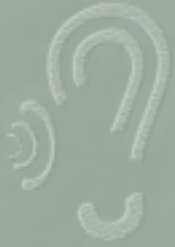




Restoring Dignity

Responding to Child Abuse in Canadian Institutions

Executive Summary



**LAW COMMISSION OF CANADA
COMMISSION DU DROIT DU CANADA**

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The Report of the Law Commission of Canada, entitled *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* is available under separate cover (ISBN: 0-662-64474-3 & CAT: JL2-7/2000-1)

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The Report and this Executive Summary are also available online at <<http://www.lcc.gc.ca>>

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Executive Summary

It is often said that children are our future. How we treat our children and how we allow them to be treated reveals much about ourselves and about our values as a society.

Over the past ten to fifteen years, child abuse has surfaced as a painful issue for Canadians. With greater public discussion has come greater awareness that children have been abused not only in their own homes and by strangers, but also in institutions where they were placed for their education, welfare, rehabilitation or even protection. Many of these institutions were run by or on behalf of federal, provincial and territorial governments.

Children do not choose to live in institutions. Societies plan and establish institutions for children with a beneficial purpose in mind. The institutions now under close public scrutiny were intended to improve the lives of the children placed in them. Many contributed significantly to doing so, and provided children with an education and life skills that have served them well as adults. Nonetheless, the fact remains that many children were harmed terribly by abuse they suffered while resident in institutions. This is the undeniable tragedy that underlies this Report.

Issues

In November 1997, Justice Minister Anne McLellan asked the Law Commission of Canada to prepare a report on the means for addressing the harm caused by physical and sexual abuse of children in institutions operated, funded or sponsored by government. These institutions included residential schools for Aboriginal children, schools for the Deaf and blind, training schools, long-term mental health care facilities and sanatoria.

From the outset, the Commission was confronted with three key facts. First, the majority of children placed in institutions came from the most underprivileged or marginalised groups in society. These included



children with disabilities, children from racial and ethnic minorities, Aboriginal children, and children living in poverty, among others.

Second, a significant power imbalance existed between the children and those in charge of these institutions, one that went beyond the obvious power imbalance between a child and an adult in a position of authority. Many teachers, counsellors, supervisors and guards, for example, had the added weight of institutional authority behind them – the moral weight of a respected religious order or the official power of a government.

Third, there was little independent monitoring of what went on inside these institutions. This lack of effective protection of children cannot be attributed to a single, simple cause. In some cases however, the desire to preserve the good name of an institution took precedence over a concern for the welfare of children.

Children who lived in residential institutions suffered some measure of disconnection, degradation and powerlessness, due to the very nature of institutional life. In determining the scope of its research, the Commission therefore felt it was important to look not only at physical and sexual abuse but at other types of maltreatment as well, such as neglect, and emotional, spiritual, psychological, racial and cultural abuse, all of which also have profound and long-lasting effects. Furthermore, it examined the impact of abuse on children who were not abused themselves but who witnessed the abuse of others.

The experience of Aboriginal children in residential schools must be singled out for particular study because their presence in residential schools was the result of a policy of assimilation sustained for several decades by the federal government, with the cooperation of many religious organisations. Deprived of their native languages, cultural traditions and religion, many Aboriginal children in residential schools were cut off from their heritage and made to feel ashamed of it. As a result, the residential school system inflicted terrible damage not just on individuals but on families, entire communities and peoples.

Central to the Commission's approach to assessing responses is the perspective of survivors. They have by far the weakest voice of all parties involved in allegations of institutional child abuse. Too often, their needs have been considered incidental to other priorities such as



the punishment of perpetrators. It is the Commission's hope that, by focussing on survivors, it will help make all processes of redress more responsive to their needs.

What are the needs of survivors? They are as diverse and unique as survivors themselves. Nevertheless, the Commission was able to identify certain recurring themes in the manner these needs were expressed. Survivors seek: an acknowledgement of the harm done and accountability for that harm; an apology; access to therapy and to education; financial compensation; some means of memorialising the experiences of children in institutions; and a commitment to raising public awareness of institutional child abuse and preventing its recurrence.

The Commission believes that two fundamental values should guide any attempt to understand and respond to the needs of survivors. First, one must respect survivors and engage them to the fullest extent possible in any redress process. Second, survivors must be given access to information and support so that they can make informed choices about how to deal with their experience of abuse.

Responses

Ideally, a process for providing redress should take into account the needs of survivors, their families and their communities in a manner that is fair, fiscally responsible and acceptable to the public. The Commission has framed this ideal through eight criteria by which various redress options may be assessed.

- **Respect, engagement and choice** – does the process respect and engage survivors as well as offer them comprehensive information about the process itself?
- **Fact-finding** – can the process uncover the facts necessary in order to validate whether abuse took place and what circumstances allowed it to occur?
- **Accountability** – do those administering the process have the authority to hold people and organisations accountable for their actions?



- **Fairness** – is the process fair to survivors as well as all other parties affected by it?
- **Acknowledgement, apology and reconciliation** – does the process provide for acknowledgement, apology and reconciliation where abuse has occurred?
- **Compensation, counselling and education** – can the process address the needs of survivors for compensation, counselling and education?
- **Needs of families, communities and peoples** – can the process meet the needs of the families of survivors as well as their communities and peoples?
- **Prevention and public education** – does the process contribute to public awareness and prevention?

