Representing Survivors: A Critical Analysis of Recommendations to Resolve Northern Ireland's Historical Child Abuse Claims ', *The Annual Review of Interdisciplinary Justice Research*, 7 (2018) 258-291 Available at: <https://pure.ulster.ac.uk/ws/portalfiles/portal/11660684/IJR7+-+Lundy+and+Mahoney+-+Print+Proof.pdf> (Accessed: 13 January 2019), p258.

⁹⁷ Ibid 283 See also; The Panel of Experts on Redress (2017) Response to Historical Institutional Abuse Inquiry Redress Recommendations : Position Paper & Recommendations , Northern Ireland : The Panel of Experts on Redress . [Online]. Available at: <https://www.amnesty.org.uk/files/2017-04/Panel%20Position%20Paper%20April%2020%20pdf.pdf?LUgUHAYg4iP9cPdKGeXsMwFK5lIXUwHL> Accessed: 13 January 2019, p27.

⁹⁸ Hart n.60, p232.

the neglect of this sub victim-survivor group. Whilst it may be difficult to secure the interest of people from overseas, this should not be interpreted as sufficient to make no efforts to explore the possibility. If this is not achievable, **special consideration and regular consultation with this sub-group could be undertaken to ensure they are not further victimised by the creation of a victim hierarchy which privileges those residing in Northern Ireland.**

7. The value of having the stories of victim-survivors heard and validated may be interpreted as a form of reparation

This is a general principle in terms of the need for service providers to acknowledge and be respectful of service users' experience and to treat them with compassion and respect. It also has practical implications for service provision. Some victim-survivors have acknowledged a sense of feeling heard through their involvement with the Acknowledgement forum, whereas others 'felt that they had been restricted in what they could say or restricted to what was considered relevant by the Inquiry'.⁹⁹ **On balance, consideration be given to extending the Acknowledgement Forum or creating a similar, less formal and potentially service-user led service to allow for others impacted to come forward and share their stories.** This can be separate to oral testimony, especially as under the current recommendations this will only occur in exceptional circumstances. A separate service-supported and service-led forum may contribute to healing for some victim-survivors and arguably contributes to a learning culture wherein the abuse is acknowledged and documented on a public record. In essence, such a strategy speaks to the reparation principle of guarantees of non-repetition that illuminates the lived consequences of victim-survivors.

⁹⁹ Lundy n.43, p22.

8. Grassroots Peer Support

Some studies highlight the positive impact of service-user led peer support groups for those affected by institutional abuse.¹⁰⁰ In a recent study involving victim-survivors of historical institutional abuse in Northern Ireland many participants talked of the value of peer support groups and proposed the creation of a 'grassroots level support centre' to facilitate a safe space for victim-survivors to share their experiences and seek support. It was also acknowledged that the remit of the centre could be expanded to include provision to survivors outside of the HIA Inquiry's Terms of Reference¹⁰¹

Recognising that 'mutual support, community and friendship are keys to healing',¹⁰² **this submission advises the Commissioner to engage in further consultation with victim-survivors to explore the potential for a grassroots peer support group to be funded by the Executive** but primarily managed by victim-survivors to help promote service user empowerment and self-determination.

9. A Partnership between the Redress Board and the Commissioner's Support Team¹⁰³

A Redress Board that encompasses a range of multi-disciplinary expertise such as legal, medical and social-care trained individuals, is likely to provide a higher measure of satisfaction and redress than a purely judicial review.¹⁰⁴ The current proposed judiciary board operates through a narrow legal lens and is insensitive on two fronts. First, on assessing eligibility, a judicial decision may not adequately incorporate the difficulties in determining causation of many harms where an enhanced payment is applied for in the compensation scheme. Thus, a plausibility approach may be more apt. The role of the medical professional should not result in a pressure on healthcare practitioners to 'diagnose' after suspected CSA and/or on the basis of past records, but rather to illuminate the complexities of CSA and the difficulties in obtaining 'medical

¹⁰⁰ Moore et al. n.73, p281-2.

¹⁰¹ Lundy n.43, p25.

¹⁰² Bringing them Home Report n.76, p279-80.

¹⁰³ The Commissioner's Team is comprised of two facets. First, the professional support team which this reports recommends to be multi-disciplinary. Second, the Advisory Panel of Victim-Survivors. The multidisciplinary team of service providers and experts may help to support and monitor the activities of the Redress Board.

¹⁰⁴ See UN Basic Principle of Reparation, IX para 22: Satisfaction may be demonstrated through a multitude of ways.

evidence.’¹⁰⁵ It is important that the Inquiry’s requirements do not detract from the wider psychosocial and health needs that require a co-ordinated multi-disciplinary response.¹⁰⁶

Second, in assessment of the gravity of these harms for those applying for an enhanced payment, a holistic approach is required to appreciate the extent of injury or loss, some of which may be of a sensitive and intimate nature. A redress board that operates under this approach with a multi-disciplinary form could potentially be reassuring to victims considering making a claim, encouraging victims to come forward and thus redress is delivered where it is needed. Aside from the sensitive and comprehensive assessment of information presented, there may be less appeals based on judicial oversights of health and social harms. The redress board needs to consider that childhood abuse has the potential to cause a range of harms, that a judicial decision-making board may fail to recognise, only to incite further distress and a sense of injustice for victims. A two way partnership with the Commissioner’s team logically enhances efforts to deliver effective redress. The Commissioner’s team (multidisciplinary professional service-providers and victim-survivor advisors) should assist the Redress Board in realising the significance/impact of certain harms and; the Redress Board can also inform the Commissioner on the range of harms contained in applications that could inform the extent of service provision required.

In sum, the delivery of services to victim-survivors symbolises an active and serious effort that goes beyond monetary claims in order to ‘repair’ the harm. The recommendations on services in this report demonstrates that services should begin at the point of application and continue throughout a person’s lifetime, whether they are a direct or indirect victim-survivor. Careful co-ordination of multiple service actors (including voluntary sector) and with the Redress Board, offers efficiency where victims have suffered decades of harm in their lifetime and a time-sensitive approach ensures those who are elderly and/or in ill health are prioritised. Consideration should also be made to guarantee non-repetition by institutions involved in the care of children, whether in state,

¹⁰⁵ Voss, L., Rushforth, H. and Powell, C. ‘Multiagency Response to Childhood Sexual Abuse: A Case Study that Explores the Role of a Specialist Centre’, *Child Abuse Review*, 27(3) (2018) 209–222, p219.

¹⁰⁶ *Ibid.* p221

religious or third party bodies that provide for the protection, support, rehabilitation and redress for victims.¹⁰⁷

E. Acknowledgement of Responsibility, Apology and Memorialisation

The key means of redress covered in the proposed draft legislation is financial compensation for victims and survivors of historical institutional abuse. Whilst compensation is recognised as a critical element of redress, holistic reparations that comprehensively address the needs of victims and survivors should be wider than monetary compensation. The need for broad reparations is reflected in the UN Basic Principles on the Right to a Remedy and Reparation, which set out five forms of reparation, namely restitution; compensation; rehabilitation; measures of satisfaction; and guarantees of non-repetition.¹⁰⁸ The UN Basic Principles allude to no hierarchy of reparations, with each of the five types of reparation complementing each other holistically.¹⁰⁹ This section explores the important role of measures of satisfaction or symbolic reparations. It focuses upon the symbolic reparative measures of memorialisation and apology and their role in publicly acknowledging and taking responsibility for the abuse.

1. The Importance of Symbolic Reparations in Acknowledging the Abuse

Reparations for past abuse are often categorised as either material (monetary compensation, including access to goods and services, such as health, housing and education) or symbolic (apologies and memorials), with greater significance placed upon material reparations. However, such a distinction can be unhelpful,¹¹⁰ blurring the critical importance of a comprehensive redress scheme, which adequately addresses issues of acknowledgement of the abuse suffered and responsibility for the abuse. The

¹⁰⁷ Gallen n.11, p348.

¹⁰⁸ UN 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 (UNPBG) (2005) A/RES/60/147, Principle 19-23.

¹⁰⁹ Luke Moffett, *Transitional Justice and Reparations: Remediating the Past?* in C. Lawther, L. Moffett and D. Jacobs (eds) *Research Handbook on Transitional Justice* (Edward Elgar 2017) p377; and Margaret Urban Walker 'How can Truth Telling Count as Reparations?' in Klaus Neumann and Janna Thompson (eds) *Historical Justice and Memory* (University of Wisconsin Press 2015) p130.

¹¹⁰ Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff and International Center for Transitional Justice (eds) *The Handbook of Reparations* (Oxford University Press 2006) 451; Margaret Urban Walker 'How can Truth Telling Count as Reparations?' in Klaus Neumann and Janna Thompson (eds) *Historical Justice and Memory* (University of Wisconsin Press 2015) 130.

prioritisation of monetary compensation, without the provision of other measures of redress, can be problematic.¹¹¹ De Greiff states that ‘in order for something to count as reparation, as a justice measure, it has to be accompanied by an acknowledgement of responsibility and it has to be linked, precisely, with truth, justice, and guarantees.’¹¹²

Victims may perceive monetary compensation alone as insufficient and insulting¹¹³ in the absence of clear and genuine demonstrations of responsibility and acknowledgement by those responsible.¹¹⁴ To an extent these aspects can be addressed through apologies and memorialisation. A comprehensive, holistic approach must involve ‘more than compensation’ - victims and survivors do not merely want a financial payment for the harms suffered, but require explicit recognition and official acknowledgement of the harm done to them.¹¹⁵ A holistic response requires both material and symbolic reparations;¹¹⁶ compensation without acknowledgement of responsibility can be perceived as ‘blood money’ to buy victims’ silence,¹¹⁷ whilst symbolic reparations of apology and memorialisation can be perceived as empty words and gestures if not accompanied by more concrete benefits including compensation and a range of support services such as counselling.¹¹⁸

2. Memorialisation and Acknowledgement

Memorialisation has been an integral element of redress in official responses to historical institutional abuse across the globe. In the Republic of Ireland, in the context of clerical institutional child abuse, the report of the Commission to Inquire into Child Abuse (the

¹¹¹ Adrian Vermeule, ‘Reparations as Rough Justice’ in Melissa Williams, Rosemary Nagy and Jon Elster (eds) *Transitional Justice, Nomos LI* (New York University Press 2012) 151.

