Redress packages for institutional child abuse: Exploring the Grandview Agreement as a case study in 'alternative' dispute resolution

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Introduction

Over the last decade there have been numerous revelations in Australia about the harms suffered by children in institutional settings. In 1997 the Human Rights and Equal Opportunity Commission reported on the experiences of the Stolen Generations;[1] in 1999 the Forde inquiry reported on the abuse of children in Queensland institutions;[2] in 2001 the federal Senate Community Affairs References Committee reported on the experiences of child migrants;[3] in 2004 the Tasmanian Ombudsman reported on children abused in state care;[4] in 2004-05 the federal Senate Community Affairs References Committee reported on the experiences of children in institutional care.[5] There is also an inquiry underway in South Australia.[6] All but one of the completed inquiries recommended that the relevant victims/survivors should be compensated and/or provided with some form of redress.[7] With two recent exceptions,[8] the various Australian governments have refused to implement any form of redress incorporating compensation.

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1 Human Rights and Equal Opportunity Commission (HREOC), *Bringing Them Home: Report of the National*

In stark contrast, in Canada where there has been a range of similar inquiries into institutional abuse of children there has been considerable progress in providing redress in the form of specifically designed reparations or compensation packages.

On a national level the Canadian Government announced in May 2006 that a settlement agreement had been reached with former students of the Indian Residential School (IRS) system.[9] This Agreement has recently been approved by the nine courts in which legal action was proceeding.[10] This is now subject to an opt-out period to allow survivors and family members time to decide whether they accept the terms of the Settlement.[11] This agreement includes an ex gratia style payment, a resolution process for claims that involved physical and sexual abuse, measures to assist with healing and commemoration, and a truth and reconciliation process. This followed a widely criticised Alternative Dispute Resolution (ADR) process that commenced in 2003.[12]

<http://www.clan.org.au/pages/template_pages.php?pageID=29&master_page_id=12> accessed 28 August 2006; (2) A $5 million package was announced for members of the Stolen Generation and their children. See *Stolen Generations of Aboriginal Children Act* 2006 (Tas). It is estimated that 124 people will be eligible for the payments under this package: Catherine Best, 'Compo Set to Benefit Stolen Generation' *The Courier Mail*, 19 October 2006, at 18. The Queensland Government has also announced an ex gratia payment for former child residents of institutions and detention centres following the recommendations of the Forde Inquiry, above n2. See the Joint Statement issued by Anna Bligh, Deputy Premier and Warren Pitt, Minister for Communities, Disability Services, Aboriginal and Torres Strait Islander Partnerships, '$100 million Redress Scheme for Children Abused in Queensland Institutions', 31 May 2007. For information about the scheme see <http://www.communities.qld.gov.au/community/redress-scheme/> accessed 6 June 2007.

9 See Indian Residential Schools Resolution Canada media release of 10 May 2006 <http://www.irsr-rqpi.gc.ca/english/news_10_05_06.html> accessed 4 January 2007.

10 On 21 March 2007 all final court approvals were delivered. The nine courts were: Court of Queen's Bench Alberta, Supreme Court of British Columbia, Court of Queen's Bench Manitoba, Nunavut Court of Justice, Supreme Court of the Northwest Territories, Ontario Superior Court of Justice, Superior Court of Quebec, Queen's Bench of Saskatchewan, and the Supreme Court of the Yukon Territory. Copies of the court decisions and more information about this historic process see the dedicated website established for this court approval process at <http://www.residentialschoolsettlement.ca/> accessed 6 June 2007.

11 The opt-out period ends on 20 August 2007.

12 For a detailed critique of the 2003 ADR model see Assembly of First Nations (AFN), *Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools* (2004) <http://www.afn.ca/residentialschools/PDF/ADR-reportFinal_english.pdf> accessed 28 August 2006; Canadian Bar Association, *The Logical Next Step: Reconciliation Payments for all Indian Residential School Survivors*, February 2005. See also the report of the Standing Committee on Aboriginal Affairs and Northern Development, House of Commons Committee, Report 4 – Study on the Effectiveness of the Government Alternative Dispute Resolution Process of Indian Residential School Claims (2005) <http://www.parl.gc.ca/committee/CommitteePublication.aspx?COM=8972&Lang=1&SourceId=107649> accessed 28 August 2006. See also the accompanying meetings and evidence taken by the committee <http://www.parl.gc.ca/committee/CommitteeList.aspx?Lang=1&PARLSES=381&JNT=0&SELID=e22_,2&STAC=1119424> accessed 28 August 2006. Information about the 2003 ADR model can be found on the website for Indian Residential Schools Resolution Canada <http://www.irsr-rqpi.gc.ca/english/dispute_resolution.html> accessed 28 August 2006.

There have also been numerous redress packages that have been designed and implemented to respond to abuse in specific provincial institutions. These include the Helpline Reconciliation Model Agreement (1993, Ontario),[13] the Grandview Agreement (1994, Ontario),[14] the Reconciliation Agreement between the Primary Victims of George Epoch and the Jesuit Fathers of Upper Canada (1994, Ontario);[15] the New Brunswick compensation agreement (1995, New Brunswick);[16] the Jericho Hill Compensation Program (1995, British Columbia);[17] the Nova Scotia Compensation Program (1996, Nova Scotia);[18] and the Alternative Dispute Resolution project for Sir James Whitney School for the Deaf (1998, Ontario).[19]

The redress packages that have been implemented in Canada vary considerably in terms of content, nature and process. In this paper,[20] we focus in depth on the Agreement reached in Canada between the Grandview Survivors Support Group

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13 This compensation program addressed claims arising from St John's and St Joseph's Training Schools for Boys. See Douglas Roche and Ben Hoffman, *The Vision to Reconcile: Process Report on the Helpline Reconciliation Model Agreement* (1993).

14 This compensation program addressed claims arising from the Grandview Training School for Girls (previously known as the Ontario Training School for Girls). This compensation program forms the main subject of this article.

15 This compensation program was for the 'primary victims' of sexual abuse perpetrated by Father George Epoch. Father George Epoch was a Jesuit priest who worked on a number of 'native reserves', Saugeen, Cape Croker and Wikwemikong. This Agreement followed an earlier process implemented by the Jesuits. For further information see Goldie Shea, *Redress Programs Relating to Institutional Child Abuse in Canada*, Prepared for the LCC (1999). Copy on file with authors.

16 This compensation program addressed claims of abuse that took place at the Boys Industrial Home in St John, the New Brunswick Training School at Kingsclear and the Dr William F Roberts Hospital School. For an outline of the program see Shea, *Redress Programs*, above n15.

17 This compensation program was for allegations arising from the Jericho Hill School for the Deaf (previously Deaf and Blind): see Jane Morley, *The Jericho Hill Compensation Program (JICP): A Unique Response to Institutional Sexual Abuse* (2001) <http://www.janemorley.com> accessed 28 August 2006. A number of former students opted out of this redress package and pursued a class action, which reached an out-of-court settlement in 2004: Jericho Hill School Class Action Settlement <http://www.jhsclassaction.com/> accessed 28 August 2006. This out-of-court settlement is notable for the range of features which makes it comparable to some 'redress packages'.

18 This compensation program concerned allegations arising from the Shelbourne Youth Centre, the Nova Scotia School for Girls and the Nova Scotia Youth Training Centre. For an outline of the program see Shea, *Redress Programs,* above n15. This compensation program has been the subject of considerable criticism about the validation process, the fact that the number of claims far exceeded the number anticipated, the making of false claims and the complexity added by the fact that some of the staff members alleged to have committed acts of abuse were current employees: Fred Kaufman, *Searching for Justice: An Independent Review of Nova Scotia's Response to Reports of Institutional Abuse* (2002) <http://www.gov.ns.ca/just/kaufmanreport> accessed 28 August 2006.

19 This compensation program was developed for claims arising from physical and/ or sexual abuse that took place at the St James Whitney School for the Deaf (formerly known as the Ontario School for the Deaf) in Belleville. Most allegations concerned 1940-1980. For an outline of the program see Shea, *Redress Programs,* above n15.

20 This paper forms part of a research project conducted by Professor Reg Graycar and Jane Wangmann, supported by the Australian Research Council and the Faculty Research Program of the Canadian High Commission, examining the way in which systemic injuries (eg institutional child sexual assault; the Stolen Generations; sterilisation of people with disabilities etc) are dealt with in the Australian tort system and the possibility of the use of alternative methods of redress/reparations.