The Commission applied these criteria to a number of approaches that have been, or might possibly be used to provide a measure of redress to former residents of institutions. It began by considering the classic legal processes – criminal prosecutions and civil actions. Next, it looked at processes that serve mainly to compensate, such as criminal injuries compensation programs and *ex gratia* payments. The Commission then reviewed several different types of investigatory processes, such as public inquiries, Ombudsman investigations and interventions by children’s advocates, as well as truth and reconciliation commissions. After that, it considered processes initiated at the grassroots level within particular communities. Finally, it canvassed the range of official processes where redress is negotiated directly with survivors.

Criminal Prosecutions and Civil Actions

It is important to understand that not all forms of institutional child abuse are considered criminal offences. Moreover, while physical and sexual abuse are unquestionably grounds for legal liability, it is less clear that other forms of abuse are civil wrongs giving rise to compensation in legal proceedings.



The criminal justice system is well-suited to identifying individual perpetrators of abuse and holding them liable. It is, however, less effective in shedding light on the systemic problems that may have allowed the abuse to occur in the first place.

From the perspective of a survivor who testifies for the prosecution, a criminal trial can be a revictimising event. Witnesses are not parties to this process, do not control any aspect of it, and may not even be kept fully informed of its progress and consequences. The criminal justice process does not promote acknowledgement, apology or reconciliation, and can only provide for a limited range of survivors' needs.

Although a civil action may deal with the same events as a criminal trial, it is not dependent on a criminal investigation or the outcome of a prosecution. A civil case may consider a broader range of evidence and relies on a lower standard of proof than a criminal case. For these reasons, it is possible for a defendant to be acquitted in a criminal trial yet found liable in a civil action.

While a civil action seems to give more respect and control to survivors than a criminal trial does, the plaintiff may not have the financial, psychological or other resources necessary to benefit fully from the process. Both criminal and civil actions are characterised by a formal structure and adversarial nature that does nothing to encourage acknowledgement, apology or reconciliation. These factors also make it difficult to engage the participants fully.

In fact, both criminal and civil trials can take a personal toll on survivors of institutional child abuse who must recall highly sensitive and painful memories in a confrontational setting.

There are other drawbacks as well. For example, both options place certain limits on the examination of abuse alleged to have occurred many years ago. Furthermore, even when the outcome vindicates the survivor's claim, criminal prosecutions and civil actions cannot address the broader range of survivors' needs such as therapy, counselling or education.

However, because trials are public, they can help to raise public awareness of this issue.



Criminal Injuries Compensation Programs and *Ex Gratia* Payments

Criminal injuries compensation programs provide only financial compensation to victims of violent or personal crimes. Their effectiveness in dealing with the full ramifications of institutional child abuse is therefore quite limited. Available in nine provinces, these programs vary widely in terms of eligibility and allowable benefits.

Governments may choose to provide voluntary (*ex gratia*) payments as compensation for certain losses or injuries when they are not legally obliged to do so but when it is deemed to be in the public interest. On its own, this option is also very limited in scope. It is preferable to use such payments only in combination with other forms of redress.

Ombudsman Offices, Children's Advocates and Commissions

An Ombudsman is an independent and impartial official appointed by a legislature to investigate complaints against government and recommend corrective action. Children's advocates and commissions protect the rights of children through a variety of means, including investigation of complaints, public education and research.

The most significant way in which Ombudsman offices (which do not exist in all provinces or at the federal level) can redress institutional child abuse is by contributing to public awareness and prevention. The investigative work of an Ombudsman can bring media and public attention to bear on past wrongdoing. However, an Ombudsman has no power to implement any recommendations.

Children's advocates and commissions can help to ensure that children currently in out-of-home care do not suffer harm. However, this exclusive focus on the present precludes any possibility of responding to the needs of adult survivors whose experiences of abuse took place many years ago. They can be effective in addressing issues of education and prevention, but otherwise do not respond to concerns identified by survivors.



Public Inquiries

Governments establish public inquiries to conduct a formal, independent study of a specific issue or event. Because a public inquiry can consider a broader range of evidence and research than a court, it has great potential for uncovering the multiple causes and effects of institutional child abuse.

While public inquiries have the potential to meet many of the eight criteria listed above, they can be time-consuming and expensive. They can also delay the opportunity for survivors to seek other more immediate and tangible forms of redress.

As is the case with an Ombudsman, public inquiries can only make recommendations, not ensure that they are implemented. As a means of redressing institutional child abuse, they would probably be most effective in holding organisations and governments, not individuals, accountable for their actions. Public inquiries can have a high profile in the media and may therefore help draw public attention to this issue.

Truth Commissions

In an effort to investigate the broadest possible range of redress options, truth commissions used in countries such as South Africa, Chile and Argentina were also considered. While these commissions have had very diverse mandates, powers and jurisdiction, all have served to denounce a past in which government-sanctioned human rights violations took place.

Truth commissions attempt to balance the interests of the country and the individual needs of survivors. They are not arbiters of justice, but provide a forum for the acknowledgement of suffering and a starting point for reconciliation.

The Commission concluded that a truth commission would probably only be suited to cases of past institutional child abuse that affected not only individual children, but also whole communities and even peoples, and which caused significant intergenerational harm.



Community Initiatives

In trying to deal with the legacy of institutional child abuse, it is not always necessary to look to governments for solutions. Some survivors, along with their families and communities, are creating their own programs either as a supplement to, or a substitute for, the official processes of courts or administrative tribunals. Financial and other support for these grassroots programs comes from a variety of sources, including governments, churches and community organisations.