¹¹² Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/69/518, 8 October 2014, para 4.

¹¹³ Brandon Hamber, *Transforming Societies after Political Violence: Truth, Reconciliation and Mental Health* (Springer 2009); Dyan Mazurana and others, *Making Gender-Just Remedy and Reparation Possible: Upholding the Rights of Women and Girls in the Great North of Uganda* (Feinstein International Centre: Tufts University 2013).

¹¹⁴ Margaret Urban Walker, *Making Reparations Possible: Theorizing Reporative Justice*, in C. Coradetti, N. Eisikovits and J. Rotondi (eds) *Theorizing Transitional Justice* (Ashgate 2015) 211.

¹¹⁵ Janna Thompson, *Reparative Claims and Theories of Justice*, in K. Neumann and J. Thompson (eds) *Historical Justice and Memory* (University of Wisconsin Press 2015) 45, p49.

¹¹⁶ Jemima Garcia-Godos, ‘Reparations’ in Olivera Simic (ed) *An Introduction to Transitional Justice* (Routledge 2017), p177.

¹¹⁷ Claire Moon, ‘“Who’ll Pay Reparations on My Soul?” Compensation, Social Control and Social Suffering’ (2012) 21(2) *Social and Legal Studies* 187, p194.

¹¹⁸ Mark Osiel, ‘“Transitional Justice” in Israel/Palestine? Symbolism and Materialism in Reparations for Mass Violence’ (2015) *Ethics and International Affairs*, 20 January <<https://www.ethicsandinternationalaffairs.org/2015/transitional-justice-in-israelpalestine-symbolism-and-materialism-in-reparations-for-mass-violence/>>.

Ryan Report) recommended the erection of a memorial.¹¹⁹ Demonstrating the important link between acknowledgement, memorialisation and apology, the report specifically recommended that a special statement made by the Taoiseach in May 1999 should be inscribed on the memorial ‘as a permanent public acknowledgement’ of the experiences of victims and survivors.¹²⁰ The words to be inscribed are as follows: “On behalf of the State and of all citizens of the State, the Government wishes to make a sincere and long overdue apology to the victims of childhood abuse for our collective failure to intervene, to detect their pain, to come to their rescue”.¹²¹ In response to this recommendation, the Irish government dedicated a budget of up to €0.5 million for the project.¹²² A committee was established to ensure, amongst other matters, adequate consideration of the views of survivor groups in relation to the location and nature of the memorial to be erected.¹²³ However, due to contentions regarding the type and location of the planned memorial, no memorial has yet been erected, a delay which has frustrated the victim-survivor community. The Hart HIA Inquiry recommended a number of reparative measures for victims and survivors including memorialisation, apology and financial compensation.¹²⁴ Similar frustrations exist among victims and survivors of historical institutional abuse in Northern Ireland, where a proposed straightforward measure of planting a memorial tree in the Stormont estate yet to be implemented. These issues highlight the importance of a timely fulfilment of government promises regarding memorialisation. Failure to act on a promise to memorialise could send the message that the government is ignoring the needs of victims and survivors.

It is inevitable that difficulties will arise regarding memorialisation, given the differing perspectives of the numerous heterogeneous victims and survivors involved in the process. Each perspective will require acknowledgement and recognition as a legitimate and integral element of the memorialisation project if general agreement is to

¹¹⁹ Commission to Inquire into Child Abuse, *Report of the Commission to Inquire into Child Abuse* (The Ryan Report) (2009) Vol IV, Chapter 7, para. 7:02 <<http://www.childabusecommission.ie/>>.

¹²⁰ *ibid.*

¹²¹ *ibid.*

¹²² Ryan Report Implementation Plan: Second Progress Report (July 2011) 11 <https://www.dcy.gov.ie/documents/20180831RyanRepImplPlanSecProgRep.pdf>.

¹²³ *ibid.*

¹²⁴ Hart Inquiry Report (2017), Vol 1, Ch 4.

be reached.¹²⁵ **In order to properly acknowledge and recognise the harms suffered by victims and survivors, careful management of the various perspectives on memorialisation is critical to ensure that the promise of appropriate memorials or tributes is achieved.**¹²⁶

Memorials are often deemed ‘easy’ and ‘soft’ reparative measures for acknowledging past abuse, with the assumption that, unlike ‘vocal’ measures, such as truth commissions or official apologies, the inherent ‘silence’ of memorials can somehow avoid the complexities and difficulties associated with justice, acknowledgement and accountability.¹²⁷ However, memorials can be more complex than they appear, particularly where controversies and unresolved issues remain surrounding responsibility.¹²⁸ If victims perceive memorials as lacking in acknowledgement of past violations, it may impede their ability to move forward.¹²⁹ This is demonstrated in the context of Australian state-initiated settler colonial memorials representing the ‘ending’ of colonialism. Here, indigenous populations do not feel adequately acknowledged by the memorials, which they identify as portraying a State interpretation of events, which differs from their own.¹³⁰ Undue haste to acknowledge responsibility with a view to closing the chapter on the past might ‘make survivors feel that reparations are being used to buy their silence and put a stop to their continuing quest for truth and justice.’¹³¹

3. The Need for Consultation around Memorialisation

The Irish government’s investigation into Magdalene Laundry regimes recognised the need for consultation with victims and survivors regarding memorialisation. The Magdalene Commission Report on the ‘establishment of an ex gratia scheme’ for

¹²⁵ Brandon Hamber and Richard Wilson, ‘Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies’ (2002) 1(1) *Journal of Human Rights* 35.

¹²⁶ Patricia Lundy, ‘The Potential and Limits of Historical Abuse Inquiries to Meet Victim’s Justice Needs’- paper presented at ‘Towards Transitional Justice: Recognition, Truth-telling, and Institutional Abuse in Ireland’ conference in Boston College (1-2 November 2018).

¹²⁷ Ereshnee Naidu, Memorialisation in Post-Conflict Societies in Africa: Potentials and Challenges, in S. Buckley-Zistel and S. Schafer (eds.) *Memorials in Times of Transition*, Intersentia (2014) 29-45.

¹²⁸ Nahshon Perez, *Freedom from Past Injustices: A Critical Evaluation of Claims for Intergenerational Reparations*, Edinburgh University Press (2012).

¹²⁹ Carla de Ycaza and Nicole Fox, Narratives of Mass Violence: The Role of Memory and Memorialisation in Addressing Human Rights Violations in Post-conflict Rwanda and Uganda, *Societies without Borders* 8(3) (2013) 344.

¹³⁰ Elizabeth Strakosch, Stories of Beginnings and Endings: Settler Colonial Memorials in Australia, in S. Buckley-Zistel and S. Schafer (eds.), *Memorials in Times of Transition*, Intersentia (2014), 124-148.

¹³¹ Brandon Hamber and Richard Wilson, Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies, *Journal of Human Rights* 1(1) (2002) 35, p46.

survivors recommended that a ‘dedicated fund’ be used for ‘the acquisition, maintenance and administration of any garden, museum or other form of memorial which the Scheme’s administrator, after consultation with ... [an] advisory body or committee ... which should include at least 6 Magdalen women, ... has decided to construct or establish.’¹³² However, the Irish government has, as yet, not followed up on its promise to consult victims and survivors on how the abuse should be remembered and memorialised, a failing which is standing in the way of moving forward. A victim-centred response to historical institutional abuse requires adequate consultation with victims and survivors, but the aftermath of the Magdalene Laundry investigation demonstrates the critical need to follow up on government promises in order to prevent further re-traumatisation and re-victimisation of victims and survivors.

To facilitate consultation and engagement with victims and survivors as regards an appropriate memorial or tribute to the harms suffered within the Mother and Baby Homes, the Irish government has established a Collaborative Forum made up of members of the victim-survivor community.¹³³ This forum consists of several sub-committees to inform the ongoing Commission of Investigation into Mother and Baby Homes on issues including memorials and personal narratives.¹³⁴ While this initiative promotes a victim-centred approach to redress measures for historic abuse, it is important to note that, in circumstances where the views of victims and survivors are sought, the government must be prepared to genuinely hear and engage with these perspectives. Differences of opinion which arise should be sensitively managed, and whilst it may be impossible to address the needs of all victims and survivors, **any memorialisation project(s) should aim to respect and meet a broad spectrum of needs.**

International inquiries into historical institutional child abuse have consulted with victims and survivors in order to best address their redress needs. The Canadian inquiry report dealing with physical and sexual abuse of children in institutions arising from

¹³² Mr Justice John Quirke, *The Magdalen Commission Report* (May 2013) <<http://www.justice.ie/en/JELR/THE%20Quirke%20report.pdf/Files/THE%20Quirke%20report.pdf>> 6th Recommendation, 12.