(GSSG) and the Ontario Provincial Government in 1994. The 'Grandview Agreement' is widely seen as an instance of *redress* – one that demonstrates an intention to develop and put in place *alternative* processes to address the harms arising from systemic injuries such as institutional child abuse. As the Institute for Human Resource development (IHRD) in its work on the needs of victims/survivors of institutional child abuse for the Law Commission of Canada (LCC), concluded:

> [the Grandview Agreement] ... stands out as the most advanced attempt to involve survivors in identifying their own needs and in directing their end of the negotiations. It is respectful, attempts to address the individual and collective needs of survivors, and aspires to make the world a better place for survivors to live. There are clearly two parties involved, the women and the government of Ontario, and the agreement is jointly derived and owned. In terms of process, it is clearly a model that any emerging case of institutional abuse should consider in addressing compensation.[21]

The Grandview Agreement sought to go beyond the tort framework that tends to characterise many 'redress' approaches. Some of these emphasise financial compensation and are characterised by adherence to more legalistic notions of responsibility, causation, validation and witness credibility. This approach seems to underpin the distinction sometimes drawn between those who deserve compensation ('true' victims') and others ('not true victims?).[22] In highlighting the Grandview Agreement we do not put it forward as the 'perfect agreement'. Nor do we necessarily accept that such redress packages will provide effective 'healing' or 'reconciliation'. As the evaluation engaged to review the Grandview Agreement concluded:

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21 Institute for Human Resource Development (IHRD), *Review of the Needs of Victims of Institutional Abuse*, Paper prepared for the LCC, (1998), at [6.3]. Copy on file with authors. The other redress package that the IHRD assessed favourably is the Helpline Reconciliation Model Agreement. The Helpline Agreement predates Grandview. It concerned allegations of sexual and physical abuse that took place at St John's and St Joseph's Training Schools for Boys. Like the Grandview Agreement, the Helpline Agreement was formed with the Ontario Provincial Government, however unlike the Grandview Agreement it also involved a number of Catholic organisations who were involved in the operation of the schools (the Archdiocese of Toronto, the Archdiocese of Ottawa and the Ottawa Christian Brothers). This multi-party negotiation created an additional level of complexity and compromise. One of the Catholic organisations, the Toronto Christian Brothers, refused to join the Agreement, and the process continued without their participation. The Helpline Agreement provided for the award of monetary compensation (which would be validated via the Criminal Injuries Compensation Board process and designated personnel). This could then be supplemented by an amount paid by the church organisations. The package also included access to counselling, an 'Opportunity Fund' for medical, educational and vocational benefits, apologies, and a document that recorded the memories and experiences of the men who attended these training schools as boys. The Ottawa Christian Brothers also made a contribution towards loss of wages: for more details about this Agreement see Shea, *Redress Programs* above n15; and Roche and Hoffman, above n13.

22 For an emphasis on this notion of 'true' victims see the critique of the Nova Scotia Compensation Program (NSCP): Kaufman, above n18. Justice Kaufman was asked to review the Nova Scotia Provincial Government's response to allegations arising from a number of institutions, with a primary emphasis on the NSCP. The report was highly critical of the NSCP. His report, discussed in more detail below, has been highly influential, and its emphasis on 'true victims' and the importance of validation has impacted on the development of other redress packages. See for example, the comments by the Hon Anne McLellan, then Minister of Public Safety and Emergency Preparedness in evidence to the Standing Committee on Aboriginal Affairs and Northern Development, Tuesday 22 February 2005, at 2 and 7, concerning the 2003 ADR model for the Canadian IRS.

> It is unreasonable to expect that the Agreement process could ever be truly positive for the women who participated. References, no matter how informal, to the Agreement as a 'healing package' may have contributed to unrealistic expectations about the extent to which a woman's life could be improved through the Agreement. Neither the process nor the package of benefits can be expected to undo what happened to them as girls at Grandview. Any future initiatives should be cautious about the language that is used to describe the Agreement.[23]

This discussion starts by providing a brief overview of the ways in which 'redress packages' are often seen, and promoted, as a better (indeed a 'healing') approach to responding to institutional harms, particularly when compared to the traditional civil and criminal legal systems. We discuss the developing field of 'therapeutic jurisprudence' and in particular the work of Bruce Feldthusen, Olena Hankivsky and Lorraine Greaves who have undertaken a detailed study comparing therapeutic outcomes for sexual assault victims who pursued their claims via one of three different methods: tort (civil justice system), a statutory criminal injuries compensation scheme and under the Grandview Agreement.[24] We then turn to examine the Grandview Agreement by way of a detailed case study. In the concluding section we provide some critical commentary on the Grandview Agreement.

PART I: Redress packages as 'healing', 'restorative' and 'therapeutic'?

What do we mean by 'redress'?

The traditional legal remedy for harm is damages, and it follows that the traditional understanding of redress or reparations usually involves some form of financial compensation. However, if redress is seen as an attempt to address the multiple needs of victim/survivors of abuse,[25] this involves looking at multiple dimensions of the process, including but not limited to financial remedies. It involves instituting a process that is more respectful of the harms that are claimed to have been experienced, and one that acknowledges the multiple ways in which those harms impact on a person. If redress is viewed in this way then we need to distinguish

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23 Deborah Leach & Associates, *Evaluation of the Grandview Agreement Process: Final Report* (1997), at 64-65.

24 Bruce Feldthusen, Olena Hankivsky & Lorraine Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' (2000) 12 *Canadian Journal of Women and the Law* 66.

25 These include establishing a historical record (remembrance); acknowledgement, apology, accountability, access to therapy or counselling, access to education or training, financial compensation, and prevention and public awareness: Law Commission of Canada (LCC), *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (2000) at 74.

between those programs that can be characterised as 'alternative' processes and those more accurately described as 'non-court based settlement packages' (or even 'out-of-court settlements'). This important distinction was emphasised by the IHRD in its research on the needs of victims of institutional abuse undertaken for the LCC.[26] The IHRD argued that true alternative dispute resolution (ADR) must be about 'more than simply lowering transaction costs, and should encompass relationship and shared decision making by groups with similar resources'.[27] In contrast, while 'non-court based settlement programs' might minimise the 'trauma' associated with civil litigation and reduce delay, the IHRD identified these settlement approaches as being 'principally designed and administered by government' where:

> Their real appeal to governments is said...to be limiting exposure to damages and maintaining control of the process of resolution and information about the abuse.[28]

Therapeutic jurisprudence

Over the last decade therapeutic jurisprudence[29] has been increasingly 'recognised as an important model for assessing the impact on participants of various aspects of the legal system'.[30] The essential aim of therapeutic jurisprudence is to examine whether particular uses of the law/legal system might be identified as therapeutic or anti-therapeutic, or whether particular areas of the law might be able to take on a more therapeutic design. Importantly therapeutic jurisprudence takes a broad focus on 'what is law' and seeks to ask questions about the therapeutic impact of its administrative elements, the actors involved, the components of the legal process as well as the final outcome.[31] It is concerned with the law, in its broadest sense, in

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26 IHRD, above n21 at [5.1.5] For a similar distinction see Ronda Bessner, *Institutional Child Abuse in Canada*, Paper prepared for the LCC, (1998). Copy on file with authors. Similarly Jennifer Llewellyn in her work on restorative justice and the resolution of claims arising from the Canadian IRS seeks to draw a distinction between 'mainstream ADR' which is focussed on settlement, and ADR which is based on restorative justice: 'Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR and Restorative Justice' (2002) 52 *University of Toronto Law Journal* 253.

27 IHRD, above n21 at [5.1.5.

28 Ibid.

29 See David Wexler & Bruce Winnick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence*, Carolina Academic Press, Durham, 1996; Bruce Wexler and David Wexler (eds), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts*, Carolina Academic Press, Durham, 2003; David Wexler (ed), *Therapeutic Jurisprudence: The Law as a Therapeutic Agent*, Carolina Academic Press, Durham, 1990; and Marilyn McMahon and David Wexler (eds), *Therapeutic Jurisprudence*, Law in Context Special Issue, Federation Press, Leichhardt, 2003.

30 Feldthusen, Hankivsky & Greaves, above n24, 67.

31 David Wexler, 'Reflections on the Scope of Therapeutic Jurisprudence' (1995) 1 *Psychology, Public Policy and Law* 220, at 225. Wexler notes that therapeutic jurisprudence did not initiate this wider focus, but rather is part of a then recent movement looking 'beyond an almost exclusive focus on the study of legal doctrine'.

action.[32] Therapeutic jurisprudence was first developed in the context of mental health law. Over the years, it has increasingly been applied to a wide range of different issues including drug-related offences, domestic violence and tort actions, including civil actions for victims/survivors of sexual assault.[33]

It is now widely understood that victims of sexual assault (whether children or adults) are often (re)traumatised by their dealings with the criminal and/or civil legal system. Many victim/survivors report finding the experience in court to be re-traumatising and in some cases worse than the rape itself.[34] It is therefore not surprising that one of the oft stated reasons for designing specific redress packages for institutional harms is that, if well-designed, they may be able, not only to remove a number of the anti-therapeutic consequences of the civil legal system (for example the negative impacts of delay and adversarial processes such as cross examination), but also to incorporate other measures that are seen as possessing potentially 'therapeutic' outcomes/ effects for the victims/survivors. The move towards recognising therapeutic outcomes also coalesces with the reasons why sexual assault victims may seek to sue a perpetrator (or third party) by way of a civil action. This often has little to do with monetary compensation and more to do with other therapeutic outcomes such as assisting with the healing process by way of receiving an acknowledgement of the harm (public affirmation and placing accountability on the perpetrator), a way of holding the perpetrator accountable while being treated with respect through that process.[35]

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32 Marilyn McMahon & David Wexler, 'Therapeutic Jurisprudence: Developments and Applications in Australia and New Zealand' in McMahon & Wexler (eds), above n 29, 2. See also Wexler, 'Reflections', above n31 at 231.

