

**Money for Justice?  
Money's Meaning and Purpose as Redress for Historical Institutional Abuse**

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### **Money's Meaning and Purpose as Redress for Historical Institutional Abuse**

In September 2015, the Australian Government tabled the *Redress and Civil Litigation Report* by the Royal Commission into Institutional Responses to Child Sexual Abuse. The report, which has 99 recommendations, was expedited<sup>1</sup> because the Commissioners believed a more rapid response was appropriate ‘to give more certainty on these issues ... and to improve civil justice for survivors as soon as possible’ (Royal Commission *Report* 2015e, 8). The *Report* is a significant achievement and a world first. Although many inquiries have been conducted before and others are underway today, none has intended to produce recommendations for redress that include such a broad range of institutional contexts (both closed and community-based); multiple jurisdictions; and government, church, and charitable organisations. In this chapter, I place the Royal Commission’s work on redress in historical perspective, and I consider the meaning and purpose of monetary payments in achieving justice for survivors.

Monetary payments are termed the ‘most contentious’ element of redress schemes (Australian Senate Report 2010, 225). Drawing on an analysis of 19 Australian and Canadian cases of institutional abuse of children (Daly 2014a, 2014b), an analysis of estimated costs of a redress scheme by Finity Consulting Pty Limited (hereafter Finity) (July 2015), the Commission’s *Consultation Paper* on redress and civil litigation (January 2015) (Royal Commission, 2015a), its public hearings on the *Consultation Paper* held in March 2015 (Royal Commission 2015b, 2015c, 2015d), and relevant research,<sup>2</sup> I explore several questions concerning monetary payments. How have these been determined, and what is the purpose of

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<sup>1</sup> The Royal Commission is to conclude its work on 15 December 2017; thus, its report and recommendations on redress and civil litigation were fast-tracked by more than two years.

<sup>2</sup> Research for this paper was undertaken before the Commission’s *Report* was released in mid-September; thus, with some exceptions, I rely on the *Consultation Paper* in analysing the Commission’s approach and thinking on redress schemes.

a monetary payment? I compare different money logics that have been used in calculating payments and the average payments in redress schemes. I then compare these with what survivor and their community supporters and legal representatives are seeking. My focus is mainly on survivors' perspectives, but I recognise the value of considering other views, such as those of individuals and organisations accused of or responsible for abuse, their legal representatives and insurers, and family members and others associated with the cases. In the final section, I consider how members of the general public may view survivors' claims for redress. First, however, I sketch a socio-historical context of the term 'institutional abuse' and why it has become the subject of redress.

### **I. Defining institutional abuse of children**

The meaning of institutional abuse is not self-evident. 'Abuse' may include physical, sexual, emotional, and cultural abuse; or it may be limited to sexual abuse alone. 'Institutional' contexts can be historical, contemporary, or both, and in 'closed', other out-of-home care, or community-based settings. Closed institutions are residential facilities for children. They include orphanages, homes, farm schools, training schools, hostels, facilities for those with disabilities, and youth detention. Other out-of-home care includes foster, kinship, and relative care. Community-based settings are organisations in the public, private, voluntary, and faith-based sectors that provide educational, sporting, recreational, cultural, and other activities for children.

My analysis here focuses on historical abuse of children in residential facilities from the last quarter of the 19<sup>th</sup> century to the 1990s. These institutions held children who were voluntarily placed by parents or other family members, or were court-ordered wards of the state, including those adjudicated delinquent. They came from socially and economically disadvantaged families, whose parents were deemed 'unfit' or whose mothers were not

married. Some had been taken from parents as part of forced assimilation policies of Indigenous peoples in Canada and Australia, or migration policies established by the British and Australian Governments, with support from religious orders and charitable organisations. Others were taken from parents who were unable to care for them, or who had neglected or abused them; still others had mental or physical disabilities at a time when institutions were believed to be the most appropriate place to care for them.

## **II. Discovering and responding to institutional abuse**

Inquiries and investigations of child maltreatment or the negative effects of institutions on children began in the mid-19<sup>th</sup> century in Canada and Australia, and they proliferated throughout the next century. Also, from the 1850s through the 1970s, numerous reports of maltreatment were made by children or family members to the police or other authorities, and there were clear signs of children's distress by frequent reports of 'runaways' from residential care. In some cases, sexual offending was prosecuted or an offending individual was dismissed or moved to another institution. However, institutional practices did not change.

Change began to occur in the early 1980s, when four elements coalesced to define institutional abuse as a social problem that demanded a response: changing concepts of childhood, new concepts that facilitated 'seeing' abuse, significant cases of clergy sexual abuse, and what I call the 'sexual turn' in the institutional abuse story.