While community initiatives cannot hold people or institutions accountable for their actions, they can respect and engage survivors more fully than other options involving the legal system. In addition, community initiatives can meet the most compelling needs of survivors by involving them directly in the design and delivery of helping and healing initiatives. This can be extremely useful in rebuilding communities damaged by institutional child abuse.

Community initiatives are an essential component of any liberal democratic society. The Commission believes that governments should not attempt to monopolise approaches to redress. Grassroots programs to recognise and respond to the harms caused by institutional child abuse should be encouraged, promoted and funded.

Redress Programs

A redress program is a process specifically designed to meet a wide range of needs of survivors, in particular by providing financial and other compensation to them. While there is no single model, redress programs will usually directly engage survivors in negotiating the elements of the program, such as the harms covered, the validation process and the compensation and benefits offered.

All redress programs are meant to be more comprehensive and flexible as well as less formal and costly than judicial options. For example, redress programs can offer opportunities to establish a permanent record of personal experiences and an apology from those responsible. They are also less emotionally stressful for survivors than court proceedings, as claims are presented in a confidential setting, and validated in a non-adversarial manner. Because they are usually



established in respect of a specific institution, redress programs can respond to the specific needs of the individuals, families and communities affected by that institution.

The Commission believes that redress programs are the official response that can be most effectively designed to meet the complete range of goals that have been identified. Negotiating a series of focussed redress programs with survivors and their communities should be a preferred, although not exclusive, response to institutional child abuse. The Law Commission believes that redress programs are an effective complement to existing judicial and administrative options available to survivors.

Commitments

The Commission cannot recommend that any single approach to redress be adopted as an exclusive recourse simply because the circumstances and needs of survivors and their communities are too diverse to be satisfied by any one option. The Commission believes strongly that survivors should have a wide range of choices available to them as they seek redress for the harms they have suffered.

The Commission's Report contains a number of specific recommendations to make all of the options reviewed more effective for survivors of institutional child abuse. By so doing, the Commission seeks to contribute to an overall improvement of these processes. Still, the fact remains that there are limits to how much existing redress options can be adjusted to meet the unique needs of these survivors. This is particularly true of criminal and civil trials – the most commonly used legal options.

The Commission believes that five principles must be respected in all processes through which survivors of institutional child abuse seek redress:

- Former residents of institutions should have the information necessary to make informed choices about what course of redress to undertake.
- They should have access to counselling and support throughout the process.



- Those who conduct or manage the process, such as judges, lawyers and police, should have the training to enable them to understand the particular circumstances of survivors.
- Ongoing efforts should be made to improve existing redress programs.
- The process should not cause further harm to survivors. The process must acknowledge that confronting a painful, even traumatic past is far from easy.

While the aim of the Ministerial Reference was to examine the various means of providing redress, the Commission wanted to recognise the importance that survivors of institutional child abuse place on prevention. With the exception of children's advocates and commissions, the options reviewed have only a limited capacity to promote prevention.

Canadians tend to be aware only of the most notorious examples of institutional child abuse, and they do not generally understand the long-term effects of abuse. To achieve effective prevention, public knowledge must be increased. There is a misconception that, because many institutions have been closed, the problem has been taken care of and is now behind us.

This is clearly not the case. We have only begun to confront the past and there is a real danger that we have not learned enough from it. We must recognise that institutional child abuse continues today, despite marked improvements in the design and administration of institutions for children. There are still large numbers of Canadian children who receive out-of-home care in many settings, including foster and group homes, mental health centres, private boarding schools, schools for children with disabilities, summer camps and organised sports programs.

Prevention strategies must be based on values and principles that affirm the rights of children in institutional settings and respect their developmental needs and well-being. Those values and principles must be put into action through concrete measures such as public education campaigns and various initiatives to make institutions for children more transparent.



At the same time, reactive measures must also be made more effective. To date, most reporting and investigation of child abuse has concentrated on domestic abuse. The Commission believes that a child-centred approach to gathering information and conducting research on child abuse would broaden this perspective so that it embraces abuse in institutions and other out-of-home settings. It is important to examine *what* is happening to our children, not *where* it is happening.

The Law Commission's review of processes for responding to past institutional child abuse points to concerns beyond prevention and public education. Understanding the circumstances of institutional child abuse highlights the need to investigate the causes of abuse and exploitation in all relationships of unequal power. This review also reveals how children from socially and economically marginalised groups have been, disproportionately, the victims of institutional abuse, and how devastating this has been on families and communities. Finally, it invites us to examine the assumptions the law makes concerning the balance to be struck between compensation and therapy, between redressing individual wrongdoing and correcting systemic failures, and between remedying harm to individuals and building or rebuilding families and communities. The Law Commission sees these concerns as central to addressing the question asked in this Reference and to its own future work.

Institutional child abuse has been a tragedy of enormous proportion in this country. All Canadians must recognise the legacy of institutional child abuse not only to redress the terrible harms done in the past but also to ensure that they do not recur. It is our responsibility as a society to respond to the needs of those who survived and to do our utmost to honour the memory of those who did not.



Recommendations

The Report of the Law Commission of Canada on institutional child abuse sets out a number of specific recommendations relating to the improvement of existing processes of redress, the creation of new processes for responding to survivors of institutional child abuse, and the promotion of approaches to prevention. But the Commission's response to the Minister involves more than proposals that can be stated in the form of specific recommendations. To situate and to complete its advice, the Commission proposes six more general recommendations that it feels must frame the way these recommendations are read.

