

# Representing Survivors: A Critical Analysis of Recommendations to Resolve Northern Ireland's Historical Child Abuse Claims

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## Abstract:

Historical child abuse is an issue of major public concern internationally. Remarkably, survivors' needs are significantly underrepresented in practices of redress.<sup>1</sup> This article makes an original contribution to filling that empirical research deficit in the Northern Ireland context of historical institutional child abuse. It theoretically and substantively analyses the Historical Institutional Abuse Inquiry redress recommendations made for institutional child abuse between 1922 and 1995. The recommendations are critiqued from the standpoint of survivors and the work of the survivor-led Panel of Experts on Redress. Key aspects of the proposed redress scheme are analysed and the likely effects on survivors' rights and interests are explored. This article concludes that while there are positive elements to the redress proposals, recommendations do not represent survivors' needs. If implemented, they could re-victimize survivors by disadvantaging or disempowering those who suffered the most serious abuse and impose a process that would create a hierarchy of claims. Alternative approaches, more representative of survivors' needs, are introduced to correct these flaws are discussed.

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<sup>1</sup> One notable exception was the approach taken in Canada where a series of cross-country dialogues were conducted to explore approaches for mitigating the impacts of the Canadian Indian Residential School experience on Indigenous peoples. The process provided an opportunity for open discussion for the over four hundred people who participated, through which thoughts, ideas, difficulties, successes, happiness, pain and sorrow were shared, enabling their representatives to develop a compassionate and meaningful approach to the past abuses of Indigenous children in the Canadian residential school system. See [http://www.glennsigurdson.com/wp-content/uploads/2016/06/Reconciliation\\_healing2.pdf](http://www.glennsigurdson.com/wp-content/uploads/2016/06/Reconciliation_healing2.pdf).

## **Introduction**

Historical institutional child abuse has become an issue of international public concern. There has been scholarly work on the context, nature and extent of historical child abuse in the Republic of Ireland (Gallen, 2016, 2010; Keenan, 2014; McAlinden, 2013; Murphy, 2014; O’Sullivan, 2015). McAlinden (2013) notes that the issue was primarily limited to considerations of child abuse in a private familial setting before emerging allegations of clerical child abuse in the 1990s turned attention towards the abuse of children in locations that were previously considered ‘safe places’ such as orphanages and residential care homes. As Flanagan-Howard et al. (2009) remark, institutional abuse cannot be dismissed as a ‘one-off’ wrongful incident but rather relates to systemic wrongdoing perpetrated over time. This systemic focus, in addition to public broadcasting of powerful survivor accounts, gave the issue widespread visibility. The current public, media and academic coverage of the issue stands in sharp contrast to the initial silence, secrecy and denial that plagued the matter in Ireland, and beyond. Individual and institutional allegations prompted a series of worldwide public inquiries from the mid-1990s into the new millennium. For the most part, governments and institutions, forced by a flood of litigation in the courts, have taken the position that where systemic historical wrongs perpetrated on innocent children in state care or state-sponsored care occurred, they constitute serious human rights abuses that must be redressed. The question is *how* to redress and to *what* extent. The end product could be a court-ordered settlement agreement<sup>2</sup> or legislation setting out both the substance and procedure of the redress.<sup>3</sup> Decision-makers rely on legal

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<sup>2</sup> This was the case in the Canadian Indian Residential School historic abuse case where courts in all of the provincial jurisdictions passed judgment on the settlement agreement and exercised jurisdiction over it.

<sup>3</sup> The Republic of Ireland had such legislation. See <http://www.irishstatutebook.ie/eli/2002/act/13/enacted/en/pdf>. In the Republic of Ireland, redress schemes responded to the abuse of children in Industrial Schools (under the *Residential Institutions Redress Act 2002*) and Magdalen Laundries.

precedent, both domestic and international, which can vary considerably depending upon local norms and practices as well as on the political climate and willingness to achieve reconciliation with those harmed. Governments and institutions in Australia, Canada, the US, UK, Sweden, Spain, Norway, Finland, France, Germany, Iceland, Austria and other Western European countries have developed a range of out-of-court measures to address historical child abuse, with varying degrees of success and acceptance (Daly, 2014; Llewellyn, 2002; Sköld & Swain, 2015; Winter, 2017).

In Northern Ireland, the Historical Institutional Abuse Inquiry (HIAI) was formally established in January 2013. Its remit was to investigate child abuse that occurred in residential institutions in Northern Ireland over a 73-year period from 1922 to 1995. The Terms of Reference (HIAI, 2012) state that the HIAI should make findings and recommendations on the following: (I) an apology; (II) findings of institutional or state failings in their duties towards the children in their care and if these failings were systemic; (III) a memorial or tribute to those who suffered abuse; and (IV) the requirement or desirability for redress to be provided by the institution and/or the Executive to meet the particular needs of victims. The HIAI Report and recommendations were published on January 20, 2017, after four years of hearings and evidence-gathering. The inquiry heard from 527 witnesses, and the acknowledgement forum heard from 428 of those applicants. It investigated 22 institutions, as well as the circumstances surrounding the sending of child migrants from Northern Ireland to Australia, and the activities of a particularly heinous abuser, Fr Brendan Smyth. Crucially, an additional 43 homes or institutions coming under the Inquiry's remit were not investigated, with the inquiry claiming investigating them would not add to their understanding of the nature and extent of systemic abuse of children in homes and institutions in Northern Ireland (HIAI, 2017, p. 234). This decision created a variety of procedural and substantive issues to be discussed later. Instead of a restorative justice approach to deal with the harms of the abuse, the Inquiry opted for a narrower, torts-based approach that limits the

scope of redress to the individual claimant, disregarding the broader, indirect effects of mass abuse on survivors, their families and communities.

