Royal Commission into Institutional Responses to Child Sexual Abuse

Issues Paper 6: Redress Schemes

Submission of the Victorian Aboriginal Legal Service

June 2014

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About the Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) provides advice and representation to thousands of Aboriginal Victorians each year by:

- Providing legal advice, assistance and representation in areas of criminal, civil and family law
- Providing community legal education to increase the communities’ knowledge of their rights and obligations before the law
- Promoting law reform to address the disadvantage suffered by the Aboriginal people and communities within the legal and justice systems
- Providing policy analysis and advice on measures to improve justice outcomes, including reducing the rate of imprisonment of Aboriginal people
- Advocating for the rights of Aboriginal people in contact with the justice system
- Building public awareness and understanding of issues confronting Aboriginal people and communities within the legal and justice system.

VALS is the only Victorian Organisation funded by the Australian Government under the Aboriginal and Torres Strait Islander Legal Services Program.

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The Victorian Aboriginal Legal Service would like to thank Rufus Coffield for his voluntary contributions to the research and writing of this submissions paper.
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Foreword

Calls for redress for Aboriginal and Torres Strait Islander people who are former wards of the state are not new. The historical injustices visited upon our people in the name of institutional ‘care’ are widespread and widely known, and have affected nearly every Aboriginal community in Victoria. Bringing Them Home, a report released in 1997, outlined the need for redress in 54 recommendations, most of which have been largely ignored by the churches, governments and other institutions towards which they were aimed.

Whether it be through sexual, physical, emotional or cultural abuse, the effects of institutionalisation on our communities remain vivid. They can be seen in the high incarceration rates and increased contact with the justice system; in the ongoing removal of our children and young people into out-of-home care; in the low employment and education outcomes; and in the cultural breakdown, loss of land, language and heritage.

I welcome the Royal Commission into Institutional Responses to Child Sexual Abuse opening up submissions for redress. In this submission, the Victorian Aboriginal Legal Service has furthered advocacy for redress for ALL Aboriginal and Torres Strait Islander survivors of institutions. In doing so, the healing of our people can continue, and the word ‘sorry’, so emotively spoken in 2008, can finally mean ‘justice’.

Moreover, it is sincerely hoped that the recommendations made not only in this report, but in previous reports concerning justice for Aboriginal people, be seriously considered. Aboriginal and Torres Strait Islander communities across the country have sadly been subjected to hundreds of reports, inquiries, commissions and ‘consultations’, most of which have amounted to nothing and fallen on deaf ears.

However, with culturally appropriate engagement with communities across the country, the Royal Commission into Institutional Responses to Child Sexual Abuse can make a difference. And it is with this in mind that the Victorian Aboriginal Legal Service offer itself as a community controlled Aboriginal organisation open to engage further on the topic of redress. Whether it be at a State or Federal level, the VALS can be a source of information for governments and institutions alike, and a conduit to our community.

Wayne Muir
Chief Executive Officer (Victorian Aboriginal Legal Service)
1. Executive Summary

The Victorian Aboriginal Legal Service has prepared this submission to represent the views of the Victorian Aboriginal community, and Aboriginal and Torres Strait Islander peoples around the country, on the issue of redress for sexual abuse victims. The Victorian Aboriginal Legal Service welcomes the invitation to submit to the Royal Commission on Institutional Responses to Child Sexual Abuse on Issues Paper 6, Redress Schemes, and has provided a number of recommendations.

This submission is divided into three parts:

Part A: Considerations for Aboriginal and Torres Strait Islander Communities

Part A outlines some of the necessary considerations that should be made with respect to Aboriginal and Torres Strait Islander communities when examining a case for redress. In particular, the Victorian Aboriginal Legal Service advocates for a redress scheme that is inclusive of all formerly institutionalised persons in order to address the harm caused by emotional, physical and cultural, as well as sexual, abuses.

Part B: Responses to Issues Paper 6 Redress Schemes

Part B provides responses to the questions posed in the Issues Paper outline. Recommendations are made, with the Aboriginal and Torres Strait Islander community in mind, as well as providing case studies which inform the ‘best practice’ (or otherwise) of previous redress and compensatory schemes, both in Australia and overseas.

Part C: Models of Redress

Part C examines models of redress and compensation that have been recommended in previous reports. Specifically, these address redress schemes relating to Aboriginal and Torres Strait Islander people, and include recommendations around cultural redress as well as financial. In particular, Part C examines the 1997 Bringing Them Home report, the 2008 proposed Stolen Generations Bill and a 2002 report by the Public Interest Advocacy Centre.
2. **Summary of Recommendations**

2.1 **Recommendations regarding redress as an alternative to civil litigation**

1. That a national redress scheme incorporating all states and territories be implemented so that victims can avoid lengthy and costly civil litigation processes.
2. That any redress scheme addresses not only the effects of sexual abuse, but physical, emotional and cultural abuse also.
3. Where states have had previous redress schemes, that these be audited for effectiveness.
4. That the needs of Aboriginal and Torres Strait Islander peoples be considered in the formation of any redress scheme.

2.2 **Recommendations regarding features of an effective redress scheme**

5. That any redress scheme be inclusive of proper and culturally appropriate supports, such as counseling and trauma assistance, and financial and legal advice.
6. That the financial impacts on victims be considered, and adequately explained to potential claimants.
7. That any redress scheme be adequately advertised to potential claimants in a culturally appropriate manner, including language and literacy differences.
8. That local Aboriginal and Torres Strait Islander organisations be engaged in the redress process.
9. That sufficient time is granted for claimants to apply for any redress.
10. That the burden of proof be kept to a minimum in support of any claim.
11. That applicants be assisted to access documents required to substantiate their claim.

2.3 **Recommendations regarding the recipients of redress**

12. That any redress scheme should include all former state wards of Aboriginal and Torres Strait Islander peoples, recognising that sexual, physical, emotional and cultural abuse had long lasting effects on the individual, their family and community.
13. In the case of deceased persons, that their family and community be allowed access to redress, acknowledging the trans-generational effects of removal, abuse and institutionalisation.

2.4 **Recommendations regarding the inclusion of institutions in a redress scheme**

14. For reasons of equity, that all institutions – religious, government, non-government – be included in any redress scheme.
15. That all institutions contribute financially to a redress fund.
16. In the case where an institution, or its parent organisation, ceases to exist or has no assets, that state and federal governments make up the shortfall.

2.5 Recommendations regarding inclusion and decision making
17. That decisions of assessment regarding victims’ applications for redress be kept independent of the institution
18. In the case of Indigenous claimants, a tribunal made up of Aboriginal and Torres Strait Islander professionals and elders be appointed to assess claims.
19. As part of any redress scheme that partnerships be formed with the institutions in the spirit of truth and reconciliation.

2.6 Recommendations regarding the participation of institutions
20. That it be mandatory for all institutions to which a claim of abuse is brought against it participate in a redress scheme.
21. Where an institution ceases to exist, the relevant state or federal government should act in its place.

2.7 Recommendations regarding participation for claimants
22. Participation in any redress scheme should be optional for any potential claimant.
23. The civil litigation process should remain open for victims of abuse.
24. Any redress scheme should adequately compensate claimants so that the adversarial process of civil litigation becomes a last resort.

2.8 Recommendations regarding the costs of redress
25. The cost of redress should be shared by all institutions to which the redress scheme may apply, based on claims made against them
26. In the case where the institution ceases to exist, the relevant state or federal government should make up the shortfall
27. Institutions should be ‘means tested’ to ensure fairness in burdening the cost of redress.

2.9 Recommendations regarding the calculation of damages
28. Any redress payment should be awarded at the same as a potential damages claim to ensure the civil litigation process can be avoided.
2.10 Recommendations regarding proof of abuse

29. Given the high rates of abuse in institutions (be it sexual, physical, emotional, or cultural), proof of abuse should simply be limited to proof of institutionalisation.

2.11 Recommendations regarding support for claimants

30. Claimants should have access to all manner of supports including financial and legal advice and health and well being counselling.

31. Aboriginal and Torres Strait Islander people should have access to culturally appropriate supports, including healing programs as run by Indigenous elders and health workers.

32. Aboriginal and Torres Strait Islander organisations should be consulted and funded to provide the relevant services to the community.

2.12 Recommendations regarding recipients of previous redress or compensation

33. Any claimant for a national redress scheme who has previously received compensation for their injuries sustained from abuse occurring in an institution should be able to apply for a ‘top up’ in order to ensure equity amongst all victims.
3. **Part A - Considerations for Aboriginal and Torres Strait Islander Communities**

3.1 **Why is redress necessary for Aboriginal and Torres Strait Islander Peoples?**

34. Issues Paper 6 of the Royal Commission into Institutional Responses to Child Sexual abuse deals specifically with proposed redress schemes for sexual abuse victims in institutional settings, regardless of background, ethnicity or indigeneity. This submission, in addressing the questions posed by the issues paper surrounding sexual abuse, advocates for particular considerations to be given to Aboriginal and Torres Strait Islander experiences when considering redress for sexual abuse victims.

35. This submission also advocates for the need for redress for all formerly institutionalised Indigenous persons, arguing that the majority suffered negative effects from either (or all of) sexual, physical, emotional and cultural abuse. The negative effects of, sexual abuse are compounded by loss of identity, language and culture, which manifest in the present day in poor mental and physical health, loss of employment and education prospects, alcohol and substance misuse and abuse, and in Victoria, a high rate of second and third generation families whose children are in out of home care.¹

3.2 **Redress for Aboriginal and Torres Strait Islander people has yet to be adequately addressed**

36. For Aboriginal and Torres Strait Islander communities, calls for a redress scheme to alleviate the suffering and provide justice for formerly institutionalised persons is not new. *Bringing Them Home*, the 1997 report which detailed the extent and consequences of removed Indigenous people, identified 54 recommendations of which many related to forms of redress.² So far, however, only the state of Tasmania has implemented a scheme specifically for the Aboriginal community in this context.³

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¹ ‘Nationally, the rate of Indigenous children in out of home care was 10 times the rate for non-Indigenous children. In all jurisdictions, the rate of Indigenous children in out of home care was higher than for non-Indigenous children, with rate ratios ranging from 3.4 in Tasmania to 15.8 in Victoria.’ In Victoria, this meant 66.4 out of every 1000 Indigenous children compared to 4.2 out of every 1000 non-Indigenous children. *Australian Government: Australian Institute of Health and Welfare Child Protection Australia 2011-2012* pp 41-42.


3. 3 Rates of abuse for Aboriginal and Torres Strait Islander people were high

37. *Bringing Them Home* stated that between 1 in 3 and 1 in 10 Aboriginal and Torres Strait Islander people were removed from their family, land, language and culture and placed into an institutionalised setting between 1900 - 1970.\(^4\) Within many Indigenous communities, particularly in Victoria, it is rare to find families that remain unaffected by the experience of removal and institutionalisation. As is being uncovered by the Royal Commission, where there were high rates of removal, there were high rates of sexual abuse.

38. *Bringing Them Home* also states that ‘almost one in ten boys and just over one in ten girls allege they were sexually abused in a children’s institution’, while ‘one in ten boys and three in ten girls allege they were sexually abused in a foster placement or placements.’\(^5\) The majority of instances of alleged sexual abuse in institutions outlined in *Bringing Them Home* were not reported to the institution - for males in institutions or foster homes, over 90% of alleged sexual abuses were not reported to the police, institution or caregiver. For females in institutions, over 88% of cases went unreported, while for those in foster homes, the figure was just over 70%.\(^6\)

39. However, these statistics are based only on instances of sexual abuse that were told to the Inquiry by way of anecdote – specific questions regarding sexual abuse within institutions were not asked as a discrete measure by way of the Inquiry. As the current Royal Commission progresses, it is becoming apparent that sexual abuse in particular institutions and circumstances was greater than was previously either known or understood.

40. Currently, the rate of calls to the Royal Commission indicated that nearly 10 percent of callers identify as being Aboriginal and/or Torres Strait Islander.\(^7\) This figure indicates that sexual abuse occurred perhaps more frequently than *Bringing Them Home* would suggest, as overall, the rates of sexual abuse the Royal Commission are uncovering across all communities are far greater than what were expected.

\(^4\) 1900-1970 was the main period of investigation of the Inquiry and the subsequent report. However, child removal had been a feature of Indigenous policy at a State and colony level for much of the 1800’s.


\(^6\) Ibid, pp 141. Given the terms of reference of the current Royal Commission, the rates of sexual abuse in adoptive or work situations have not been commented upon.

\(^7\) Royal Commission into Institutional Responses to Child Sexual Abuse *First Anniversary Fact Sheet*. 
3. 4 Sexual abuse is linked to greater historical injustices

41. Sexual abuse in institutions is part of a broader experience of historical injustice for Aboriginal and Torres Strait Islander people, which relate to a series of inhibited rights and freedoms over time, enacted by policies in each State and Territory. While the actual instance(s) of sexual abuse may seem to be isolated, such treatment is part of an overall and interwoven fabric of colonisation experienced by Indigenous communities.