For concepts of childhood, a societal shift occurred in the early 1960s in affluent nations of the developed world toward a more child-centred world, a 'prizing of childhood' that came with higher standards of living, lower birth rates, and better treatment of child illnesses (Corby, Doig, and Roberts 2001, 43). For new concepts, institutional abuse of children was 'discovered' in the 1980s. It built upon the 'discovery' of child *physical* abuse in the 1960s. Concept diffusion, that is, seeing child physical abuse as widespread, occurred

in the late 1960s and early 1970s (Parton 1979). The ‘discovery’ of child *sexual* abuse began in the 1970s. The term ‘child sexual abuse’ was used for the first time in published research by de Francis (1969) and Gil (1970). The next step—of seeing child sexual abuse as widespread—began in the 1970s and continued into the 1980s. Like child physical abuse, attention centred on intra-familial sexual abuse. In 1975, David Gil coined the term ‘institutional abuse’ of children, which he defined broadly to include not only acts of abuse but also ‘abusive conditions’ and policies, which occurred in a wide array of settings, including residential care (Gil 1975, 347).

Major media cases of sexual abuse of boys by Catholic priests in the United States first arose in the mid-1980s. Although the priests’ offending took place in community settings, their admissions made more credible children’s reports of offending in closed institutions. Finally and related to clergy abuse, the ‘sexual turn’ in the abuse story transformed what had previously been concerns by authorities for ‘too harsh’ corporal punishment of children into the recognition of ‘a more disturbing form of abuse’ (Corby et al. 2001, 83), *sexual abuse* by adults of children in their care. This galvanised a belief that ‘something must be done’ to address institutional abuse.

Some observers have termed the 1980s a decade when a ‘moral panic’ concerning child sexual abuse took hold (Jenkins 1998). A moral panic occurs when fear over a social problem is ‘wildly exaggerated and wrongly directed’ (Jenkins 1998, 7). At the time, such fears included organized paedophilia and satanic ritual abuse. My analysis of institutional abuse case in Canada, Australia, and elsewhere (Daly 2014b) suggests that although most were subject to media attention, it was not sexual abuse of children alone that motivated government, church, or charitable organisations to respond. Other factors triggered responses: media stories of failed investigations and cover-ups by government and church authorities in

the past, victim-survivor advocacy group campaigns, the pressure of civil litigation, and previous inquiries.

The temporal ordering of discovering and responding to institutional abuse is, first, the emergence and recognition of a social problem; then, heightened media, political, and public concern ‘to do something’ about it; and then, a variety of triggering factors that precipitated responses by authorities. By responses, I mean a sustained set of initial and subsequent activities that were taken to address a perceived social problem.

The major types of responses were criminal prosecution, civil litigation, public inquiries, and redress schemes; and typically, each case had more than one response. Of the 19 cases in my study, 14 were associated with criminal prosecutions that resulted in convictions; for the remaining five cases, no charges were laid in three, and two were redress scheme only cases. Sixteen cases were associated with civil litigation, and seven had public inquiries. Fourteen cases had redress schemes with monetary payments; and in two others, survivors received monetary payments from civil settlements only. However, for the remaining three—all Australian nation-wide cases (*Stolen Generations*, *Child Migrants*, and *Forgotten Australians*)—there remains unfinished business. Survivors view the monetary payments from state redress schemes in Queensland, South Australia, Tasmania, and Western Australia, and from non-government schemes, as inadequate. And there are many others who have not sought or received any monetary payment.

### **III. Victim redress and redress schemes**

Victim redress can be defined broadly<sup>3</sup> as all the activities, processes, and outcomes that recognise and provide a compensatory mechanism for harms or wrongs against an individual

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<sup>3</sup> I explicitly include all activities and processes, not just the outcomes, of redress schemes or civil litigation. The ‘how’ is as important as the ‘what’ of redress.

or group.<sup>4</sup> Redress is a type of corrective or civil justice, which aims to rectify what is termed private wrongs, as compared to criminal justice, which aims to address what is termed public wrongs by criminal prosecution, trial, and punishment.<sup>5</sup> Civil litigation and redress schemes are two modes of redress, and my focus here is on redress schemes.

Applied to institutional abuse, a redress scheme is more than a monetary payment. Broadly conceived, it includes all the processes that occur when claimants seek monetary payments, benefits, and services: how well informed they are and whether they understand the redress process, how they are treated, and whether they have a role in shaping the process and desired outcomes. In addition to monetary payments, benefits, and services, redress outcomes may also include public apologies, memorialisation, and commemoration, and other types of memory projects. The latter activities have a wider audience and purpose. They seek to remember and reinterpret past wrongs, and they attempt to imagine new futures and identities of wronged individuals or groups.<sup>6</sup>

Of the 19 cases, 14 had redress schemes or packages, and one had two schemes, for a total of 15. Redress schemes are structured by content and constraints. Content has three dimensions: (1) the logics used in deciding monetary payments; (2) the types of processes used to validate and assess applications; and (3) the inclusion (or not) of benefits, services, or other outcomes. The content of a scheme may change over time, and it may include a

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<sup>4</sup> For historical institutional abuse of children, the term redress is commonly used; however, for international crime and violations of human rights, reparation is more common (Torpey 2006), although redress may also feature (McCarthy 2012). I have not seen the two compared, nor do I see a bright line between them. I suspect that the choice of term arises from historical usage, coupled with a writer's academic discipline or field of research.