This article presents a critical analysis of the HIAI redress recommendations from the standpoint of survivors. It is divided into three parts. Part 1 discusses methodology and the ‘bottom-up’ participatory, collaborative approach between academia and civil society in the pursuit of social justice. Part 2 reviews conceptual and policy redress debates. It draws on literature from a range of disciplines, including transitional justice, anthropology, sociology, criminology and socio-legal studies as well as legal theory. Part 3 has two discrete sections. Section A examines the two proposed compensation categories (standard payment and individual assessment) balanced against the expectations and needs expressed by survivors. Section B critically analyses key structural, substantive and procedural issues (scope of redress, legal processes, evidentiary requirements, administrative appointments and funding mechanisms). The potential effects on survivors’ rights and interests are critically examined. Comparisons are made with redress schemes in other jurisdictions, primarily the Republic of Ireland and Canada.<sup>4</sup> International standards and benchmarks are referred to where appropriate. The final section concludes that positive elements of the HIAI redress scheme should be retained, while improvements proposed by survivors should be adopted.

## **Methodology**

The authors are members of the Panel of Experts on Redress. The Panel is an independent umbrella group made up of individual survivors, survivor groups, human rights organisations, academics, members of the legal profession, and national and international experts. It has representation and active participation from all four

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<sup>4</sup> The redress provided to survivors by the Indian Residential Schools Settlement Agreement was significantly informed by the redress in the Republic of Ireland.

institutional abuse survivor groups. Members work on a voluntary basis. The Panel emerged through discussions with the authors and survivor groups.

A bottom-up participatory action research methodology (one not previously applied in historical child abuse scholarship<sup>5</sup>) underpinned the project<sup>6</sup> (Gready & Robins, 2014; Lundy & McGovern, 2006, 2008; McEvoy & McGregor, 2008; Robins, 2011). Terms of Reference were agreed, and a mechanism (the Panel) was created to facilitate academics and human rights organisations working collaboratively with survivors in the pursuit of fair and just redress. Regular monthly meetings were held and Panel members fully participated in shaping every stage of the research project. The remit of the Panel was to bring to the foreground survivors' views on redress and ensure their participation in the shaping of any future redress scheme. The goal of the project was to provide survivors with tangible outcomes and to go beyond the traditional academic research publication. Hence, the project had two components: to undertake and produce empirical academic research, and to utilise the research findings to inform survivors' campaign strategies and focused policy interventions. The bottom-up participatory methodology puts survivors centre-stage and prioritises and privileges their needs and concerns; it is empowering and *the process* is transformative (Gready & Robins, 2014).

The Panel published three reports that explored what survivors want from redress, followed by their proposed compensation model and a critique of the HIAI recommendations (Lundy, 2016; Mahoney & Lundy, 2016; Panel of Experts, 2017). The reports were based on a wide consultation and verification

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<sup>5</sup> But see Note 2 where the Inquiry was also grounded in Indigenous scholarship, with writers such as John Borrows in *Canada's Indigenous Constitution* (2010) and Val Napoleon and Hadley Friedland in *Gathering the Threads, Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions* (2015), adding to the theoretical and practical interest in institutional child abuse cases.

<sup>6</sup> This article is part of a wider study conducted by one of the authors.

process. To establish what survivors want form redress, five full-day focus groups were held in October and November 2015, with over 75 survivors participating. This method, built around small, closed discussion, was designed to provide a 'space' that would empower participants to share their views on redress. The focus groups were recorded and transcribed; thematic analysis and frequency coding was undertaken. In collaboration with survivor groups, a research instrument was designed to guide the focus group discussion; whenever possible, open questions were used so that survivors had the space to identify priorities, and intra-group discussion was not stifled. The focus groups were held in Belfast and Derry; a key criterion was that they should reflect a broad cross-section of survivors of institutional abuse. Local facilitators with extensive experience in working with survivors conducted the sessions. Draft copies of the reports were circulated to survivor groups involved in the research to verify content and ensure that their needs and priorities were reflected accurately and that they had ownership of the process and output.

Between October 2014 and January 2017, 43 semi-structured interviews were conducted with individual survivors who had attended the HIAI.<sup>7</sup> The majority of interviews took place across Northern Ireland; a small number were carried out in the Republic of Ireland (two) and England (four). These were recorded, transcribed and thematically analysed.