42. With regards to compensation for child removal, it is often the whole-of-experience that people are wanting redress for – the removal itself, the abuse within institutions (physical and emotional as well as sexual), the loss of land, language and culture, the violence and dispossession of colonisation. As such, redress for sexual abuse within institutions is not simply an acknowledgement of a sexual crime perpetrated by an individual, but a recognition of the historical injustices experienced by Indigenous communities, and an acknowledgment of the removal itself.

3. 5 Joint Institutional and Governmental Responsibility

43. It is the view of the Victorian Aboriginal Legal Service that redress for formerly institutionalised Aboriginal and Torres Strait Islander persons is a joint responsibility between both the institution and the government. Although the abuse may have occurred under the ‘care’ of employees or religious persons affiliated with a particular institution, and thus may be culpable on an institutional basis, it is the view of the Victorian Aboriginal Legal Service that ultimately, it was legislation passed by the government at the time that allowed the victim to be placed in a vulnerable position in the first place.

44. Furthermore, both the government and the institution had a duty of care to any state ward to ensure that abuses were not committed, that staff and workers in any institution were fit to enact their duties in a manner conducive with the best interest of the child, and that repeat offenders were not simply transferred to other institutions, as outlined in the Victorian report titled *Betrayal of Trust*. As such, any redress scheme should be a joint partnership between the institutions and the relevant state or federal government.
3.6 Justice versus Healing

45. There have been a number of services that have been funded to address certain aspects of Indigenous removal (such as the Healing Foundation or Link Up). These services have assisted clients in many ways, including finding family, counselling and case management and education. Similarly, certain programs such as Marumali\(^8\) and Red Dust,\(^9\) have been set up in order to address issues of wellbeing with formerly institutionalised Indigenous people, and have had success in these areas.

46. Such organisations are about healing – addressing the cultural loss and personal and familial pain that Indigenous people experience as a result of the institutional experience, including sexual (and other) abuses. Redress, however, is about justice and about righting a moral wrong in a way that is amenable to the individual or community members involved. Usually, it is via monetary means - *Bringing Them Home* made a range of recommendations in which redress could be defined by other, non-monetary means as well.\(^{10}\)

3.7 Financial assistance will help address the ramifications of institutionalisation today

47. Aboriginal children continue to be removed and placed in out-of-home care at far higher rates than non-Aboriginal children, in all states and territories. In Victoria, Aboriginal children are placed in out-of-home care at a rate of over 15 times non-Aboriginal (the highest in Australia).\(^{11}\) These high rates can in part be attributed to the inter-generational effects of removal and institutionalisation.

48. Parents who have their children removed were often removed themselves – a legacy of growing up in abusive situations with no parental models. These difficulties are often compounded by extreme poverty, poor education and employment opportunities, poor mental and physical health and low outcomes across a range of other social indicators. As such, a well-executed redress plan for sexual abuse victims in institutional contexts could assist Aboriginal and Torres Strait Islander people and help to lift them out of poverty and address the numerous social stresses.

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\(^8\) http://marumali.com.au/
\(^9\) http://www.thereddust.com/

\(^{11}\) According to a Child Welfare Report released in 2012 by the Australian Government, Victorian Aboriginal children are more than fifteen times more likely to be placed in out of home care than non-Aboriginal children.
4. Part B - Responses to Issues Paper 6: Redress Schemes

4.1 What are the advantages and disadvantages of redress schemes as a means of providing redress or compensation to those who suffer child sexual abuse in institutional contexts, particularly in comparison to claims for damages made in civil litigation systems?

49. The Victorian Aboriginal Legal Service supports a redress or compensation scheme at either a state or national level for those people sexually abused while in the ‘care’ of an institution. The civil litigation process can and has been a barrier for Aboriginal and Torres Strait Islander people seeking justice for injuries sustained while institutionalised.

50. Thus far, the civil litigation process has provided few (if any) clear examples whereby institutionalised Aboriginal or Torres Strait Islander peoples have successfully won a claim. Barriers to the civil litigation process include time limitations, costs, understanding of the legal process, health and well-being issues and a general mistrust of the ‘justice’ system for many Indigenous peoples.

51. A non-adversarial redress or compensation scheme which provided Aboriginal and Torres Strait Islander people with culturally appropriate services and support would be of greater advantage to achieving justice. However, the Victorian Aboriginal Legal Service supports a redress scheme that would include other forms of abuse, including sexual, emotional, physical and cultural.

Recommendations regarding redress as an alternative to civil litigation

- That a national redress scheme incorporating all states and territories be implemented so that victims can avoid lengthy and costly civil litigation processes.
- That any redress scheme addresses not only the effects of sexual abuse, but physical, emotional and cultural abuse also.
- Where states have had previous redress schemes, that these be audited for effectiveness.
- That the needs of Aboriginal and Torres Strait Islander peoples be considered in the formation of any redress scheme.
4.2 What features are important for making redress schemes effective for claimants and institutions? What features make redress schemes less effective or more difficult for claimants and institutions?

52. With regard to Aboriginal and Torres Strait Islander people, a number of features are required to make a redress scheme effective. This includes adequate time periods for people to apply, providing an in depth knowledge and understanding of the process (including how any potential financial payments will affect Centrelink payments and/or Medicare benefits), accessibility to the redress scheme for those people with numeracy or literacy difficulties, the provision of culturally appropriate supports, and legal representation and consultation.

53. Furthermore, any hearings or tribunal to which claimants would potentially tell their stories to must include Aboriginal and Torres Strait Islander representatives in order to provide a culturally safe space for people to talk about abuse. The burden of proof should be kept to a minimum to ensure that claimants are not re-traumatised in the process, and any redress scheme must be adequately advertised to Indigenous communities. Furthermore, access to records can prove a major barrier to substantiating any claims, and assistance should be provided to ensure records can be obtained to assist in any claims process.

54. The financial implications of any scheme should also be considered. In previous redress schemes (WA and Tasmania), lump sum payments have affected tightly knit communities in a number of ways, including exacerbating alcohol and drug dependencies, ‘humbugging’ and family infighting. Although the Victorian Aboriginal Legal Service supports a redress or

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Case Study: Tasmania

The Stolen Generations of Aboriginal Children Act 2006 (TAS) provided redress for removed Aboriginal children and their families. A review of the scheme provides examples of potential pathways to justice over and above the civil litigation process. The Stolen Generations Assessor, who reviewed all claims, had the flexibility to conduct interviews with applicants in a non-adversarial way, and this, with the absence of rules of evidence on oral testimony, allowed applicants to much more readily access redress. This also helped to reduce the risk of re-traumatisation under cross-examination, while other barriers of a formal court setting, including literacy and confidence in court, could be reduced via the Assessor’s informal interviewing process.
compensation scheme that includes financial payments, serious consideration must be
given to how such a scheme should be delivered in the most beneficial way.

Recommendations regarding features of an effective redress scheme

- That any redress scheme be inclusive of proper and culturally appropriate supports, such as counseling and trauma assistance, and financial and legal advice.
- That the financial impacts on victims be considered, and adequately explained to potential claimants.
- That any redress scheme be adequately advertised to potential claimants in a culturally appropriate manner, including language and literacy differences.
- That local Aboriginal and Torres Strait Islander organisations be engaged in the redress process.
- That sufficient time is granted for claimants to apply for any redress.
- That the burden of proof be kept to a minimum in support of any claim.
- That applicants be assisted to access documents required to substantiate their claim.

Case Study: Tasmania

The Tasmanian Stolen Generations Redress Scheme created by The Stolen Generations of Aboriginal Children Act 2006 (TAS) provides insights as to how a tailored redress scheme’s evidentiary requirements can assist applicants. The Tasmanian Scheme placed the responsibility of providing documentary evidence on the relevant government departments. S16 of The Stolen Generations of Aboriginal Children Tasmania Act (2006) TAS legislated that assistance from the Archives Office of Tasmania be provided to applicants. This is an appropriate measure to assist people who have been institutionalised prove their identity and removal.

Case Study: Western Australia

As part of the Western Australian redress and compensation scheme for former wards of the state, ‘Redress WA’ a specialist team within the Department of Community Affairs managed archives and documents. This service applied also to accessing private care providers’ (churches) documents for applicants. The research team had access to, and organised files for applicants, from documents provided by previous care providers. These adaptations can be placed in contrast to legal proceedings, where difficulty in obtaining documentary evidence can be a significant barrier to formerly institutionalised applicants.
4.3 What forms of redress should be offered through redress schemes? Should there be group benefits available to, say, all former residents of a residential institution where abuse was widespread? What should be the balance between individual and group redress?

55. The Victorian Aboriginal Legal Service is of the view that redress should be made available to all institutionalised Aboriginal and Torres Strait Islander people, and in the case of those who are deceased, their families and communities. Whether through sexual, physical, emotional or cultural abuse, the removal and institutionalisation of Aboriginal and Torres Strait Islander children from their families, communities, land, language and culture continues to affect people today, resulting in a number of poor social indicators including increased numbers of Indigenous children in out-of-home care.

56. Any redress or compensation scheme should acknowledge the harm done to both the individual and their family and community, as well as the cultural damage caused. As well as financial redress, assistance should be provided for healing programs, to link people back to country and community, and also to assist families whom the trans-generational effects of institutionalised trauma still resonates.

57. Trans-generational effects can be seen in poor social indicators in both the formerly institutionalised person, their families and children. Areas of impact include increased contact with the justice system (especially incarceration), high rates of children in out-of-home care, poor unemployment and education opportunities, poor mental and physical health and a decreased average lifespan, and as such, any redress scheme should include adequate funding for Indigenous services who seek to assist communities in these areas.

**Recommendations regarding the recipients of redress**

- That any redress scheme should include all former state wards of Aboriginal and Torres Strait Islander peoples, recognising that sexual, physical, emotional and cultural abuse had long lasting effects on the individual, their family and community.

- In the case of deceased persons, that their family and community be allowed access to redress, acknowledging the trans-generational effects of removal, abuse and institutionalisation.
4.4 What are the advantages and disadvantages of establishing a national redress scheme covering all institutions in relation to child sexual abuse claims? If there was such a scheme, should government institutions (including state and territory institutions) be part of that scheme? How and by whom should such a scheme be funded?

58. Any redress scheme should be made available nationally, and include all states and territories. ALL institutions – government, non-government, church and religious groups – should be included in its scope. This will ensure that every survivor – both Indigenous and non-Indigenous – has the same access to justice, regardless of the legal or governmental standing of particular institutions.

59. Funding should be a joint venture between the state and federal government, and the institution. This will ensure the shared responsibility towards institutional survivors, as it was the State laws that placed children in care, the responsibility of the institution to provide that care, and today, the responsibility of the federal government as a representative of the Australian people.
60. Furthermore, a review of the existing redress schemes (Towards Healing, the Tasmanian Stolen Generations Scheme, WA Redress Scheme and QLD Redress Scheme) should be conducted to examine the effectiveness of each scheme and learn from those processes. Any potential national scheme should not preclude claimants from previous schemes from applying – however, consideration may be given to any financial outcomes of previous schemes.

**Recommendations regarding the inclusion of institutions in a redress scheme**

- For reasons of equity, that all institutions – religious, government, non-government – be included in any redress scheme.
- That all institutions contribute financially to a redress fund.
- In the case where an institution, or its parent organisation, ceases to exist or has no assets, that state and federal governments make up the shortfall.

**Case Study: Canada**

The Canadian Residential Schools Agreement was designed specifically to manage compensation and redress for survivors because, for churches, the threat of multiple class actions led to the acknowledgement a settlement would be needed. The Agreement was signed by the Federal Government, plaintiff lawyers, Indigenous groups, and all major churches involved in litigation at the time in May 2006. This Agreement merged almost all existing class actions into a general Statement of Claim, and signaled an end to decades of civil litigation by former residents of Indian Residential Schools. Not only did this provide a comprehensive agreement between all major parties, but avoided lengthy and expensive court proceedings.

**4.5 If institutions have established internal redress schemes, should all or any part of the decision-making of the scheme be independent of the institution? Should the schemes be subject to any external oversight? If so, what?**

61. It is the view of the Victorian Aboriginal Legal Service that any decision making should be made independent of the relevant institution to provide a fair and unbiased assessment of any claims made against the institution. As suggested in a document prepared by the Public Interest Advocacy Centre in 2002, a tribunal of Indigenous elders and relevant
professionals would be best practice to ensure that Aboriginal and Torres Strait Islander people’s claims would be adequately and culturally appropriately assessed.

62. However, regardless of the decision-making process, the relevant institutions should be consulted and included in order to form a partnership to ensure that a holistic healing process is maintained in the spirit of truth and reconciliation. This is especially so for religious institutions, by which the claimant may retain the spiritual beliefs, religious practices and moral ethics of the Church, thus restoring faith in Church practices and religious hierarchy.

**Recommendations regarding inclusion and decision making**

- That decisions of assessment regarding victims’ applications for redress be kept independent of the institution
- In the case of Indigenous claimants, a tribunal made up of Aboriginal and Torres Strait Islander professionals and elders be appointed to assess claims.
- As part of any redress scheme that partnerships be formed with the institutions in the spirit of truth and reconciliation.