General Recommendations

THE LAW COMMISSION BELIEVES that approaches to providing redress to survivors of institutional child abuse must take the needs of survivors, their families and their communities as a starting point.

Survivors have suffered the harm. They, their families and their communities are best able to articulate the harm suffered. Of all the parties to institutional abuse, survivors traditionally have had by far the weakest voice. Too often the focus of official processes has been on punishing wrongdoers rather than on righting the wrongs done to survivors and on healing their communities.

THE LAW COMMISSION BELIEVES that every survivor has unique needs. All attempts to address these needs should be grounded in respect, engagement and informed choice.

Survivors must be shown respect. They must be engaged by whatever types of redress processes are put into place to the fullest extent the process permits and they themselves desire. They should have access to adequate and unbiased information about the options available to them. And they must be provided support throughout the process they choose. Any existing processes for redress should be modified where necessary so



as to better achieve these goals. Survivors should be given the time and the information they need in order to make the choices that they feel are best for them individually.

THE LAW COMMISSION BELIEVES that processes of redress should not cause further harm to survivors of institutional child abuse, their families and their communities.

Officials responsible for a redress process should have special training or experience with protocols for assisting survivors. The process should be set within an integrated, coordinated response to survivors, their families and their communities that recognises the full range of harms that have been suffered and the full range of needs expressed. The process should not be a revictimising experience for survivors. It must, however, be fair to all those who are affected by it, including those who are alleged to have committed the abuse.

THE LAW COMMISSION BELIEVES that community initiatives should be promoted as a significant means of redressing institutional child abuse.

Grassroots and self-help initiatives should be encouraged and facilitated. They should seek to build upon community understanding of the types of response that best meet the needs of survivors and their families. Where it is acceptable to survivors, those responsible for institutions at which abuse took place should participate in these initiatives, by providing financial or human resources to help communities to develop and manage these initiatives.

THE LAW COMMISSION BELIEVES that redress programs negotiated with survivors and their communities are the best official response for addressing the full range of their needs while being responsive to concerns of fairness and accountability.

Those responsible for institutions at which abuse took place should demonstrate their willingness to establish optional redress programs with survivors and their communities. The features of these programs should be developed through negotiation. The programs should be designed and operated so as to offer those who wish, the opportunity



to be involved in the process. Survivors should have the option of choosing which particular mix of benefits or compensation best meets their needs.

THE LAW COMMISSION BELIEVES that in addition to specific programs designed to meet the needs of survivors, it is crucial to establish programs of public education and to continue to develop and revise protocols and other strategies for prevention.

Canadians need to know more about why children were placed in institutions, what happened to them there and how abuse was allowed to occur. Canadians need to understand that institutional child abuse remains a problem in our society, to which all children in out-of-home care are vulnerable.

Specific Recommendations

The Criminal Justice Process

PEOPLE BRINGING COMPLAINTS TO THE POLICE should be fully informed at the outset of how the criminal justice process works and their role in it.

Considerations:

Governments should prepare, in consultation with interested parties, pamphlets and information kits that describe the character of the criminal process as it affects adult complainants alleging institutional child abuse.

Community service agencies, survivors' groups and other non-governmental organisations should also be given resources to develop their own information kits and pamphlets about how the criminal justice process works when there are allegations of institutional child abuse.



These various information kits should be available at all police stations, social service agencies, hospitals and the offices of health care professionals.

Police, social service agencies, hospitals and the offices of health care professionals should have access to literature or help-line numbers to which they may refer those who may disclose experiences of child abuse.

THOSE INVOLVED IN investigating, prosecuting, defending and judging allegations of institutional child abuse should have special training, expertise or experience and should have access to survivor-sensitive protocols that have been developed for this purpose.

Considerations:

Protocols have been developed to deal with investigations of multi-victim institutional child abuse. Any police force embarking on such an investigation should consult these protocols or those who have developed them.

When approaching potential witnesses, particularly for the first time, there must be respect for the privacy of former residents of institutions.

As a rule, the first substantive interview in an investigation should be conducted by a person with whom a survivor feels comfortable, and this option should be presented to survivors. Where possible, former residents of institutions should have follow-up interviews by an officer with whom they feel comfortable (*e.g.* a female officer or an Aboriginal officer).

Complainants should, however, be informed at the outset that it may not be possible, over long and complex proceedings, to ensure that the witness or complainants will always be able to deal with the same officials.

All major decisions about how the police intend to proceed should be explained fully to the complainant(s), especially any decision not to lay charges or to terminate an investigation.



PEER, PROFESSIONAL AND PRACTICAL SUPPORT for survivors should be available from the commencement of a criminal investigation throughout the trial and beyond.

Considerations:

Those involved in victim witness support programs should receive training or education with respect to the particular needs of survivors of institutional child abuse.

Wherever possible, witnesses for the prosecution should have access to a private area while waiting to testify, so they do not have to wait with the accused.

Support should include access to both peer and professional counselling during a criminal investigation and prosecution.

Financial support should be available to permit a family member or friend of the complainant to attend the trial or to provide the services of a therapist or peer counsellor.

THE EXPERIENCE OF TESTIFYING should avoid revictimising complainants.