The present article further draws on document analyses, including analyses of HIAI transcripts, dialogue and public meetings with survivors, and a questionnaire. The Panel met separately to scrutinise the HIAI recommendations and to receive further feedback from survivor groups. The questionnaire was distributed at public meetings and was emailed and posted to a broad cross-section of

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<sup>7</sup> The interviews were conducted by one of the authors; the data was analysed with the support of a research assistant.

survivors in Northern Ireland, the Republic of Ireland, the UK and Australia. The sample reflects a broad cross-section of male and female survivors and the different types of institutions (state, church and privately run care homes). A total of 205 questionnaires were distributed, and 119 were completed/returned. The data was coded and analysed using SPSS.

The Panel's reports were submitted to the Northern Ireland Executive and are used as a lobbying tool. The Panel has engaged in a series of meetings with political parties, senior government officials, and representatives of the Catholic Church and religious orders. The importance of meaningful involvement of victims in designing and implementing redress has been underscored by various international authorities and declarations,<sup>8</sup> and participatory processes have become one of the guiding principles to build a successful redress programme (Suchkova, 2011, p. 3). The conceptualisation of participation utilised in this research project means full and effective participation and, thus, representation of survivors whose rights are affected in all decisions on the nature, design and implementation of any future redress scheme.

### **Theory, Concepts and Debates**

Designing a redress scheme is complex and can be fraught with difficulties. Redress often constitutes a multifaceted legal, political, economic and cultural package (de Greiff, 2006, p. 1–3). Needs and experiences will often vary from one society to another; sensitivity to the specific historical, cultural and socio-political contexts is important. There has been considerable theoretical debate about the purpose, nature and justification of redress for human rights abuse and harms suffered. Redress can be material and symbolic, individual and collective, and may include a 'package of measures' rather than

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<sup>8</sup> See, for example, UN, *Principle 32; Declaration of Basic Principles of Justice for victims of Crime and Abuse of Power*, UNGA Res 40/34, para. 6(b); UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616 (2004) para. 16.

relying on one single measure. It can include public inquiries, financial compensation, truth commissions, therapeutic and support services, memory projects and apologies (Sköld & Swain, 2015). Redressing the legacy of human rights abuse has been the subject of significant scholarly and policy attention (Assembly of First Nations, 2004; de Greiff, 2006; Johnston & Slyomovics, 2008; Margarrell, 2007; Minow, 1998; UN Secretary General, 2011; Walker, 2006).

The right to remedy and reparation is well established under international human rights law and humanitarian law.<sup>9</sup> Of particular importance are the United Nations' *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (the Basic Principles). Although relating to post-conflict societies, the Basic Principles indicate the elements of redress to which victims are entitled (UN, 2005, p. 16). Basic Principles include the following remedies: compensation to provide victims with monetary and non-monetary damages to pay for the losses they have experienced; rehabilitation to repair the lasting damage of human rights violations through provision of medical, psychological, legal and social services; restitution to restore the condition lost by the victims due to gross violations of human rights, such as the restoration of liberty, citizenship, employment or property; satisfaction to cease continuing violations, disclose the truth, search for the disappeared or the remains of those killed, officially declare and apologize to restore the dignity, reputation and rights of the victim, impose sanctions against perpetrators, and create commemorations and tributes to the victims; guarantee non-repetition by initiating reforms to ensure independence of the judiciary, human

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<sup>9</sup> See, for example, United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; International Covenant on Civil and Political Rights (1976), Article 2; International Convention on the Elimination of All Forms of Racial Discrimination (1969), Article 6; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1987), Article 14; Convention on the Rights of the Child (1990), Article 39.



rights education, mechanisms for preventing and monitoring conflicts, and reviewing and reforming laws and policies that contribute to gross violations of human rights.

The most common forms of redress under the Basic Principles are based on the corrective justice theory and comprise restitution and compensation. Less common are the remedies of rehabilitation, satisfaction and guarantees of non-repetition,<sup>10</sup> which fall into the restorative model of justice. The Basic Principles are useful guidelines that point to the elements of redress as well as the mechanisms, modalities and procedures for implementing reparations. The Principles therefore provide a useful benchmark in law and global practice that can assist victims in their redress requirements. They also serve as a useful tool to evaluate and critique remedies or redress programmes offered or imposed on the victims of mass human rights violations.

Corrective justice is a theory that is based on the proposition that an individual has a duty to repair the wrongful losses that his or her conduct causes. A loss need not be one for which the wrongdoer is morally to blame. It need only be a loss incidental to the violation of the victim's right—a right correlative to the wrongdoer's duty not to inflict the loss on the victim. Corrective justice seeks to repair the injury of the victim or to put the victim back in the position he or she was in prior to the injury taking place. The corrective justice remedy takes the form of damages compensated for with money.

Corrective justice neatly accounts for the central features of tort law. It explains why tort law links victims and injurers, since the injurer has the duty to repair the wrongful losses that he causes. However, a problem with corrective justice is that it is often not possible for a wrongdoer to repair the injury inflicted. When a victim

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<sup>10</sup> In cases of institutional child abuse, the nature of the harm and the unique vulnerability of the victim (a child) when the abuse occurred means that traditional forms of restoration may not be possible.

suffers a serious bodily injury, for example, it may be possible for the wrongdoer to pay the victim's medical bills or compensate for lost wages, but the physical damage the victim suffered may be beyond repair. The problem is all the more striking when the wrong involves a serious affront to the victim's dignity. For example, it is doubtful that a rapist could repair the 'loss' suffered by his victim, regardless of the amount of compensation paid. In cases such as these, what corrective justice corrects is the expressive significance of the wrong. As the victim of a rape cannot be restored to the position she was in before the wrong, her rape can still be treated as a wrong, thus reasserting her right not to be raped (Coleman et al., 2015).