**Case Study: Canada**

As part of the Indian Residential Schools Settlement Agreement, a National Administrative Committee with representatives from applicants and government and churches was created to oversee the implementation of the Settlement generally. The Agreement stated the Committee must be set up with 7 members who are appointed by the parties who signed the Settlement Agreement. Five of the voting members of the Committee represent former residents of the schools. There is also 1 voting representative from the churches and 1 voting representative from Canada. The Committee has the power to seek necessary court orders as well as ensure that there is national consistency in the Settlement’s implementation.

**Case Study: New Zealand**

The New Zealand Waitangi Tribunal processes are bilingual and bicultural. Of the tribunal members, half are Maori, and at least one Maori member must sit on the panel for each hearing. Hearings are held in the villages of the community bringing a grievance, in meeting houses following customary law of dispute resolution.
4.6 Should establishing or participating in redress schemes be optional or mandatory for institutions?

63. It is the view of the Victorian Aboriginal Legal Service that the establishment of, and participation in, any redress scheme should be legally mandatory for any institution to which it may apply. Where the institution or governing body of the institution may cease to exist, the State or Federal government should act in its place.

**Recommendations regarding the participation of institutions**

- That it be mandatory for all institutions to which a claim of abuse is brought against it participate in a redress scheme.
- Where an institution ceases to exist, the relevant state or federal government should act in its place.

**Case Study: Queensland**

In Queensland, which set-up a redress scheme for former wards of the state, it was not mandatory for residential institutions, where significant proportions of the abuse in question occurred, to contribute to, or be involved in, the redress schemes. In Queensland on accepting an offered payment, applicants were to sign a Deed of Release to indemnify the government from further litigation. But no indemnity was extended to the Queensland residential institutions in question, as they had little involvement in the Queensland redress scheme other than the obligation to provide relevant documents subject to Freedom of Information requests. Queensland was however, the only Australian state with a redress scheme where a symbolic apology was issued by the State Premier with representatives of the residential institutions.

**Case Study: Ireland**

In the Republic of Ireland, involvement in the state redress scheme of 2002 by residential institutions was voluntary. However, the government scheme provided an indemnity to churches that contributed in a proportional manner to the reparation fund. 128 million euro worth of cash and assets were contributed by the Irish churches, in exchange for the indemnity. For churches this was a means to avoid potentially expensive future litigation. As an alternative to mandatory contribution by residential facilities this provides a strong example for how institutions may be persuaded to make a significant contribution to facilitating just outcomes.
4.7 Should seeking redress or compensation through a redress scheme be optional for claimants? Should claimants retain the ability to pursue civil litigation if they wish?

64. Any participation in a redress or compensation scheme should remain optional to potential claimants. Depending on the nature of, or financial outcome of, a claimant may feel that the civil litigation process may be more rewarding. However, given what is known and understood about the difficulties of civil litigation, any redress scheme should adequately compensate claimants so that the civil litigation process can at best be avoided and remain a last resort.

Recommendations regarding participation for claimants
- Participation in any redress scheme should be optional for any potential claimant.
- The civil litigation process should remain open for victims of abuse.
- Any redress scheme should adequately compensate claimants so that the adversarial process of civil litigation becomes a last resort.

Case Study: Comparisons for Consideration
In the Canadian, Irish, Western Australian, Queensland, Tasmania and New Zealand redress schemes for care-leavers involvement was optional for applicants. In the Australian state schemes, potential applicants could choose to not apply for redress, and pursue civil litigation as an alternative. However in the state schemes, the narrow windows of opportunity within which to apply for redress may have contributed to this choice. The Tasmanian Stolen Generations Scheme remained open for 6 months; the Western Australian scheme for 12 months; and the Queensland scheme for 12 months. These narrow windows limit the capacity for some potential applications to put in an application, especially for disadvantaged communities. The Irish redress scheme remained open for 3 years. The Canadian Settlement redress schemes were both open for 6 years. This appears the more effective means of enabling all the opportunity to apply.

4.8 How should fairness be determined in redress schemes when some institutions have more assets than others? How should fairness and consistency between survivors be achieved in these circumstances? What should be the position if the institution has ceased to operate and has no clear successor institution?

65. It is the view of the Victorian Aboriginal Legal Service that institutions should be ‘means tested’ in order to provide a percentage of funding to the redress scheme comparable to its assets. Equity amongst claimants is paramount to the process in order to ensure that
the outcome remains fair to each claimant. Given that children were made state wards under state legislation, where the institution or governing body of the institution may cease to exist, the State or Federal government should act in its place. This includes providing the ‘pro rata’ funding required via the means test and to make up any shortfalls caused by non-existent institutions.

Recommendations regarding the costs of redress

- The cost of redress should be shared by all institutions to which the redress scheme may apply, based on claims made against them
- In the case where the institution ceases to exist, the relevant state or federal government should make up the shortfall
- Institutions should be ‘means tested’ to ensure fairness in burdening the cost of redress.

Case Study: Canada

In Canada’s redress scheme for illegally removed children an example can be seen of proportional contributions by institutions and government to relieve the suffering they caused. The major churches involved in managing residential schools and government both contributed to the Trust funds for all Settlement programs to a proportional degree calculated at negotiation. The United Churches’ maximum contribution was almost $7 million, whereas the 48 Catholic Church entities contributed a maximum of $30 million each, with various actual sums. The Anglican churches contributed a little over $15 million. The Presbyterian Church contributed a little over $1 million. The government provided the rest of the funding, in recognition of its role in maintaining the Residential Schools as government policy for decades.

4.9 What are the advantages and disadvantages of offering compensation through a redress scheme which is calculated on the same basis that damages are awarded by courts in civil litigation systems? Should affordability for institutions be taken into account? If so, how?

66. One of the advantages of having a redress scheme is that legal costs are minimised in comparison to the civil litigation process. It is also important that claimants have the right to legal representation even within a redress scheme should institutions have the right to respond. The amount offered in any redress scheme should be comparable to that which may be offered in civil litigation claim, to reduce the necessity for victims to undertake a lengthy, expensive, adversarial and potentially traumatic civil litigation process.
Recommendations regarding the calculation of damages

- Any redress payment should be awarded at the same as a potential damages claim to ensure the civil litigation process can be avoided.

Case Study: Canada
The Canadian redress scheme provides a compensatory Common Experience Fund (CEF) Payment for all applicants who can show they were residential at a listed institution. In addition to this, applicants could also pursue compensation for particular harm experiences under the Independent Assessment Process (IAP). The IAP looked to factors of the years spent in an institution, harm experienced by authorised adults or by other students where supervisors ought to have provided protection. Then compensation was provided for consequential suffering, and consequential loss of opportunity. Compensation was provided for each type of harm stemming from physical or sexual abuse. This process was transparent and arrived at a number for compensation payment for each applicant based on a points system taking into account circumstances of suffering, and the types of harm caused.

Case Study: Ireland
The Irish redress scheme on the other hand operated only one mode of claim, specifically to compensate an individual’s suffering. Heads of damage were abuse that can be categorised as sexual, physical, or emotional abuse, and serious neglect. Compensation was then awarded for physical, psychiatric or other injuries including psycho-social issues or loss of earning, as a result. There were 5 Bands of payment corresponding to harm suffered. The points added by each band of severity, which was taken from harm suffered, would establish the payment offered. The lower band of under 30 points saw a payment of up to 50 000 euros made. 70 points and more would see 200 000 – 300 000 euros made available. On top of this the Redress Board would make payment of Aggravated Damages in circumstances where the injury suffered by an applicant was not restricted to specific acts of abuse, but was exacerbated by the general climate of fear and oppression which pervaded the institution.
4.10 Given that the sexual abuse of children mostly occurs where there are no witnesses, what level of verification or proof should be required under a redress scheme to establish that a claimant has been sexually abused? How should institutions be involved in verifying or contesting claims for compensation?

67. It is the view of the Victorian Aboriginal Legal Service that any redress scheme should be made available to all formerly institutionalised persons. Whether or not sexual abuse impacts a person more than physical, emotional or cultural abuse should be made irrelevant, as it is well know that institutionalisation has negatively impacted the majority of survivors in many ways.

68. What is also known is that a high majority of institutionalised persons were abused in some form or another, and thus, a case can be made to suggest that any person who was housed in an institution has suffered some form of abuse that has impacted their life. Should redress be made available to all survivors, the burden of proof should then simply be proof of institutionalisation. This can be made via records obtained through Freedom of Information.

**Recommendations regarding proof of abuse**

- Given the high rates of abuse in institutions (be it sexual, physical, emotional, or cultural), proof of abuse should simply be limited to proof of institutionalisation.

**Case Study: Ireland**

As discussed above in relation to Question 1 – benefits of redress schemes, modification of evidentiary requirements is an important element of a functioning redress scheme dealing with issues of child abuse in an institutional context. Demonstrative of a failure to consider these particular issues can be seen in the Irish redress scheme, where high standards of evidence were required of applicants. The level of proof required to make a claim for Redress consisted of evidence of:

(i) His or her identity;
(ii) His or her residence during childhood (i.e. while under the age of 18 years) in an institution listed in the schedule to the Act;
(iii) He or she was abused while so resident and suffered injury, and
(iv) That injury is consistent with any abuse that is alleged to have occurred while so resident.
4.11 What sort of support should be available for claimants when participating in a redress scheme? Should counseling and legal advice be provided by any redress scheme? If so, should there be any limits on such services?

69. Culturally appropriate services should be provided to all Aboriginal and Torres Strait Islander claimants, their families and communities. This should include healing programs, counselling and psychiatric assistance, legal and financial advice, and assistance with any language or literacy barriers that may arise during the claims process.

**Recommendations regarding support for claimants**

- Claimants should have access to all manner of supports including financial and legal advice and health and well being counselling.

- Aboriginal and Torres Strait Islander people should have access to culturally appropriate supports, including healing programs as run by Indigenous elders and health workers.

- Aboriginal and Torres Strait Islander organisations should be consulted and funded to provide the relevant services to the community.

**Case Study: Queensland**

The Queensland Redress Scheme for survivors of institutional child abuse, set-up in 2007, provides a strong case for support and service provision within any redress scheme. From 2007 significant resources were allocated for assistance and support to care-leavers as part of redress, and supporting them on their path to compensation. This was implemented in the form of the Lotus Palace program that created a service center specifically for care-leavers. This houses four bodies funded by the Government to assist care-leavers. All four provide specific services to care-leavers, including information and referrals, as well as small financial grants.
4.12 If a claimant has already received some financial compensation for the abuse through one or more existing schemes or other processes, should the financial compensation already received be taken into account in any new scheme?

70. Any previous financial compensation should be taken into account, however should not preclude survivors from applying. Should a Federal redress scheme be developed it is the view of the Victorian Aboriginal Legal Service that if the sum offered is more than the claimant’s previous payment under a state scheme then their sum should be ‘topped up’ to ensure equity amongst the claimants. Further, this should apply also to any potential applicants who have received state assistance under Victims of Crime Assistance, a claim under a redress scheme should ‘top up’ this previous payment with any sum required to reach overall the amount an applicant would receive under a single claim for redress.

Recommendations regarding recipients of previous redress or compensation

- Any claimant for a national redress scheme who has previously received compensation for their injuries sustained from abuse occurring in an institution should be able to apply for a ‘top up’ in order to ensure equity amongst all victims.

Case Study: VOCAT

A precedent for this can be seen in the operation of the Victims of Crime Assistance Tribunal (VOCAT) in Victoria, where payments are made with regard to whether the applicant has recovered from any other statutory scheme or civil suit. Here the amount granted is ‘topped-up’ if under another scheme the applicant received less than they would under VOCAT. If a state-based scheme were to be adopted in Victoria, the Victorian Aboriginal Legal Service would advocate for this ‘topping-up’ approach for applicants who may already have recovered some level of compensation under another scheme or suit.
Part C: Models of Redress

71. Previously, there have been three detailed models of redress put forward for consideration regarding the specific redress and compensation for removed Aboriginal and Torres Strait Islander persons. These include Bringing Them Home (1997), the Public Interest Advocacy Centre’s Tribunal Model (2002) and the Stolen Generation Compensation Bill (2008).

72. Although these models are broader in scope than Issues Paper 6 Redress is asking submissions for, the Victorian Aboriginal Legal Service strongly recommends they should be considered for the proposals they make with regards to redressing past injustices to Aboriginal and Torres Strait Islander persons in the field of child removal and institutionalisation.


73. In the Bringing Them Home report the Human Rights and Equal Opportunity Commission (HREOC) made over 50 recommendations for action by governments, churches and the community to assist healing, and provide justice, for members of the Stolen Generations. A national compensation fund was suggested as an alternative to civil suits for seeking redress.

74. HREOC recommended a one-off lump sum payment of compensation to all those who were removed from their families. The report also recommended additional compensation for people affected by the policies who could prove types of harm recognised under Australian law, such as labour exploitation, physical and sexual abuse, loss of culture and loss of land rights. Loss of earnings, damage to reputation and dignity, and loss of opportunity were to be included also.