¹³³ See Department of Children and Youth Affairs, Mother and Baby Home Collaborative Forum, <https://www.dcy.gov.ie/docs/Mother-and-Baby-Home-Collaborative-Forum/4667.htm>

¹³⁴ See Department of Children and Youth Affairs, Charter for a Collaborative Forum of Former Residents of Mother and Baby Homes and Related Institutions, https://www.dcy.gov.ie/documents/MBHCharterForCollaborative_Forum.pdf

issues of cultural assimilation, identified memorialisation as one element of a comprehensive redress scheme desired by victims and survivors, together with acknowledgement, apology, appropriate service provision, financial compensation and a commitment to prevent reoccurrence.¹³⁵ Australian public inquiries into institutional child abuse, addressing the interrelated issues of institutional care abuse, abuse by members of religious orders and the forced removal of children from their families, have also recognised the importance of memorialisation.¹³⁶ The Government of South Australia, through the Stolen Generations Reparations Scheme, provides grants to support memorials to historical abuse victims, including \$95,000 to the Aboriginal Health Council South Australia for creating a healing and memorial garden to share the story of the Stolen Generations; \$100,000 to the city of Adelaide for a Stolen Generations public artwork and place of reflection; and \$45,000 to the Point Pearce Aboriginal Corporation for a Stolen Generations memorial and garden at Point Pearce.¹³⁷

4. Types of Memorialisation

Memorials to historical institutional abuse across the globe have generally taken the form of statues, monuments, trees or memorial gardens. The erection of a child statue within the grounds of Stormont to maintain awareness amongst politicians and the civil service, and similar memorials placed at other public locations, could serve as a societal reminder of the abuse. These statues should not only include those who were abused within the Northern Ireland institutions, but also include individuals who were sent abroad and abused, as well as a range of forms of harm suffered by victims.¹³⁸ Recent discourse among victims and survivors of Mother and Baby Home institutions in the Republic of Ireland and related advocacy groups is calling for state funding of ‘more “active”

¹³⁵ Law Commission of Canada *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Ottawa: Law Commission of Canada, 2000).

¹³⁶ See Bringing them Home Report n.76, p306; Senate Community Affairs Reference Committee, Parliament of Australia *Lost Innocents: Righting the Record – Report on Child Migration* 2001 (Canberra, Senate Standing Committee on Community Affairs) Recommendation 32, xix, 243; Senate Community Affairs Reference Committee, Parliament of Australia *Lost Innocents and Forgotten Australians Revisited – Report on the Progress with the Implementation of the Recommendations of the Lost Innocents and Forgotten Australians Reports* 2009 (Canberra, Senate Standing Committee on Community Affairs) 170-171; *Royal Commission into Institutional Responses to Child Sexual Abuse*, Recommendation 17.6. https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_recommendations.pdf

¹³⁷ Stolen Generations Reparations Scheme (September 2017) <https://www.dpc.sa.gov.au/what-we-do/services-for-business-and-the-community/Aboriginal-community-advice-and-support/current-initiatives/stolen-generations-reparations-scheme>

¹³⁸ *ibid.*

methods of memorialisation so that society can learn from what happened in these institutions'.¹³⁹ 'Active' memorialisation is described as including educational initiatives and research projects such as oral history archives.¹⁴⁰ 'Living' memorialisation could also be used, such as mobile photo exhibitions or oral archives that are able to display stories with headphones for individuals to listen to, there is the possibility of digital technology in preserving and disseminating such information and recognition.

Educational awareness programmes on child abuse, highlighting its prevalence, existing misconceptions, perpetrators' tactics, services for victims, and treatment for offenders¹⁴¹ have been recommended in the Australian and Canadian inquiry reports. The Canadian Restoring Dignity Report recommended that there should be a place(s) where those who lived in institutions can record their experiences and where historical materials concerning these institutions can be gathered.¹⁴² Through the Stolen Generations Reparations Scheme, the Government of South Australia has funded numerous storytelling and oral history projects.¹⁴³ Oral history projects can be a valuable means of affording acknowledgement to the sufferings of victims and survivors, enabling them to 'tell their stories' in a more sensitive environment than the acknowledgement/truth-telling forum of an official inquiry, which can be perceived as too judicial in nature.

Advocacy groups in the context of Mother and Baby Homes have identified other measures, such as adequate provision of information and tracing services and a centralised archive of records, in the Republic of Ireland as falling within the concept of memorialisation.¹⁴⁴ The Ryan Report recommended that funding for family tracing services should be continued to assist individuals deprived of their family identities.¹⁴⁵

¹³⁹ Maeve O'Rourke, Claire McGettrick, Rod Baker and Raymond Hill, Clann: Ireland's Unmarried Mothers and their Children: Gathering the Data, para. 6.8, http://clannproject.org/wp-content/uploads/Clann-Submissions_Redacted-Public-Version-October-2018.pdf

¹⁴⁰ *ibid.*

¹⁴¹ Children in State Care Commission of Inquiry: Allegations of Sexual Abuse and Death from Criminal Conduct (Mullighan Report), p. XXIV.

¹⁴² Restoring Dignity: Responding to Child Abuse in Canadian Institutions: Executive Summary (Restoring Dignity) 32.

¹⁴³ Stolen Generations Reparations Scheme (September 2017) <https://www.dpc.sa.gov.au/what-we-do/services-for-business-and-the-community/Aboriginal-community-advice-and-support/current-initiatives/stolen-generations-reparations-scheme>.

¹⁴⁴ Maeve O'Rourke, Claire McGettrick, Rod Baker and Raymond Hill, Clann: Ireland's Unmarried Mothers and their Children: Gathering the Data, para. 6.8, http://clannproject.org/wp-content/uploads/Clann-Submissions_Redacted-Public-Version-October-2018.pdf

¹⁴⁵ Commission to Inquire into Child Abuse, *Report of the Commission to Inquire into Child Abuse* (The Ryan Report) (2009), 462.

The Government of South Australia, through the Stolen Generations Community Fund, has provided a \$97,850 grant to support software and database improvements to enable the wider Aboriginal community to better access family history information.¹⁴⁶ Given the separation of families in the context of historical institutional abuse in Northern Ireland, the provision of information and tracing services and access to records represents an important aspect of ‘active’ memorialisation.

A **comprehensive, holistic approach to redress** should be taken, recognising that the needs of victims and survivors are wider than financial compensation. A comprehensive approach recognises the complementary role of memorialisation in addressing the critical issues of acknowledgement and responsibility for the abuse and serving as a societal reminder of what happened to ensure its non-recurrence.

Meaningful consultation with victims and survivors regarding memorialisation should be an integral part of the process, placing victims and survivors at the centre and ensuring that memorial projects are non-tokenistic. The voices of those who suffered the abuse should be listened to and acted upon, with differences of opinion sensitively managed, to ensure that memorial projects are completed without undue delay.

5. Apologies and acknowledgements

Public apologies have become an increasingly accepted means of addressing historical institutional abuse,¹⁴⁷ and were recommended for victims and survivors of abuse in Northern Ireland in the Historical Institutional Abuse Inquiry Report in 2017. They have been offered in response to institutional abuse in the Republic of Ireland, Canada, Sweden and Finland, and have recently been promised by the Australian government in 2018 following the publication of a Report of the Royal Commission into Institutional Responses to Child Sexual Abuse. The significance of apologies to victims and survivors has been repeatedly highlighted within research, which suggests that acknowledgement is

¹⁴⁶ Projects Supported by the Stolen Generations Community Reparations Fund (SGRS) January 2018 <https://www.dpc.sa.gov.au/what-we-do/services-for-business-and-the-community/Aboriginal-community-advice-and-support/current-initiatives/stolen-generations-reparations-scheme>

¹⁴⁷ For a more detailed analysis of apologies in the context of institutional abuse please see in general Queen’s University Belfast, ‘Apologies and Institutional Child Abuse’ *Apologies, Abuses and Dealing with the Past Paper Series*, available at www.apologies-abuses-past.org.uk (‘QUB Report’).

one of victims and survivors' highest priorities.¹⁴⁸ Apologies may help restore a sense of dignity and self-worth on the part of victims and survivors, by publicly acknowledging wrongdoing and through the acceptance of responsibility on the part of the offender or member of the offending institution or collective. Apologies can mark a symbolic break from the past, towards a 'future of just dealings and respect.'¹⁴⁹

If apologies are to have meaning to victims and survivors, it is important that they are crafted and delivered in a way that demonstrates commitment to genuine reconciliation. Apologies which appear to be avoiding full acknowledgment, responsibility or remorse can signal indifference towards the harm that was caused and the indignities suffered by the victims and survivors.¹⁵⁰ This can lead to a sense of moral insult, and the apology being dismissed as meaningless by those to whom it is directed. Such dismissals followed early apologies by the Catholic Church leadership in the Republic of Ireland, as well as the apology by the Garda Commissioner following the Report of the Commission of Investigation into the Catholic Archdiocese of Dublin.¹⁵¹

In order to avoid such a response, it is important that **apologies include five key elements: acknowledgement of the wrong; acceptance of responsibility; expression of remorse/regret; assurance of non-repetition; and an offer of repair or corrective action.**¹⁵² Acknowledgment of wrongdoing should include the articulation of the offence, acknowledgment of the consequences of the offence for victims and survivors, and acknowledgment that those harmed were not responsible.¹⁵³ Acceptance of responsibility should involve acceptance that 'one has no excuse, defense, justification or explanation'

¹⁴⁸ Law Commission of Canada (ed), *Restoring Dignity: Responding to Child Abuse in Canadian Institutions: Executive Summary* (Law Commission of Canada 2000); Patricia Lundy, 'Historical Institutional Abuse: What Survivors Want From Redress' University of Ulster Seminar Report (March 2016); Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (Royal Commission into Institutional Responses to Child Sexual Abuse 2015). Lee Taft, 'Apology Subverted: The Commodification of Apology' *The Yale Law Journal* 109 (5) (2000), 1137.

¹⁴⁹ Janna Thompson, *Apology, Justice, and Respect: A Critical Defense of Political Apology*, in Gibney and others, (eds) *The Age of Apology: Facing up to the Past*, (University of Pennsylvania Press 2008).

¹⁵⁰ Zohar Kampf, *Public (Non-) Apologies: The Discourse of Minimizing Responsibility*, *Journal of Pragmatics* 41 (11) (2009), 2257-2270.

¹⁵¹ QUB Report n.147, p6-7.

¹⁵² Susan Alter, *Apologizing for Serious Wrongdoing: Social, Psychological and Legal Considerations*, (May 1999) Final Report for the Law Commission of Canada; Gibney M and others (eds), *The Age of Apology: Facing up to the Past*, (University of Pennsylvania Press 2008).