If corrective justice can offer no more than money and an assertion of rights, it is often an unsuitable form of redress when harms are multiple and diverse such as in the case of mass human rights violations. Walker (2006) points out that while corrective justice as reflected in tort law sets out a moral baseline for acceptable conduct, it is not a suitable approach to correct historical acts or forms of injustice such as those found to have occurred in the HIAI. Where relentless enforcement of degraded moral status of individuals has occurred, especially where systemic conditions persist over extended periods of time based on group membership, corrective justice remedies are incapable of comprehending or correcting the relationship between the oppressed and the oppressors.

In contrast, restorative justice theory provides a framework for repairing such relationships. It allows for a wider range of remedies to address a wider range of needs. It emphasizes repairing the harm caused by unjust behaviour and, unlike corrective justice, it is more contextual and supports a process where those primarily affected by an incident of wrongdoing can come together to share their feelings, describe how they were affected and develop a plan to repair the harms done or prevent its recurrence (McCold, 2000). Restorative justice is put into practice through cooperative processes that involve not just the person injured but all stakeholders.

Restorative responses to wrongdoing exercise both high control and high support, confronting and disapproving of wrongdoing while supporting the worth of the wrongdoer. The goal of restorative justice is to be transformative—of people, relationships and communities. The transformation occurs because those directly affected are empowered to express their feelings and influence the outcome (McCold, 2000).

Redress for historical child abuse in Northern Ireland is a policy decision that governments and institutions grapple with. The policy choices are either to let the courts decide whether the claimants will get reparations and, if so, what they will be, or to settle the matter out of court. The relative advantages and disadvantages of out-of-court redress schemes, as opposed to litigation, are practical as well as theoretical. The practical disadvantages have been discussed in a variety of different contexts (Assembly of First Nations, 2003; Law Commission of Canada, 2000; Llewellyn, 2002; Sköld et al., 2015 Stanley, 2015; Winter, 2017). These writers discuss the numerous disadvantages of court processes:

- they are incapable of redressing systemic harms;
- they often do not achieve consistency in awards for similar harms;
- they require a high standard of proof for both the acts and the causation of harms
- they are vulnerable to tactical delays that can exhaust the emotional and financial resources of claimants;
- they are very time consuming, expensive and often take years to resolve;
- they are adversarial, public, highly intrusive and have the potential to re-traumatise and re-victimise survivors, many of whom are elderly and suffer from physical and mental ill-health;

- they are governed by limitation periods that can nullify deserving claims;
- they often rely on institutional documentation containing systemic flaws to prove or disprove claims;
- they cannot take into account the intergenerational needs of survivors and their families;
- they are not cost efficient as the administration and legal costs of court proceedings often far exceed the compensation awards.

Moreover, there is cumulative evidence acquired from research in various jurisdictions, with different legal systems, which shows that victims who seek ‘justice’ often feel let down by the justice system (Herman, 2003, 2005; Orth, 2002; Parsons & Tiffany, 2010). Court proceedings can disempower and marginalise victims, “publicly challenge their credibility” (p. 159) and hinder construction of a “meaningful narrative” (Herman, 2003: 160). As Herman (1992, p. 72) notes, “if one set out intentionally to design a system for provoking systems of post-traumatic stress disorder, it might very much look like a court of law.” There is now a robust body of empirical evidence suggesting that negative experiences of the justice system can exacerbate the trauma of the original crime and lead to secondary victimisation (Doak, 2008; Herman, 2003; Orth, 2002; Parsons & Tiffany, 2010). The wishes and needs of victims are often “diametrically opposed to the requirements of legal proceedings” (Herman, 2005, p. 574), which usually have broader aims and objectives than addressing the psychological needs of individual victims.

The benefits of out-of-court alternatives to litigation include less adversarial and intrusive processes, more flexible and less onerous standards of proof, and greater participation of survivors with a greater likelihood of success and satisfaction in establishing their claims. They are usually faster and cheaper than judicial

proceedings and offer more certainty. On the downside, because of the trade-off for less onerous procedures, compensation awards may be less than those awarded through litigation.

### **Monetary Compensation**

This section analyses the compensation scheme proposed by the HIAI Report and survivors' views on the proposals. The HIAI Report findings provide clear evidence of widespread abuse and systemic failings in children's 'care' homes from 1922 to 1995 in Northern Ireland. To correct these wrongs, the HIAI Report recommends primarily a corrective justice model of reparations through a state-funded compensation scheme. The Report stipulates two categories of compensation, which are not mutually exclusive<sup>11</sup>: (1) 'lump sum'/standard or common experience payment, and (2) individual assessment for more serious abuse. To be eligible for compensation under both categories, survivors must show, on the balance of probabilities, that they suffered abuse in the form of sexual, physical or emotional abuse, or neglect or unacceptable practices, between 1922 and 1995; were living in a residential institution in Northern Ireland as defined by the Terms of Reference of the HIAI; and were under the age of 18 at the time (HIAI, 2017, p. 238). If these requirements are met, a claimant will be eligible to apply for both categories of compensation. The standard common experience payment for claimants is set at £7,500. In this regard, the HIAI Report states the rationale for the lump sum payment:

[I]n some, though not all, of the institutions investigated there was a harsh environment that affected all the children in that institution. Other children who were exposed to that harsh environment, but were not themselves abused, were still affected by the general regime and the impact of what they witnessed, and therefore were also abused. We regard

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<sup>11</sup> Internationally, some redress schemes provide compensation in both categories (Canada Indian Residential Schools and Queensland Government) but most only employ one or the other.

that such persons also should be regarded as having been abused and should be eligible for an award of compensation. (HIAI, 2017, p. 238)

As the following quote indicates, the remedy of compensation as a matter of principle was welcomed by survivors:

We live in a claim nation, people were abused, compensate them, plain and simple. It will either go to their loved ones, it will go to their grandchildren, it will help their kids get into education for what they lost. These people are poor, these institutions are rich; they're rich. We know they are guilty. [Interview M: May 2016]

A recorded comment by a survivor clearly reflects the corrective justice theory:

I suppose it's like a sense of worth. Whatever the amount of money that is actually dished out; it's somebody saying we're acknowledging that you went through a lot, and you went through so much that we think you deserve this amount of money. It's not because it's money, it's because it's the only form of acknowledgment that we're ever going to get. We can't ask for anything else because our lives are not going to be given back ... So the money in a sense would give you something back, some piece of mind, something back for what they did to us but it also puts a value on who you are and gives you a sense of worth. [Interview F: Jan 2017]

Hamber (2006, p. 571) makes the point that redress is a social barometer for victims; it "tells the victim much about their place in society." It also sends out a message of recognition, acknowledgement, responsibility and intent to do justice (Walker, 2006, p. 119). Minow (1998), while arguing for restorative justice to repair social connections and achieve peace, also says that the 'core

idea' behind reparations is compensatory justice where the wrongdoer should pay victims for losses to wipe the slate clean. Brooks (2004), while arguing that the tort model is morally deficient, nevertheless still sees monetary reparations as essential to make other remedies such as apologies believable. The next quote indicates the importance of restorative justice ideals to some survivors:

Financial compensation, I think it's a really solid way of saying, what happened to you shouldn't have happened. That overall message to me is more important than everything else in the process. It really genuinely is a significant acknowledgement, that that stuff shouldn't have happened to you. If you grew up the way I did, basically the overall message was that you're a waster, you're no good, you'll never amount to anything. And the implication was when we beat you or sexually abuse you, or punish you in barbaric ways, and they were myriad ... When people stand up and say, what we did was wrong, we shouldn't have done that, here's a pile of money. Then you get to think, you know what, maybe I'm not scum, maybe I didn't deserve this.  
[Interview M: Nov 2016]

The HIAI recommendation for a £7,500 payment for all claimants was based on a court model—namely, two judgments of the High Court of Justice in Northern Ireland, *McKee v. Sisters of Nazareth* (2015) and *Irvine v. Sisters of Nazareth* (2015). In the *McKee* case, the plaintiff did not succeed because of statutory time limitation bars. The judges, in the *obiter dictum*, said that they would have awarded 'a modest sum' to reflect the nature of the harsh, uncaring and brutal regime that was in place in Nazareth Lodge. In the *McKee* case, the plaintiff resided for only two-and-a-half months in the institution and was awarded £6,500, whereas in *Irvine*, the plaintiff resided at the school for nine years and the court would have awarded her £7,500 (2017, p. 6). The HIAI said it had no reason to depart from the amounts paid by the courts in Northern Ireland (HIAI, 2017, p. 246, para. 75). The HIAI added the further rationale that “[the lump sum

of £7,500] is easier to identify possible total cost of the redress” and it is “easier to administer” (HIAI, 2017, p. 234, para. 24). The HIAI’s goal of cost efficiency appears to take priority over a genuine attempt to compensate individuals fairly. Not only does this approach ignore the restorative justice requirements of the UN Basic Principles but it does not even meet tort law’s fundamental legal principle which requires that the amount of compensation must, as closely as possible, place the plaintiff in the position he or she would have been in had the injury not been committed (Waddams, 2004; Cassels, 2008).

In the five focus groups held by the Panel of Experts *before* the HIAI Report was published, there was general consensus that while it was helpful and desirable to have financial compensation, a lump sum payable to all without differentiating between individual experiences added insult to injury. In questionnaire responses almost all survivors (92 percent = 109) stated that the standard payment should be higher, should *not* be the same for everyone, and should reflect the length of time spent in the institution. Their view was that those who suffered the most should get the most compensation. At a public meeting organised by the Panel held on February 3, 2017, there was palpable anger voiced by survivors in response to the proposed £7,500 lump sum. As one survivor put it: “We are looking at childhoods destroyed and a future destroyed ... and we need to make the State pay and not pay minimally but to pay the maximum.”