33 Ibid. See also Wexler, 'Reflections', above n31 at 226-228

34 In regard to the experiences of victims of sexual assault in the criminal legal system, see the study conducted by the NSW Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996). For a similar study conducted in Victoria see Melanie Heenan & Helen McKelvie, *The Crimes (Rape) Act 1991: An Evaluation Report*, Department of Justice (1997). For a discussion of the experiences of victims of sexual assault in the civil legal system see Feldthusen, Hankivsky & Greaves, above n24 at 85-86. For a detailed personal account of a victim/ survivor's dealings with both the criminal legal system and the civil legal system see Jane Doe, *The Story of Jane Doe: A Book About Rape* (2003).

35 See Bruce Feldthusen, 'The Civil Action for Sexual Battery: Therapeutic Jurisprudence?' (1993) 25 *Ottawa Law Review* 203, at 211. However it is also important to recognise that financial compensation can be very important as it possesses a range of key meanings for victims in terms of validation, demonstrates that they were believed, can enhance self-esteem and the ability of money to offer some life opportunities – see the discussion of financial compensation in the context of criminal injuries compensation schemes in Ian Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy* (2001) at 92, 96-97, 100; see also Seetal Sunga, 'The Meaning of Compensation in Institutional Abuse Programs' (2002) 17 *Journal of Law and Social Policy* 39.

Feldthusen, Hankivsky and Greaves interviewed a number of victims/survivors of sexual abuse and compared the therapeutic outcomes for those who pursued their legal claims through the tort system, those who did so via the Ontario Criminal Injuries Compensation Board (CICB), and those who were part of the Grandview Agreement.[36] As they put it, their research:

> ...attempted to identify survivors' expectations upon entering these legal processes and to examine how they assessed the therapeutic consequences of the processes on completion.[37]

In summary the study found that all three legal avenues have the potential to provide victims/survivors with both therapeutic and anti-therapeutic outcomes, and that it was not possible to assert clearly that one method was superior to the others.[38] The study found that while only 50% of Grandview claimants interviewed would recommend going through such a process to others, this figure was considerably higher than those for a tort action or criminal injuries compensation.[39] Feldthusen, Hankivisky and Greaves concluded that:

> The therapeutic implications of compensation claims by victims of sexual abuse cannot be overstated or ignored. Claimants often enter the processes for explicit therapeutic reasons. They measure their success or failure in therapeutic terms. They experience significant therapeutic and anti-therapeutic outcomes... A compensation regime that does not take reasonable steps to address the therapeutic needs of the claimants is one that cannot achieve its professed restitutionary goals. As is made clear in this study, money alone cannot heal.[40]

The importance of process

Feldthusen and colleagues draw on the work of Tom Tyler[41] in discussing the importance of 'process' to how plaintiffs/ claimants feel about legal action. In turn they ask questions about the extent of victim participation in the procedure (for example modes of giving evidence, extent of control over the process); the extent to which plaintiffs feel they are 'treated with respect, politeness and dignity, and whether

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36 Feldthusen, Hankivsky & Greaves, above n24. For other discussions of therapeutic jurisprudence and sexual assault civil legal actions see Nathalie des Rosiers, Bruce Feldthusen & Olena Hankivsky, 'Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System' (1998) 4 *Psychology, Public Policy and Law* 433; and Feldthusen, above n35.

37 Feldthusen, Hankivsky & Greaves, above n24 at 67.

38 Ibid at 67-68.

39 Ibid at 113.

40 Ibid at 112. Reference omitted.

41 Tom Tyler, 'The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings' in Wexler & Winnick (eds), above n29. For another discussion of the importance of process see Arie Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism' in McMahon & Wexler (eds), above n29 at 15-17.

their rights as citizens are acknowledged';[42] timeliness of the legal resolution; how people felt about their legal representation; the role of support networks in seeking a legal response; the hearing setting; the effect of any financial compensation; and whether the process involved 'confronting the perpetrator'. They also explored how people felt after the adjudication process had been finalised (as a reflection on the whole process). Feldthusen has previously emphasised the importance of focussing on process and not simply outcomes when attempting to respond to complex harms, and sexual harms in particular:

> ...we learn that litigants' evaluation of the litigation experience is little influenced by the actual outcome of the case, by the time or money spent on litigation, or by variables such as age, education, race or sex. Rather, what really counts is whether or not litigants perceive that they have been treated fairly. Litigants want to perceive the proceedings as unbiased. They respond favourably to how they are treated, especially whether they are treated with dignity and respect. They prefer a procedure in which they can participate, have a voice, or control.[43]

The question of therapeutic outcomes (and anti-therapeutic effects) has important resonance when talking about redress packages or reparations. This is because they are frequently discussed in the language of 'healing' and 'repairing harm'. This raises a number of key issues. The conception of redress packages as 'healing packages' is discussed in more detail below, in particular the associated assumption that the contents and process of the package are what claimants require to 'heal' and 'move on'. As Feldthusen, Hankivsky and Greaves point out care needs to be taken in assuming that victims/survivors are unwell.[44] Another key issue concerns the responsiveness of such packages to the victim/survivors. There is always a concern that what might appear to be responsive has been imposed on survivor groups without any real consultation/negotiation, leaving the victim/survivors feeling once again disempowered.[45] This raises questions about the extent to which this language of

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42 Tyler as cited in Feldthusen, Hankivsky & Greaves, above n24 at 86.

43 Feldthusen, above n35 at 217.

44 Feldthusen, Hankivsky & Greaves, above n24 at 69.

45 The 2003 ADR model for IRS survivors only provided compensation to those survivors of the IRS who had been subjected to sexual and/or physical abuse. It did not compensate for any form of psychological abuse, and most importantly it did not provide any compensation for loss of language and culture (as these types of injuries have not been recognised by the courts as compensable). In addition a strict approach to causation was adopted through the adjudication process and what appears to have been an unnecessarily legalistic approach. One example that illustrates these concerns, and is frequently cited to demonstrate them, is the case involving Flora Merrick. At the completion of her ADR adjudication she was awarded $CDN 1500 for the physical punishment ('strapped quite severely on her hands and forearms' which left red marks and bruising) that she endured as a result of running away after being refused permission to attend her mother's funeral when she was 15. Ms Merrick had been in a residential school since she was five. The adjudicator noted that while the punishment endured by Ms Merrick was within the 'standards of the day', it was arbitrarily imposed and this 'harsh incident' had remained in her memory. Canada appealed this decision on the ground that the ADR was only meant to provide compensation for those acts

'healing' is appropriate if a particular redress package has failed to look at the therapeutic dimensions of the process. It is in this respect that the Grandview Agreement is distinguishable from many of the other packages that have been developed. The key innovation of the Grandview Agreement was that it was designed, and driven, by the women themselves.[46] From the outset, it was the survivors, through the Grandview Survivors' Support Group (GSSG), that defined their own harms and the remedies they sought. It was the women who approached government and negotiated a process that would provide a range of benefits that were focused on 'what they needed to get better'.[47]

PART TWO: The Grandview Agreement

Background

The Grandview Training School for Girls operated from 1933 to 1976.[48] The School initially operated under the *Industrial Schools Act* under which girls aged 12 to 18 were admitted to the school by order of the provincial minister. After 1939, admission was via a court order under the *Ontario Training Schools Act*.[49] Once admitted, a girl became a state ward and the provincial government was responsible for her 'care, custody and control'.[50] Aboriginal and non-Aboriginal girls attended the school, with an average of 120 girls residing at Grandview in any given year. Most girls were held at Grandview for a few years, however some girls were there for only a few months and others for as long as four years.

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of physical punishment outside the standards of the day. As a result of this appeal Merrick has joined the Baxter Class Action. See discussion in CBA, above n12, at 13-14; and Debbie O'Rourke, 'The Forgotten Scandal: Feds Lavish Millions of Dollars on Lawyers while Fleecing Residential School Victims', (24) *Now Toronto*, 28 April – 4 May 2005, <http://www.nowtoronto.com/issues/2005-04-28/news_story3.php> accessed 28 August 2006.

46 Susan Vella, 'The Healing Package Negotiated by the Grandview Survivors' Support Group: An Example of Alternative Dispute Resolution and Societal Accountability in Action' published in Canadian Institute, *Civil Liability for Sexual Assault in an Institutional Setting* (1995). Copy of paper on file with authors.

47 Interview #5.

48 Before 1967 it was known as the Ontario Training School for Girls.

49 See brief discussion of legislation in Joan Sangster, *Regulating Girls and Women: Sexuality, Family and the Law in Ontario, 1920-1960* (2001) at 249, en 5.

50 Vella, above n46.

Notions about delinquency, deviance, and explanations of their causal factors, were particularly gendered during the time that Grandview was in operation.[51] In her research on the regulation of women in Ontario 1940-1960, Joan Sangster found that girls were much more likely to be institutionalised than boys.[52] Boys were primarily institutionalised for offences like theft, whereas girls were more likely to be charged with status offences. Before 1944 this was likely to be 'truancy' and after that time 'incorrigibility – often linked to promiscuity'.[53] Notions of delinquency and deviance were also linked to ideas about class and race.[54] Sangster argues that Aboriginal girls were more likely to be sentenced to the 'protective' environment of an industrial school given the impact of 'dominant racist views' which identified Aboriginal girls as being '...more vulnerable to alcohol abuse and promiscuity...Court workers and judges also tended to see the material and cultural background of Native girls as more likely to lead to immorality and delinquency'.[55] Added to these ideas was the notion that schools, such as Grandview, were 'industrial' or 'training schools', and this created the perception that the girls would receive an education of some kind. As a result the schools were promoted by welfare agencies as being of 'benefit' to 'neglected and abused girls'.[56]

One feature that distinguished Grandview from other girls' training schools was the existence of a secure facility operated by male guards, known as Churchill House, which opened after 1960.[57] Approximately one third of Grandview residents would be held in this isolation facility for punishment at any one time. Survivors stated that they were 'held naked in cold, damp cells without furniture, bedding, clothing or blankets' and that some girls were 'forced to urinate, defecate and menstruate on the

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51 Sangster, above n49, at 136. See also accompanying endnotes at 252. See also Joan Sangster, 'Girls in Conflict with the Law: Exploring the Construction of Female "Delinquency" in Ontario, 1940-60' (2000) 12 *Canadian Journal of Women and the Law* 1.