<sup>5</sup> I do not consider here the relationship between corrective justice and distributive justice in the design and implementation of redress schemes, nor in how these justice aims relate to the purpose of a scheme, but will save that analysis for another time. I note that neither corrective nor distributive justice has been explicitly discussed by redress scheme planners or in the research literature more generally (but see Winter 2014).

<sup>6</sup> Arguably, a broader response to institutional abuse might be envisaged, which went beyond redress schemes by instituting more systemic reforms to the provision of health and welfare services. However, I know of no redress scheme to date where such systemic change has been considered. Such a response could conceivably affect not only institutional abuse survivors, but also other adults affected by childhood adversity and disadvantage.

combination of money logics in deciding payments. The schemes are constrained by the amount of money that government and non-government entities are willing to spend and the number of claimants who apply. Circumscribing content and constraints are questions about what, precisely, is the subject of redress. Is it any type of abuse or neglect, or sexual abuse only? Does it include peer abuse as well as that by adults? Is it exposure to and experiences of abuse and neglect as reflected by the number of years spent in care? If so, what types of care, and in which institutions? Further, what should be redress for government policies and practices, in consort with those of church and charitable organisations, which targeted particular groups of children for removal from families, migration schemes, and income generation and medical experimentation?

Monetary payments are just one element of a redress scheme; and from a survivor's perspective, what is considered an adequate payment can be contingent on the provision of benefits, services, or other elements. Although victims and survivors say 'it's not the money that matters' in pursuing redress, in time, a payment can matter because it is linked to a sense of validation (being believed) and vindication (recognition by an authority that a wrong has occurred).

#### **IV. Monetary payments**

Compensation is used loosely by many to refer to a monetary payment that may be part of a redress scheme, when, more precisely, compensation refers to an amount of money decided by a court for damages in a civil suit, where fault or liability for an injury has been or is likely to be established on the balance of probabilities. When monetary payments are part of redress schemes, the accurate term is an *ex gratia* payment. This is understood to be an 'act of grace' or 'kindness' by authorities without an admission of liability, and the standard of proof (or

evidentiary criteria) may be at a lower threshold ('plausibility' or 'reasonable likelihood').<sup>7</sup> Because such payments are discretionary, eligibility criteria and payment levels may change. Some schemes have used grids, matrices, and scoring systems, coupled with high maximum caps, which more closely align with a tort logic of injury and damages. Examples of these are Canada's *Indian Residential Schools* (specifically, the Independent Assessment Process) and Ireland's *Residential Institutional Redress Board*.

### **Money logics**

The logic of monetary payments has two dimensions: *how to decide* and *how much to pay*. *How to decide* can either be individualised or equal (same) treatment of eligible claimants. Individualised assessments use grids, matrices, or scoring systems to assess abuse and severity, or to assess abuse, severity, and its impact. For equal treatment, claimants receive the same amount as a flat payment, or another equality-based formula is used, such as the number of years spent in an institution. *How much to pay* can be open-ended, with a high maximum cap; or it can have a much lower cap or be a flat payment. Of the 15 redress schemes in my study (Daly, 2014a), some used a combination of money logics; thus, there were a total of 20 monetary payment outcomes. Of the 20, 12 used individualised assessments, with lower maximum caps,<sup>8</sup> and one used an individualised assessment, with a high maximum cap. For the remaining seven, four paid the same amount to each eligible

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<sup>7</sup> The Victoria State Government's *Public Consultation Paper* (2015, 8) notes that 'it is misleading to label redress as wholly *ex gratia*, given that institutional participation in redress carries some implication of responsibility'. In addition, executive redress for state wrongs may be justified as compensation. For example, described in Winter (2014, 164-68), the Civil Liberties Act Redress Provision provided a payment to Japanese Americans who 'evacuated, relocated, and interned' during World War II. The payment (US \$20,000, when applications were open from 1990 to 1993) was explicitly not *ex gratia*, but rather it was stipulated by the legislature to compensate for the US Government's liability.