75. The Report recommended all people affected be able to make a claim, including siblings, descendants, and parents.

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13 Ibid, Chapter 14.
14 Ibid, Chapter 14.
15 Ibid, Chapter 14.
16 Ibid, Chapter 14.
76. HREOC recommended a Board be constituted, of both Indigenous and non-Indigenous experts, to administer and supervise the operations of the compensation fund.\(^\text{17}\) It is strongly recommended the funding come from new contributions by all Australian governments, and not be removed from existing budgets for Aboriginal and Torres Strait Islander Affairs.

77. Throughout the redress process the report recommends assistance be made available with regards to applicants’ accessing their documents relevant to removal.\(^\text{18}\) HREOC suggested the procedure of the Board in assessing individual claims be guided by the following:

1. Widest possible publicity.
2. Free legal advice and representation for claimants.
3. No limitation period.
4. Independent decision-making which should include the participation of Indigenous decision-makers.
5. Minimum formality.
7. Cultural appropriateness (including language).\(^\text{19}\)

78. *Bringing Them Home* also recommended significant restitution (restoring to the state of affairs prior to harm caused) in relation to land, culture and language; as well as financial redress.\(^\text{20}\)

5.2. Public Interest Advocacy Centre (PIAC) Tribunal Model (2002)

79. PIAC recommended a redress model, with a Tribunal investigating claims in response to the report’s conclusion that most potential applicants would not succeed with civil litigation.\(^\text{21}\) Due to statutes of limitations, the evidentiary requirements, and issues around

\(^{17}\) Ibid, Chapter 14.
\(^{18}\) Ibid, Chapter 14.
\(^{19}\) Ibid, Chapter 14.
\(^{20}\) Ibid, Chapter 14.
access to documents many applicants would fail on this. PIAC also recognised the potential harm caused by the adversarial nature of a court process, in relation to such sensitive matters.

80. In 2000 the Senate Legal and Constitutional Reference Committee endorsed the PIAC model for a Stolen Generations Tribunal.

81. PIAC’s Moving Forward project sought and collected feedback widely to inform its model. This Included:

- group and individual interviews with over 150 people at 10 focus group meetings across the country between February and May 2001
- meetings with over 20 Indigenous organisations, including stolen generations groups, Indigenous health services and legal services
- Submissions were received from over 30 people and organisations during the project.

82. The PIAC Model is supported by Australians for Native Title and Reconciliation, the Australian Council for Social Services, the National Sorry Day Committee, and HREOC. The Tribunal was envisaged with the purpose of operating as a “preferable alternative to litigation and to comprehensively address inadequacies in government and church responses to Bringing Them Home.” This is done by providing an opportunity to tell an account of suffering and experience in residential homes, and the provision of compensation. It would also serve a policy advisory role.

83. The Tribunal is suggested as a ‘partnership’ of governments, churches, Indigenous organisations, and members of the stolen generations; but sufficiently independent of all. Funding would come from governments and churches. Tribunal members would be

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25 Ibid. 4.
26 Ibid. 16.
27 Ibid. 16.
28 Ibid. 16.
29 Ibid. 16.
appointed as a mix of Indigenous and non-Indigenous people, with appropriate skills and knowledge. 30

84. The model put forward hinges on 4 central principles: acknowledgement, self-determination, prevention of future harm, information and access to the process. 31 An Applicant’s suggested evidentiary burden to access compensation would be limited to: proving Aboriginal or Torres Strait Islander Identity, circumstances of removal, events following removal, and the type of harm caused. 32 PIAC’s proposed standard of proof is the balance of probabilities, and the rules of evidence should not apply. The Tribunal is suggested to have an investigate function, so as to do more than rely on an applicant’s records or statements. 33

85. Who can apply is recommended to cover: individuals removed, their families, groups affected by disintegration and cultural loss due to child removal, descendants of individuals removed. 34 Payments are recommended as payable to groups or individuals, but generally groups in the form of grants. 35 Grants are recommended to cover a broad range of community interest projects, particularly those assisting with healing, and cultural recognition and celebration.

86. The recommended cut-off date should be 1970, representing a date where race-based assimilation policies ended. 36

87. On types of Heads of Damage the PIAC proposal is informed from wide community consultations; and has settled on the inclusion of labour exploitation, physical abuse, psychological harm, and sexual abuse, loss of culture and loss of land. 37

88. The PIAC proposal includes a separate function to the Stolen Generations Tribunal that has a “role providing for public hearings and an opportunity to affirm one’s experience”, while the investigative process separately assesses individual claims. 38 This appears to be

30 Ibid, 16.
31 Ibid, 54.
32 Ibid, 58.
33 Ibid, 58.
34 Ibid, 58.
36 Ibid, 58.
37 Ibid, 57.
38 Ibid, 58.
modelled on the Canadian Truth and Reconciliation Commission, which operated separately to the compensation process there, and instead focussed on public awareness raising, and providing an opportunity for survivors to be heard.


89. The Bill proposes the establishment of a Stolen Generation Tribunal to provide compensation and acknowledgement to give justice to members of the Stolen Generations and their descendants. 39 The Tribunal is suggested to comprise of half Indigenous and half non-Indigenous experts, who would decide on individual’s claims. 40

90. The Redress scheme would operate similarly to Canada’s, with a Common Experience Payment of $20 000 to be made to any applicant, with an additional $3000 for every year institutionalised. 41 A 7 year window of opportunity would be available to make applications, and all decisions of the Tribunal would be subject to Judicial Review. 42

91. Eligibility for this scheme requires establishing identity as an Aboriginal or Torres Strait Islander, and removal under the Northern Territory Aboriginals Ordinance 1911 (or 1918) or a similar scheme in another state (that permitted forcible child removal) prior to 1975. 43 Alternatively an applicant could seek to establish, along with ATSI identity that they were removed from their family in circumstances of ‘duress by a state agency as a consequence, in whole or in part, of race-based policies’ prior to 1975. 44 A descendant of a deceased person who met these criteria would also be eligible.

92. Under this proposed scheme justice would be provided primarily through the payment of compensation, however funding for specialised medical facilities (on consultation with Stolen Generations across Australia) would also be made available. 45

39 Stolen Generation Compensation Bill 2008 (Cth).
40 Ibid, s 15.
41 Ibid, s 11.
42 Ibid, s 13.
43 Ibid, s 5.
44 Ibid, s 5.
5.4. Additional Recommendations

5.4.1 Tribunal of Elders

93. As per the PIAC report, the Victorian Aboriginal Legal Service recommends that any redress scheme which involves Aboriginal and Torres Strait Islander people be headed up by a tribunal of relevant and professional Indigenous elders. This will ensure the cultural safety of any applicant’s experience and ensure that the principles of Indigenous self-determination as per the United Nations Declaration on the Rights of Indigenous Peoples (of which Australia is a signatory) are adhered to.

5.4.2 The Burden of Proof

94. The Victorian Aboriginal Legal Service also recommends that the burden of proof be limited to simply proving institutionalisation. Given the high rates of both sexual and physical abuse in the majority of institutions, proof of removal and wardship should suffice, given on the balance of probabilities that abuse of some form occurred. To then narrow the focus down only to sexual abuse would require a great deal more proof, potential retelling of traumatic stories, and further complications in establishing abusive incidents.

5.4.3 Redress for emotional, physical and cultural abuse as well as sexual

95. The Victorian Aboriginal Legal Service recommends to the Royal Commission that any redress scheme should include the physical as well as sexual abuse. The impacts for both sexual and extreme physical abuse are often similar, and can result in Post-Traumatic Stress Disorder and a range of symptoms such as depression and anxiety and poor life outcomes. Furthermore, it can be argued that ‘sexual’ abuse is a form of ‘physical’ abuse, given the pain, trauma and often physical nature acts of sexual abuse can often entail.

5.4.4 Time to Apply

96. In most accounts of the state redress scheme, insufficient time was granted to potential applicants to make a claim. This is especially the case considering the majority of Indigenous people live in remote and rural areas and may not be exposed to mainstream media and forms of advertising. As such, it is necessary that enough time be granted to allow for people to firstly be exposed to the knowledge of any potential redress scheme, have time to understand and consider the nature of the scheme, seek assistance if required from a local community organisation, and lastly obtain the necessary documents and complete the application process.
5.4.5 *Language and Literacy Barriers*

97. Information regarding any potential redress scheme should be made available to those people for whom English is a second or third language, or face barriers around literacy. Assistance should be made available to ensure that any information is made clear to potential applicants, and Aboriginal and Torres Strait Islander organisations are funded to provide such assistance to their local communities as required.

5.4.6 *Culturally appropriate case management*

98. Potential applicants will require assistance in a variety of areas including counselling, legal advice, assistance in the application process, understanding the application process, literacy, language and numeracy, and financial counselling. Any potential redress scheme should adequately fund case management via local Aboriginal communities, to assist potential applicants in such areas.

5.4.7 *The impact of lump sums on communities*

99. Evidence in other state schemes would suggest that negative impacts can arise with lump sum payments to community members. These can include impacts on other payments or health rebate schemes such as Centrelink or Medicare, and also social and family impacts. Consideration could be made to delivering any potential monies via a payment scheme, and financial counselling should be made available.

5.4.8 *Cultural loss and reclamation*

100. Any redress scheme should be made culturally relevant to Aboriginal and Torres Strait Islander peoples by providing healing and restoration to cultural losses experienced while in care. This could be made via funding of local community and cultural groups, or through healing programs that aim to assist survivors of institutional abuse.

5.4.9 *Healing Programs*

101. As well as financial redress, any scheme should include funding to assist formerly institutionalised persons, their families and communities, to engage with culturally appropriate and community controlled healing programs. As an holistic approach to redress, this will enable the healing of communities suffering from their abusive experiences while in institutional care, and assist families in addressing the current high rates of child removal caused by the trans generational effects of removal and
institutionalisation.

5.4.10 **Support for Families**

102. Current high rates of Indigenous children in out-of-home care are in part due to the effects of past removals and institutionalisation. Aboriginal and Torres Strait Islander families require assistance to address the breakdown of families and communities in this way. As such, as well as providing for children in out of home care, any redress scheme should assist parents and families so that their children are not removed in the first place.

5.4.11 **Acknowledgement in Education**

103. Part of any redress or compensation is the acknowledgement that the injustice occurred. While such acknowledgements have been address through state and church based apologies, it is the view of the Victorian Aboriginal Legal Service that the education system play a role in this process, by encouraging schools to find ways of acknowledgement and ensure such history is taught in the curriculum.

5.4.12 **Funding for Indigenous Services**

104. Throughout all the of these recommendations, it is imperative that, whatever redress scheme may come about, that Indigenous people have access to community controlled services to assist them in legal, health, healing, education, cultural and many other areas to ensure they are adequately supported. As such, the Victorian Aboriginal Legal Service strongly recommends that funding to such services be increased to support Indigenous self-determination and community assistance.
Appendix A. The Indian Residential Schools Agreement Redress Scheme

Introduction and context

The Indian Residential Schools Agreement (IRSA) represents one of the largest class-action settlements in Canada’s history. The IRSA was signed by the Federal Government, plaintiff lawyers, Indigenous groups, and all major churches involved in legal claims at the time, and came into existence in 2006. 46

In a similar history to Australia’s, Canada’s Indian Residential Schools were founded with the purpose to assimilate Canadian Aboriginal people, and remove language, culture and religion from children taken. 47 Records are incomplete but the scale of this policy was large, with an estimated 130 000 Aboriginal children having lived in one of the many government-funded and church-run schools. 48

Growing public awareness about the history of Indian Residential Schools grew over this time. A final report in 1997 of the Canadian Royal Commission on Aboriginal Peoples called for a significant redress and compensation schemes for Residential School survivors. 49 A subsequent report in 2000 by the Canadian Law Commission further reiterated the importance of some degree of governmental response. 50

The government brokered this agreement between parties in the face of significant legal claims, particularly class actions, going through the court system. 51 The Agreement of May 2006 was specifically therefore to manage compensation and redress for survivors. 52 For churches, the threat

of multiple class actions had led to the acknowledgement a settlement would be needed. \(^{53}\) The Canadian government was actively involved in the settlement negotiations. \(^{54}\) This settlement merged almost all existing class actions by Aboriginal people against residential schools and government into a general Statement of Claim. \(^{55}\)

The Assembly of First Nations, as well as several of the tribal-based Grand Councils, were actively involved in reaching the settlement. \(^{56}\) As well as pushing for full compliance and diligent fulfillment of the Agreement to this day. \(^{57}\)

Overall the Settlement saw large amounts of funding made available for compensatory payments, with more going to programs for assistance and healing. \(^{58}\) It provided acknowledgement, public education, and a platform for healing and justice.

Terms of the Settlement

The churches and government both contributed to the Trust funding for Settlement programs, this was calculated during negotiations to be a proportional contribution. The United Church’s contribution was almost $7 million, \(^{59}\) whereas the 48 Catholic Church entities contributed approximately $30 million each, with varied sums for each entity. \(^{60}\) The Anglican churches contributed a little over $15 million. \(^{61}\) The Presbyterian Church contributed $1 million. \(^{62}\) No other churches were party to the Agreement.