Considerations:

Devices to protect witnesses, such as screens in front of the witness box, closed-circuit television and videotaped evidence should be available, in appropriate circumstances, to adult witnesses. Currently, such devices are available only to witnesses under the age of 18, and only where they are complainants in cases involving sexual abuse.

Crown attorneys should have the resources necessary to fully prepare survivors for testifying. Crown counsel who undertake prosecutions of historical child sexual abuse should have the resources to explain issues such as: how the process works, possible outcomes, the role of the complainant, the duration of the process, *etc.*

Efforts should be made to avoid subjecting witnesses to multiple examinations in the course of one criminal proceeding. Such a procedure would require the support and collaboration of the Crown and defence bars. The testimony would have to be videotaped, so that those relying on it and not present when it was taped could assess the demeanour of the witness.



If preliminary inquiries are not abolished, cross-examinations within them should be time-limited, as determined on a case-by-case basis, subject to an extension where this is justified.

The *Criminal Code* should be amended to ensure that all victims of child abuse benefit from the same procedural protections as those who are covered by the 1983 amendments to the sexual assault provisions.

Witnesses' testimony should not automatically be discredited solely because they have spoken together. There should be no presumption that such as evidence is tainted. Defence counsel who wish to establish that testimony is not reliable should have the burden to do so as in other ordinary challenges to evidence.

THE SENTENCING PROCESS should be inclusive and restorative wherever possible.

Considerations:

Defence counsel should exercise discretion and restraint in cross-examining persons who have submitted a victim impact statement.

Family members should be entitled to provide victim impact statements to illustrate the lifelong effect of child abuse and how it affects the relationships of victims with their families.

Where appropriate, courts should promote restorative justice approaches and involve members of affected communities in sentencing hearings.

Civil Actions

PROSPECTIVE PLAINTIFFS should have access to basic information about civil actions at no cost.

Considerations:

Provincial governments, Law Societies, professional organisations and law faculties should continue to develop basic public legal information programmes that provide accessible information about legal options available to survivors of institutional child abuse.



This information should relate to matters such as how to contact a lawyer, the procedure, costs, possible outcomes, and the length of the process.

Community service agencies, survivors' groups and other non-governmental organisations should also be given resources to develop their own information kits and pamphlets on the same topics.

Access to information about the experience of pursuing a civil claim involving institutional child abuse should also be available, and social service agencies or others who work with survivors should set up programs that enable former residents to share their experiences with potential plaintiffs.

PROSPECTIVE PLAINTIFFS should have access to support services to assist them in coping with the stress of civil litigation.

Considerations:

Social service agencies should develop and promote support networks composed of survivors with experience in civil litigation and related processes for seeking redress. They should also compile and publicise a list of community organisations that have experience in assisting survivors. Emotional and psychological support should be available throughout the litigation process.

Professional associations should compile a roster of therapists experienced in working with abuse survivors.

LAW SOCIETIES AND BAR ASSOCIATIONS should continue to organise professional development programs on how to conduct cases involving allegations of past institutional child abuse.

Considerations:

Law Societies may also wish to consider adding civil litigation dealing with child sexual and physical abuse to the list of specialties that may be certified.



Certification should require not only expertise in litigation, but also training in how abuse affects survivors, and the implications for the desirability and conduct of the litigation.

Certification lists should be promoted in appropriate communities, including within therapeutic communities.

LAW SOCIETIES SHOULD REVIEW their *Codes of Professional Conduct* to ensure that appropriate rules are in place to safeguard against the exploitation of survivors of institutional child abuse, especially with respect to recruitment of clients and fee arrangements.

Considerations:

The recent revisions to rule 1602.1 of the *Code of Professional Conduct* made by the Law Society of Saskatchewan could serve as a model.

The potential for exploitation inherent in contingency fees for class actions involving survivors of institutional abuse could also be minimised or eliminated through a variety of means:

- Establishment of a provincially-run class action fund to cover initial disbursements.
- Mandatory taxation of contingency accounts, or a requirement of prior judicial approval of contingency fee arrangements.
- Governments or other institutional defendants could refuse to negotiate settlements where the contingency fee is inflated.

THE NATIONAL JUDICIAL INSTITUTE and other judicial education bodies should promote judicial education programs about the circumstances and consequences of physical and sexual abuse of children in institutions.

Considerations:

These programs should provide judges with basic information about survivor litigants, including:

- information about how survivor symptoms may manifest themselves during litigation, and how they might be misinterpreted.



- information about racial and cultural differences that may manifest themselves in testifying.
- information about the non-financial expectations shared by many abuse survivors, and how the judicial role and the conduct of the litigation may assist survivors to obtain these goals without impeding any other requirements of justice.

LEGISLATURES SHOULD REVISE the principles governing limitation periods in cases of institutional child abuse, and governments should refrain from relying on limitation periods as a defence in such cases.

Considerations:

Provincial legislatures should consider the extension of limitation periods for child sexual abuse through such means as:

- amending legislation so that the limitation period does not begin to run, in the case of certain types of sexual offences in particular those that occurred during childhood or adolescence, until the plaintiff becomes aware of the connection between her or his injuries and the harm inflicted; and
- increasing the limitation period whenever the action is based on misconduct committed in the context of a relationship of dependency.

The federal government should take the lead in adopting a policy that it will not rely solely on a limitation period defence in cases relating to institutional child abuse.

COURTS SHOULD GENERALLY RESPECT the requests of plaintiffs to preserve their privacy over the course of a trial.