The proposed standard payment of £7,500 not only fails to account for experiential differences but also fails to accord with the approach taken for similar mass harms in other similar jurisdictions.<sup>12</sup> In Canada, for example, survivors of Indian Residential Schools were paid a common experience payment of \$10,000 for the first year or portion of a year of their residence and \$3,000 per year or portion of a

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<sup>12</sup> See Winter (2017) for a detailed discussion of the Republic of Ireland, Magdalen Laundries redress scheme and compensation payments.



year thereafter to account for increased harms suffered the longer the child stayed in the institution.<sup>13</sup>

From a theoretical perspective, a common experience payment of an inflexible set amount to all survivors, regardless of how long they were institutionalized, is not consistent with compensatory tort law theories, corrective justice principles or restorative justice guidelines as articulated in the UN Basic Principles.

### ***Individual Assessment for Serious Abuse Claims***

The HIAI Report recommends that eligible claimants who suffered more serious, individualized forms of abuse should be entitled to a payment up to a maximum of £72,500 over and above the common experience payment. To succeed in a claim for serious, individualized abuse, the recommendations follow a stricter model of corrective justice. A claimant faces three barriers: first, claimants must prove on the balance of probabilities that the abuse happened and caused them harm; second, there should be no compensation for loss of income or loss of opportunity; third, claims for the deceased should only be compensated up to 75 percent of what the claim is worth. Once again, the HIAI recommendations fall short of even the minimum requirements of corrective justice, let alone restorative justice models. The following discussion explains the shortcomings.

### ***The Standard of Proof***

The standard of proof recommended by the HIAI will be difficult if not impossible for most claimants to meet, especially for the causation part of the harms calculus. As most claims are decades old, proving on the balance of probabilities that the acts perpetrated when claimants were children resulted in the harms they have experienced,

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<sup>13</sup> Compensation formed only a part of the agreement, which also included a truth commission, apologies, healing funds, educational credits, an educational trust, commemoration funds and a research centre, among others. See Indian Residential Schools Settlement Agreement [www.residentialschoolsettlement.ca/english.html](http://www.residentialschoolsettlement.ca/english.html).

or are experiencing, is an immense challenge. This is because over the years many other events happen in a person's life which make determination of causation very difficult to prove. If the purpose of the redress plan is to fully compensate claimants for abuses suffered in institutional care, a less onerous proof requirement would be more appropriate, such as the standard of proof required of survivors under the Canadian redress plan for survivors of residential schools.<sup>14</sup>

### ***Loss of Opportunity***

The recommendation of the HIAI that loss of income or loss of opportunity should not be compensated was met with strong disagreement by survivors, and this is reflected in responses to the Panel's questionnaire. Almost all survivors agreed that loss of opportunity should be compensated (90 percent = 113) and be central to the compensation package.<sup>15</sup> Common themes expressed by survivors were that they 'missed out' on career opportunities because of an inadequate education compounded by a harsh living environment and, for some, physical, emotional and sexual abuse. This is how two survivors phrased it:

Given the chance, I would have liked to have done medicine. It was all to do with the beatings—god the beatings, they were awful. The beatings were terrible, particularly with our crowd. I never got the opportunity, when you reached 15, as it was in the 60s you left school and you worked about the orphanage and then you went to the big girls' dormitory and they had a little curtain around their bed ... When I left school in Nazareth I looked after the wee ones but we were never paid. And I was put out to service to a family, somewhere, it was away far. I mean I didn't have anywhere beyond the

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<sup>14</sup> In Canada, the standard of proof of causation for residential school claimants to meet was the plausibility standard, a much lower standard than the balance of probabilities.

<sup>15</sup> Both the Republic of Ireland redress process and the Canadian agreement compensated for loss of opportunity or actual loss of income. The cap in the former was €300,000 and in the latter \$250,000.

walls of Nazareth House. I was a skivvy for 3 months and I thought, ‘I am fecking out of here’ and I was never paid. [Interview F: Jan 2017]

Because of what I’ve suffered, the abuse that I’ve suffered, it had a massive effect on my life, massive. My whole life stemmed from what happened to me ... The emotional abuse that happened to me was immense, immense; it would probably have been worse than even the physical abuse because of the way it made me feel about myself, the insecurities I had. So when I left [the home] I couldn’t get jobs. I couldn’t get a career, even the army ... I was only getting work from people who knew me, you know a few days here and a few days there and that’s how my whole life working was, all my work life was like that. So, that’s because of how I was made to feel about myself, so missed opportunities. [Interview M: July 2016]

The HIAI recommendations fall short of the moral baseline of the corrective justice model and the fundamental principle of civil law that the injured party must be compensated for losses caused by the wrongdoer. In addition, it is clear the needs of survivors are not represented in redress recommendations.

### ***Claims for Deceased Claimants***

Equally important to survivors was the need for full compensation for spouses or children of deceased victims. One hundred of 126 survivors questioned indicated that spouses and children of deceased survivors should be entitled to put forward a claim for full redress on behalf of the deceased. They found that the HIAI Report’s recommendation that the spouse or children should be able to claim only 75 percent of any award for the deceased was unjustified and unfair to the families. Survivors felt that a payment to the spouse or

children would be an acknowledgement and mark of respect.<sup>16</sup> This inexplicable inequality contradicts Boxill's description of compensatory justice as aiming at a restoration of 'moral equality' (Boxill, 2002). He sees justice as requiring equal consideration between equals. As such, a payment that fails to respect equality such as this one undermines the moral function of tort law and corrective justice.