The government provided the rest of the funding, in recognition of its role in maintaining the Residential Schools as government policy for decades. \(^{63}\) The Agreement established two forms of compensatory payments, as well as founding a Truth and Reconciliation Commission (TRC) to promote reconciliation and healing. \(^{64}\)


\(^{54}\) Ha-Redeye, 2009.

\(^{55}\) The Indian Residential Schools Agreement, 2006, C. (‘The Agreement’).


\(^{57}\) Grand Council of the Crees, ‘Indian Residential Schools Agreement’.

\(^{58}\) Ryan Carlisle Thomas Lawyers, Submission on Civil Litigation and the Barriers to Justice for Victims of Institutional Abuse, Royal Commission into Institutional Responses to Child Sexual Abuse, 17 March 2014, 36.

\(^{59}\) The Agreement, Schedule O-4.

\(^{60}\) The Agreement, Schedule O-3.

\(^{61}\) The Agreement, Schedule O-2.

\(^{62}\) The Agreement, Schedule O-1.

\(^{63}\) The Agreement.

\(^{64}\) National Administrative Committee, Settlement Agreement.
Healing

In addition the Aboriginal Healing Foundation was granted $120 million by the Settlement to provide further support and healing services to residential school survivors. 65 This recognised the ongoing nature of harm caused, and aimed to therefore also provide assistance to descendants of survivors.

The AHF supports community-based healing initiatives addressing the legacy of physical and sexual abuse suffered in the Residential Schools. 66 Its projects aim to address principally the occurrence of ‘lateral’ violence (oppressed communities fighting among themselves), suicides, depression, poverty, alcoholism, lack of parenting skills, and lack of capacity to build healthy families and communities. 67 The AHF has funded regional healing centres and given community grants for healing projects. Concern however has been raised at the winding-up of projects, with no ongoing government funding from 2012 onwards. 68 The purpose of funding the AHF appears to be for promoting healing principally, while the other elements of the Settlement Agreement focus on achieving justice.

Justice

The Common Experience Fund (CEF) and the Independent Assessment Process (IAP) are the two separately managed compensation payments that form part of the Settlement. 69 The IAP looked to years spent in an institution, harm experienced by authorised adults or by other students where supervisors ought to have provided protection. 70 It then provides compensation for consequential suffering, and consequential loss of opportunity. 71 Compensation was provided for each type of harm stemming from physical or sexual abuse, and calculated cumulatively. This process was transparent and arrived at a number for compensation payment for each applicant based on circumstances. 37,919 applications were made, and the average payment was $115,259. 72 The IAP required greater standard of proof as an assessment process than the CEF, as individual incidents

65 Ha-Redeye, 2009.
68 Ibid, 8.
70 National Administrative Committee, Independent Assessment Process.
71 Ibid.
must be proven.

After accepting an IAP settlement, applicants provided an indemnity to the respondent parties (government and churches) from further litigation.  

The Common Experience Fund (CEF) was paid to former students from any of the listed Indian Residential Schools. If an applicant showed they had been present at one of these institutions they were granted $10,000 for their first year of attendance, with $3,000 for each additional year. The CEF aimed to provide a straightforward compensation claims process for all applicants of separate class actions, and others eligible by institution named. The minimal requirements flow from the recognition in the Settlement process that any student at a named school was highly likely to have suffered there. For CEF a $1.9 billion Trust Fund was set-up, $1.6 billion of which was paid out. This averaged to a little under $20,000 each applicant.

Reconciliation

The TRC was founded with $60 million over 5 years, plus another $20 million for commemoration projects. Its model was to be less formal than that of South Africa, and aim primarily at creating a setting for telling of individual stories from the particular institutions. The TRC’s mandated role is to inform all Canadians about what happened in Indian Residential Schools by documenting the truth of survivors, families, communities and anyone personally effected by the School system. This has been done through national events of commemoration, the founding of a national research centre, as well as public hearings. The TRC has also collected testimony made by survivors, and provided a support process for people who choose to come forward, including private recordings, and the presence of a support worker at hearings. From 2009-2011 this was done at over 400 outreach events and statement-gathering initiatives, including public sharing-circles set-up by the TRC.

A formal apology was made by the government outside the Settlement Agreement, to avoid reducing its symbolism as something that had been ‘brokered for’. This was delivered in the House of Commons by PM Stephen Harper in 2008.

74 Department of Aboriginal Affairs and Northern Development, 2013.  
75 Ibid.  
76 Ibid.  
77 Ha-Redeye, 2009.  
78 The Agreement, Schedule N.  
81 Ha-Redeye, 2009.
Analysis of the Settlement and provision of redress

Benefits to the scheme

1. In 2007 an Advocacy and Public Information Program was devised by the Settlement’s National Administrative Committee to disseminate information more effectively to all Aboriginal communities. Importantly special effort was made to reach-out to homeless, institutionalised and remotely located former students of the residential schools.\(^{82}\) To illustrate this, 2007-2013 saw over $26 million invested into 138 regional and national projects across Canada to conduct outreach.\(^{83}\)

2. The CEF provided compensatory payments on the basis of presence at an Indian Residential School, removing the painful and difficult process of proving abuse.

3. The CEF provided for appeals to the Settlement governing board, the National Administrative Committee

4. The CEF compensation available was calculated transparently, and set at $10,000 for each student’s first year of residence, and $3,000 for each additional year.\(^{84}\)

5. IAP compensation was made available for each allegation of harm, and suffering experienced, and was calculated on a transparent points-basis.\(^{85}\) Applicants could feel each experience was given justice and recognition.

6. In the IAP, applicants could seek payment for consequential harms and loss of opportunity stemming from a lifetime dealing with childhood trauma, and this included loss of earnings.\(^{86}\) This represents a wide interpretation of seeing justice done.

7. The standard of proof in IAP for alleged harms was ‘on the balance of probabilities’, and therefore not as exacting as criminal allegations.\(^{87}\) Whereas, for the CEF, applicants only needed to prove they had been at a Residential School, with evidence of admittance.

8. The IAP and CEF processes have provision for church and government cooperation with regards to documents and access to records.

9. During the IAP claims process, funds were set aside for support-persons’ travel, and counseling services were made available, as well as ceremonies to meet the gravity of the situation on the applicants’ request at the start of a Hearing.\(^{88}\)

\(^{82}\) Department of Aboriginal Affairs and Northern Development, 2013.
\(^{83}\) Ibid.
\(^{84}\) Ha-Redeye, 2009.
\(^{85}\) National Administrative Committee, *Independent Assessment Process*.
\(^{86}\) Ibid.
\(^{87}\) Ibid.
\(^{88}\) Ibid.
10. IAP Applications were to go before an Adjudicator and an inquisitorial model was employed to promote fact-finding and fairness between the parties.  

11. The IAP and CEF were open from 2006 to 2012, providing a significant window of opportunity to seek compensation. As a testimony to this 105,542 people made CEF claims.  

12. Claims for sick and elderly applicants were fast-tracked, giving anyone over 65 priority.  

13. The Churches, due to their significant role in the Schools were made to contribute to the Settlement, however the figure was set to ensure they would not be bankrupted by it. Nonetheless churches contributed $125 million overall.  

14. A $20 million commemoration fund has been set-up and, with the TRC’s assistance, grants are made to community commemoration initiatives.  

15. By direction in the Settlement Agreement, the TRC was strictly confined to not act as a Formal Inquiry or legal proceeding. Compared to other TRCs this had been seen as a positive means to avoid the overly adversarial nature of proceedings, where adversarial processes overtake the substance of the inquiry.  

16. The TRC’s separation from the reparation process ensures it serves its focus of truth-finding, and awareness-raising more accurately; without it needing to shape and advance legal frameworks.  

17. The TRC serves a paradigm-shifting role with regards to how the Residential Schools are seen today:  
   “In Canada, the factual truth about IRS may be publicly available, but that truth is still resisted in the dominant narrative. This dominant narrative says that the schools were created and run with the best intentions and that in hindsight some of the methods used and some of the individuals involved may have been overly harsh or abusive.”  

Issues in the provision of redress  

1. In the CEF Application process legal representation was assumed, and the Defendants were well represented with skilled lawyers. This seemingly is a barrier to justice to applicants.

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89 Ibid.
90 Department of Aboriginal Affairs and Northern Development, 2013.
91 Ha-Redeye, 2009.
92 Ibid.
94 The Agreement, Schedule N.
95 Stanton, 2011, 5.
96 Ibid, 7.
97 National Administrative Committee, Independent Assessment Process.
However to reduce the impact of this the Agreement provides for an additional 15% of the redress sum granted be added, to cover legal fees. 98

2. From 2010 onwards there is no ongoing government funding for Aboriginal healing Foundation healing projects. 99 This is a serious issue for the effectiveness of projects intended to reduce the cyclical nature of residential school trauma, which requires ongoing support.100

3. The TRC has revealed that through its Hearings many survivors of Indian Residential Schools have come forward speaking of their missing-out on the healing and claim process from having attended schools not listed in the Settlement. 101 These appear to have been more remote schools, or effect students listed as ‘day students’ who were in fact billeted and subject to the same abuse as residential students. The churches running these schools were not involved in the Settlement negotiations generally; showing its failure to provide full coverage as a redress scheme.

4. The TRC has found that in remote communities, the provision of health, and particularly mental health, services has not been increased to meet the demand of communities with large numbers of Residential School survivors.102 In some areas one psychiatric nurse services geographic areas the size of Canada’s provinces, where many survivors are in need of assistance.

5. Document-provision for the TRC has not been satisfactorily complied with by the Canadian government.103 It has refused to provide documents specified in the 2006 Agreement, and refuted having any obligation to identify and provide documents from the national archives, or provide access to the government residential schools database. Churches too have tried to limit use of their documents and materials by the TRC. In 2013 this came before the Ontario Supreme Court, and the TRC’s mandate has been extended to 2015 to deal with the new material made available by the Government upon Court order.104

98 Ibid.
102 Ibid, 7.
103 Ibid. 17.
Consultation and Involvement of Indigenous Organisations

In Canada Tribal bodies, and other Indigenous representative groups, were actively involved in the initial brokering of the Indian Residential Schools Settlement. This involvement stemmed from the fact that various groups were involved in the large class action suits that lead to the Settlement. 105 Notably, the Assembly of First Nations, as well as several of the tribal-based Grand Councils, were actively involved in the settlement, and in pushing for full compliance and fulfillment of the Agreement to this day.106

In addition to this active creating of the agreement, Indigenous groups were brought on-board in service provision as part of the Agreement. The Indigenous-run Aboriginal Healing Foundation (founded in 1990s) was granted $120 million by the Settlement to provide further support and services to residential school survivors.107 The Foundation then went-on to grant funds to local projects and grants run by tribal bodies to facilitate healing locally.

The Canadian Truth and Reconciliation Commission had active involvement from Indigenous groups, and saw the Chair and one of the two commissioners appointed as people from Aboriginal background. An Inuit Sub-Commission and Survivor’s committee also provide for oversight and constant input from survivors.

The Assessors for the IAP are overseen by a special committee with representatives from former students, plaintiff law firms involved, the Federal government, and church groups; to ensure all voices are heard regarding the type of process to be used.108 This level of control was more than advice and included:

- Appointing the chief adjudicator
- Appointing and selecting training for adjudicators
- Implement IAP structure through the Chief Adjudicator

The National Administrative Committee was also set-up to oversee the implementation of the Settlement generally.109 The Agreement says the NAC must be set up with 7 members who are appointed by the parties who signed the Settlement Agreement. Five of the voting members of

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106 Grand Council of the Cree, ‘Indian Residential Schools Agreement’.
108 The Agreement, Schedule D.
109 The Agreement, ‘The National Administrative Committee’. 
the NAC represent former students. There is also 1 voting representative from the churches and 1 voting representative from Canada.\textsuperscript{110}

The NAC has the power to seek necessary court orders as well as ensure that there is national consistency in the Settlement’s implementation.\textsuperscript{111}

**Sources:**


\textsuperscript{110} The Agreement, Schedule D.

\textsuperscript{111} Ibid.


*The Indian Residential Schools Agreement*, 2006, Schedule N.
Appendix B. The New Zealand Care-leavers Redress Scheme and Waitangi Tribunal

----- Care-leavers Redress Scheme

----- Waitangi Tribunal

The Care-leavers Redress Scheme

Background

In New Zealand for children of all background, for decades there were significant issues of abuse in residential care, and due to, removal from family; that has prompted government response.\(^{112}\) In several ways New Zealand has a similar history of race-based child removals as Australia.\(^{113}\) However it was not until the 1960s that significantly large numbers of children were removed and placed in residential facilities, and prior, child protection operated much more within Maori communities and without the overarching policy of racial assimilation.\(^{114}\) In the 1970s several changes were made to child welfare legislation, bringing the family into the process of child safety assessment and removal, and giving some degree of community control and input.\(^{115}\) This included, for example, the strengthening of Maori child welfare organisations, and their involvement in decision-making.\(^{116}\)

Nonetheless amongst the large numbers of children effected and caused harm due to residential and out-of-home care in New Zealand, Maori children were highly represented.\(^{117}\)

The Scheme

In 2004 New Zealand established a redress scheme for all care-leavers, providing a process of review of the experience of residential care, and appropriate remedies as required.\(^{118}\) A Care Claims and Resolution unit within the Ministry of Social Development administers the scheme.\(^{119}\) Between 2004 and 2013 $6 million was given in compensation to 297 applicants, equating to approximately $20,000 for each applicant.\(^{120}\)

\(^{112}\) Ryan Carlisle Thomas Lawyers, Submission on Civil Litigation and the Barriers to Justice for Victims of Institutional Abuse, Royal Commission into Institutional Responses to Child Sexual Abuse, 17 March 2014, 36.