52 Sangster, above n49 at 148.

53 Ibid at 148. See also Feldthusen, Hankivsky & Greaves, above n24 at 72-73; and Vella, above n46.

54 See Sangster, above n49 at 140. One of the adjudicators for the Grandview Agreement, Interview #2 made similar comments about reading the Crown Ward files and noting the ways in which class and race biases were built into the system of incarcerating young girls.

55 Sangster, above n49 at 142, 147.

56 Sangster, above n49 at 133. References omitted.

57 Vella, above n46 at 2.

floor of their cells'.[58] Some survivors referred to Churchill House as the 'screaming house'.[59]

Public knowledge about abuse that took place at Grandview was generated by the coincidence of two survivors seeking assistance from the same psychologist. During their separate counselling sessions the two women revealed similar experiences, which led the psychologist to ask the women whether they wanted to meet and provide each other with support. The psychologist also 'said that he would support them' if they wanted to publicly reveal their experiences. The women did so making 'public appearances on television asking [other survivors] ...to contact the police or the provincial government'.[60]

What followed was one of the longest police investigations at that time.[61] Given the scale of these allegations, a specific Victim Witness Program was established at the end of 1992.[62] Despite the extensive police investigation, and the laying of multiple charges against a small number of alleged offenders, only two convictions ensued.[63]

The Nature of the Allegations

Most of the allegations of abuse concern the 1960s-70s when Churchill House was opened.[64] While most allegations concerned male staff, allegations were also made against female staff and fellow wards.

The allegations of sexual abuse were extensive and include sexual touching, being watched by male staff while showering and undressing, being strip searched by male

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58 *Report of the Grandview Adjudicators*, 13 May 1998, 20. Copy on file with author.

59 Barbara Aggerholm, 'Play Keeps Grandview Survivors' Story Alive', *Kitchener-Waterloo Record*, 20 July 2002.

60 Shea, *Redress Programs,* above n16.

61 Aggerholm, above n59 at B3.

62 Leach, *Evaluation,* above n23 at 9. This witness assistance program was established to assist victims in dealing with the criminal process, eg providing information about the court process and information about referral services and so on: Kaufman, above n18 at 333 fn 3.

63 See Goldie Shea, *Institutional Child Abuse in Canada: Criminal Cases*, paper prepared for the LCC (1999). Copy on file with authors. The failure to secure convictions was followed by the media raising questions about the veracity of the women's complaints. The media reports, in turn, suggested that the government had acted too quickly in providing compensation: see Kirk Makin, 'Real School Scandal May Not be Sex Abuse as More Charges Fall by the Wayside, One Lawyer Wonders Why Province Paid Off the Complainants', *The Globe and Mail*, 28 November 1997; and Donna Laframboise, 'Opinion: Who's the Victim Now? In our Outrage Over Sex Crimes, the Rights of the Accused are Sometimes Overlooked by the Media and the Public. The Sordid Saga of the Grandview Training School Abuse Trials is a Case in Point', *The Globe and Mail*, 8 November 1997.

64 Shea, *Redress Programs*, above n15.

staff, as well as more serious allegations including being 'coerced...into sexual activity', exchanging privileges for sexual 'favours', and being 'raped repeatedly and violently by male guard(s), and the use of objects such as brooms to rape the girls.[65] Physical abuse and mistreatment included '...being punched, slapped, pulled, shoved, pinned, choked and kicked...blows aimed to the head, back, sides, ribs, stomach, arms and shins'.[66] Other girls were 'dragged by their hair', thrown against walls and down stairs. Many girls sustained injuries including 'scrapes, bruises, wrenched muscles, bleeding noses, bleeding ears, split lips, cuts and lacerations, split foreheads, cracked ribs and broken bones'.[67] Psychological abuse also included the cutting of girls' hair without consent, lack of food, regular strip searches frequently involving internal vaginal examinations, being compelled to give up their babies for adoption, 'excessive and cruel use of solitary confinement' and lack of 'intellectual stimulation'.[68] Some of these acts of violence and abuse had racialised dimensions when perpetrated against Aboriginal girls,[69] and Aboriginal girls also experienced particular forms of race-based harms.[70] There were also incidents reported of anti-Semitism and anti-lesbianism against Grandview residents.[71]

As noted above, there were also some instances of abuse perpetrated by fellow wards. This is not surprising in the context of a toxic environment where supervision was inadequate and often failed to protect the girls, and violence and sexual abuse became normalised.

The Formation of a Support Group

Led by the public revelations by the two women and their psychologist, a small number of victims/survivors started to meet to provide each other with support and commence discussion about seeking a response from the government.[72] In 1992 this

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65 *Grandview Adjudicators' Report*, above n58.

66 Ibid.

67 Ibid at 19.

68 Bessner, above n26. See also the *Grandview Adjudicators' Report*, above n58 at 18-19.

69 See *Aboriginal Adjudicator's Report on the Process of the Grandview Agreement*, 24 March 1998, copy on file with author and the *Grandview Adjudicators' Report*, above n58 at 20 and Interview #7.

70 *Aboriginal Adjudicator's Report*, above n69.

71 Email communication, Interview #4.

72 Leach, *Evaluation*, above n23 at 10.

group became known as the Grandview Survivors' Support Group (GSSG).[73] The membership of the GSSG grew to over 200, they elected an executive and hired a lawyer to start to formulate what they wanted in response to the harms that they had suffered at Grandview. What is notable, and unusual about this lawyer/client relationship, was that it was the women themselves who set the agenda and articulated their harms and the responses that they sought. It is this active involvement of the GSSG that is one of the factors that led to the Grandview Agreement being seen as 'truly alternative'. The lawyer who acted for the GSSG identified this process as critical to the formation of the Agreement.[74]

Negotiations with the Ontario Government

The Grandview Agreement was reached following ten months of intensive negotiations, assisted by a feminist facilitator, between the GSSG and the Ontario. In these negotiations the GSSG was represented by four elected members and their lawyer. The Government also kept is representation to a minimum: it was represented by the 'Grandview Project Manager and legal counsel from the Ministry of the Attorney General'.[75] During this negotiation period the Government agreed to a number of interim measures.[76] This demonstrated not only the Government's good faith in the process, but also that it recognised that measures such as therapy were necessary for the women to be able to participate effectively in the negotiations and, in turn, to be able to participate in the processes of the Agreement itself. In February 1994 the GSSG and their lawyer organised a process that enabled members of GSSG to vote on the Agreement. Over 80 per cent of the 127 women who voted accepted the Agreement.[77] In June 1994 the Government formally approved the Agreement.[78]

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73 Other survivors of institutional abuse have also formed survivors groups that have been key in negotiating redress outcomes. The other key example is Helpline mentioned earlier in this article.

74 Vella, above n46.

75 Vella, above n46 at 7 and Shea, *Redress Programs*, above n15.

76 Interim measures included: a therapy program, a 24 hour crisis telephone line; and funding enabling the GSSG to have paid executive positions and conduct outreach to other women who attended Grandview. The government also created a specific section within the Attorney General's Department to manage the Grandview project (the 'Abuse in Provincial Institutions Office') staffed by people who had experience in working on issues concerning violence against women. The Government also agreed to pay the legal costs incurred by GSSG during the negotiation.

77 Leach, *Evaluation*, above n23 at *ii*.

78 Ibid.

The Importance of Attention to Process

The detailed negotiating process and the active role of the GSSG are considered the critical components of the Agreement's success. That is, it is the process, rather than the outcome per se, that is the real measure of the Agreement as a 'true' ADR process and a feminist ADR process.[79] This emphasis on process is important – there is a tendency to talk about redress packages in terms of their contents, rather than how those contents were reached and the way in which the contents are implemented. Yet the process in reaching the final redress package can tell us much about whether a process is empowering to victim/ survivors; whether it responds to their needs; rather than simply comparing it to other packages or to what a victim/survivor might be entitled to if successful in a tort action.

> ...the essential distinguishing or unique feature about Grandview was the process that [the GSSG and their lawyer] engaged in to determine what to put forward to the Government. We had close to 200 women who had gone to Grandview .... The remedies that were put forward were survivor-defined not lawyer-created .... We had a negotiating team that the women selected and that negotiating team was at the table. ... We all spoke...[The lawyer] would obviously address legal matters or shortcomings or things like that but ... the women were very strong at giving blunt examples to make the point and putting forward ... rationales for why it was that these things were needed in order to help them move on with their lives... So it was the process that I think really defines the Agreement.[80]

The Contents of the Grandview Agreement

The innovative nature of the Grandview Agreement is well illustrated by its 'overview' statement. The 'overview' situates the experiences of Grandview within the wider context of institutional child abuse and its negative impact, not only on individual victims/survivors, but also on the wider community.