¹⁵³ Law Commission of Canada (ed), *Restoring Dignity: Responding to Child Abuse in Canadian Institutions: Executive Summary* (Law Commission of Canada 2000); Patricia Lundy, 'Historical Institutional Abuse: What Survivors Want From Redress,' University of Ulster Seminar Report (March 2016).

for the harmful act.¹⁵⁴ Expressions of remorse should signal that the offender understands the implications of their actions, and should include recognition of the extent of the harm, awareness of the impact on victims and survivors, and regret that the harm took place.¹⁵⁵ Assurances of non-repetition should include descriptions of how this will be achieved, and assure victims and survivors that future generations will be spared the abuse they have suffered.¹⁵⁶ Finally, offers of repair or corrective action of the types explored within this submission should be prioritised, as words alone are unlikely to be sufficient to redress the harm done.

While these five elements will not guarantee that victims and survivors accept the apology, the failure to include them is likely to be fatal to any attempt at reconciliation. In addition to these elements of content, those making the apology should give consideration to who is going to deliver the apology, where it will be done, the form it will take, and when it will be delivered. In relation to who is best placed to make the apology, this will generally be the offender; however, in cases of apologies made in a representative capacity, individuals with more authority and stature are likely to be considered more credible.¹⁵⁷ If apologies are being made by different levels of an institution (e.g. regional, national), it is important that those made by more authoritative figures do not undermine more local attempts. In relation to the setting of the apology, it is important to select a setting that is accessible to victims and survivors, likely to ensure broad publicity, and of sufficient gravity to demonstrate the seriousness that is attributed to the event.¹⁵⁸ In relation to the form of the apology, this should take the form requested by victims and survivors, whether that be public statements, personal letters, formal written apologies or another form. Finally, apologies should be timed to demonstrate sincerity, i.e. not immediately following revelations, or in an attempt to engage in ‘damage control’. Late apologies do not always mean ‘too little, too late’, as they have the potential to restore the dignity and moral worth of victims and survivors, even if delivered many years later.

¹⁵⁴ Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation*, Stanford University Press (1991) p19.

¹⁵⁵ QUB Report n.147, p8-9.

¹⁵⁶ *Ibid* p9.

¹⁵⁷ *Ibid* at 11.

¹⁵⁸ *Ibid* at 12.

Apologies are unlikely to be perceived as sincere if they are unaccompanied by other attempts to correct the harm caused; tangible responses such as redress, reform and measures of accountability are crucial to demonstrating that victims and survivors' harm has been taken seriously. However, other measures which are unaccompanied by apologies can similarly be rejected as insincere. Meaningful apologies can be hard to deliver, and victimised populations may reject even carefully crafted and delivered apologies. Yet, research demonstrates that they have the potential to deliver significant restorative benefits, and can be a valuable means of restoring dignity and self-worth following institutional abuse.

F. Compensation

The 2005 UN Principles stipulate that compensation should be,

‘provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.’

Compensation is economic or monetary awards to remedy or alleviate damage or loss suffered by injured parties for a range of harm and suffering. As Grotius said ‘money is the common measure of valuable things’.¹⁵⁹ Compensation can enable victims to manage their suffering as they see fit, spending it on private health services, investing it in a business or pursuing further education for themselves or their family. Indeed, as evidenced through recent empirical research carried out in Northern Ireland and the Republic of Ireland, for many victims/survivors, financial compensation combined with appropriate support services (such as counselling), is the most valued means of

¹⁵⁹ Opinion in the *Lusitania Cases*, 1 November 1923, *Recueil de sentences arbitrales*, Vol. VII, p. 32, at 35.

reparation, ahead of memorialisation and apology.¹⁶⁰ As such compensation can enable victims a ‘freedom of choice’ to spend the money as they see fit.¹⁶¹ Such flexibility enables it to be used to respond to a range of violations, but as Shelton notes,

‘incapable of restoring or replacing the rights that have been violated and, as a substitute remedy, are sometimes inadequate to redress fully the harm . . . [it can however] supply the means for whatever part of the former life and projects remain possible and may allow for new ones.’¹⁶²

Compensation can cover physical or mental harm, lost opportunities or earnings, material damages, moral damage and costs for legal, social or medical assistance. Compensation is often categorised into covering pecuniary and non-pecuniary harm. Pecuniary or material compensation encompasses damages that have a quantifiable amount, such as loss of income, property or even a body part. Non-pecuniary or moral damages are compensated to reflect the more intangible violations of a person’s dignity, such as being stigmatised by sexual violence or preventing from knowing the fate of a loved one disappeared. The European Court of Human Rights has justified non-pecuniary harm to dignity on the grounds that victims have suffered moral harm and this needs to be recognised due to their ‘evident trauma, whether physical or psychological, pain and suffering, distress, anxiety, frustration, feelings of injustice or humiliation, prolonged uncertainty, disruption to life, or real loss of opportunity’ caused by such gross violations of their rights.¹⁶³ The rest of this section addresses the issue of compensation under the headings of payments, eligibility, structure and process, and reparative value.

1. Form and Amount

Compensation can take different forms of one off payment of a lump-sum, periodic or pension payments,¹⁶⁴ or even a top-up for collective measures, such as housing or

¹⁶⁰ See ongoing field research with HIA survivors as part of the ESRC funded project ‘Apologies, Abuses and Dealing with the Past’ [Grant ref: ES/N010825/1]. See project website: <https://apologies-abuses-past.org.uk/>

¹⁶¹ Truth and Reconciliation Commission of South Africa Report (1998) Vol. 5, p. 179.

¹⁶² Dinah Shelton, *Remedies in International Human Rights Law*, Oxford University Press (2005), p291.

¹⁶³ *Varnava and Others v Turkey*, Judgment 18 September 2009, para.224. For more information on reparations, see <https://reparations.qub.ac.uk> as part of the AHRC project ‘Reparations, Responsibility and Victimhood in Transitional Societies’ [Grant ref: AH/P006965/1].

¹⁶⁴ As in Chile, see Elizabeth Lira, *The Reparation Policy for Human Rights Violations in Chile*, in de Greiff (2006).

education.¹⁶⁵ However, the form of compensation can also have unintended consequences, such as where it impoverishes victims or do not sufficiently take a gender sensitive approach. We welcome that the payment through the NI Redress Scheme will not affect benefits or other assessment and will be non-taxable. This ensures that engaging in such a scheme does not disincentivise survivors from claiming. The government in advertising the scheme should make this apparent to claimants. Nonetheless we have substantive concerns over the nature of such payment and the amount. Terming the payment ex-gratia ‘implies that such a payment is charitable, rather than based on any legal obligation, identifiable responsible actor or entitlement for such victims to a remedy.’¹⁶⁶ Other redress schemes in Ireland and Australia have obliged responsible institutions to contribute, at least in part, to compensation for victims.¹⁶⁷ This reflects that compensation is not just money, or a means to buy off victims, but reflects the institution’s responsibility and some measure of public accountability for its actions.

The HIA Redress Board Scheme in Northern Ireland sets out three different payments available to victims. The first is a ‘standard amount’ which offers an ex gratia payment of £7,500 for any claimant falling under the definition of s.2(1)-(3) of the Act. The second amount is an unspecified additional payment from the Board if they are ‘justified by the severity of the matters raised’; not to exceed the value of £72,500. There is no framework given on which the ‘severity’ is to be calculated, nor which separates the ‘abuse’ referred to in respect of the standard payment in comparison to the additional sum available. The final award available is a stand-alone payment of £20,000 available to any child sent to Australia under the ‘Child Migrants Programme’.¹⁶⁸ In contrast to other contexts this amount is on a lower scale. It is also comparatively low given the often life-long trauma which many victims of historical institutional abuse have experienced

¹⁶⁵ *Prosecutor v Germain Katanga*, Draft implementation plan, ICC-01/04-01/07-3751-Red, 25 July 2017, para.102

¹⁶⁶ L. Moffett, A pension for injured victims of the Troubles: reparations or reifying victim hierarchy?, *Northern Ireland Legal Quarterly* 66(4) (2016) 297–319, p310.

¹⁶⁷ See section 48, National Redress Scheme for Institutional Child Sexual Abuse Act 2018. In Ireland the 2002 Indemnity Agreement established the Catholic Church to pay 50%, but has only contributed to 14% of the cost (some €96.1 million of a €1.5 billion bill). See Henry McDonald, Survivors of Catholic church abuse in Ireland demand papal meeting, *The Guardian*, 6 March 2018.

¹⁶⁸ The maximum compensation award available to any one claimant was capped at £80,000, or £100,000 if the claimant was sent to Australia, under s.7 Subordinate Legislation.

including the denial of the basic right to education while in the institutions which may have adversely impacted their ‘life chances’ and employment prospects.¹⁶⁹

Under the IRSSA in Canada, two complementary streams of compensation were established: the Common Experience Payment (CEP) and the Independent Assessment Process (IAP). The former provided a lump-sum recognition of harm, while the latter was a stratified assessment of the severity of harm incurred.¹⁷⁰ Under the CEP, successful claimants were entitled to \$10,000 as a lump sum for having attended an Indian Residential School for one year or less, with an additional \$3000 allotted for each subsequent year.¹⁷¹ As a complementary scheme, the IAP assessed the severity of abuse and harm inflicted on students on a case-by-case basis, using a hierarchical points structure to quantify their experience on a scale of 1-100, with up to \$275,000 available.¹⁷² Combining the two compensation streams, claimants could receive a maximum total of \$300,000 each.

In Ireland, as noted above, the administrative scheme was set up to provide redress for victims of institutionalised abuse in residential care settings. Claimants were entitled to an individually assessed payment of up to €300,000, plus an additional redress not exceeding 20% of the original amount in exceptional cases. Empirical research also suggests that the maximum payment for victims in this context was approximately €60,000-70,000.¹⁷³ Applicants could also claim medical expenses not exceeding 10% of the original award. The Magdalene Restorative Justice Scheme offered victims a time-based award. For three months or less in a Magdalene Laundry (or laundries) claimants were eligible for a lump sum of €10,000, with an additional €500 for every month thereafter, up to a maximum of €40,000. Victims would also claim a contributory state pension worth €230 every week.¹⁷⁴

¹⁶⁹ See ongoing field research with HIA survivors as part of the ESRC funded project ‘Apologies, Abuses and Dealing with the Past’ [Grant ref: ES/N010825/1].