<sup>8</sup> One of these, *Jericho Hill Class Action*, level 2 and 3 payments, did not report outcomes; thus, outcomes for 11 individualised assessment cases are shown in Table 1.

survivor ('flat payment'), and three used other types of equality-based formulas such as years spent in an institution or dividing a fixed sum by the number of eligible survivors.<sup>9</sup>

Money logics affect the processes used to validate and assess applications. Flat payments and other equality-based approaches do not require probing a claimant's experiences of abuse, and depending on the scheme, can be based on records of placement histories or time spent in institutions. However, relevant records may be lost, destroyed, or difficult to locate. Individualised assessments require that claimants detail incidents of abuse and severity (and when relevant, subsequent impact in adult years) on an application form. Depending on the scheme, additional supporting evidence may be required. Based on the available evidence, we have learned that the process of completing applications can create emotional difficulties when claimants are asked to relive memories of what happened to them (see Daly 2014a, 167-74).

As for *how much to pay*, there is no clear justification in any of the Canadian or Australian Government schemes for why certain amounts were chosen as maximum caps, and how these might relate to the type, frequency, or impact of abuse (but see *Jericho Hill* discussed below). The first government redress scheme for institutional abuse was negotiated in Ontario in 1993 between the Ontario Government, Catholic Church dioceses in Toronto and Ottawa, and a survivor group named Helpline. The *how much to pay* money logic in that case (*St John's and St Joseph's*) was tied to the Province of Ontario's criminal injuries scheme, which in 1993 had a maximum of CAD \$25,000 (and in 2014, the maximum is still \$25,000).<sup>10</sup> Other Canadian government redress schemes emerged in the 1990s, modelled on

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<sup>9</sup> Complicating the matter, in some redress schemes, individualised decisions are made within a fixed budgetary sum. This was the case in *Queensland Institutions and Redress WA* (Royal Commission *Consultation Paper* 2015a, Appendix A, 235-40).

<sup>10</sup> An Australian non-government redress scheme, *Melbourne Response*, set an initial cap of \$50,000 to align with the maximum that could be awarded in Victoria's Victims of Crime Compensation Scheme (Royal Commission *Report* 2015e, 578). Unless otherwise noted, I report money amounts in a country's local currency and not adjusted for inflation.

*St John's and St Joseph's* and *Grandview*, the latter having a higher maximum (\$60,000) than the province's criminal injuries scheme.<sup>11</sup>

In a Canadian case, *Jericho Hill*, which centred on sexual abuse in a residential institution for Deaf students, special counsel Thomas Berger was asked to provide advice on the parameters of a money payment. Berger (1995, section VII) reviewed amounts that had been awarded in Canadian courts for individual cases of contemporary sexual abuse. His report considered different categories of damages, but concluded that 'pain and suffering' (non-pecuniary) was most appropriate for the claimant group. He decided to use precedent, proposing that *Jericho Hill* use a tiered approach like another Canadian case of institutional abuse, *Grandview*, with amounts ranging from \$3,000 to \$60,000.

### **Purpose of a money payment**

The money logics of *how to decide* and *how much to pay* are linked to the *purpose* of a money payment. Royal Commission Chair, Justice Peter McClellan probed witnesses in the redress and civil litigation hearings in March 2015 on the question of purpose. For example, on the first day of the hearings, he asked Nicky Davis, a leader of Survivors Network of those Abused by Priests (SNAP):

In the context of justice for the survivor, what do you see the amount of money doing? What is it achieving? How is it contributing to justice? (Royal Commission 2015b, 13610)

McClellan is asking two related questions: what is an amount of money *achieving* for survivors, and how does it *contribute 'to justice'*. The Commission's *Consultation Paper* (2015a, 133) focused on the purpose of a money payment as important to help claimants

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<sup>11</sup> Since 1993, and in addition to Australia and Canada government schemes, redress schemes have been established in Belgium, Germany, Ireland, the Netherlands, New Zealand, Norway, States of Jersey, and Sweden. In Australia, non-government schemes have been established by church and charitable organisations (for example, *Towards Healing*, *Melbourne Response*, and *Salvation Army*).

‘understand the purpose of the scheme’ and what a monetary payment ‘is meant to represent’.<sup>12</sup> It suggested that

the purpose ... should have some connection with the amount ... For example, a smaller payment might more readily be accepted as an ‘acknowledgement’, while a larger amount might be expected as a ‘tangible recognition of the seriousness of the hurt and injury’. (p. 134)

Based on previous redress schemes and what was said in the Commission’s public hearings in March 2015, I identify three purposes of monetary payments, from a victim’s perspective:

- (1) recognition of past abuse and actions of an institution as being wrong;
- (2) support and assistance to bring ‘closure’ and ‘healing’ to survivors and their families (that is, providing a limited form of rehabilitation); and
- (3) tangible recognition of the seriousness of the hurt and injury that can make a substantial difference in a person’s life; or as Justice McClellan (2015, 3) says, ‘to help those who have suffered heal and live a productive and fulfilled life’ (that is, providing a more expansive form of rehabilitation and social welfare).<sup>13</sup>

As we shall see, when they relayed their views to the Royal Commission, members of advocacy, community, and legal groups talk about payment amounts and their rationale in ways that reflect purpose (3), but they desire an assessment process with the lowest standard of proof, ‘plausibility’.