> This Agreement is based on ... a recognition that society has a direct responsibility to provide the support necessary to facilitate the healing process of survivors of sexual and institutionalized abuse, particularly when such abuse arises in the context of an institution housing children. It also recognizes the current individual-based solutions offered by the civil justice system are inadequate responses to institutionalized and sexual abuse. These problems are prevalent enough in our society so as to warrant a social based response which seeks, ultimately, to facilitate the healing of survivors ...
>
> ....
>
> It is an objective of the various components of this Agreement to facilitate a path of healing and recognition of self-fulfilment for its beneficiaries. It is hoped that the coordination of the various components, will, as an integrated whole, produce a more accountable and effective response for survivors of institutionalized and sexual abuse...[81]

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79 See Interview #4; Interview #5. See also Interview #6 which comments on the key role of the Helpline Group and the GSSG. See also Interview #1 which comments on the relationship between the GSSG and their lawyer, where the lawyer did not tell the GSSG what to do but rather listened, translated and presented options.

80 Interview #5.

81 The Grandview Agreement, Overview. Copy on file with author.

The approach adopted by the GSSG was to seek a package that provided some level of redress to many women, rather than recommending that individual women pursue individual tort actions where, if they were successful, they might have received greater financial compensation.[82]

The Agreement was developed with a view to helping each individual woman to move towards 'healing'; it was about the impact of the act of violence and abuse, rather than simply quantifying the act itself.

By September 1998, a total of 329 women had participated in the Agreement.[83] It is estimated that the total expenditure on awards and benefits was $CDN16.4 million over the six-year period 1992/93 – 1997/98.[84]

Three Types of Benefits

The range of benefits available under the Agreement stands in marked contrast to those available under traditional civil litigation or criminal injuries compensation schemes. There were three broad categories of benefits: group, general and individual.

(a) Group benefits

Group benefits were available to all women who attended Grandview regardless of whether they experienced physical or sexual abuse or mistreatment. This is notable, as most redress schemes only provide access to benefits for individuals who have their particular claims validated.[85] Group benefits included such things as payment for the removal of tattoos that were inflicted whilst incarcerated at Grandview; the provision

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82 The difficulties that would have been faced by survivors of Grandview if they approached the civil legal system for compensation is discussed in more detail later in this paper when issues of credibility and validation in the context of the adjudication process under the Grandview Agreement are discussed.

83 Deborah Leach, *Wind Down Report: Lessons Drawn by the Abuse in Provincial Institutions Office About the Grandview and St Johns and St Joseph's Agreement Processes* (1998) at 7. Copy on file with authors. Due to inadequacies in record keeping regarding the number of girls who attended Grandview, and lack of knowledge about how many suffered sexual, physical or psychological abuse while incarcerated there, it is not possible to know whether this is a good uptake rate.

84 Ibid at 11.

85 As outlined earlier the Settlement Agreement reached regarding the IRS also contains an interesting example of a group provision in the form of a 'common experience payment'.

of a 1800 crisis telephone line; and a 'general acknowledgement' (often referred to as an apology) by the Government of Ontario.[86]

The availability of laser tattoo and scar reduction,[87] provides a clear indication of the degree of involvement of the victims/survivors in the design of the package. As one of the adjudicator's of the Grandview Agreement commented:

> ...you can see this was an Agreement negotiated by the women when you see that [the removal of tattoos]...you just know that mattered to them. I would never have thought of it.[88]

As in many other institutionalised contexts, the infliction of tattoos and other forms of self-harm, was common at Grandview. For many of the women, the existence of their tattoos, or the scars remaining from attempts to remove them, served as daily reminders of Grandview. Survivors reported in the evaluation of the Agreement that this was a 'significant' benefit which had assisted in improving self-esteem and the 'ability to "live in the present"'.[89]

(b) General benefits

The Grandview Agreement included a number of measures that were referred to as 'general benefits' in that they do not specifically benefit Grandview survivors, but were aimed to assist survivors of sexual assault and institutional abuse more generally. It is in this area that the Agreement shows some weakness as these measures were either not followed through with, or took some time to be implemented. There were three general benefits: legislative, research and the investigation of a healing centre.

The main legislative benefit related to the statute of limitations.[90] In 1994 there was a bill before Parliament that sought to amend the limitation period applicable to certain

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86 Grandview Agreement, cl 2.3.1-2.3.2. This apology was issued on 16 November 1999, long after the hearings had finished, as a consequence of needing to wait until the criminal trials were completed. This 'delay' was perceived negatively by some women who felt that it postponed closure: see Leach, *Evaluation*, above n23 at 26, 53, 67; Feldthusen, Hankivsky & Greaves, above n24 at 77. The delay was also commented upon by the opposition: Ontario, *Parliamentary Debates*, Legislative Assembly, 16 November 1999 (Michael Byrant) at 1419.

87 Grandview Agreement, cl 2.2.1-2.2.9.

88 Interview #3. See also Interview #2, #4 and #5.

89 Leach, *Evaluation*, above n23, at 43-44.

90 Limitation periods have represented a significant barrier to civil litigation for survivors of childhood sexual abuse, see Ben Matthews, 'Limitation Periods and Child Sexual Abuse Cases: Law, Psychology, Time and Justice' (2003) 11 *Torts Law Journal* 119. See also Joanna Manning, 'Reasonable Sexual Abuse Victim: "A Grotesque

sexual assault claims (when bringing claims against a public servant, and more generally, in relation to claims for sexual assaults perpetrated within a trust relationship). The Government indicated in the Agreement that this was 'a matter upon which...[it] propose[d] to act'.[91] However, the bill was not passed at that time, nor on the successive occasions when similar amendments were raised and it was not until the *Limitations Act 2002* (which came into force on 1 January 2004) that such legislative measures became operative.

The research initiatives involved commissioning an evaluation of the Agreement, which was conducted by Deborah Leach & Associates.[92] This evaluation is very informative, and it is significant that this is the only redress package to date that has conducted such an independent evaluation. However it is also limited, primarily because of the time when it was conducted (July 1996 – March 1997); before the completion of the adjudication process, and before there had been extensive use of the benefits available under the package. The evaluation notes these limitations and indicates that its findings are 'preliminary'.[93]

The research initiatives also included the creation of a 'historical record', which provides a means of recording and commemorating the experiences of survivors. For Grandview, this historical record was made in the form of a video documentary which provides a background to the school, profiles some women who talk of their

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Invention of the Law"?' (2000) 8 *Torts Law Journal* 6; Janet Mosher, 'Challenging Limitation Periods: Civil Claims by Adult Survivors of Incest' (1994) 44 *University of Toronto Law Journal* 169; and Ann Marie Hagan, 'Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse' (1991) 76 *Iowa Law Review* 355. A number of overseas jurisdictions have removed or amended limitation periods in child sexual assault cases [eg see *Limitation Act 1996* (British Columbia) s 4(k); *The Revised Statutes of Saskatchewan 1978*, Ch L-15, Limitation of Actions Act, s 3(3.1)]; or introduced moratoriums (eg in California a 12 month suspension in relation to certain child sex abuse claims was introduced via an amendment to *Code of Civil Procedure,* s 340.1). One of the 'general benefits' under the Grandview Agreement was the intention to amend the statute of limitations. While this did not take place at the time, it is significant that it was included.

91 Grandview Agreement, cl 6.1.1.

92 Leach, *Evaluation*, above n23. The evaluation component of the Agreement is provided for under cl 6.2.1. Another research initiative concerned the need for research to develop standards of intervention or practice for counsellors. This was expressed in vague terms and there appeared to be no requirement on the Government to implement it. See Grandview Agreement, cl 6.2.2. Another vague clause related to exploring the creation of a 'healing centre': Grandview Agreement, cl 6.3. Shea's research for the LCC notes that this proposal 'was discussed but not acted upon. Instead, there was some money put aside for a needs assessment which eventually went back to the general revenue fund.': Shea, *Redress Programs*, above n15.

93 Leach, *Evaluation*, above n23 at 4. This was also commented upon by a key professional interviewed for this research, see Interview #6

experiences at Grandview, and the development of the Agreement.[94] The LCC notes that such a form of 'intangible but very real benefit' is sought by 'many survivors' and is a 'significant non-monetary benefit that can be incorporated into any redress program'.[95]

(c) Individual benefits

Individual benefits were available to women whose claims about sexual or physical abuse or maltreatment were validated. Individual benefits included: financial compensation, financial advice services, education and training assistance, counselling/ therapy, and an individual apology. The harms and injuries that were compensable were defined widely in the Agreement, and were broader than would be compensable under tort law, or indeed under a number of other redress packages.[96] Generally most other redress packages implemented in Canada have restricted their definitions of abuse to physical and/or sexual abuse and have not explicitly extended to psychological abuse.[97] The limitations of a restrictive approach to harms was reflected on by the LCC in its work. Originally asked by the Minister to explore responses to the physical and sexual abuse of children in government institutions the LCC adopted a more expansive approach. In forming this decision, the LCC explained:

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94 *Until Someone Listens: Recovering From Institutional Abuse*, video recording produced by the GSSG. Running time: 120 minutes. Distributor: V Tape. Copy on file with author. Similar historical records have been produced under other agreements. For example, the Helpline Agreement provided for a written report: Benjamin Hoffman, *The Search for Healing, reconciliation and the Promise of Prevention: The Recorder's Report Concerning Physical and Sexual Abuse at St Joseph's and St John's Training Schools for Boys* (1995). See other examples in LCC, above n25 at 313.