\(^{113}\) Andrew Armitage, Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand, (UBC Press, 1995), 160.

\(^{114}\) Armitage, 1995, 162.

\(^{115}\) Ibid, 164.

\(^{116}\) Ibid, 164.

\(^{117}\) Ibid, 170.

\(^{118}\) Ryan Carlisle Thomas Lawyers, 2014, 36.


\(^{120}\) Ryan Carlisle Thomas Lawyers, 2014, 36.
No data is available on the numbers of Maori applicants.

The Process for the Scheme begins with initial contact made by an applicant to the Care Claims and Resolutions unit.\(^{121}\) Within three weeks an allocated social worker meets with the applicant, the social worker evaluates then what help is needed for the process (including assistance accessing records).\(^{122}\) A Claims Officer then reviews the experience of state care and abuse suffered, and investigation may be carried out. This can include interviewing former staff and reviewing records institution.\(^{123}\)

On this assessment, in a meeting the applicant they will be told if the care they received was inappropriate, and remedial matters will be discussed, including the giving of an apology. The final outcome for an applicant may include compensation, provision of counseling services, and help to find family members.\(^{124}\)

**Consultation with Maori groups**

This scheme has been little commented on in the New Zealand media, and has not arisen out of consultation with, or requests from, New Zealand Maori representative groups. The Maori parties appear to not focus on policies for care-leavers, and the Redress Scheme appears a minor issue to Maori groups.\(^{125}\)

**Benefits to the scheme:**

1. The scheme is set to close in 2020, giving a 2004-2020 window of opportunity for making applications.\(^{126}\) $16 million is allocated for the remaining claims put 2013-2020.
2. The process of review takes on average 12 months to finalise (being significantly faster than litigation).
3. The Department assists in providing all relevant documentation the government holds on an applicant.\(^{127}\)
4. Counseling can be provided during the claims process.

\(^{121}\) Ibid, 36.
\(^{122}\) Ministry of Social Development, ‘Historic Claims’.
\(^{123}\) Ryan Carlisle Thomas Lawyers, 2014, 36.
\(^{124}\) Ibid, 36.
\(^{126}\) Ryan Carlisle Thomas Lawyers, 2014, 36.
\(^{127}\) Ministry of Social Development, ‘Historic Claims’.
5. There is a preference for face-to-face meetings with Case Workers (though some remote areas will only have phone meetings). 128

6. There is no requirement for legal representation to make a claim. However for applicants who engage a lawyer, fees will not be payable by the Scheme. 129

**Issues within the scheme:**

1. Appeals are limited to a complaint to the Ombudsman for issues with the process. 130
2. If the applicant is dissatisfied with the Redress Scheme, the Comprehensive Accident Insurance Scheme bars taking any legal action in a civil suit. 131
3. Proof of harm is required to access compensation payments. 132 There is no provision for payments to a group of claimants on the basis of the residential facility they were placed in.
4. It appears the Scheme was not widely advertised, and care-leavers associations were not embedded in the functioning of the scheme.

**The Waitangi Tribunal**

The Waitangi Tribunal was established in New Zealand in recognition of widespread dispossession due to the colonising process. 133 The Tribunal has wide powers to hear claims by Maori where they “have been prejudiced by laws, policies or practices of the Crown in breach of the principles of the Treaty of Waitangi 1840”. 134 This serves an important role in providing for justice on a range of matters, however damages are not regarded as within its role. 135 Compensation is generally only given as part of a return of land to its owners. The Tribunal therefore has no application to Maori children removed from their families.

**Process**

The processes the Tribunal uses are considered best-practice in many ways. The Tribunal aims to

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128 Ibid.
129 Ibid.
130 Ibid.
131 Since 1972 New Zealand has effectively removed the capacity to sue for personal injury. The Comprehensive Accident Insurance Scheme allows the direct making of claims for personal injury (and more generally, accidents), removing the civil litigation pathway.
Ryan Carlisle Thomas Lawyers, 2014, 36.
132 Ministry of Social Development, ‘Historic Claims’.
133 Cornwall, 2002), 42.
134 Ibid, 42.
be bilingual and bicultural.\textsuperscript{136} Of the members, half are Maori and at least one Maori must sit on each hearing’s panel.

Hearings are also held in the villages of the community bringing a grievance, in meeting houses following customary law of dispute resolution.\textsuperscript{137}

**Relevance for Redress Schemes:**
The above process can provide guidance as to how a compensation process can operate with a multi-lingual and culturally appropriate function. This is highly relevant to any redress process.

**Sources:**

Amanda Cornwall, ‘Restoring Identity: Final report of the Moving Forward Consultation project’, *Public Interest Advocacy Centre*, (15 August 2002).


\textsuperscript{136} Cornwall, 2002), 43.
\textsuperscript{137} Durie and Orr. 1990.
Appendix C. The Queensland Redress Scheme

Functions of the scheme

In 2007 the QLD government introduced a Redress Scheme for survivors of institutional child abuse. This was in response to the recommendations made by the 1999 Forde Inquiry. Reparations were made as Ex Gratia payments ranging from $7000 to $40,000, with $100 million set aside for the scheme.

A 2-tiered system of payments was instituted, with Level 1 requiring applicants show they were living within a government or non-government institution, and had experienced institutional abuse or neglect. Level 2 required an independent panel of experts find more serious harm had been suffered. On accepting an offered payment, applicants were to sign a Deed of Release to indemnify the government from further litigation.

Overall 10,200 applications were made under the scheme. As part of the redress scheme, the government funded several commemorative projects. This includes an annual care-leavers remembrance day. On 25 August 1999 the State Premier, with representatives of the residential institutions, issued a formal apology for the harm caused.

Significant resources were allocated for assistance and support to care-leavers. This was implemented in the form of the Lotus Palace program that created a service center specifically for care-leavers. This houses four bodies funded by the Government; the Forde Foundation, the ARC (Queensland), the Esther Centre and the Historical Abuse Network (HAN). All four provide

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139 Ibid, 31.
140 Ibid, 31.
143 Ibid, 31.
144 Senate Community Affairs Reference Committee, Parliament of Australia, Lost Innocents and Forgotten Australians Revisited (2009), 39. (‘Forgotten Australians Report’)
145 Ibid, 35.
146 Ibid, 69.
147 Ibid, 77.
specific services to care-leavers, including information and referrals, as well as small financial grants.

**Analysis of the Scheme and provision of redress**

**Significant benefits of the Scheme include:**

1. The 2-tier system allows for applicants who have suffered harder to prove types of abuse to make claims successfully under Level 1 ‘institutional abuse or neglect’. Additionally for applicants who wish to avoid as much as possible the re-living of traumatic experiences, this Tier 1 claim allows for less investigations. While those who suffered harm and wish to seek full compensation by giving full accounts of their experiences can access a higher payment via Level 2.

   The Level 1 payment requires proof only of residence in an institution and a statement that the applicant is someone “who self-identified as having experienced that abuse or neglect”.  

2. Free legal advice was provided for applicants to consider the signing of Deed of Release. However for the making of an application, applicants were required to self-fund, or represent themselves.

3. Judicial Review was available for decisions made by the applications assessor.

**Issues in providing redress**

1. The Scheme does not provide for any access-to-documents assistance, leaving applicants to make FOI requests in order to access their documentation of time in residential care. However the Community and Personal Histories unit with the Office of Aboriginal and Torres Strait Islander Partnership provides assistance to Aboriginal and Torres Strait Islander people in accessing documents about themselves and their communities for Redress applications.

2. Not all forms of state care were covered by the scheme. Notably, foster care was outside the Redress scheme.

3. Level 2 payments were to be made only with the remaining funds once Level 1 payments and legal costs associated had been paid-out. This shows an arbitrary determination of

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153 Ibid, 123.
154 Ibid, 123.
155 Ibid, 51.
156 Ibid, 38.
what is required for justice. Accordingly, the maximum payment for each applicant was $40 000.

4. The scheme only remained open from 1 October 2007 to 30 September 2008, giving a limited opportunity to make an application.\textsuperscript{157}

5. The scheme’s failure to cover wrongful removal of children explicitly shows it is not intended to address the harms caused to members of the Stolen Generations, except where that harm comes within the more narrow definition of abuse that occurs within institutions.\textsuperscript{158}

This is despite the fact that, as of June 2008, 53% of the 6655 applicants to the QLD scheme identified as Aboriginal or Torres Strait Islander, and would likely have an interest in broader heads of damage like wrongful removal, being considered.\textsuperscript{159}

\begin{figure}
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\caption{Australian Ex Gratia Redress Schemes}
\end{figure}


\textbf{Consultation and Involvement of Indigenous Organisations}

In QLD there is some evidence of prior consultation with, and ongoing communication to, care-leavers associations for the Redress Scheme (particularly in relation to the creation of a service

\begin{thebibliography}{99}
\bibitem{157} Ryan Carlisle Thomas Lawyers, 2014, 31.
\bibitem{158} Winter, 2009, 54.
\bibitem{159} Ibid, 57.
\end{thebibliography}
However no active consultation or oversight role was extended to ATSI community bodies or groups.

In fact it appears that the only acknowledgement of Aboriginal care-leaver’s specific needs in the Redress Scheme is the creation of a Community and Personal Histories unit with the Office of Aboriginal and Torres Strait Islander Partnership to assistance to Aboriginal and Torres Strait Islander people in accessing documents about themselves and their communities. This assists in the making of applications, but does not constitute oversight or thorough consultation.

Sources:


\[^{160}\] Forgotten Australians, 2009, 77.

\[^{161}\] Forgotten Australians, 2009, 123.
Appendix D. The Western Australia Redress Scheme

Introduction and context

In WA the Redress Scheme came about in the context of growing public concern and awareness of the issues faced by child migrants, and wards of the state in institutional care.162 This awareness developed mainly in the 1990s and early 2000s. With a 1998 apology from the Premier to Child Migrants, and the publication of a 2003 Federal Senate report on abuse in institutional care, the foundations were laid for a redress scheme for a group of survivors that became known as the Forgotten Australians.163 This time period corresponds to the release of the Bringing them Home report on Stolen Generations in 1997.164 In that year the Leader of the Opposition Geoff Gallop moved a motion supported by Premier Richard Court on behalf of WA apologising to the Stolen Generations.165

The Redress Scheme however, when announced, was couched in general terms and did not refer specifically to the suffering of Stolen Generations in state care as Forgotten Australians.166 While it was clear Aboriginal people would make applications under the scheme, by the language employed, Redress WA did not specifically seek to provide redress to the Stolen Generations. The scheme provided payments to people over 18 who had suffered abuse and/or neglect as children in state care in WA prior to 2006.167 The Redress scheme was administered by the WA Department of Communities.168 According to the Dept.

“Redress WA was based on four pillars of support: an opportunity to make a police referral; a personal apology from the Premier and Minister for Community Services;

164 Ronald Wilson and Mick Dodson, Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, 1997. (‘Bringing them Home Report’)
167 Forgotten Australians Report.
provision of support and counseling services; and ex gratia payments”. 169

Payments were made on a two-tier basis:

- Up to $10 000 for applicants that show a reasonable likelihood that they experienced abuse and/or neglect, or
- Up to $80 000(*) for applicants whereby medical and/or psychological evidence is provided to substantiate claims of abuse and/or neglect. 170
  
  (*) In 2009 the maximum amount payable was reduced to $45 000 after the original budget of $114 million set in 2007 was spent. 171

A memorial was unveiled in 2010 acknowledging the experience of forgotten Australians in WA, and like the focus of Redress WA it was broad in scope, with an inscription reading it is dedicated to “to all Western Australians who experienced institutional or out-of-home care as children.” 172

Successful applicants were posted a signed letter of apology from the Premier and Minister for Communities, acknowledging and taking responsibility for the states’ role in their experience. 173

The scheme provided for Police Referral for applicants wishing to have records of their perpetrators passed on to WA Police. 174 Some 2000+ referrals were made, with a mind to prosecuting perpetrators who had not yet been investigated, or against which insufficient evidence had been accumulated. 175

**Seeking Compensation: the process**

A specialist team within the Redress WA organisation managed archives and documents. 176

Applicants did not need to access and provide documentation for their claims to be assessed. This service applied also to accessing private care providers’ (churches) documents for applicants. Generally interviews were not required in the claim process. 177 For Tier 1 payments applicants needed to show on the balance of probabilities “a reasonable likelihood that they experienced abuse and/or neglect”. 178

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170 Ibid, 45.
Redress WA required that prior to accepting an offer of their payment all applicants take independent legal advice on the nature and effect of the terms of the settlement. Legal advice was paid for by Redress WA up to a maximum of $1000. Anecdotal evidence in the case of one highly qualified advocate, who made an application under the scheme and relied on legal advice, shows that many applicants would likely have spent more than $1000 on this, and sought help for the whole process not just the terms of signing the Indemnity.