Considerations:

In a few recent decisions involving compensation to victims of sexual violence, the courts have respected the victims' wish to protect their privacy by granting a request for authorization to use a pseudonym or initials, seal the file, obtain a temporary order preventing the publication of any information that could identify the victim, or holding the proceedings *in camera*.



Where legislation now protects the anonymity of the parties by requiring civil proceedings in family matters to be held in camera but does not apply to civil proceedings relating to institutional child abuse, it should be amended so that it encompasses any proceedings relating to matters, such as institutional violence, that directly or indirectly affect the family.

GOVERNMENTS SHOULD NOT IMPOSE confidentiality provisions on settlements with survivors of institutional child abuse, or on awards granted pursuant to any alternative dispute resolution process.

Considerations:

It should be up to the plaintiff to decide whether he or she wishes to keep the terms of an agreement confidential.

Settlement agreements that are not confidential could be recorded in the register of the superior court where the case was launched.

Where plaintiffs wish to preserve the confidentiality of their settlement agreements, governments (and other institutional defendants) should nevertheless publish aggregate data about settlements in respect of institutional child abuse cases, so long as the data cannot identify any plaintiff.

WHERE COURTS APPLY statistical data in order to determine lost income for survivors of institutions, they should use the statistics for the Canadian public as a whole, rather than those specific to the population that attended the particular institution.

Considerations:

Statistical averages drawn from among those who were survivors of institutional child abuse offer only a partial indication of how any particular individual would have succeeded had he or she not suffered abuse.



Criminal Injuries Compensation Programs

CRIMINAL INJURIES COMPENSATION programs should explicitly provide for extended limitation periods in cases of sexual or physical abuse committed while the claimant was a child.

Considerations:

Incorporation of the “delayed discoverability” rule or a statutory extension of the limitation period would be consistent with the treatment of child abuse claims in civil actions for damages.

SURVIVORS OF INSTITUTIONAL CHILD ABUSE should not be refused compensation solely because they do not report the abuse to the police or automatically cooperate in an investigation.

Considerations:

Adjudicators should take into account that a claimant’s failure to cooperate with the police may result from a distrust of authority originating in the very abuse for which compensation is being sought.

CRIMINAL INJURIES COMPENSATION BOARDS should publish the framework or analytical screen used to determine their awards, as well as their decisions, withholding the names of the claimants.

Considerations:

Publication of awards would promote consistency, especially among provinces with similar ceilings for claims.

This would enable policymakers to assess the adequacy of the program and determine where adjustments should be made.

Ex Gratia Payments

GOVERNMENTS SHOULD REVISE POLICIES on providing compensation by way of *ex gratia* payments to include classes of persons who suffered harm, directly or indirectly, as a result of policy decisions later found to have been inappropriate, even when others are potentially liable in a civil action.



Considerations:

Normally governments are not civilly liable for damages flowing from policy, planning or executive decisions. Where a misguided policy opens the door to, or facilitates the commission of a civil wrong by others, *ex gratia* payments should not be excluded as a means to acknowledge the wrongful policy.

EX GRATIA PAYMENTS should be offered in cases where an otherwise meritorious and provable claim cannot be pursued because it falls outside a limitation period, or where liability is uncertain and it is not in the public interest to defer compensation until litigation has concluded.

EX GRATIA PAYMENT OFFERS to individuals should include reimbursement for the costs of seeking professional advice in order to make an informed decision about whether to accept the offer.

GOVERNMENTS SHOULD REVISE POLICIES on paying compensation so as to provide a mechanism for expedited, interim and “without prejudice” *ex gratia* payments.

Ombudsman Offices

JURISDICTIONS THAT DO NOT now have an Ombudsman’s office or similar institution should consider enacting legislation to establish one.

Considerations:

Where specialised Ombudsman’s offices exist in a jurisdiction, but they do not have authority to examine questions of institutional child abuse, either a general Ombudsman office or another specialised Ombudsman (such as, in the case of the federal government, an Aboriginal Ombudsman with authority to investigate abuse in residential schools) should be created.

OMBUDSMAN STATUTES should be amended (where necessary) to require that governments table a response to an Ombudsman report in the legislature within a specified delay.



Children's Advocates and Commissions

JURISDICTIONS THAT DO NOT now have independent bodies to act as children's advocates should consider enacting legislation to establish them.

THE MANDATES OF CHILDREN'S advocates and commissioners should be broad enough to assist children and youth living in residential institutions and other types of out-of-home care settings, as well as those living at home.

CHILDREN'S ADVOCATES AND COMMISSIONS should establish and consult regularly with advisory committees made up of people who are or have been in care, including adult survivors of institutional child abuse.

Considerations:

These committees could advise them generally on how they carry out their advocacy roles and specifically on matters related to education, research and systems reviews.

Public Inquiries

GOVERNMENTS SHOULD WEIGH the following factors when determining whether to launch a public inquiry into allegations of institutional child abuse:

1. Whether individuals have made allegations of multiple abuse affecting several children and authorities have not responded;
2. Whether a primary goal of the inquiry would be to identify systemic weaknesses and failures;
3. Whether a criminal investigation is ongoing or charges have been laid;
4. Whether an Ombudsman or a children's commissioner has authority to investigate; and
5. Whether any other fact-finding process more attuned to meeting the needs of survivors exists.



Considerations:

Even in a jurisdiction with an Ombudsman or a children's commissioner or advocate, a public inquiry may still be appropriate because: (1) the issue involves a private institution; (2) there is need for special resources or expertise; (3) the investigation must be concluded in a short period; and (4) the investigatory powers of a children's commissioner or a children's advocate may be limited to current abuse.