95 LCC, above n25 at 313.

96 Abuse and mistreatment were defined as follows: 'ABUSE means an injury as a result of the commission of a criminal act or act of gross misconduct by a guard or other official at Grandview or in some circumstances by another ward and includes physical and sexual assault or sexual exploitation. It is acknowledged that sexual abuse includes arbitrary or exploitative internal examinations for which no reasonable medical justification existed and which resulted in demonstrable harm.' 'MISTREATMENT means an injury as a result of a pattern of conduct that was 'cruel' and for which no reasonable justification could exist (arbitrary) and includes conduct that was non physical but had as a design the depersonalization and demoralization of the person with the consequent loss in self esteem, and may involve discipline measures unauthorized by any superior authority....This [pattern of] conduct may include taunts, intimidation, insults, abusive language, the withholding of emotional supports, deprivation of parental visits, threats of isolation, and psychologically cruel discipline or measures which were not officially permitted in the management and control of the residents of the facility.' See discussion in Vella, above n46 at 9.

97 For example, the Jericho Hill Individual Compensation Program, above n17, and the Reconciliation Agreement regarding Father Epoch, above n15, were restricted to compensating sexual abuse; the Nova Scotia Compensation Program, above n18, and the 2003 ADR for IRS claims provided compensation for sexual and physical abuse. Even where claims are restricted to only sexual or physical abuse, there may still be further limitations about what can be claimed, for example the 2003 ADR model implemented for the IRS system adopted a narrow definition of physical and sexual abuse: see criticism of this narrow approach in AFN, above n12.

> While such types of abuse are certainly the focal point of concern about institutional abuse, they cannot be viewed in isolation. Children who are physically or sexually abused suffer emotionally as well. Similarly, emotional and psychological harm is done to children who are not physically or sexually abused themselves, but who witness abuse. Certain groups of children may also have been subjected to racial or cultural abuse. To ignore of discount these other types of abuse would be to take the problem of historical and sexual abuse of children in institutions out of the larger contexts within which it occurred.[98]

This expansive approach, reflected in the Grandview Agreement, is indicative of a more sophisticated appreciation of the types of harms that arise in institutional contexts, and the willingness of the Government to respond to the harms that the GSSG were articulating in negotiations. However, despite the breadth of the definition, the Aboriginal adjudicator points out that the lack of representation of Aboriginal women on the GSSG may have led to a general failure to consider the specific needs of Aboriginal claimants and the possibility that they experienced harms that were qualitatively different, or that Aboriginal women may have experienced different, racialised dimensions of harm.[99]

The application process for individual benefits involved a relatively brief application form. This form included both open and closed questions, and its brevity is in contrast to some other more complex application forms that have been instituted in other redress processes in Canada.[100] In the evaluation report, Leach commented that the brevity and structure of the Grandview application illustrated the balance between constructing a form 'to elicit sufficient information to assess a claim, while at the same time respecting the needs (eg literacy level, possible impacts of completing the form) of applicants'.[101] While the Grandview application process was much simpler than comparable redress packages, a number of women still found it difficult. Some women stated that they found the form difficult to understand and that the process of completing it brought to the surface matters and events that they had not thought about for some time.[102] On submitting the application, claimants were required to sign a release stating that they would not be able to commence any civil action against the

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98 LCC, above n25 at 7-8.

99 *Aboriginal Adjudicator's Report*, above n69, at 5-8.

100 Eg the application form employed in the 2003 IRS ADR process.

101 Leach, *Wind Down*, above n83 at 24.

102 Leach, *Evaluation*, above n23 at 27-30.

Government concerning Grandview, this release did not apply to action against the alleged perpetrator.[103]

The application was investigated by a small team seconded from the Criminal Injuries Compensation Board (CICB). While this process was referred to as an 'investigation,' it was largely conducted on the face of documentary evidence and generally involved comparing the woman's application with the Crown Ward files, any statements to the police and other documentary evidence that might be available.[104]

Financial compensation was determined via a matrix divided into four tiers ranging from $CDN3000 for 'mistreatment' up to $CDN60 000 for 'repeated serious sexual abuse'. The matrix was designed to reflect the severity and chronicity of the harm/injury.[105] The average award made under the Agreement was $CDN37 700.[106] On its own, the maximum financial award was small, particularly when compared to what women might have achieved if they were successful in a tort action.[107] However the combination of benefits that were available once a claim had been validated maximised the monetary worth of the package. It has been suggested that this approach better reflected the emphasis on 'healing' that underpinned the Agreement.[108]

> Given the amelioration goal of the Agreement, the provision of both benefits and a financial award was extremely important. Many women told us that while 'the money may go, the long term benefits of therapy, improved education and training will last'. For many women the benefits have contributed to positive changes in their lives, including improved self esteem, greater financial independence, an ability to think about planning a future for the first time and the possibility of getting an education and enhancing their skills.[109]

The vast majority of women who participated in the evaluation indicated that the financial award made a positive difference to their lives by increasing financial

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103 Grandview Agreement, cl 10.1 – 10.4.

104 Interview #6.

105 Grandview Agreement, cl. 4.2.6. Many other redress programs have also relied on a grid or matrix: see Shea, *Redress Programs*, above n15.

106 Leach, *Wind Down*, above n83 at 11.

107 In their study comparing the therapeutic outcomes for women who had been sexually assaulted who sought damages via the tort system, the CICB and under the Grandview Agreement, it was found that awards for those who were successful in their civil action 'ranged from $42 500 to $479 000…[with an] average award… [of] $209 833: Feldthusen, Hankivsky & Greaves, above n24 at 96.

108 Interview #5. In addition any award made under the Agreement was exempt in Ontario from the provisions of the *Family Benefits Act* and the *General Welfare Act*: Vella, above n46 at 10.

109 Leach, *Evaluation*, above n23 at 66. See also findings in Feldthusen, Hankivsky & Greaves, above n24 at 111.

security, independence and their capacity to provide for the future and, in particular, for their children. Positive benefits were also associated with the sense of validation that the financial award represented. At the same time, a number of the women who participated in the evaluation, and the later study by Feldthusen, Hankivsky and Greaves, expressed dissatisfaction with the small amount awarded, considering it inadequate compared to the harms suffered.[110] In addition, a small number of women indicated that the award created difficulties with managing the money and dealing with demands from family and friends).[111]

Individual benefits incorporated access to financial advice services including financial counselling, establishing a trust fund for children, and receiving the award by way of periodic payments or a structured settlement instead of a lump sum.[112] At the time of the evaluation, few women had used the financial counselling services and, for those who had, responses were mixed: some found it helpful while others found it a 'difficult and shaming process'.[113]

Vocational or educational training or upgrading[114] covered 'basic costs' such as tuition fees, books/ course materials, a transport allowance and assistance with the cost of child care. Applicants could participate in a 'psycho-educational assessment' to assist in identifying an appropriate course.[115] While not many women had accessed these benefits at the time of the evaluation, they were seen as particularly important as education was something that 'was stolen from [the women] at Grandview'.[116] Women reported that this benefit increased their 'self-esteem', 'self-worth', provided

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110 Leach, *Evaluation*, above n23 at 35 notes that some women were dissatisfied with the financial award and felt that claimants under the Helpline Agreement received greater amounts. See also comments made by one women in the evaluation that 'no amount of money will heal me…': at 52; Feldthusen, Hankivsky & Greaves, above n24 at 97 and 99-100. Claims validated under Helpine received on average $33 700 (this includes the financial award and other benefits and support costs). The highest award was $107 944 and the lowest was $2500. While the highest award was certainly greater than that able to be paid under the Grandview Agreement the general level of awards under Helpline would indicate that the view held by some women about the Grandview Agreement vis-à-vis Helpline, is not accurate. For a discussion of the importance of explaining the meaning of the financial compensation component of a redress package see Sunga, above n35.

111 Leach, *Evaluation*, above n23 at 44-45.

112 Grandview Agreement, cl 4.3.1-4.3.6.

113 Leach, *Evaluation*, above n23 at 45.

114 Grandview Agreement, cl 4.1.1-4.1.2.

115 Grandview Agreement, cl 4.1.1. This assessment was voluntary. The evaluation notes that for the very small number of women who used this found it helpful as it gave them an idea of what they are capable of doing and pursing in educational terms: Leach, *Evaluation*, above n23 at 46-47.