¹⁷⁰ Green n.3.

¹⁷¹ Consultation and engagement on a potential financial compensation/redress scheme for victims/survivors of abuse in care, Scotland: Scottish Human Rights Commission. Available at: https://www.celcis.org/files/3615/3622/6806/Report_3_International_paper_06.09.18.pdf (CELSIS, 2018).

¹⁷² CELSIS *ibid*, 2018.

¹⁷³ See ‘Apologies, Abuses and Dealing with the Past’ project, [ES/N010825/1].

¹⁷⁴ As recommended in The Magdalen Commission Report - Report of Mr Justice John Quirke, On the establishment of an *ex gratia* Scheme and related matters for the benefit of those women who were admitted to and worked in the Magdalen Laundries, May 2013.

In Western Australia the Commission originally proposed a \$10,000 base amount with a maximum of \$80,000; however, a random assessment of applications found that most individuals suffered severe abuse and so to make the scheme equitable and affordable the maximum threshold was reduced to \$45,000.¹⁷⁵ In Tasmania claimants are entitled to a one time payment of \$58,333.333.¹⁷⁶ This award was calculated on a pool of money made available for survivors which was then divided equally amongst successful applications. Children of the deceased could claim awards between \$4000 and \$5000. The amount of ex-gratia payments in respect of a family group of children was not to exceed \$20,000 and was distributed evenly amongst the family group of children.¹⁷⁷

Survivors and their family should be given a choice of whether to have a lump sum as proposed in the redress scheme bill, or in monthly pension amounts. Beneficiaries of the scheme should also have access to free legal and financial advice on how to manage their money, as well as being support by other reparative measures such as counselling services. Such financial advice should be available to victims and survivors before the make a decision on the form of their award (lump sum, pension, basic rate etc.), as well as periodic assessment to evaluate the sustainability of such support or if their needs have changed for service provision. The experience in other jurisdictions is that some survivors have developed addiction and substance abuse problems, which have left them unable to manage their money wisely. In other cases, victims and survivors have felt stigmatised by received large sums of money or retraumatised by the constant reminder of the abuse.¹⁷⁸ **Indeed, some victims have also committed suicide following the award of compensation. There is a role for the redress scheme when advertising its work and encouraging those affected to apply, it should at the same time be attuned to the symbolism of such payments in acknowledging the suffering of these individuals as undeserved and necessity of remedying the harm they have suffered. Such expression of values is just for the survivors, but can also play an important role in educating their families and society as a whole on need to redress such harm and prevent its recurrence.**

¹⁷⁵ Marilyn Rock, Redress *WA Final Report, Western Australian Department for Communities*, (2007), p5.

¹⁷⁶ Rae n.7, p649.

¹⁷⁷ Rae, *ibid*.

¹⁷⁸ See Daly n.25.

2. Eligibility

In order to be eligible for a standard payment, the claimant must have suffered abuse *and* been resident in an institution during the prescribed period. The definition of abuse in the proposed redress bill includes some ambiguous and legally undefined terms including ‘maltreatment’ and ‘a harsh environment’. There are no criteria or examples given of what may constitute a harsh environment under the Act, without which some claimants are likely to be confused over their entitlement, potentially leading to a reluctance to apply, a hierarchy of victims, and an unequal distribution of compensation. Instead, a similar definition to that of the Republic of Ireland is recommended:

“abuse”, in relation to a child, means

- (a) the wilful, reckless or negligent infliction of physical injury on, or failure to prevent such injury to, the child,
- (b) the use of the child by a person for sexual arousal or sexual gratification of that person or another person,
- (c) failure to care for the child which results in serious impairment of the physical or mental health or development of the child or serious adverse effects on his or her behaviour or welfare, or
- (d) any other act or omission towards the child which results in serious impairment of the physical or mental health or development of the child or serious adverse effects on his or her behaviour or welfare, and cognate words shall be construed accordingly.’¹⁷⁹

Such touchstone parameters for claiming redress should be explicitly stated in the legislation to enable victims and survivors to have some legal certainty in what they have to evidence in their claims. There are a number of other problematic eligibility issues that need to be considered in light of a victim-oriented approach to redressing historical institutional abuse.

a) Excluded Institutions

The issue of excluded institutions in Canada led to significant ill-will amongst ‘ineligible’ applicants, First Nation communities, and their allies. Only children who attended schools included on the government’s list were eligible under the IRSSA, which was limited based on the government’s geographic boundaries and definitions used. Newfoundland and Labrador’s residential schools were initially deemed ineligible, because the province had not yet joined the Confederation of Canada when they were

¹⁷⁹ s.1(1) RIRA 2002.

created.¹⁸⁰ This meant First Nation survivors on Newfoundland were without recourse, and excluded by the process for nearly a decade. The provincial government failed to provide an alternate compensation scheme, and it took until 2016 for the Government of Canada to extend compensation to those survivors and victims. Many schools and hostels on the mainland were ruled out as well, for a range of reasons, and while some survivors have successfully appealed the classification, others have failed. This denied them any healing for the harms the IRS system had on them and expunged their abuse from the official record.¹⁸¹

Refusing redress for these victims or basing redress on the same assumptions and availability of evidence already collected through investigations, creates a hierarchy of victims, silencing those at other institutions and compromising the efficacy and justiciability of the redress scheme overall. These limitations should not be placed on institutions in Northern Ireland, and the Board should aim to use a broad definition to include as many relevant institutions as possible, with thorough investigations into claims from individuals who attended institutions not already recognized in the HIA Inquiry. Approximately 65 schools and institutions were named in complaints which led to the initial investigations, but only 22 were investigated and named within the HIA Inquiry (HIAI). For the purposes of the compensation scheme, this leaves victims of the uninvestigated 43 schools at a huge disadvantage in terms of proving their abuse and finding documents and presenting evidence. **There must be a concerted effort to investigate the other named institutions (outside of HIAI scope) in order to substantiate the complaints, without the task falling to survivors once more.**

b) Deceased Victims

Different jurisdictions have varied their approach in relation to eligibility of family members in respect of a deceased victim. Tasmania offered no information. The Queensland National Redress Scheme agreed that awards could be paid to next of kin if a claimant died prior to the payment being made although no information is given on the percentage. Funeral costs were also covered if a claimant died before the case was settled. In the Western Australia scheme, next of kin were also not available to apply but a

¹⁸⁰ See Pethoukav n.5.

¹⁸¹ Moran, *The Role of Reparative Justice in Responding to the Legacy of Indian Residential Schools*, *University of Toronto Law Journal* 64 (2014) 529.

‘complimentary’ award of \$5,000 was given, usually to cover funeral costs. In the Republic of Ireland, family members were eligible to claim on behalf of a deceased victim and to continue a claim if a victim died before the case settled. They were awarded the full amount. Under the IRSSA, next of kin were able to claim the full CEP payment and if the victim had submitted an IAP claim but died before its completion, the next of kin would be able to proceed with this claim.

Under the HIAI, it recommended that applicants applying on behalf of a deceased are only entitled to 75% of what the victim would have been awarded should they have survived. This is not in line with other jurisdictions and there is no reason given as to why a departure from the full amount or this specific percentage has been proposed.¹⁸² The most obvious reason to victims, families and others is that this is a ‘cost-cutting’ exercise and a way in which the State can retract from their obligation to provide reparations for the harm caused. This undermines the redress process and the purpose of the scheme and can be seen as an insult to victims and families, who have had to live with the consequences on familial relations. Such undermining of the scheme may have knock-on consequences for other elements of the redress scheme e.g. memorials. Additionally, empirical data undertaken by a Panel of Experts have expressed their frustration at the inclusion of this limitation, describing the payments as a ‘mark of respect’ to both the victims and their families.¹⁸³ Similarly, some victims felt there should be parity across the island of Ireland for the compensation scheme; many of the institutions operated on both sides of the border and families will have settled in different areas over time.

c) Co-habiting Partner

It is within the ‘Board’s discretion’ to decide who will constitute a cohabiting partner for the purposes of making an application. This needs to be defined and clearly stated under what criteria an application will be accepted. For example, compensation is available to victims who died on or after 29th September 2011 - by 29th September 2019, this will be a period of eight years. The period for which compensation is available for duration of institutionalisation is up until 1995. A cohabiting partner may have been in a relationship, supported, cared for, and dealt with the victims’ emotional and psychological distress as a result of the harm they have suffered for years and since entered into a new relationship

¹⁸² Section 7(3), Subordinate Legislation.

¹⁸³ Panel of Experts, 2018, p16.

etc. Thus **the definition of who is a qualifying ‘co-habiting partner’ should be defined clearly and inclusive as possible to reflect the care and support such individuals gave to direct victims of historical institutional abuse.**

d) Previous convictions

Under the recently passed redress bill in Australia the issue of past convictions featured strongly in debates, over concerns that those with serious criminal convictions could bring the system into disrepute or undermine public confidence. As a result, the administrator taking into account the nature of the crime, their rehabilitation and length of time since their imprisonment can exclude individuals who are convicted of a serious criminal offence of over five years.¹⁸⁴ As noted by the submissions of different survivor groups to the Australian parliament, prison terms vary per state, with a disproportionate rate of children in institutions ending up in prison (this is even greater for Aboriginal and Torres Strait Islanders), and represents further exclusion from and punishment by society to those who have served their time.¹⁸⁵ The legislative committee suggested instead that taking into account the convicted person’s rehabilitation, they should have access to counselling and a direct personal response from responsible institutions.¹⁸⁶ However, such exclusions risk absolving or at least distracting society from the responsibility of institutions for sexual and other abuse of children.¹⁸⁷

We do not think that such a provision should be brought into the Northern Ireland redress scheme, as given the history of conflict in the region as well as a growing amount of research pointing to those being in institutions having a high incarceration rate,¹⁸⁸ such an exclusion would diminish the reparative effect of such a scheme. Reparations are intended to remedy the harm caused by violations against human being, rather than a moral judgment on their character or circumstances.