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<sup>12</sup> Justice McClellan’s language implies a one-way determination of the meaning and purpose of a monetary payment, more specifically, of the state’s (or church’s) ability to communicate its meaning and purpose. However, survivors and their legal representatives can also be active participants in the negotiation process when they have bargaining power (Daly 2015).

<sup>13</sup> By assisting survivors who were *disadvantaged* by abuse (not simply *injured* by abuse) to ‘live a productive and fulfilled life’, McClellan is using the language of distributive justice. My appreciation to Stephen Winter (10 August 2015, personal communication) for calling my attention to the ways in which corrective and distributive justice are interrelated in redress schemes.

## Monetary payments in redress schemes

Table 1 displays the average monetary payments in Australian, Canadian, and Irish redress schemes, both government and non-government. The figures provide evidence against which to assess witnesses' comments in the Commission's public hearings on redress. The bolded figures are averages, as reported in Daly (2014a, 151).<sup>14</sup> The non-bolded figures are sourced from the Commission's *Report* (2015e, Appendix N and Chapter 7),<sup>15</sup> except for the Defence Abuse Response Taskforce, which was sourced from an Australian Senate (2014) report. Adjustments for inflation are important to take into account (but it appears that the Commission did not do so for Australian church and charitable organisations), along with the year used for calculating the exchange rate calculation. We may assume that recent estimates (2012 to 2014) are comparable to the bolded figures adjusted for inflation in 2012. Another matter is whether or not estimates are net of legal fees. They are for the bolded figures and the estimate for Ireland's *Residential Institutions Redress Board* (hereafter *RIRB*), but neither the Commission's *Consultation Paper* (2015a) nor *Report* (2015e) provides this detail.

Four points can be drawn from Table 1. First, comparing average payments for government institutions, the average (mean) for eligible claimants in the five Australian schemes was \$23,100, while the mean for those in the six Canadian schemes was nearly twice as high, \$45,800.<sup>16</sup> Second, more recent Australian schemes for government institutions, *WA Country High School Hostels* and the *Defence Abuse Response Taskforce*, report higher means than previous Australian schemes, ranging from about \$36,000 to

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<sup>14</sup> For ease of reading, I have rounded the figures to the nearest 100, rather than reporting precise amounts ranging from \$1 to 99.

<sup>15</sup> I compared figures given in the *Consultation Paper* (2015a) and *Report* (2015e). Except for two (South Australia and Salvation Army Eastern and Southern Districts), there were no differences. With more applications finalised, South Australia's average decreased from \$14,400 to \$14,100, and the Salvation Army's increased from \$49,100 to \$51,100 (which includes \$5,000 for counselling). My average for the Australian state schemes, which was calculated in August 2014, used the (then) current figure of \$14,400.

<sup>16</sup> Two schemes, one in Canada (*Jericho Hill*) and one in Australia (*South Australian Institutions*), are based on sexual abuse only; all other individualised government schemes are based on physical and sexual abuse.

\$41,000. Third, for the Australian non-government schemes, all but one of which (*Salvation Army*) addressed both physical and sexual abuse, the range is \$38,800 to \$48,300 (Royal Commission *Report 2015e*, 578-79). For all the individualised schemes with lower maximum caps, purpose (2) appears to be the typical rationale for monetary payments (Daly 2014a; Royal Commission *Consultation Paper 2015a*, Appendix A, which shows information on more cases than the *Report 2015e*, Appendix H).

Finally, the two individualised government schemes with the highest averages are Canada's *Indian Residential Schools*, Independent Assessment Process (\$97,500) and Ireland's *RIRB* (\$88,000). Each is closely aligned with a tort logic of injury, impact, and a potential loss of opportunity. Supporting medical or psychological documents are required to demonstrate proof of abuse and impact, and legal representation of survivors is required (for which each scheme pays the costs up to a stipulated maximum), although survivors can self-represent. The rationale for the monetary payment in the *RIRB* is purpose (3):

[to] provide some tangible recognition of the seriousness of the hurt and injury caused to the survivors of child abuse, and that it may enable some survivors to pass the remainder of their years with a degree of comfort which would not otherwise be readily attainable. (Compensation Advisory Committee 2002, vi)

In general, higher average monetary payments, reflecting purpose (3), are associated with a higher standard of proof, supporting documentation, and a more legalistic process.