116 Leach, *Evaluation*, above n23 at 45.

a 'new beginning' and meant that they were 'finally getting the education that [they] never got at Grandview'.[117] While this benefit was obviously very valuable, it is important to recognise that some women's ability to access these benefits would have impeded by their experiences at Grandview. For example, as a result of experiences at Grandview some women not only had lower levels of education and literacy, but also carried with them negative experiences of school environments.[118]

Individual benefits also included access to long term therapy/ counselling.[119] To access this benefit, successful claimants submitted a treatment plan usually for 12 months duration to the EIC for approval.[120] The provision of long-term therapy was identified in the evaluation as 'the cornerstone' of the Agreement. Women indicated that therapy made a significant difference by improving self-esteem, assisting in healing, sustaining them through the Agreement process, assisting in the capacity to cope, and generally being able to 'move on'.[121] While the Agreement noted that access to this therapy was not a long-term benefit,[122] its cessation caused some dissatisfaction with the claimants who felt that the fact there was some limit was not made clear to them and that they might have used this benefit in a different way if they had known that there was some limit.[123] This appears to be a problem of communication, and perhaps a failure to appreciate the extent to which the process would bring to life issues that many of the women had not directly faced for many of years, and the emotional and psychological toll that would incur.[124]

Following validation, a woman was able to make a number of applications to a contingency fund (up to a total amount of $CDN3000).[125] This fund sought to cover

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117 Ibid at 46.

118 Ibid at 45.

119 Interim counselling was provided prior to the finalisation of the Agreement, this interim measure was to expire six months after the ratification of the Agreement, whereby if claimants wanted to access longer term counselling they were required to submit an application for individual benefits. If that claim was not yet determined there were measures in place to continue therapy arrangements: see Grandview Agreement, cl 4.4.5.

120 Grandview Agreement, cl 4.4.3. It was possible to for these treatment plans to be extended, and in some exceptional cases residential care could be approved: Grandview Agreement, cl 4.4.16.

121 Leach, *Evaluation*, above n23 at 42. See also women's comments in the evaluation: at 42-43.

122 Grandview Agreement, cl 4.4.12.

123 Leach, *Evaluation*, above n23 at 43, see also comments at 59. See also Leach, *Wind Down*, above n83 at 18.

124 See some comments from survivors about the difficult experience of proceeding through the Grandview Agreement: Leach, *Evaluation*, above n23 at 52.

125 Grandview Agreement, cl 12.7-12.13 deals with the contingency fund.

'need[s not] … readily met by any other private or public program'.[126] Just over half of the uses of this fund (53.5%) were for health-related matters.[127] While this was the most popular benefit,[128] its administrative complexity detracted from its usefulness.

An individual acknowledgement (apology) was to be provided to every woman whose claim was validated.[129] Like the general acknowledgement issued in Parliament, these individual apologies were delayed until the completion of criminal proceedings against the alleged perpetrator.

The adjudication process

Six adjudicators, agreed to by the GSSG and the Government, were appointed to hear and assess the claims lodged under the Agreement. All of the adjudicators were women; five were white and one was Aboriginal. While the Agreement did not say a great deal about the qualifications required,[130] all adjudicators had a background in work on violence against women, most had previous experience in adjudication processes, five were law professors and one was a practising lawyer. The adjudicators brought a broad range of knowledge and experience: they described their collective expertise as being in 'human rights, feminist legal theory, tort law, criminal law, family law, constitutional law, property law, access to justice, health law, Aboriginal legal rights, minority language rights and adjudication in administrative tribunals'.[131] The background in violence against women was significant as it meant that the adjudicators brought to the hearing and decision writing process knowledge about the harms that are directed at women and children, knowledge about the prevalence of violence against women, and an understanding of the variety of ways in which experiences of violence or abuse may impact on women, including affecting their ability to recount what they have experienced. As experienced lawyers, they also brought to this process knowledge of the ways in which women and children's claims

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126 Grandview Agreement, cl 12.11.

127 Leach, *Evaluation*, above n23 at 39.

128 Ibid at 47.

129 Grandview Agreement, cl 4.5.1-4.5.2.

130 See Grandview Agreement, cl 8.4.

131 *Grandview Adjudicators' Report*, above n58 at 5.

about violence have historically been dealt with within the legal system.[132] The adjudicators saw the process as having 'multiple goals':

> First, it was a forum for the review and assessment of evidence relating to 'validation' and the assessment of quantum of damages. To this extent, the hearings did not differ from other, more traditional legal proceedings where judges review exhibits, listen to evidence, and make findings of fact based on legal standards and principles, including the onus of proof. Second, the Grandview hearings were intended to offer the applicants an opportunity to describe their experiences in their own words to someone with authority. The goal of adjudication pursuant to the Agreement was to empower the survivors of institutional abuse to define the wrong that was done to them, to explain the repercussions on their lives, to demand accountability and the restitution of their dignity, and to claim official recognition of injustice. The Grandview adjudication process was designed to accomplish all these goals.[133]

Four of the adjudicators commenced in 1995 and the remaining two commenced in the following year. The sole Aboriginal woman who was appointed as an adjudicator was one of those who started in 1996. In their final report, the adjudicators critically observed that the absence of an Aboriginal adjudicator at the outset was a significant omission.[134]

Four key aspects of the adjudication process are explored below: (1) training; (2) the hearing format; (3) the validation process; and (4) the written decision.

'They never once said to me 'I understand what you went through'.

The adjudicators who commenced in 1995 were provided with training by a feminist therapist who also had Grandview survivors as her clients. The training included help with dealing with people with multiple personalities, 'ways to be more respectful as an adjudicator in responding to testimony',[135] an injunction not to interrupt testimony too many times, assistance with asking questions about inconsistencies or discrepancies, as well as more practical issues like what to wear to make claimants feel more comfortable.[136] As Des Rosiers, Feldthusen and Hankivsky point out, it is possible to 'show empathy without compromising one's impartiality'.[137]

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132 For a discussion about women's credibility in law, particularly in terms of sexual assault criminal trials, see Kathy Mack, ' Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process' (1993) 4 *Criminal Law Forum* 327; and Rosemary Hunter, 'Gender in Evidence: Masculine Norms v Feminist Reforms' (1996) 19 *Harvard Women's Law Journal* 127.

133 *Grandview Adjudicators Report*, above n58 at 10.

134 They commented that had there been wider representation, this may have provided the applicants with more choice: Ibid at 6.

135 Interview #2.

136 Interview #3.

137 Des Rosiers, Feldthusen & Hankivsky, above n36 at 447.

The training emphasised the importance of not saying 'I understand what you are going through' because someone who did not attend Grandview could not possibly 'understand'. This was considered very important by the adjudicators,[138] and is also reflected in the research by Feldthusen, Hankivsky and Greaves. They report that people who made claims to the CICB were critical of these types of statements being made:

> *Their inability to empathize... Their lack of understanding and off-hand comments like, 'I know what you are going through'.* [139]

This is contrasted with the responses of those who went through the Grandview adjudication process:

> *I have nothing but the highest praise for every single person I came into contact with. They never once said to me 'I understand what you went through'. They were never disrespectful. That touched my life.*[140]

The hearings

Hearings 'began in the summer of 1995 and ended in March 1998'.[141] The Agreement required that a hearing was to be held for each application. While this did not have to be an oral hearing, in practice all claims were determined that way.[142] The nature of the hearings and their structure was determined by the adjudicators.[143] The only guidance provided by the Agreement was that the model for the adjudication is the 'administrative law system' and that it was expected that each hearing would take around half-a-day to conduct.[144] The four adjudicators who commenced about a year before the other two adjudicators formulated the process, including the way that decisions would be written. The hearings were designed to be 'informal and non-confrontational'.[145] Once appointed, the Aboriginal adjudicator also incorporated measures that made the hearings more accessible to Aboriginal survivors:

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138 This formal training was only provided to those four adjudicators who commenced in 1995. One of the original adjudicators suggested that the intention was that they provided the information to the new adjudicators: Interview #2.

139 Feldthusen, Hankivsky & Greaves, above n24 at 87 and 107.

140 Ibid at 88.

141 *Grandview Adjudicators Report*, above n58 at 4.

142 Ibid at 7.

143 Grandview Agreement, cl 8.10.

144 Grandview Agreement, cl 4.2.4.

145 Kaufman, above n18 at 343.

> We had the smudging ceremony in the morning or they'd have the opportunity ... the Government would set aside another room for them if they brought in an elder to the ceremony to go off and do what they wanted to do. Sometimes they asked us to participate, sometimes they wouldn't, or they would do it at sunrise, which is when you're supposed to do it...[146]

The Aboriginal adjudicator noted that while the Agreement had not been explicitly designed to take account of the needs and cultural requirements of Aboriginal claimants, it was 'most receptive to Aboriginal women, perhaps because of its underlying principles of healing and flexibility'.[147]

The hearings were held around Canada in many different venues. Generally, they would be held in an office setting, but some took place in the homes of applicants and in some cases, in prisons.[148] The Adjudicators stressed the importance of the physical layout of the hearing rooms. Efforts were made to ensure that the setting was non-hierarchical and that rooms had windows to assist those 'applicants [who] may experience claustrophobia as a result of prolonged detention'.[149] This was appreciated,[150] however, some women did have critical comments about the setting.[151] The critical nature of the setting is something that Feldthusen, Hankivsky and Greaves also discussed. They point out that 'the lack of a relaxed and non-threatening environment cause[s] participants stress, trauma, and feelings of revictimization'.[152]

While legal representation was permissible, few women chose to be represented. For the first couple of hearings, lawyers for the GSSG and for the Attorney General attended to monitor the process, but after that time, by-and-large no lawyers attended. All the hearings were private and confidential (ie closed to the public), though the women were free to bring someone with them as a support person (eg, their counsellor, family members or friends). While no transcript was kept of the

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146 Interview #7.