¹⁸⁴ Section 63, National Redress Scheme for Institutional Child Sexual Abuse Act 2018.

¹⁸⁵ Community Affairs Legislation Committee Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017, March 2018, 2.149-2.157.

¹⁸⁶ *Ibid.*, 2.160.

¹⁸⁷ *Ibid.* 2.161.

¹⁸⁸ See Report of an independent review chaired by Lord Laming, *In Care, Out of Trouble: How the life chances of children in care can be transformed by protecting them from unnecessary involvement in the criminal justice system*, Prison Reform Trust 2016.

e) Previous Claims

When evaluating claims of abuse, individuals should not be automatically excluded from the process simply because they have attempted to have their experiences previously recognised. The instances of abuse occurred in these institutions up until the mid-1990s. Some survivors attempted to seek redress through private civil proceedings prior to the establishment of the redress schemes; indeed it was out of these claims that many of the redress schemes were born. The historical institutional abuse proposed redress board bill specifically excludes those survivors who have already made a claim against a relevant institution through a private civil procedure even if the claim was unsuccessful (excluding cases where time period expired)¹⁸⁹ or who have already made a claim against a relevant institution through a private civil procedure and have been awarded damages of a lesser amount than they would be eligible for under the scheme. This means that rulings prior to broad recognition of systemic abuse would be upheld even if it meant denying compensation to victims where subsequent investigations have proved to be legitimate. It represents a gross exclusion of survivors, without clear purpose, when it would be more feasible to implement a cap on total compensation than to deny a second claim.

The Redress Board Scheme should be cognisant of the historical shortcomings of the claim process and the power imbalance between victims and responsible institutions and individuals.¹⁹⁰ This has been the case in other contexts where religious institutions have weaponised spirituality by offering truth in order to secure forgiveness and preclude further investigations¹⁹¹ or put pressure on victims in settling perhaps for smaller amounts that they would have otherwise been eligible for.¹⁹²

In contrast, under the Western Australia scheme, applicants were required to advise if they had previously received payments from other organisations or received criminal injuries compensation for the same harm, which was taken into account when determining the level of payment. The Australian National Redress Scheme has a maximum threshold of AUS \$150,000 which does not bar previous claimants from

¹⁸⁹ Section 3(3), Historical Institutional Abuse Redress Board Bill.

¹⁹⁰ Royal Commission into Institutional Responses to Child Sexual Abuse, p91; and The Panel of Experts on Redress Position Paper and Recommendations, April 2017, p16-17.

¹⁹¹ D. Pilgrim 2011, 'The child abuse crisis in the Catholic church: International, national and personal policy aspects' Policy and Politics 39(3) 309-324.

¹⁹² The Panel of Experts on Redress Position Paper and Recommendations, April 2017, p14.

applying for, but instead reduces the amount awarded depending on previous payouts by responsible institutions.¹⁹³ Thus, victims are not prevented from seeking redress through this scheme even if they already had been compensated. Under the Indian Residential Schools scheme, claimants were entitled to the Common Experience Payment regardless of other claims, but were not eligible to apply for the IAP if they had received compensation through civil courts. Applicants applying under the Redress Scheme in the Republic of Ireland were subject to the same requirements proposed for the Northern Ireland and additionally, those who had claimed under the Magdalene Restorative Justice Scheme were unable to claim through any other modes.

Whilst it is agreed that there needs to be parity and fairness across compensation payments awarded, it is arbitrary and unnecessarily exclusionary that an applicant meeting the requirements under the proposed framework is either barred from applying or likely to receive a lower amount than those who claim under the scheme based on previous efforts at having their abuse recognised. This goes against being a victim sensitive, if not victim centred, process, and can only cause further frustration amongst victims, some of whom have indicated to us they will continue in their civil litigation claims, due to their view that the redress scheme is inadequate. **The purpose of the HIA Redress Board Scheme is to offer adequate compensation to survivors who had suffered abuse at these institutions and therefore they should be entitled to apply regardless of previous court proceedings. Where they were awarded a monetary payment in the past, this should be considered to avoid double compensation, but should allow a ‘top-up’ payment to bring them in line with other victims as the most equitable approach.**

While administrative schemes for large scale atrocities should encourage victims to apply through them, victims should be allowed to choose civil litigation as a way to ensure their rights, but this should also be made accessible. In the United States, while a unique set of circumstances, the US 9/11 compensation fund allowed victims to choose their scheme or civil litigation, with 97% choosing the former.¹⁹⁴ More importantly to better inform claimants of their options, the fund provided a detailed total of the likely

¹⁹³ Section 30, National Redress Scheme for Institutional Child Sexual Abuse Act 2018.

¹⁹⁴ Kenneth R. Reinberg, *Compensating the Families and Victims of September 11th: An Alternative to the American Tort System*, in Permanent Court of Arbitration, *Redressing Injustices through Mass Claims Processes: Innovative Responses to Unique Challenges*, OUP 2006, 235-242, p236.

amount they would receive, allowing them to choose the fund or to continue down the civil route.¹⁹⁵ This helped to ensure transparency and trust with the fund, as being victim sensitive and a process that was assisting them, rather than being adversarial. In addition, the 9/11 fund had a two track process that enabled families to choose either a presumptive streamlined approach based on their age and salary or an individual assessment based on their circumstances.¹⁹⁶ While we are not advising the government to adopt a similar scheme, we do suggest that being responsive and supportive to victims can help to ease their burden in obtaining redress. The Scottish Human Rights Commission highlighted that,

‘The civil justice system should be increasingly accessible, adapted and appropriate for survivors of historic abuse of children in care, including through the review of the way in which ‘time bar’ operates.’¹⁹⁷

Taking into account such barriers for survivors in making claims, having a victim sensitive claims process through the civil courts, also goes to the issue of guarantees of non-repetition and access to justice for victims in ongoing and future child abuse claims against institutions.

3. Structure and Process

An appropriately structured redress scheme is vital to ensuring that victims are able to claim the compensation they are entitled to. It must be fair, impartial, take account of the needs of the applicants, and ensure there are no arbitrary or unnecessary impediments on the ability of the applicant to submit a claim. The process must be efficient, effective and streamlined to ensure a timely response and resolution to all applicants. In Canada before the IRSSA was finalized, more than 12,000 First Nations people had filed claims against the Canadian government, which represented approximately 10% of living residential school survivors.¹⁹⁸ 105,000 sought redress through the CEP, which showed there was a high amount of engagement among First Nations community members, and far more than there would likely have been through individual suits.¹⁹⁹ That said, a lot of the work to

¹⁹⁵ Reinberg *ibid*, p238.

¹⁹⁶ *Ibid*. p241.

¹⁹⁷ Scottish Human Rights Commission, *Action Plan on Justice for Victims of Historic Abuse of Children in Care*, Edinburgh: SHRC, 2013, p10.

¹⁹⁸ Borrows, Residential Schools, Respect, and Responsibilities for Past Harms. *University of Toronto Law Journal* 64(4) (2014), 486-504.

¹⁹⁹ Borrows, 2014.

make the IRSSA function as it was meant to was being done behind the scenes by Indigenous organizations, negotiating, publicizing, and pushing the operations forward.²⁰⁰ Despite their efforts, the governmental bureaucracy associated with the project still caused it to stall regularly. It has been criticized for its resource limitations and delays, as well as for cuts to health-support, which caused public frustration at the process.²⁰¹ The process as a whole was characterised by its complicated nature and the high burden it placed on applicants, which resulted in a re-traumatization for many. There were also criticisms of the system in that some applicants were abused by legal professionals, who they turned to for help to navigate the complex application.²⁰² It therefore follows that the process should be as victim-friendly as possible, to avoid criticisms the IRSSA faced regarding complexity and placing a high burden on applicants.

The first step to learning from Canada's failures is to increase transparency and clarity in the advertising of the application process. The proposed legislation provides that the commencement date shall be advertised in the 'Belfast Gazette'. Not all victims (if any) will read or be aware of this publication. **There needs to be a duty on the Board to advertise and publicise the 'commencement date' as widely as possible, through direct contact, print media and online social-media, with enough notice to allow victims to prepare themselves not just for the actual applications, but also for the emotional process on which they will be embarking.** Read in comparison to the Republic of Ireland redress law there is a clear difference in terms of the duty on the Board to publicise:

'The Board shall... make all reasonable efforts, through public advertisement, direct correspondence with persons who were residents of an institution and otherwise, to ensure that persons who were residents of an institution are made aware of the function... of the Board.'²⁰³

a) Applications

The legislation states that applications must be in writing. This is less accessible for applicants who may struggle to interpret the application form or provide written testimony. This also has the potential to disadvantage claimants from the 43 institutions

²⁰⁰ Ibid.

²⁰¹ Green n.3, p131.

²⁰² Moran, 2014.

²⁰³ Section 5(1)(b) Residential Institutions Redress Bill 2002.

that were not investigated; where less evidence is available or accessible and where the Board may be less familiar with other institutions, making the application form comparably less compelling than from those who attended an investigated institution. The IRSSA example with the CEP application process provides a good balance of only requiring the application form, and substantiating the claims through government administrators, and that substantiation process should be emulated by the Board in Northern Ireland. Where helpful, victims should also have the option of providing further evidence or testimonies to the board orally to increase the accessibility of the procedure.