### ***Prior Lawsuits***

Another major equality concern for survivors was the eligibility for redress for those survivors who have already litigated their claims in the courts. Under the HIAI Report recommendations, if a person was unsuccessful in civil proceedings, where their case was dismissed *solely* because of the use of the defence of limitations, they should be able to apply to the Redress Board. However, the report also stressed that no court awards should be 'topped up' and no cases should be re-opened. On the other hand, while survivors believe that no person should be entitled to be compensated *twice* for abuse they suffered, it also stated that where Redress Board compensation is *higher* than court judgments for the same injuries, those survivors should be able to receive a 'gap' payment to bring them in line with others. When questioned whether a 'top-up' should be available, a significant majority of survivors responded yes (81 percent = 96); only 11 people said no (11 didn't know; one did not answer). The following written questionnaire comments reflect the sense of injustice felt by survivors who accepted settlements:

Heinous is the description of such a recommendation by Sir Anthony Hart, it seems a complete con to the victims who put much effort without legal advice and had the trauma to go to the inquiry, which would not have taken place without us ... It's an insult not justice. Victims were forced to take their

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<sup>16</sup> In the Republic of Ireland, full awards were available to the children or spouse of persons who died.

pittance amounts. I know, I was part of the abuse in the law courts. [Code ID103]

I settled out of court; my barrister told me there were worse cases than mine. I told my solicitor I am a 66 year old man and I remember all the bad things that were done to me by the people who were there to care for me. I just wish it was finished for me and my family. [Code ID99]

Unless the redress plan includes a ‘top-up,’ the fear is that the HIAI recommendation could lead to an unequal two-tier system, doubly disadvantaging survivors who endured the financial and emotional costs of litigating their claims. The following quotes from interviews with survivors give an insight into the trauma, stress and disappointment of the court process:

I was offered a settlement of £30,000 ...<sup>17</sup> it was a slap in the face for what I had been through. I’m still devastated because I feel like they made me suffer all over again. I got shingles, my immune system went downhill, I couldn’t breathe; I had a doctor saying to me you have to stop this court stuff because you are making yourself ill ... But I couldn’t because the alternative was to kill myself. I went through to the end, more for their acknowledgement than anything. [Interview F: August 2016]

This is what hurts. They abused me all over again because on a daily basis my solicitor was on the phone saying—they’ve moved them (nuns), they’ve changed their names (nuns). The only thing they would say was statute of limitations, statute of limitations, statute of limitations. Oh the tactics ... You know something they made me suffer all over again and my family had to watch me go downhill. [Interview F: June 2015]

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<sup>17</sup> The actual amount awarded has been changed to safeguard the interviewee’s identity.

The Panel of Experts stressed that survivors should not be punished further for taking a claim before the courts. However, from the outset the HIAI has recommended that survivors must choose one or the other compensation route. This seems an unnecessary constraint on survivors' choice of redress. International standards do not prohibit the exhaustion of more than one avenue to obtain compensation, and the plan should respect the international rules.<sup>18</sup> From a corrective justice perspective, such a distinction between survivors is morally indefensible. When distinctions opportunistically deny rights or effective protection and remedies to powerless groups, the baseline of corrective justice is undermined. Corrective justice is only as morally legitimate as its moral baseline, and it would seem particularly important for the HIAI to ensure that the moral baseline underlying their recommendations is preserved and legitimate (Walker, 2006).

## **The HIA Redress Board**

### *Design and Process*

There are a number of theoretical and practical flaws in the proposed design of the redress scheme that are briefly examined here. These include appointments; legal aid and legal protection; a 'paper only' process and oral evidence; and equality of treatment of cases. While the HIAI recommendations clearly allow for the theory and practice of restorative justice to be incorporated into the proposed redress package, it does not appear to be the case.

### *Appointment of Decision-Makers*

The HIAI Report recommends a highly legalistic Redress Board to administer the compensation scheme. It says adjudicators should be drawn from the judiciary, either practising or retired, and a single

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<sup>18</sup> "An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies" (UN Basic Principle 14).

judge sitting alone should decide on eligibility and compensation. This highly legalistic model appears out of step with redress boards internationally. In the Republic of Ireland, Sweden and Canada, redress was multidisciplinary, designed to be non-adversarial, flexible and more ‘claimant friendly’ than a solely legalistic, court-inspired model. The model proposed by the HIAI will likely result in abuse claims interpreted, assessed and decided exclusively through an overly restricted and inflexible legal lens. The Panel of Experts argues the resolution of institutional child abuse claims is not, and should not be, the *sole* preserve of the legal profession because it does not represent the needs of survivors. They recommended that in the interest of fairness and the appearance of fairness, the Board should be comprised of legally and medically trained people, and/or individuals with a therapeutic background with specialised knowledge in the fields of psychology or psychiatry and with particular knowledge and understanding of child abuse.