Guidelines were developed for the assessment of claims put by people with serious health issues, to support and enable their participation.

There was no cause for Review of Redress WA decisions, however a Complaints process was set-up. This provided an internal review panel of legal and psychological experts, an internal complains process, and a line to the Ombudsman for unresolved complaints. No data is available on how many applicants sought review.

Applications for the scheme were open from 1 May 2008 to 30 April 2009. This is a very narrow window of opportunity for redress. 3303 claims were put, approximately half by Indigenous people. There was some provision however for late applications to be accepted.

**Follow-up process**

No significant reports have been undertaken on the Scheme. Questions of whether it achieved its objectives, whether the money went to services needed, how applicants lives have been effected and general effectiveness overall have not been looked at since the scheme’s ending. Piecemeal reporting in Dept of Communities and WA Police Annual Reports provide little more than the numbers of claims processed and other basic information as a measure of success.

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179 Ibid.
182 Ibid.
184 The West Australian, 29 July 2009.
Analysis of the scheme and provision of redress

Visible positives of the scheme

1. Aboriginal claims made up about half the applications, suggesting strong involvement and effort made to reach members of the Stolen Generations, despite the scheme’s more general focus. Advertisements were placed in Indigenous newspapers, and the Aboriginal community appeared to be very organised in helping applicants put in claims.\(^\text{187}\)

2. The redress scheme was broader than litigation would be for many applicants. As an illustration, ‘neglect’ was a recognised basis for a claim in the governing statute.\(^\text{188}\)

3. Processing of claims was more straightforward than litigation, being less arduous, costly and adversarial.\(^\text{189}\)

4. The burden of proof was lower, allowing a successful tier-1 claim for someone who can show a “reasonable likelihood that they experienced abuse and or neglect”. This allows claims to get through that may be rejected in litigation.

5. In terms of cost, delay, the ‘feeling of being put on trial’ the claims process is much more favorable to applicants than criminal or civil litigation.\(^\text{190}\)

6. Documents required in the claims process were provided by the Redress WA specialists, taking the complexity of accessing documentation out of applicants’ hands. After the claims process applicants could get all documents on their File from Redress WA under FOI.

7. Outreach for the scheme seemed fairly effective at reaching a wide audience, though the numbers of applicants was still low. The Care Leavers Australia Network (CLAN) provided assistance to applicants for the Redress WA Scheme, many requiring legal referral.\(^\text{191}\) CLAN believes Redress WA “have done quite a lot of advertising. They have allocated money for advertising and to try to find people in other states.”\(^\text{192}\) It remains to be known if this outreach targeted Aboriginal and Torres Strait Islander communities sufficiently.

8. Effort was made to ensure informed decision-making and management of paid-out sums. Redress WA required that prior to accepting an offer of their payment all applicants take independent legal advice on the nature and effect of the terms of the settlement. Legal advice was paid for by Redress WA up to a maximum of $1000.

However no assistance was provided once a payment was made in ensuring it is spent in


\(^{188}\) Forgotten Australians Report, 2009.

\(^{189}\) Ibid.

\(^{190}\) Ibid.


accordance with an applicant’s need. Only a recommendation to contact Centrelink Financial Information Service is given to applicants to help managing the payment. ¹⁹³

Issues in the provision of redress

1. Ex gratia payment does imply the state sees compensation for harm caused not as a legal necessity, but a benevolent act.

2. Once compensation is accepted, applicants have indemnified the state against further litigation.¹⁹⁴ For members of the Stolen Generations this puts at risk chances to access redress or run litigation that may actually cover Wrongful Removal.

3. The scheme, while providing a specialist document service, put significant pressure on the Department responsible for most records. This lack of capacity in government archiving delayed claims, and showed the need for more focus on Access to Documents.¹⁹⁵

4. The narrow two-month window in which to place a claim is a significant barrier to justice. The 2009 Senate Forgotten Australians report noted that “considerable numbers of people are likely to have missed the opportunity to submit claims” due to these unrealistic timeframes.¹⁹⁶

Redress Schemes should be open-ended, to allow people to make claims when they feel emotionally ready, when they have adequate documentation. Most importantly, those without literacy, dealing with mental health issues, currently homeless, or outside government advertising reach will need more time than 2 months to prepare a claim.

5. The Dept responsible expected up to 10,000 applications however in the end it was little more than 3000.¹⁹⁷ A 1-in-5 uptake of those expected, let alone the many more eligible, is an indicator of poor attempts to reach out to potential applicants.

6. A heavy criticism was that service provision to vulnerable people effected by institutional abuse has not increased in WA with the Redress Scheme. Some counseling services were provided during the scheme (3 hours free counseling service), but this has since been withdrawn, leaving people without affordable care.¹⁹⁸

¹⁹³ CLAN, ‘Support Services for Redress WA’.
7. Anecdotally the process of applying was traumatic, and potentially re-traumatising for several applicants, and Michelle Stubbs from the Adult Survivors of Child Abuse has criticised the process as ‘humiliating and painful’.  

8. Anecdotally many applicants spent significant portions of their payments on legal fees, indicating a difficult process for unrepresented applicants. This is despite $1000 being made available for every applicant who gets to the juncture of accepting a claim. WA Legal Aid provided advice to applicants for Redress WA, and several other community organisations offered to assist applicants. Overall this indicates the forms may have been difficult to complete, and the appearances before the assessment tribunal hard to undertake. Many Perth-based personal injury firms have reported acting for “hundreds of applicants under the Redress WA scheme.”

9. No analysis or follow-up review has been undertaken on the scheme.

10. Only lump sum payments were granted, without provision of periodic payments.

11. Little part of Redress WA dealt with the cyclical nature of abuse. Applicants denied education as children are not given ongoing training or educational opportunities, and counseling services are limited.

12. Wrongful removal is not a recognised harm within the Redress Scheme. This limits the capacity of Stolen Generations to argue their particular suffering with regard to redress.

13. Lost and stolen wages of Wards of the State have not been addressed by the scheme. The separate Indigenous Stolen Wages scheme has been heavily criticised. Now closed, applicants could get only $20 000 and a window of 6 months in which to apply. Aboriginal Legal Service of WA campaigned strongly against such a weak scheme.

Consultation and Involvement of Indigenous Organisations

In WA no specific community consultation on the Redress model was undertaken regarding ATSI communities.

Further, changes were made to the process without any warning or engagement with ATSI groups.

199 ABC, 9 September 2011.
or representative bodies. No oversight role was given to ATSI bodies or plaintiff firms during the Redress process.

Sources:


Care Leavers Australia Network.


Western Australia Aboriginal Legal Service.


Appendix E. The Tasmanian Redress Scheme

1 - Stolen Generations Redress Scheme

Introduction and context

Seeking Compensation: the process

Analysis of the scheme and provision of redress

Consultation and Involvement of Indigenous Organisations

2 - Responses to Institutional Child Abuse

Introduction and context

Seeking Compensation: the process

Analysis of the scheme and provision of redress

Tasmanian Stolen Generations Redress Scheme

Introduction and context

The Tasmanian Stolen Generations reparation scheme was introduced in 2006 and provided funds of $5 million for Ex gratia payments to those removed as children, or the children of deceased members of the Stolen Generations. Of 151 claims made, 106 were assessed as eligible and 84 received a sum of $58 333. 21 children of deceased members of the Stolen Generations made claims and received either $4000 or $5000 in compensation.

Payments were made with the goal to compensate for the harm caused by removal from family and from culture. This is a wider purpose than compensating for particular cases of abuse due to removal.

Seeking Compensation: the process

A 3-tier system of claims was developed. Category 1 applied to Aboriginal people who had been removed from their families as children between 1935-75 under the Infants Welfare Act 1935 or the Child Welfare Act 1960, and who became wards of the state. This applied to Aboriginal people who had been removed for more than 12 months, usually under application to the Courts to have a child declared ‘neglected’.

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207 Ibid. 2.
208 Ibid. 2.
209 The Stolen Generations of Aboriginal Children Tasmania Act (2006) TAS, s 5. (‘The Act’)
Category 2 applied to Aboriginal people who had been removed from their families between 1935 and 1975 under ‘active intervention of a state government agency’.  

Category 3 applied to descendants of a deceased person who would have satisfied either Category 1 or 2 requirements. Category 3 claims were limited to $5000, and $20 000 per family group. Category 1 and 2 claimants were granted the remainder equally divided of the fund after Category 3 sums were granted. The window for making claims was 6 months from 15 January 2007 when the Act commenced.

The scheme appears to have been widely advertised. The Assessor placed ads in major and local papers as well as the Koori Mail and the National Indigenous Times. Aboriginal organisations were also liaised with, a 1300-number phone line was set-up, information sessions were held, and a website was set-up; all to provide information to potential applicants.

The Assessor hearings/interviews with applicants were held without the rules of Evidence. Hearings were informal, and claimants were encouraged to bring a support person. The Assessor took responsibility to liaise with government departments on the provision of relevant documents, and this supporting information was not required for claim to be lodged.

Analysis of the scheme and provision of redress

Benefits of the scheme

1. The scheme addresses directly assimilatory policies in child removal, not limiting itself to abuse suffered in care like the other state schemes.
2. The onus of proof for the legality of the removal does not lie with applicant under this scheme. Once an applicant has shown the necessary facts of s 5, then it is on the Assessor to find any reasons for why there was ‘no choice but to remove’.

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211 The Act, s 5.
213 Ibid, 8.
214 Ibid, 9.
216 Ibid, 9.
217 Ibid, 10.
218 Ibid, 9.
221 Sculthorpe and Mansell, 2008, 22.
3. The tiers applied in the scheme do not seek to apportion ‘harm’ and grant sums according to this, but they do differentiate between Stolen Generations, and their descendants.

4. The scheme appears to have been widely advertised.

5. The application process appears to have been straightforward for applicants. The Archives Office of Tasmania appeared to play a significant role in presenting information to the Assessor per s 16.  

   The Assessor’s role in designing the process from the beginning appears significant here, as the Act was silent on procedure methods.

6. Children who, while removed, were allowed to return home for short periods, or were allowed to briefly stay with another Aboriginal family were not excluded from Redress on the grounds of still having some cultural connection. The Assessor judged temporary return to an Aboriginal family “did not break the continuity of the period of removal”.

7. S 5 appears predicated on there existing a duty of care to not unduly remove Aboriginal children, and to try to return them to their family within 12 months. This reverses in statute the ruling in Cubillo of there being no such duty.

8. For claims where a parent’s potential consent to a child’s removal was unclear (which arose in several claims where children were removed for the ‘furtherance of their education’), the burden of proof did not lie with the claimant. Only where it was “clear on the material provided that a parent had genuinely consented” did a claim fail for this.

9. Adopted children appeared to have had reasonable access to the scheme. By showing the adopting-out was done without the mother’s consent, or by “the active intervention” of the state, claims could succeed. As above, the burden of proof on the question of a mother’s consent was not unduly burdensome on claimants. For showing state intervention all that was needed was “some persuasive evidence”, however what this constitutes is unclear from the Assessor’s Report.

10. The question of communal recognition arose with some claimants, whose total removal saw them having very little connection to their community. Fortunately, for these claims,

222 The Act, s 16.
225 Sculthorpe and Mansell, 2008, 22.
226 Ibid, 14.
227 Ibid, 14.
228 Ibid, 14.
Aboriginal communities’ extension of recognition to that person when they had evidence of ancestry, was enough to meet the Act’s requirements. 229

11. Counseling was provided to applicants throughout the process. 230

12. When there is a question of consent for removal, the Act requires the Assessor to look at “duress and undue influence”. 231 Indigenous Rights advocate and lawyer Michael Mansell believes the ubiquitous ‘X’ on consent forms has been looked at in this context, giving applicants a greater chance of success. 232

13. No indemnity for the state was required to access the redress payments. 233

Issues in the scheme

1. The scheme’s overall focus appears more focused on individual compensation, than redress and reparation for the whole community. For example, no public hearings were held locally, only interviews with the applicants privately, which likely limits the public education value of a redress scheme. 234

2. Per s 13 Judicial Review of decisions was not available. 235

3. Payment was given only by lump sum per s 12, and no flexibility was given in providing periodic payments, or payment to a community or project.

4. Six claimants failed as they had not been removed for their families for longer than 12 months. 236

5. 17 claimants failed for unconfirmed Aboriginality. 237 This raises issues of access and perhaps too high a standard of ancestral proof. 238

6. Ten claimants failed as they had been removed after 1975. 239 No explanation was given as to why the Act cut-off at 1975, and what was the basis for this.

7. S 5 of the Act precluded claims from those removed from their families as a result of a criminal conviction. 240 While the Assessor goes to an effort to show that s 5 was not applied to minor offences, where for example, the Children’s Court did not officially record a conviction on the record, and s 5(5) specifies that this section will not apply to children remove under an Act.