IF A PUBLIC INQUIRY into institutional child abuse is established, the order-in-council should clearly set out its objectives and the key questions to be addressed (e.g., whether the focus will be on determining wrongdoing, or on systemic and organisational aspects of abuse, or both).

Considerations:

The mandate should be communicated to all potential participants; in particular, former residents and employees of the institution(s) being investigated.

The commission should be accorded resources that are sufficient to accomplish its mandate in the time allotted to it.

When a commission of inquiry is established, procedural matters for its consideration should include:

Whether to hold the hearing in public and how to protect the confidentiality of former residents of an institution.

If former residents of an institution are dispersed geographically, how to ensure they are able to attend the inquiry.

How to ensure counselling and peer support is available to former residents during the course of the inquiry.

How to ensure that both the process and the commission's report meet the communication requirements of former residents, including for example, the need for interpreters and the need to publish documents in alternate formats.



IF A PUBLIC INQUIRY into institutional child abuse is established, respect for survivors should be reflected in its membership.

Considerations:

Where an inquiry has several members, the inquiry should reflect expertise not only in law, but also in disciplines experienced in dealing with the impact of institutional child abuse (such as therapists and social workers). The inquiry should demonstrate sensitivity to the specific socio-demographic makeup of survivors.

Truth Commissions and Similar Processes to Address Systemic Human Rights Abuses

A TRUTH COMMISSION HAS the potential to be an appropriate forum for providing redress where large numbers of people spread over a wide geographic area have suffered abuses over several generations, and the goals of fact-finding and healing cannot be achieved without a generalised amnesty for wrongdoers.

Considerations:

The decision whether to establish a truth commission or some other truth-finding procedure is a matter to be determined by governments in cooperation with the affected communities and peoples. If it were agreed to establish a truth commission, then certain issues related to the operation of the commission would need to be considered, including the following:

- A truth commission should have the power to compel production of government and institutional evidence. It must be capable of exploring the evidence left by the institutions in question, and relevant internal records.
- The information-gathering process should be more respectful of survivors and more therapeutic than it is in criminal or civil actions. The process should not force survivors to tell their stories. Those who do participate should be able to testify, publicly or privately, in a safe and supportive environment.



- A truth commission should encourage the presentation of official, public apologies that are meaningful. In addition, the process could create a forum similar to South Africa’s “Register of Reconciliation” web page, where individuals can make informal or personal apologies.

Community Initiatives

SURVIVORS AND THEIR COMMUNITIES should be encouraged to experiment with different projects and programs organised and administered at the community level.

Considerations:

A first step is to make available information about other initiatives so that the full range of possible initiatives can be considered.

Existing healing and reconciliation funds, whether established by government or others, should be active in providing seed money for innovative programs.

COMMUNITY-BASED PROGRAMS should be assisted in sharing their experiences so that new programs could be modelled on successful initiatives.

Considerations:

This might involve sponsoring publications, videos and websites or even paying the transportation costs to enable those who are managing successful programs to visit communities that wish to set up their own program.

ORGANISATIONS THAT SPONSORED RESIDENTIAL facilities and governments should continue to make resources available to support local initiatives through which social services are delivered to survivors of physical and sexual abuse.



Redress Programs

A REDRESS PROGRAM should be designed with input from the group it is intended to benefit.

Considerations:

The most credible form of input is negotiation directly with former residents or their representatives.

The circumstances of negotiations should ensure, to the extent possible, that the former residents are on an equal footing with those offering redress. It may also involve funding a survivors' group so that information is disseminated to as many former residents as possible, and they are aware of the progress of negotiations. This should involve ensuring that this group has the means to hire the professional help they require, if they choose, to assist in the negotiations. This may include lawyers, interpreters or others such as survivors from other institutions who former residents feel they need.

Disseminating this information would enable survivors to provide their views to those negotiating on their behalf.

A REDRESS PROGRAM should offer compensation and benefits that respond to the full range of survivors' needs.

Considerations:

In institutions where physical or sexual abuse was pervasive, residents may have suffered psychological and emotional damage as a result, even if they themselves were not victims of such abuse.

In institutions where the culture of the resident population was consistently undermined (*e.g.* in certain residential schools for Aboriginal children or certain schools for Deaf children), residents may have suffered long-term harms as a result.

Deprivation of an adequate education should also be considered as a basis for redress.



REDRESS PROGRAMS should offer a wider range of benefits than those available through the courts or administrative tribunals.

Considerations:

Survivors may require support in the form of services as much as they require financial compensation.

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

Redress programs should be flexible about how they distribute benefits. The program itself need not provide the benefits directly, but may simply be willing to fund a variety of services in the community so long as they are directly related to survivors' needs.

FAMILY MEMBERS should be entitled to certain benefits of a redress program.

Considerations:

Where a family member has suffered harm as a result of the abuse of a relative in an institution, he or she should be entitled to receive reasonable compensation or to participate in certain of the benefits offered to survivors, in particular, therapy or counselling.

Survivors should also have the option of transferring benefits such as education benefits to a family member.

BEST EFFORTS should be made to contact as many former residents as possible to inform them of the redress program in a timely fashion, while respecting their privacy.

Considerations:

Outreach efforts should protect the privacy of former residents by avoiding direct approaches, for example, through the mail.