## **V. What do Australian survivor advocacy, community services, and legal groups say?**

During the hearings on redress and civil litigation in March 2015, the Royal Commission invited witnesses representing government and non-government entities (church, charitable, youth groups); insurance; survivor advocacy and legal groups; and peak bodies in child sexual abuse, psychology, social work, and community and victim services. The final witness

list had 38 organisations or individuals, who were selected from a larger number of written submissions (over 250 received). In addition, comments were received from about 100 organisations and individuals via an online form (Royal Commission 2015b, 13556). I listened to the testimony live, as it was streamed on the internet on 25 and 27 March 2015, and I read the transcripts for the three days of hearings. My analysis here focuses on what was asked and said about the purpose and quantum of a monetary payment. It is provisional and would need to be augmented by a systematic analysis of the written submissions.

For context, the Commission's *Consultation Paper* (2015a) put forward an approach to assessment, which included a matrix for assessing severity of abuse, severity of impact, and distinctive institutional factors. It did not explicitly discuss flat payments or equality-based formula. Finity (revised report, July 2015)<sup>17</sup> modelled the costs of a redress scheme, based on assumptions of 60,000 eligible survivors, a maximum cap of \$200,000, and an average of \$65,000. The Commission was correct in say that average payments, not maximum caps, should guide estimates of cost. My analysis of the relevant Australian and Canadian cases shows that average payments were 24 to 65 per cent of the maxima (Daly 2014a, 143). Assuming that 60,000 eligible sexual abuse survivors received a mean of \$65,000, the total cost of the monetary payment portion of the redress scheme is estimated at \$3.5 billion (this includes a reduction of \$400 million for previous payments received). Additional costs for counselling and administration are estimated at \$330 million and \$180 million, respectively (Finity, 2015, 6).

What emerges from the testimony of survivor groups and their community and legal representatives is a significant gap between what they would like to see, and what is feasible from a legal and fiscal perspective. Many wished to see a wider definition of abuse to include sexual, physical, emotional, and at times, cultural abuse. They preferred plausibility as the

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<sup>17</sup> Figures differ somewhat in Finity's first (January 2015) and second (July 2015) report, which was tabled with the Royal Commission's *Report*.

evidence standard, and they desired high monetary payments to provide survivors a better life.

Nicky Davis of SNAP replied to the Chair's question about the purpose of a payment this way:

The answer to that is completely individual. It really doesn't come down to the amount. For some people, it has been that they have needed to pay off a debt or they have wanted to give some money to their children ... There are all sorts of things. But it's something that the survivor has to spend some time ... thinking about: *what is going to make a difference to my life?* (Royal Commission 2015b, 13611, emphasis added)

Here we see that Davis has in mind how justice is achieved for survivors in *spending a payment* that can 'make a difference', as compared to a scheme planner, who is likely to have in mind a particular purpose (or purposes) in *deciding to make or offering a payment*.

Noelle Hudson, of CREATE Foundation (a national body representing children and young people in out-of-home care), responded to the Chair's question, 'what would be seen to be the purpose of a redress money payment?' in a similar fashion, saying:

We have found through our research that young people exiting care have had very poor educational outcomes ... have been in homelessness and have experienced a reliance upon welfare. An investment in their life—to help them assist to transition to a better life, to access good educational outcomes or employment outcomes—would be a wonderful use for this money. (Royal Commission 2015d, 13794)

Like Nicky Davis, Hudson imagines the ways in which a payment could be used (optimally) as an investment in making a better life.

Karyn Walsh, CEO for Micah Projects, called for a wider definition of abuse to include physical and emotional abuse. She drew attention to information collected from survivors by Lotus Place:

We had listening posts of 162 people who came through the centre [Lotus Place] and gave their views on a range of issues ... It is really complex, and people are coming from very many perspectives and experiences in their life. (Royal Commission 2015b, 13577-78)

Of the 162 posts, four directly mentioned money amounts; and here is what they said (Lotus Place 2015, 8-10):

\$65,000 is reasonable for average payment.

Should start at \$100,000.

Everyone should get a decent and fair amount and should be the same, e.g., \$400,000.

Redress payment should be \$200,000 to \$2 million.

Compared to the average amounts received by survivors in previous redress schemes, and with one exception, the proposed amounts are very high.

Similarly, Leonie Sheedy, CEO of Care Leavers Australia Network (CLAN), reported that her organisation 'asked care leavers what they think is a fair amount of redress'. She continued:

... From almost 370 responses received so far, the most nominated amount was between \$100,000 and \$250,000. Notably, 11 per cent said no amount would ever be enough, and 36 per cent couldn't nominate any amount of compensation. (Royal Commission 2015d, 13786)

I note that an average of AUD \$100,000 to \$250,000 as a monetary payment has no precedent in any redress scheme for institutional abuse to date.