### ***Legal Aid***

The Panel of Experts and the survivors strongly support the HIAI recommendation that applicants should be eligible for legal aid to allow them to obtain legal assistance to make an application for an award. The following recognition will go some way towards achieving equal treatment of survivors: “to pursue their claims effectively, applicants to the HIA Redress Board, *particularly those who were resident in an institution not investigated by the Inquiry*, will require legal representation in order to obtain the necessary evidence to bring their application” (HIAI, 2017, p. 248, emphasis added).

However, the Panel of Experts further recommends that survivors should have the choice of having legal representation and that legal fees should be subject to a cap at a reasonable level and be paid by the state. Legal aid in Northern Ireland is means tested. A sizeable number of survivors are likely to be low-income earners because of the effects of institutional abuse. This could mean that they will not qualify for legal aid and will be deemed ineligible.

Equal access to justice for survivors would be assured with state-funded legal fees and would be much more consistent with restorative justice principles.

### ***Reception of Evidence***

Under the HIAI-proposed Redress Board, decisions as to whether compensation should be paid (and if so, the amount to be paid) should be made solely on the basis of written material submitted by the applicant and any other written material the judicial member (or the Appeal Panel) considers relevant. The Expert Panel points out that a ‘paper only’ process puts a very heavy burden on survivors. Proving that they have been ‘damaged’ relying solely on institutional records, police reports or psychological assessments that may not be complete or accurate will likely result in many worthy claims being dismissed or inaccurately assessed. A number of survivors at the focus groups voiced serious concerns and anxiety about records that have been lost or destroyed over time, or records that may contain inaccuracies. They say they should be permitted to give oral evidence and call witnesses in support of their claims. Otherwise, only those that win the lottery of having complete and accurate documentation will be successful. While a ‘paper only’ process offers “straightforward, effective, and efficient” (HIAI, 2017, p. 242) processing of claims, which is less costly and time-consuming, the question must be asked whether cost savings should be allowed to trump fairness for survivors.

Undoubtedly, some survivors will be relieved that they do not have to give more oral evidence. The burden on survivors of retelling their stories of abuse and injuries, and the potential re-traumatizing effect, is an important point. The proposed HIAI ‘paper only’ process would cushion survivors against such stress. If victims are properly supported and legally represented, a ‘paper only’ process has much to recommend it. However, a great majority of survivors emphasized that they should have the choice to give oral evidence or give evidence in person to the Redress Board (91 percent = 108).



Without the choice of giving oral evidence or calling witnesses, survivors who did not attend the HIAI, or spent time in one of the 43 institutions that were not investigated, are in effect ‘silenced’ and disempowered. The failure to allow oral evidence will result in a hierarchy of eligible claimants—those with greater and lower chances of success. It is also likely that under these circumstances, the most difficult cases to prove may be ‘put to the back of the queue,’ thus exacerbating the embedded inequities.

If the UN Principles and Guidelines are to be respected, restorative justice values should be incorporated into processes for dealing with violations as well as in the outcomes, because restorative justice defines itself in terms of human relationships. Through this lens, mass human rights violations are seen as violations of acceptable human relationships. The need for a full and detailed articulation of the violations becomes itself a part of the reparative activity and a measure of the adequacy of other remedies (Govier, 2002). The HIAI recommendations that the process of obtaining compensation be wholly determined by judges, whose information about the violations will be on paper only, does not bode well for the careful and detailed articulation of the full story of oppression, terror and subjugation that was the historical institutional abuse in Northern Ireland, which should be part of the reparative process. A ‘paper only’ process recommended by the HIAI plan does not represent the needs of survivors and would seriously undermine restorative justice principles and the goal of repairing fractured relationships.

## **Conclusion**

The primary focus of this article has been a theoretical and practical critical analysis of the proposed compensation package for historical institutional child abuse in Northern Ireland from the standpoint of survivors. A number of theoretical, structural, procedural and substantive flaws were identified, and improvements were recommended. Beyond this, the importance of this study and methodology is that it created a *process* that empowered and represented survivors’ struggle for their right to prompt, adequate and

effective reparations as adults consistent with the restorative and corrective justice theories that form the UN Principles and Guidelines. This is a politically engaged research project. The ‘bottom-up’ approach is framed by a commitment to furthering social justice, giving voice to those usually silenced, challenging structures of oppression and acting with ordinary people to bring about representative social change. The research has articulated survivors’ justice needs from their perspective and assisted the campaign for fair and just redress. This ‘story’ may not otherwise have been heard. Survivors’ voices are a crucial source for evidence-based policy with respect to reparations; without this representation, redress measures are unlikely to meet the needs of survivors and could fail. If restorative and corrective justice approaches are adopted, and survivors’ perspectives are incorporated into a redress plan, it is highly likely that many more people will opt for a settlement instead of going to the courts. A measure of the success of any compensation process for institutional abuse is the number of people who are willing to trust that it will produce a fair and just resolution of their claims. The Northern Ireland Executive now has a unique opportunity to deal with the historical institutional abuse of Irish children in a way that will respect human rights, promote healing, and build trust in the state and the commitment to guaranteeing human rights in the future. However, it is our view that the HIAI’s recommendations, while a step in the right direction, fall short of this goal. This critique is not intended to replace the HIAI recommendations but to add to them to achieve a better result that is representative of and consistent with the aspirations and needs of the survivors.

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