229 Ibid, 15.
230 Lawry, 2010, 89.
231 Sculthorpe and Mansell, 2008, 22.
232 Ibid, 22.
233 Winter, 2009, 56.
234 Lawry, 2010, 89.
235 The Act.
238 Lawry, 2010, 89.
239 Ibid, 13.
240 Ibid, 14.
convicting them as a ‘neglected child’, this may still be an issue of justice. The Assessor report does not detail how s 5 was applied in circumstances of convictions outside these two areas, and perhaps this has denied some claimants redress.

8. Mansell has criticized the scheme, saying many Aboriginal Tasmanians who had been removed as children did not apply as they believed themselves not eligible. 241 This raises the issue of accessibility and perceptions of overly high standards of proof in the scheme.

9. The scheme was only open to applications’ for a 6 month period. This limits the capacity for some to put in an application, especially for disadvantaged communities. Commentators also suggest this narrow timeframe meant less focus and public discussion on the issue, educating the broader population on these issues. 242

Consultation and Involvement of Indigenous Organisations

The Tasmanian government made significant effort to effectively liaise with Aboriginal groups and bodies during the Redress Scheme’s operation. Throughout the scheme Aboriginal groups were consulted particularly on how to advertise the application process, and reach-out to potential applicants. 243

There were Aboriginal rights activists (notably Michael Mansell) who criticised the scheme, alleging not enough was done to encourage people to apply. 244

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242 Lawry, 2010, 89.
244 Hall, 2008, 21.
**Tasmanian Response to Institutional Child Abuse**

**Introduction and context**

In 2003 the Tasmanian Premier, on behalf of the government, issued “a formal apology to those people who had been in State care”.\(^{245}\) In August 2003 the government established its Redress Scheme for those who suffered abuse and neglect in care as wards of the State.\(^{246}\) $24 million was made available for the Scheme, most of it for Ex Gratia payments.\(^{247}\)

The goals of the scheme were to compensate for harm caused, enable claimants to tell their stories, facilitate access for people to see their files, and provide counseling as well as payments.\(^{248}\)

The scheme was open from 2003 to 2005, but then re-opened in 2008 as many care-leavers had in fact missed out on the opportunity to make a claim during that period.\(^{249}\) It appears the Department took a lesson from this – that in a set period of time to claim some will always miss out for a variety of reasons.\(^{250}\)

As a result the opportunity to make a claim remains open, but is capped at the maximum payment granted to date, $35,000.\(^{251}\)

Further measures:

- Police referrals of perpetrators (with consent of claimant)
- The set-up of a State database for known perpetrators

**Seeking Compensation: the process**

An Independent Assessor within the office of the Tasmanian Ombudsman was appointed to accept and weigh the merits of each case.\(^{252}\) Compensation was set at a maximum $60 000 per person, with flexibility for more in exception circumstances.\(^{253}\) A review team cross-checked each claim with government documents and interviews.\(^{254}\)

Flexibility was built-in to the process as an interview with each claimant would determine what they sought from the Redress Scheme.\(^{255}\) Available was assistance in the form of:

- an apology issued on behalf of the Department of Health and Human Services,
- official acknowledgment that the abuse occurred,


\(^{246}\) *Forgotten Australians Report*, 2009 41.

\(^{247}\) Ibid, 41.

\(^{248}\) Ibid, 42.

\(^{249}\) Ibid, 42.

\(^{250}\) Ibid, 42.

\(^{251}\) Ibid, 42.


\(^{254}\) *Forgotten Australians Report*, 2009 41.

\(^{255}\) Ibid, 41.
• assistance tracking lost family members and access to departmental files,
• professional counseling,
• payment of medical expenses, and
• compensation

Analysis of the scheme and provision of redress

Benefits

1. Oral evidence was taken to be of weight, thereby avoiding issues stemming from reliance only on government files.
2. Documents are located and reviewed by the Independent Assessor, thus removing a significant burden on claims.
3. There are no time limits on when the abuse occurred.
4. A less formal interview process is used to hear a claimant’s story, reducing access to justice barriers of a more formal process. However this potentially limits the truth-telling, and healing process of giving testimony to a more formal tribunal.
5. Due to the Stolen Generations Scheme requiring no indemnity from applicants, this redress scheme is also open to members of the Stolen Generations for harm suffered in-care.

Issues in the provision of redress

1. Sums received would be set by the Assessor, rather than providing a simple tiered system.
2. No specialised services were created for applicants, and access to services for care-leavers broadly has not been increased. No individual support to individuals has been provided, though a CREATE foundation has been set-up to advocate on care-leaver issues in the state.
3. No specialised archive service has been created to help care-leavers access their files, this is provided for by the Department and Independent Assessor only during assessment of claims.

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256 Ibid, 54.
257 Ombudsman Report, 2004 73.
258 Ibid, 72.
259 Ibid, 73.
261 Ibid, 95.
262 Ibid, 95.
263 Ibid 125.
4. For each claim the Independent Assessor within the Ombudsman Office compiles a report with the relevant facts and recommendations to the Department of Health and Human Services, however the decision rests with the government. 264

Sources:


The Stolen Generations of Aboriginal Children Tasmania Act (2006) TAS.


Appendix F. The Republic of Ireland Redress Scheme

Introduction and context

The Residential Institutions Redress Act 2002 was legislated to provide compensation to survivors of child abuse within residential schools.265

From the 19th century British government and, successively the new Republic, had policy supporting the removal of children, and placing them in homes, reform schools, industrial schools, and religious institutions.266 This would stem from a finding by authorities that a parent was ‘unable or unsuitable to care for them’.267

In the 1990s survivor organisations began to campaign politically for, and litigate, compensation from churches and government for suffering caused. In 2000, the government established the Commission to Report on Child Abuse, headed by former Judge Laffoy.268 This aimed to inquire into abuse that occurred since the 1940s, and how it was allowed to happen.269 The Commission also sought to listen to survivors, and hear their stories. Confidential and Investigate Committees were set-up, with the Confidential Committee empowered to facilitate survivor’s testimony in more appropriate ways, and the Investigative power given penalising powers for those it seeks information from but who refuse.270 This Investigative role aimed to shame organisations, following testimonies from survivors, and case study reports on several institutions were compiled.271

The Confidential Committee heard stories, but operated separately to the Board of Redress, which administered payments and heard formal applications after 2002.

268 The Commission to Inquire into Child Abuse Act 2000, Republic of Ireland.
271 Ibid, 3.
Out of the work of the Commission the government decided to legislate a Redress scheme in 2002 to compensate survivors. The Commission has been made a permanent statutory body, to work in an ongoing way collecting testimony.  

Legislative Change

The Statute of Limitations (Amendment) Act 2000 altered the statutory limitations for bringing suits retrospectively. This came about as a means to recognise the reasons for, and limitations posed, by delayed reporting in these types of cases.

Civil suits therefore remained an alternative to the statutory redress scheme. However, any applicants who accepted payment from the Redress Scheme are required to sign an indemnity.

Seeking Compensation: the process

The Residential Institutions Redress Act of 2002 was legislated to enable a scheme of compensation for people who were abused as children in industrial schools, reformatories and any other institutions subject to state regulation or control.

Claims are made to a Board of Experts, who assess and then offer a payment. If the sum is accepted then an indemnity is provided to the state and the school administrators (often churches) from further litigation.

Heads of damage are abuse that can be categorised as sexual, physical or emotional abuse, and serious neglect; and compensation is awarded for physical, psychiatric or other injuries as a result.

There were 5 Bands of payment corresponding to harm suffered. The points added by each band of severity would establish the payment offered. The lower band of under 30 points saw a payment of up to 50 000 Euros made. 70 points and more would see 200 000 – 300 000 Euros made available.
By 2012 the Board had received 16,081 applications, approximately 1000 of which were late applications after the 2002-2005 window for applications.\(^{280}\) This was from an approximate 80,000 survivors.

The Board in its official guide explains that legal representation is not required to make a claim.\(^{281}\) The Board also offers to pay any reasonable legal fees, subject to negotiation with the applicant’s solicitors.\(^{282}\) Nonetheless 98% of applicants had legal representation.\(^{283}\) The structuring of many of the scheme’s processes appear to assume legal representation.

Some government assistance was made available for applicants to access their records; as stated by the Board:

> "With regard to (b) (proof of residence in institution) a report entitled “Report by School Number and Pupil Number” may be obtained from the Department of Education and Science, Cornamaddy, Athlone, Co Westmeath, which holds records for children who were sent to a residential institution on foot of a court order. \(^{284}\)"

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\(^{282}\) The Residential Institutions Redress Act 2002, s 27(1).


Applications were not accepted after 2005, giving 3 years to make an application. However exceptions were made for late claims in some circumstances.

A national counseling service for survivors was created at the same time to provide greater support services.

128 million euro worth of cash and assets were contributed by the Irish churches, in exchange for the indemnity the government-sponsored process provided.

**Analysis of the scheme and provision of redress**

**Benefits**

1. A significant role of the Board of Experts was the wholesale advertising of the scheme. Advertisements were taken out in newspapers, on radio and TV; and were run in the UK, Canada, USA, and Australia.

2. The inclusion of emotional injury and loss of opportunity as heads of damage for the Redress enables greater recognition of the type of suffering caused.

3. Additional payments are made for medical costs associated with abuse.

4. Alongside the Redress scheme operates an Education Fund set up by the Department of Education and Science in 2002. This fund aims to provide an opportunity for former residents who were denied an education.

5. The 2002-2005 window in which to apply provides a fairly generous time to hear about, consider, and make an application for Redress.

6. The Dept of Education made assistance available for accessing documents, and prioritised FOI requests in relation to Redress for a 2-week return time limit.

7. Family of a deceased survivor can seek Redress for the harm caused to them via the suffering of family members, if they were deceased after 11 May 1999.

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286 Brennan, 2007, 251.
290 Ibid, 6.
291 Ibid, 7.
292 Ibid, 12.
293 Ibid, 6.
8. Interim payments of 10,000 Euros were made available depending on age and health of applicant, providing the Board could find it likely the applicant would be awarded a payment. 294

9. The Board would make payment of Aggravated Damages in circumstances where the injury suffered by an applicant was not restricted to specific acts of abuse, but was exacerbated by the general climate of fear and oppression which pervaded the institution in which he or she was resident. 295

10. The Board has discretion to make payments as Lump Sums, or in Installments on application. 296

11. A Review committee provides right of review for final Board decisions, decisions that form the substance of the claim, and decisions of payment. 297

12. On receipt of a payment, an applicant is also entitled to Financial Counseling to assist in the decision-making around the lump sum payment. 298

13. The specific naming of individual abusers and their organisations by the Investigate committee provided for strong public condemnation, as well as public education. 299

14. The Investigative Committee and the Confidential Committee both provided a strong truth-telling role, not dissimilar to the TRC in Canada.

Issues in the provision of redress

1. In the first year of operation the Redress scheme had several major issues that required resolution, and were cited by the outgoing Commissioner Laffoy in 2003 as ‘major obstacles’. 300 These were “compensation [amounts], legal representation and the unanticipated volume of complaints to the Investigation Committee”, however it appears these were subsequently dealt with under the new Commissioner Ryan. 301

2. The high proportion of applicants who rely on legal advice for the making of an application (98%) raises concerns about access to justice. 302

3. The level of proof required to make a claim appears to be very high, requiring evidence of:

   (i) His or her identity;

294 Ibid, 6.
300 Ibid, 258.
301 Brennan, 2007, 257.
302 Ibid, 252.
(ii) His or her residence during childhood (i.e. while under the age of 18 years) in an
institution listed in the schedule to the Act;

(iii) He or she was abused while so resident and suffered injury, and

(iv) That injury is consistent with any abuse that is alleged to have occurred while so
resident.  303

4. When allegations of abuse are made against a specific person in the application, the Board
notifies that ‘relevant person’ of the claim against them, and gives them an opportunity to
respond. 304 This appears simply to test an application’s veracity, but does involve the
return to the applicant of the ‘relevant persons’ response, and their possible giving
evidence before the Board. This seems an inordinate risk of retraumatisation and pressure
on the applicant.305

(i) This ‘relevant person’ can also cross examine the applicant. 306

5. The Board of Experts has no representation of survivors embedded, or any consultative
committee to assist and provide advice.

Consultation and Involvement of Survivor Organisations

For the Irish Scheme, engagement with survivor groups was limited to involvement in the
Commission Reports that lead to the establishment of Redress.

This included providing testimony, and advising on the nature of a potential redress scheme. 307
However the Redress Scheme was managed wholly by a Board of Experts, with no official means of
input from survivors.

At the closing of the redress scheme, the Commission collecting survivor’s testimony was made
permanent.308 This gives survivor organisations and individuals and ongoing platform to share their
experiences.

303 Residential Institutions Redress Board, ‘A guide to the Redress Scheme under the Residential Institutions
305 Brennan, 2007, 246.
306 Residential Institutions Redress Board, ‘A guide to the Redress Scheme under the Residential Institutions
Redress Act 2002’, 22.
307 The Commission to Inquire into Child Abuse Act 2000, Republic of Ireland.
308 The Commission to Inquire into Child Abuse Act 2000, Republic of Ireland.
**Sources:**