Caroline Carrol, of the Alliance for Forgotten Australians (AFA), said that ‘people have said that it is not about the money, but it is the only thing that churches and charities and governments ... can do to say sorry’. She went on to say:

They have said sorry, but nothing has changed in the lives of most Forgotten Australians. They are still living below the poverty line; they have still got drug and alcohol issues. (Royal Commission 2015c, 13759)

Thus, in Carroll’s mind, a money payment is a mechanism that can give a real effect to an institution’s apology, and it may go some way to changing a survivor’s financial status and mental health. Written submissions by the AFA and Open Place, a community service for ‘Forgotten Australians’ based in Melbourne, said that a financial payment is appropriate to ‘enable survivors to build a fulfilling life’ (AFA 2015, 12) and ‘to allow a survivor to have life experiences that otherwise would not be possible’ (Open Place 2015, 6). Unusually, this submission also said that a payment should ‘hurt the institution and ... make the point that failure to learn the lessons of the past will continue to hurt the institution financially’ (6). A payment intended to ‘hurt’ an institution was not queried during the Commission’s public hearings on redress.

The Coalition of Aboriginal Services, based in Victoria, gave plausibility as the standard of proof, noting that ‘the preference was for the highest average payment [of \$80,000], with a maximum of \$200,000’, and that ‘being part of the Stolen Generations and suffering from cultural abuse’ should be considered under ‘distinctive institutional factors’ in the Commission’s matrix (Royal Commission 2015b, 13599). Tom Allen, speaking for Kimberley Community Legal Services in Western Australian, said that ‘we’ve called for a high-end monetary payment or an upper cap above what’s been published. ... We say [a \$200,000 cap] would be insufficient’. The reasons he gave are as follows:

Number one, we say one of the purposes of the monetary payment is to provide a substantial difference in people's lives, and number two is to recognise the high cost of living in the Kimberley. If a substantial difference in somebody's life is that they're able to be housed, then that, we submit, reflects upon what the cap should be. (Royal Commission 2015b, 13616)

A potential problem with Allen's argument is that he views the upper cap of a payment to be unrelated to abuse severity and impact. Instead, the purpose of a payment—to make a substantial difference to a survivor's life—must consider the high costs of living in some areas. This reverses the way in which individualised redress schemes normally calculate *how much to pay*, that is, it is based on an assessment of abuse severity or abuse severity and impact. Many survivors would also challenge Allen's ideas because, they would argue, payments should not reflect where a survivor lives.

Contrary to others, Julian Pocock, of Berry Street, a community organisation in Melbourne, did not use a forward-looking purpose. He said the following:

The [proposed] payments in the redress scheme ... are payments that should be there to acknowledge the harm that has been caused and provide some measurable expression from institutions that they do truly regret what has happened. (Royal Commission 2015d, 13826)

Thus, in part, like Carroll's comment above, Pocock views a payment as giving effect to an institution's regret for the harm that occurred.

## **VI. Discussion and implications**

Monetary payments are one element in redress schemes, which typically include the provision of counselling, other benefits or services, and apologies. The problem with money is that, unlike other redress elements, it has a market meaning. Sunga (2002, 40) argues that

unless a symbolic meaning is given to a payment, ‘the money will tend to indicate some form of exchange for abuse injuries’. One consequence is that, if survivors do not receive a money payment that reflects what they feel they (and their abuse) are ‘worth’, they will be angry and disappointed. To address this problem, Sunga (2002, 60) suggests that scheme planners should articulate a clear relationship of meaning to accompany a payment, and moreover, that the payment should be seen as symbolic: ‘a form of recognition for injury and a solace for pain’. Such a ‘clear relationship of meaning’ has not been made in previous Australian and Canadian schemes, and indeed, all the individualised tiered schemes have carefully ‘calibrated’ money payments to injury and impact (Winter 2009, 55).

Although the Commission’s *Consultation Paper* (2015a, 134) suggests that the purpose of a money payment should be linked to the amount paid (‘a smaller payment might ... be accepted as an “acknowledgement”, while a larger amount might be expected as a “tangible recognition of the seriousness of the hurt and injury”’), little consideration was given in the *Consultation Paper*, public hearings, or calculations by Finity of how this idea would translate in practice. In addition, sole attention was given to an individualised scheme, with a matrix similar to Ireland’s *RIRB*, and with average payments of \$50,000 to \$80,000. More consideration might have been given to equality-based formulas and what would be viewed as an adequate level of a base or recognition payment, and to a scheme that combined equality-based and individualised assessments.<sup>18</sup>

The discussion of monetary payments in the submissions and hearings before the Royal Commission gives me cause for concern for several reasons. First, survivors’ aspiration for high money payments, using plausibility as the standard of proof, has no precedent in any previous redress scheme. Relatedly, the average amounts proposed are very high, higher than any previous redress scheme. Expectations will need to be realistic and have

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<sup>18</sup> The Royal Commission’s *Report* (2015e) proposes a matrix, but not a scheme that combines equality-based and individualised assessments. It anticipates a minimum payment of \$10,000, a maximum of \$200,000, and an average of \$65,000. Of the 100 points in the Matrix, 20 are allocated for elements other than abuse or its impact.

some relationship to precedent. Second, in the final design of a redress scheme, it will be crucial to establish agreement on the purpose (or purposes) of a monetary payment. This will require charting a path through the competing interests and expectations of institutions and their insurers, and survivor, community, and legal groups in designing a scheme that is ‘just, practical, and affordable’ (McClellan 2015, 19).