Proving institutional abuse for specific incidents poses the greatest challenge for survivors in claiming redress. In the Indian Residential Schools scheme (IRS), the Common Experience Payment (CEP) and Independent Assessment Process (IAP) had distinct evidential processes, with onus on the applicant to varying degrees. The CEP evidence was standard as far as these processes are concerned - applicants filled out the form and they could be contacted to provide additional information as requested.²⁰⁴ While there is some strain placed on applicants in terms of interpreting applications and providing written accounts of their experiences, it is relatively minor, only requiring where they went to an IRS and for how long, when compared to the IAP. Under that framework, applicants needed to provide supporting documents to their claims of abuse and its consequences, collect information, and organise witnesses and their statements prior to the hearings.²⁰⁵ While information on the institutions and named individuals was sourced by the adjudicators, and supplemented by expert testimonies, this was still a high threshold of evidence when considering abuse on a scale of 1-100 and the need to evidence the severity of suffering to reach higher point categories. This caused difficulties for many applicants, and lack of documentation led to the denial of many claims.²⁰⁶

In comparison, Northern Ireland's application process is more similar to the CEP model, including a 'balance of probabilities' standard for assessment. Where it differs is a source of potential issues. To be eligible for a claim under the redress board, victims must prove they have suffered abuse for the standard award, whereas for a claim under the

²⁰⁴ CELSIS, n.171.

²⁰⁵ Ibid.

²⁰⁶ Green n.3.

CEP, the claimant simply had to show which school(s) they had attended and how for long. The proposed system therefore expects a higher standard of evidence from applicants, which is related to a narrower eligibility; they wish only to compensate those directly abused, which can constitute a denial of more nuanced, indirect forms of trauma.

As has been noted **elsewhere, the application model could be improved with better advertising, explanatory resources, and provisions to include oral applications to increase accessibility, but there is potential for evidentiary standards to be fair.** It is dependent on the criteria of the Board for assessment of claims, which has not yet been sufficiently clarified. However, if they engage with an investigative approach it might be possible to minimize the burden on applicants, which is in turn likely to improve their experience in such a difficult endeavour.

The expert panel has also recommended that oral provision of evidence by claimants should be exceptional and in private, with most claims corroborated through a ‘paper only’ process through the submission of written and documentary evidence.²⁰⁷ Such a victim centred or sensitive process can build trust and support amongst survivors and civil society by working with victims to verify their claims. The Canadian and Australian experience are more sensitive to victims due to the appreciation that civil litigation is adversarial in nature and is not premised on ensuring victims’ best interests.²⁰⁸ This was based on findings that survivors have been exhausted and retraumatised by the lengthy legal process.²⁰⁹ There is a substantial amount of information that has been collected and documented before the redress board. **There should also be presumptions built into the claims process as well as use of the subpoena powers to encourage and compel responsible institutions to provide information to corroborate survivors’ claims.**

²⁰⁷ The Panel of Experts on Redress Position Paper and Recommendations, April 2017, p23.

²⁰⁸ See Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions Ottawa: Minister of Public Works and Government Services* (2000); and J. Ellis and N. Ellis ‘A New Model for Seeking Meaningful Redress for Victims of Church-related Sexual Assault’ *Current Issues in Criminal Justice* 26(1) (2014) 31-41.

²⁰⁹ Royal Commission into Institutional Responses to Child Sexual Abuse (2014b) Report of Case study No. 3: Anglican Diocese of Grafton’s response to child sexual abuse at the North Coast Children’s Home Sydney: Royal Commission into Institutional Responses to Child Sexual Abuse, p33.

The UN Claims Commission stipulated a lower evidential threshold for small claims.²¹⁰ Similar to the Indian Residential Schools scheme, the NI Redress Scheme could offer a ‘base rate’ for an individual who was resident at an institution identified by the HIAI during a period of abuse. This amount could be around £10,000 to reflect an equitable amount, which would be on a prima facie evidential claim for survivors. This is comparable to the *McKee* case where although the claim was time barred the individual was awarded £6,500 for two and half months in an abusive institution.²¹¹ Similarly in the *Irvine* case the claimant would have been awarded £27,500 for nine years in a similar institution if her claim were not similarly barred.²¹² This presumption that they were abused based on findings of the HIAI would reduce survivors having to speak of their experience again and to be assessed. This base rate scheme would also have a fast track for those with terminal or serious illness to provide them with an interim payment.²¹³ This would be in line with HIAI report’s recommendation for priority for those over 70 or in poor health.²¹⁴ The proposed NI redress bill does allow the board to prioritise, rather leaving it to the discretion of the President of the Board to decide the order of priority, age and ill-health should be mandatory for those with serious ill-health and over 70.²¹⁵

For those wanting to claim beyond this on the proposed amount, this would require evidence on a balance of probabilities. Again similar to the Indian Residential Schools scheme, this amount could be based on time spent in institution on a monthly basis, with supporting evidence provided by the institution or HIAI were possible. Alternatively a presumption to expedite the process could be for survivors who were resident within an abusive institution to only have to register with the Board, relying on a lower evidential requirement (*prima facie*) for the base rate, and a balance of probability for those wanting further compensation with a monthly rate for time spent in an abusive institution. For those who fall outside of the institutions identified in the HIAI report, the Board should conduct its own analysis to determine whether or not an abuse was

²¹⁰ Jacomijn J. van Haersolte-van Hof, Innovations to Speed Mass Claims: New Standards of Proof, in Permanent Court of Arbitration, *Redressing Injustices through Mass Claims Processes: Innovative Responses to Unique Challenges*, OUP (2006), 13-23, p16.

²¹¹ *McKee v. The Sisters of Nazareth* [2015] NIQB 93.

²¹² *Irvine v The Sisters of Nazareth*, [2015] NIQB 94, para.64-65.

²¹³ Similar to the Redress Western Australia Guidelines, Part 5 - Interim Payments..

²¹⁴ Chapter 4 – Recommendations, para.61.

²¹⁵ Section 7(2). Historical Institutional Abuse Redress Board Bill.

committed at the institution, to remove the burden from these claimants in satisfying this hurdle. In such cases where the institution is not identified as abusive in itself, the applicant would have to demonstrate that they suffered abuse. In such cases the Board could follow a more victim sensitive approach to the burden of proof (given the passage of time), such as the Colombia use of ‘good faith’ to accept victims’ claims of suffering, with the state responsible for verifying it in light of other facts.²¹⁶

b) Oral Hearings

Following this, s.6(1) of the proposed redress bill entitles the board to make an order for an oral hearing. This must be a choice. Victims should not be forced to recount their experiences in front of a judicial board to prove the harm they have suffered was ‘real’ or substantial enough to be eligible for such payments. This form of testimony can be re-traumatizing, and it should be viewed as equally credible to submit testimony only in writing. Should they choose to participate in a hearing, victims must also be guaranteed separation from potential abusers, and it should not be framed as an adversarial process. A mixture of oral hearings and paper evidence have been used in different jurisdictions. Hearings have the potential of allowing victims to feel they have had ‘their voice heard’, which is an important part of any redress scheme. For example, the RoI and IRSSA schemes both involved hearing from different parties, oral testimony and the questioning of parties and witnesses. These were only used in specific circumstances; when an initial payment offer was rejected (RoI) or where a case was considered to be more complicated and could not be resolved on the basis of written submissions and available records. (IRSSA).

c) Timelines

As with many complex bureaucracies, reparation schemes have earned reputations for being slow and dissatisfying. The IRSSA was criticised for time constraints and unnecessary delays in applications. No timeline for initial decision is set out in the legislation. This should be done in a swift and efficient manner and a timeframe should be established within which applicants will receive an a) update or b) response. There should be no undue delay in order to minimise the difficulty of this process and uncertainty for the victim, mindful of the fact that this process will force the claimant to

²¹⁶ Artículo 5, Ley de 1448/2011.

relieve difficult and traumatic past experiences, which may exacerbate or heighten existing health conditions. In comparison, in Tasmania, the Stolen Generations Assessor determined eligibility within 12 months of the Act; applications needed to be made within 6 months of the Act; and decisions by the assessor were not eligible for appeal or review.²¹⁷ While Tasmania was a positive exemplar of swift assessment and resolution, it was an unfortunate sacrifice that an appeals process was not included. Learning from that, in cases of a denied application, the Board should provide full and detailed reasons in order to allow the applicant a fair basis on which to launch an appeal should they so wish.

d) Appeals

If a claim for CEP under the IRSSA was denied, a claimant would automatically be entitled to have their application “reconsidered” by supplying new or additional information. If another denial followed, the claimant would then be entitled to appeal the decision with the National Administration Committee. The NAC is made up of lawyers who represent each of the following groups:

- Government of Canada
- Church organizations
- Assembly of First Nations
- The National Consortium
- The Merchant Law Group
- Inuit representatives, and
- Independent counsel

The proposed framework states that an Appeal Board comprised of judicial members have the authority to reduce an award upon appeal. This makes the system appear adjudicative and more akin to a legislative rather than administrative process, and if a claimant feels their harm has not been compensated adequately, they risk losing the full amount. This has the potential for increasing negative stressful impacts of the process on a victim and for that reason, **the Appeal Board should not have the ability to reduce or remove any initial compensatory offer on appeal, but only confirm or increase the original amount.** This will ensure the process remains in line with general restitutive

²¹⁷ Stolen Generation of Aboriginal Children Act, 2006.

themes and processes. In addition, reliance on the Board itself to assess appeals potentially undercuts the legitimacy of the appeals process, as it means there is no oversight on the decisions they make and if they should err, it will be final. If an applicant feels they have not been treated fairly by the Board, this gives them no further form of redress. **A third-party appeals body or independent reviewer could remedy that issue and increase faith in the decision-making process.**

e) Legal Representation

The Republic of Ireland and Indian Residential School (IRSSA) schemes covered the legal expenses of claimants, but were capped at certain amounts. The Irish redress scheme defined this as ‘reasonable amounts’ and the IRSSA capped the recoverable amount at no more than 15% of the final award for IAP claimants only. **Increasing the standard payment in line with other jurisdictions and framing it in such a way that there is no burden to prove any abuse, merely residence at a school, will reduce the need for legal advice and/or support in the first instance. For those claiming an additional award, the State should cover the legal costs incurred and the Board should compile a list of legal firms willing to participate in this.**

f) Assessment Bodies

International precedent is varied in terms of assessing compensation claims, with some jurisdictions relying on inadequate systems of consideration. In Tasmania, for example, assessment of applications was left in the hands of a single, state-appointed assessor, with no appeals process or oversight body.²¹⁸ While this was possible in practice due to the relatively few individual applicants, in principle it represents a gross simplification of the components necessary to creating strong assessment standards.