General outreach (*i.e.* notices and advertisements) can target settings where survivors are likely to see them, for example, wherever mental health services are provided, Aboriginal friendship centres, community groups, continuing education institutions.

Former residents serving time in prison should be given an equal opportunity to participate in redress programs – outreach to the prison population should therefore be undertaken, and accommodation made to enable prisoners to present their claims. The information provided in outreach letters or advertisements should be in clear and accessible language.

Verbal outreach (*e.g.* via radio or a toll-free 1-800 number) is as important as written communication.

Outreach should commence well in advance of the program itself, to allow former residents the time needed to consider their options and to maximise the number of claimants who apply within the set period.

THE CLAIMS PERIOD should be designed to ensure that the maximum number of claimants has an opportunity to apply.

Considerations:

A claims period should be set for a realistic duration, and should not be terminated prematurely.

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

A REDRESS PROGRAM must be based on a clear and credible validation process.

Considerations:

The focus of the validation process should be on establishing what harms were suffered at the institution, the effects of those harms, and the appropriate level of compensation.

The standard of proof required should be commensurate with the benefits offered.



Those determining the validity of claims should be impartial decision makers. Members of adjudication panels should have the appropriate professional background, training or life experience to recognise the harms of institutional child abuse. They should have experience with a compensation process, rather than only a fault-finding process.

The onus should be on those organising the redress program to corroborate, to the extent possible, the experiences recounted by those claiming compensation. All possible sources of corroboration should be canvassed, including institutional archives, school performance and attendance records, contemporaneous medical, social service or police reports, and the verdicts of criminal proceedings, if any.

THE ADMINISTRATION OF A REDRESS PROGRAM should have the confidence of both funders and beneficiaries.

Considerations:

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

An attempt should be made to assure continuity in the administration of the program, both for the sake of efficiency and to facilitate the development of a relationship of trust with survivors.

Adjudication panels should have some members whose backgrounds reflect the backgrounds of the claimants.

BEST PRACTICES IN REDRESS PROGRAMS should be assembled by an independent body, such as a university department or research institute, for the benefits of society as a whole, as well as survivors.

Considerations:

Programs to train survivors or their representatives in the negotiation of redress programs should be established.

Those who negotiate on behalf of governments or churches should also receive training or have knowledge about the circumstances and effects of institutional child abuse.



THERE SHOULD BE A PLACE (OR PLACES) where those who lived in institutions can record their experiences and where historical materials concerning these institutions can be gathered.

Considerations:

The recording of experiences could be done in a variety of formats – tape-recorded conversations, interviews, monologues, original artwork, photographs, written remembrances, videotapes, *etc.* Contributions need not be limited to experiences of abuse, but could include all recollections of life in an institution.

Contributions could come from individuals, groups, and/or communities.

Procedures should be in place to ensure that no allegations or accusations are made against named or identifiable individuals. Where such allegations or accusations are made, they should be deleted or expunged.

Prevention

THE VALUES AND PRINCIPLES set out in the *Convention on the Rights of the Child*, should be the foundation upon which all programs and services for children and youth in out-of-home care are built.

Considerations:

Governmental and non-governmental organisations that deliver programs and services to children outside the home to assist in their personal growth or well-being should review, and if necessary revise, their guiding instruments (such as laws, by-laws, missions statements, policies and standards) to ensure that they clearly and formally articulate and reflect the rights and best interests of the children in their care and are consistent with the values and principles set out in the *Convention on the Rights of the Child*.



GOVERNMENTS, RESEARCH INSTITUTIONS and non-governmental organisations should coordinate their efforts to compile and disseminate an inventory of promising and proven measures to prevent the abuse of children in out-of-home care.

Considerations:

A number of published and unpublished studies and reports have already been produced which relate to the vulnerability and experiences of children and youth in residential and out-of-home care. As a first step, Health Canada could create an inventory of these reports (which have been prepared by provincial Ombudsman offices, children's advocates and children's commissioners, by independent researchers under contract to governments, by non-governmental organisations and by others). The inventory, along with links to electronic copies or information on how to obtain copies of these materials, could be made available online through an electronic resource centre such as the National Clearing House on Family Violence.

The objective in compiling and coordinating information is to raise awareness and provide resources for education. Governments should not control or hoard information and a plurality of non-governmental research bodies should be supported.

RESEARCH AGENCIES, non-governmental organisations and governments should compile a comprehensive, inter-disciplinary, and public review of child abuse reporting laws and practices.

Considerations:

This review should explore the reasons mandatory reporting provisions are not working and suggest alternative approaches and frameworks that could lead to more voluntary disclosures, encourage reporting of all types of abuse affecting all children and youth, and produce interventions that are responsive to the young people's needs and serve their best interests.

This review should also examine whether current laws adequately identify the out-of-home care facilities to which they apply, whether they envision licensing and mandatory, independent inspections, and whether they require comprehensive investigations of systemic features of a facility where abuse is reported.



RESEARCH AGENCIES, non-governmental organisations and governments should sponsor research into the most appropriate strategies for healing the harms of institutional child abuse.

Considerations:

The need to understand how to help survivors overcome the negative effects of institutional child abuse is pressing. Traditional legal redress processes have shown their limited capacity to meet the needs of survivors. Newer, more comprehensive redress programs are being established without any clear understanding of the kinds of individual and collective therapeutic needs of survivors and their communities.

Collaborative research funding programs could be an effective means of promoting the necessary research.