The final design and implementation of a redress scheme will be highly complex because of the breadth and variation of ‘institutional contexts’ and the Commission’s recommendation to create a national redress scheme, to be led by the Australian Government. The Abbott administration did not support a national scheme in March 2015. However, with the release of the *Report* on the same day as a change in party leadership (14 September 2015), the *Report*’s recommendation to establish a national scheme may be met more favourably by the Turnbull administration. A letter by state and territory attorney-generals (25 September 2015) has urged the federal attorney-general to give the ‘earliest possible indication from the Commonwealth as to whether it intends to establish and fund a national redress scheme’ (Berkovic, 2015).

Consideration must be given to whether members of the general public will support redress for institutional abuse as being the fair and right thing to do. The total estimated cost of a national redress scheme is \$4.01 billion dollars over ten years (Finity 2015, 7); and if federal and state/territory governments are the funders of last resort, they could pay 47 per cent of the total redress budget (Finity 2015, 64). Governments may not have the appetite for the cost of redress, and members of the public may question why a particular group of individuals is deserving of redress.

Survivor groups will need to find effective ways to communicate to the public what their aspirations are for justice and redress. Monetary payments can have varied purposes: recognition of past abuse and wrongs of institutions; an institution’s giving meaningful effect

to an apology; assistance to survivors in ‘healing’ and ‘recovering’ from abuse; and making a substantial and tangible difference in survivors’ lives, including the ability ‘to live a productive and fulfilled life’ (McClellan 2015, 3). Of these, the last is often given by survivors, but its implied social welfare purpose will need to be carefully crafted and explained to persuade the public.

Table 1. Monetary payment averages for redress schemes that use an individualised approach for assessing abuse severity or abuse severity and impact

	AUD, adjusted for inflation in 2012 dollars (bolded)
<b>AUSTRALIA</b>	
Government institutions, 2003 to 2013	
<b>average (mean) for five individualised schemes in Queensland, South Australia, Tasmania (phases 1-3 and 4), and Western Australia</b>	<b>23,100</b>
Other government institutions (individualised only)	
WA Country High School Hostels, 2012 to 2013	36,300
Defence Abuse Response Taskforce (DART), 2011 to 2014	40,860
Non-government institutions: faith-based or charitable organisations (individualised only)	
Melbourne Response (Catholic Church), 1995 to 2014	38,800
Salvation Army (after deducting \$5,000 for counselling), Eastern and Southern Territories, 1995 to 2014 (updated from \$44,100 given in the <i>Consultation Paper</i> ).	46,100
Towards Healing (Catholic Church), 1997 to 2014	48,300
<b>CANADA</b>	
Canadian state institutions, excluding Independent Assessment Process for Indian Residential Schools, 1993 to 2001	
<b>average (mean) for six individualised schemes: three in Ontario, one each in New Brunswick, Nova Scotia, and British Columbia</b>	<b>45,800</b>
Independent Assessment Process for Indian Residential Schools), 2007 to present	
<b>average (mean)</b>	<b>97,500</b>
<b>IRELAND</b>	
Residential Institutions Redress Board, 2003 to present (average [mean] as of December 2014, €62,237, using the Commission's <i>Report</i> [2015e, p. 228] exchange rate conversion)	88,000

*Note:* The Royal Commission sought monetary data from governments and non-government institutions under notice. It has reported the data in two documents (*Consultation Paper*, 2015a, Chapter 6 and Appendix A; updated in the *Report*, 2015e, Chapter 7 and Appendix N). Table 1 combines three sources: (1) the Commission's data from Australian non-government institutions and WA Country High School Hostels; (2) data from my analysis of state schemes (Queensland, South Australia, Tasmania, and Western Australia), as reported in Daly (2014a, p. 151); and a Senate (2014) report, section 3.53, p. 43, as of 22 September 2014, for the Defence Academy Response Taskforce (DART). The Commission's *Report* (2015e) updated figures for the Salvation Army Eastern and Southern Districts and for South Australia's government scheme; otherwise, there were no differences in the figures in the *Consultation Paper* and *Report*. The Commission's figures and mine are the same for the Australia state schemes; however, my figures here are adjusted for inflation.

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