In contrast, Canada provides a model worth consideration in creating a Board in Northern Ireland. If anything, where Tasmania was too simplistic, Canada may have been too complex, but their multi-tier system provided more nuance to a process that otherwise was often far too reductive. Applications through the IAP were assessed first by administrators, who substantiated and validated claims, and then adjudicators for preliminary hearings and full hearings, who considered evidence, witnesses, and

²¹⁸ Rae n.7.

determined points according to the payment matrix. That process was subject to an oversight committee, and everyone involved was supposed to be trained, with experts consulted wherever possible.²¹⁹ While this entailed a very long and sometimes tolling process for applicants whose claims required a hearing, it did mean that there were multiple stages of consideration, with oversight from another body and diverse expert perspectives taken into consideration. The diversity of actors in the compensation process is crucial to creating a holistic assessment for compensation, and is therefore a valuable precedent to set for reparative compensation schemes.

In Northern Ireland, assessment of applications is proposed to be fully in the hands of the HIA Redress Board Bill, but it does not specifically state whether the process itself is legislative or administrative. A legislative process will depart from a victim-centred approach due to the natural and inherent structures a legal and adversarial system operates on. Providing evidence and attending hearings in front of judicial members of the board is likely to increase the already difficult and negative emotions a victim will be experiencing. It also offers an opportunity for the perpetrators and institutions against which these claims are levelled to rebuke or attempt to rebut the allegations a claimant is making. An inquisitorial approach however will involve the appointment of an independent adjudicator whose primary role is to ‘fact-find’ and assess the probability of applications.

Relevant institutions should not be a party to any of the proceedings or applications under the Redress Bill and should not form part of any advisory committee or board. In addition, there are concerns over the compensation and redress scheme being observed by a predominantly judicial Board. As was observed in Canada, making the process intensely legal in language and structure caused claimants to feel alienated from it, as though their experiences were being reduced to a set of rules instead of a holistic understanding.²²⁰ As well, the overwhelming inclusion of judicial members on the board and the way in which the legislation frames the application and evidentiary process (oral hearings, orders to appear, ‘gagging’ orders) has the potential not only to intimidate claimants, but also to have a detrimental impact on their applications and the consideration of the harm done and suffered. The process as it stands is at risk of side-

²¹⁹ See CELSIS n.171.

²²⁰ Pethoukav n.5, p82.

lining victims' rights and remedies and an appropriate understanding of their suffering in lieu of a rigid legislative approach to the process. To remedy this, the Board should be selected from a panel of experts which mirrors the approach taken in other jurisdictions to include: judicial experts, social workers, medical experts, psychologists and/or psychiatrists; all with appropriate experience in the field of child abuse, its effects, and appropriate healing remedies and coping mechanisms.

4. Reparative Value

Individuals who have suffered gross violations of human rights are entitled to have access to appropriate and proportional redress for the gravity and circumstances of their suffering.²²¹ As such, reparations are intended to provide an effective remedy and recognition of the violation of these individuals' rights and the responsibility of those involved. In the cases of Canada and Australia, redress is part of a broader effort of reconciliation with Indigenous communities, who have been systematically and historically victimised by state violence. With the Magdalene Laundries in the Republic of Ireland, and the historical institutional abuse for Northern Ireland, compensation serves as a more direct source of redress for those whose abuse was caused by systemic state neglect and wrongdoing. While these instances all share a core systemic abuse against vulnerable peoples, they have had varied degrees of success in meeting their reparative aims and warrant individual consideration.

In Canada, the Indian Residential Schools Settlement Agreement has a controversial reputation in terms of its reparative capabilities. The process has been critiqued as a formal atonement, which allowed the government to sidestep greater structural change, ignoring the more complex needs of survivors, their families, and Indigenous communities as a whole.²²² Settling the matter so conclusively allows the government to view their role in reparations as finished, rather than creating a framework for longer term reparative work. The creation of the Aboriginal Healing Centre did allow space for longer term healing, including families and communities more broadly, but the overall sincerity of the Agreement was called into question because of its limitations and

²²¹ Principle 18, UN 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, A/RES/60/147.

²²² Green n.3.

structural confines.²²³ The process was not victim centred in its creation, and while the Truth and Reconciliation Committee has been viewed positively in its collection of survivor testimonies and truth-seeking exercises, the IRSSA was top-down in its approach to working with Indigenous communities, viewing them as claimants or subjects rather than participants or collaborators. It would have been more reparative to include First Nations communities at every stage of developing the IRSSA, including in establishing the formal structure and compensation procedures for the CEP and IAP. For true reparations, ownership of the process should be shared.

Eligibility constraints undermined the legitimacy and reparative power of the Agreement, with family members sometimes unable to claim compensation on behalf of deceased victims of the residential school system, ignoring the intergenerational and community harms of such systemic abuse and cultural genocide.²²⁴ Additionally, the complexities of the application process were alienating for many applicants. As mentioned in the Eligibility section of this comparative analysis, Indigenous students who attended schools not recognized by the official government roster were denied redress.²²⁵ For those who did meet the narrow eligibility criteria, the necessity of providing evidence and justifying the amount of harm suffered could be challenging, both practically and emotionally. Records and proof of attendance could be difficult to obtain without legal support, especially given the efforts of the IRS' proprietors to erase evidence of their wrongdoing.²²⁶ If proof was available, the technical legal language and monetization of suffering was in itself dehumanizing, and it inhibited a more holistic understanding of survivors' experiences, which in turn undermined the reparative potential of the compensation schemes.²²⁷

The IRSSA did have some positive elements, when compared to other compensation schemes. Its two-pronged compensation structure allowed for diverse applicants to receive individualized reparations; proof of attendance at a recognized school automatically qualified applicants for the Common Experience Payment, while the Individual Assessment Procedure allowed space outside of court proceedings for varying

²²³ Ibid.

²²⁴ Green n.3.

²²⁵ Pethoukav n.5, p78.

²²⁶ Green n.3.

²²⁷ Pethoukav n.5, p87.

severities of harm to be recognized. This was positive because it represented both collective and individualized reparations, which has been a challenge for other reparation procedures. The inquisitorial adjudication of the IAP was a beneficial structure compared to adversarial models, with victims and survivors not being forced to confront their abusers directly, as the balance of probabilities standard applied. These measures somewhat increased faith in the process. At its core, the IRSSA had reparative value in recognizing a range of government wrongdoing and validating the experiences of successful applicants, providing some redress for their suffering, but its reparative potential was undercut by the process applicants were forced to endure, its eligibility constraints, its monetary and time limitations, and its insincerity in relation to broader reconciliation efforts.

While Canada's approach to compensation was a federal, top-down system, the Australian government was resistant to such an undertaking, causing states to individual develop compensation schemes for members of the Stolen Generation. In itself that caused ill-will; it was a piecemeal approach to reparations, where the federal government denied its responsibility to the Stolen Generation, and it caused regional inconsistencies to develop. Varied compensation amounts were therefore allotted state to state, for similar experiences, which could be framed as creating a hierarchy of victimhood that should be avoided. The federal government became involved in compensation only in 2018, and primarily to provide compensation for survivors not in states with independent compensation schemes (Northern Territories, Australian Capital Territory). Having varied sources of compensation funds also undermines the legitimacy of the process - since it is representative of the party responsible for wrongdoing, it is difficult to repair or restore relationships with Indigenous communities if the party responsible for harms is inconsistently identified. The process should have been federal from the beginning, which was a failure of the Australian Government.

The reparative value of their compensation schemes therefore differed state to state. Some notable shortcomings included Tasmania giving all of the power to one individual assessor to determine applications' credibility, without a mechanism for oversight or appeal.²²⁸ It is difficult to create faith in a process where so much power is

²²⁸ Rae n.7.

given to one individual, without options for redress if they are to make mistakes. Positive elements of Australian reparations practices included the relatively high lump-sum allotments, with most states settling on \$75,000 per eligible claimant. Tasmania, where survivors were only provided with \$58,333.33, was credited for a comparatively early and direct acknowledgment of suffering and provision of compensation, which allowed the legislation to create a practical means to deepen conversations about reconciliation and improve political relationships. That base creates a common language for discussions of reparations and reconciliation.

This response informs discussion about the reparative potential of the proposed compensation scheme in Northern Ireland. There are a number of areas of the proposal that might undermine faith in the process and could potentially cause ill-will amongst survivors and victims, including the eligibility constraints, structure of the board, appeals procedure, lump sum value, and unclear assessment criteria. Without implementing the following recommendations, it is likely that many survivors will be left dissatisfied with the process, contrary to both the aims of the Bill and the requirements of the United Nations standard discussed in the context of this paper. Anyone eligible for this compensation has already suffered at the hands of the government, and they should not need to again. It is therefore imperative that changes be implemented to protect the needs of complainants above the interests and the budgetary constraints of the government.

G. Conclusion

Northern Ireland has an opportunity to learn from the experiences of other states and to provide a more comprehensive basis for remedying the suffering of survivors who suffered institutional abuse as children. Responding to the HIAI report, the government has the chance to make good on failures in the past to protect or prevent violations to children and the vulnerable, as well as to avoid re-traumatization through arduous legal proceedings. As the proposal for compensation stands, the practical needs of applicants have been overlooked in terms of the rigidity of eligibility requirements, the timeframe of the process, the amount of compensation allotted, and the individualisation of results. It is not enough to symbolically pay survivors and move on as a government or a society; compensation schemes that are not victim-orientated can create further frustration and resentment. Given the widespread and systematic perpetration of abuse against children

in institutions, it requires a holistic and comprehensive approach to redress. The Commission, service provision, memorialisation, apologies and compensation need to be used in a concerted manner to effectively redress the gross harm caused by historical institutional abuse in the province. This goes beyond money, by providing an appropriate reparative package of symbolic measures and services that can alleviate survivors' suffering and afford them new opportunities for themselves and their families.

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