147 *Aboriginal Adjudicator's Report*, above n69 at 1.

148 *Grandview Adjudicators Report*, above n58 at 5.

149 Ibid at 10.

150 Leach, *Evaluation*, above n23 at 32.

151 Ibid.

152 Feldthusen, Hankivsky & Greaves, above n24 at 96. See also Des Rosiers, Feldthusen & Hankivsky, where they note that the emphasis survivors of sexual assault place on the 'spatial environment'. This study concerned claimants using the CICB and the civil legal system. The authors noted that the importance of the environment was 'not well-documented in the literature': above n36 at 438.

proceedings, adjudicators did take notes to assist them in writing their decision. These notes were subsequently destroyed.[153] The adjudicators emphasised that this privacy was essential to many claimants' willingness to participate in the process – necessitating as it did the revelation of harms of a sexual nature, and a background of institutionalisation that they may not have revealed to anyone.[154]

> Some of [the applicants] would have chosen to forego any compensation for the abuses they experienced if it had meant that they had to appear in a public forum to give their evidence.[155]

The adjudicators formulated a general introductory statement to make at the commencement of the hearings. This provided some consistency between hearings performed by the different adjudicators. Attention was also paid to the nature of the 'oath' to tell the truth. The adjudicators developed a question which was easier to understand using the term '"promise" instead of "swearing on the bible" or "solemnly declaring"'.[156]

> Do you promise to tell the truth, the whole truth and nothing but the truth to the best of your ability to recollect it?[157]

As the adjudicators pointed out, this was an attempt both to ensure that applicants understood the concern with telling the truth, but also to acknowledge that the passage of time and the impact of traumatic events can have a negative impact on a person's ability to recall accurately or in full detail:

> The wording of the oath was intended to reassure an Applicant that the purpose of the hearing was to speak only about what she remembered and to identify memory gaps where they existed; and that it was anticipated that there might be problems recalling the full details of abusive events.[158]

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153 Concerns about confidentiality, the taking of notes by the adjudicators and what would happen to the notes was raised in the evaluation: Leach, *Evaluation*, above n23 at 32.

154 *Grandview Adjudicators Report*, above n58 at 7-8.

155 Ibid at 8.

156 Ibid at 11.

157 Ibid at 11. It is not clear that this form of oath really departs significantly from the way in which oaths are generally put in a court room. It is also worth reflecting on whether such a formal process may also be important to the claimants themselves; ie, that there is some formal character to the process that serves to indicate that their stories and claims are being taken seriously, and are being treated seriously. One adjudicator interviewed for this research reflected in a later email communication, that she did not recall the oath used in Grandview in this way in the hearings that she conducted: Email communication, Interview #3. While she notes that they required claimants to 'promise' to tell the truth to the best of their recollection, she recalled that the adjudicators had an understanding that there was not necessarily something that equates to the 'whole truth' and that in recognising this 'does not detract from or undermine what you do remember'.

158 *Grandview Adjudicators Report*, above n58 at 11.

Aboriginal claimants could 'pledge their truth telling with an eagle feather, a traditional way of giving such an undertaking'.[159]

Applicants were then invited to tell their story in a manner that suited them.

> The goal was to show the Applicant the respect of allowing her the opportunity to 'tell her own story', to articulate her experience in narrative form.[160]

This might involve the woman recounting her experiences in a narrative format, or it could involve a series of questions and answers.

> Care was taken...not to interrupt the Applicant in the flow of her narrative, and to wait for an appropriate point to intervene with queries. The intent was to allow the Applicant a broad scope to define the way in which she could give her evidence about the Grandview experiences.[161]

Follow-up questions were asked by the adjudicator to 'to ensure that the hearing canvassed all the issues contained in the written documentation, or to clarify confusing or apparently inconsistent points'.[162] In their final report, the adjudicators reflected on this process:

> [It]...seemed to enable Applicants to give difficult evidence. In the absence of constant interruptions and questioning by adversarial lawyers, some Applicants were less likely to become confused or defensive. As a result, Applicants were able to speak in detail about complex and emotionally-charged events. Applicants appeared to be comfortable explaining when their recollection of events was clear, when it was confused or foggy, or when they could not remember what happened. Indeed, it was striking how many times Applicants acknowledged a lack of clear recollection of some events while recalling others, knowing that their veracity would reduce the level of compensation to be received. Many Applicants took great pains to explain that they did not experience certain forms of abuse, or to describe and to distinguish clearly that part of their experience that was positive from that part which was abusive.[163]

Applicants could take as many breaks as they required when giving what was 'emotionally draining' and traumatic evidence.[164] Importantly:

> Unlike other legal proceedings where breaks are generally scheduled at the discretion of the presiding judge, the Applicant in these hearings was invited to request a break when she needed one.[165]

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159 Ibid.

160 Ibid at 11-12.

161 Ibid at 12.

162 Ibid at 12.

163 Ibid at 12-13.

164 Ibid at 11.

165 Ibid.

Survivors indicated in the evaluation that the hearing process was the most positively received feature of the Agreement, albeit still traumatic.

> The most positive thing about [the hearings] was the opportunity they offered, in a relatively safe context, for women to tell their stories and have their experiences acknowledged. The most difficult thing was the 'horror of remembering' and describing their lives at Grandview.[166]

As the practical centrepiece of the Agreement,[167] it is significant that the hearing process was assessed so very positively by victims/ survivors. For example, women commented:

> *We were allowed to speak freely about what happened. We were able to express our feelings totally without being looked down upon.*
>
> *I was simply glad to have it over. I felt most satisfied with myself being able to tell what happened.*
>
> *She was strong, yet caring – non judgmental.*
>
> *I finally felt that I had been acknowledged, I was not bad. There had been something very wrong – this was finally confirmed.*[168]

Some of the positive factors to which the women referred included:

- that the adjudicators were women (87.5% of respondents to the evaluation indicated that this was 'very important'),
- the availability of an Aboriginal adjudicator (when appointed) was 'very important',
- that they were able to bring a support person (71% indicated that this was 'very' or 'somewhat important'), and
- that attention had been paid to aspects such as the physical space of the hearing room.[169]

Grandview survivors reported that they felt 'listened to' and 'understood' and that the adjudicator was 'clear and easy to understand'.[170] The positive experience of the

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166 Leach, *Evaluation*, above n23 at 31.

167 We use the phrase 'practical centrepiece' to contrast the importance of the hearings with the importance of the process that enabled this practical component to take place and be undertaken in the positive and sensitive way that it was. The reference to the hearing and the accompanying written decisions as the 'centrepiece' was also used in Interview #1.

168 Leach, *Evaluation*, above n23 at 31.

169 Ibid at 31-32

adjudication process was also reflected in the study conducted by Feldthusen and colleagues. This study found that 85 per cent of the Grandview survivors interviewed indicated 'overwhelming approval of their adjudication experience'.[171] Again survivors stated that they felt that they had been 'listened to' and 'believed'. The '[a]djudicators were consistently described as respectful, considerate, empathetic, patient, fair and sincere'.[172]

A small number of survivors raised concerns about the hearing process. For example, some were concerned about confidentiality and anonymity, and in particular, were worried about the notes that were being taken by adjudicators during the hearing and what would happen to those notes afterwards.[173] Others found the hearing room small, cold and clinical.[174] Feldthusen and colleagues found that for all three groups studied (civil claimants, criminal injuries claimants and Grandview claimants):

> Eighty-four percent of all respondents reported some negative emotional consequences. These consequences included a sense of loss of control over the process, mental anguish, depression, suicidal tendencies, frustration, anger, and a feeling that the system was not dealing with them in a responsive and personal manner. In addition, 53 per cent reported physical side-effects, including headaches, insomnia, hypertension, diarrhoea, vomiting, and other ailments, that required hospitalization. This percentage did not vary amongst the groups.[175]

Most survivors told the Grandview evaluator that they were satisfied with the time it took to schedule their hearing (41.7% were very satisfied and a further 41.7% were somewhat satisfied). By contrast, in the study conducted by Feldthusen and colleagues, it was Grandview (46%) and CICB (63%) claimants, rather than the tort claimants (38%) who complained about delay.[176] This may well reflect the way in which criminal injuries and redress packages are often promoted as a speedy way in which to resolve claims and this increases the expectation of timeliness. By comparison those claimants that proceed through the tort system are likely to be better prepared by their lawyers for the length of time a case will take to resolve.

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170 Ibid at 32.

171 Feldthusen, Hankivsky & Greaves, above n24 at 83.

172 Ibid at 89. A number of other positive comments are also quoted on 89, although there are also negative comments reported. Feldthusen and colleagues note that the overwhelmingly positive attitudes about the adjudication process is one of the areas where the Grandview Agreement 'really distinguishes' itself from the other processes studied (civil litigation and CICB).

173 Adjudicators indicated that the notes would be destroyed: *Grandview Adjudicators Report*, above n58 at 11.

174 Leach, *Evaluation*, above n23 at 32.

175 Feldthusen, Hankivsky & Greaves, above n24 at 83.

176 Ibid at 93.

Validation

An applicant under the Grandview Agreement was required to establish on the balance of probabilities[177] that they had suffered an injury, as outlined in the matrix, while at Grandview. The adjudicator had regard to the following matters:[178]

- The length of time that the applicant resided at Grandview
- The age of the applicant at that time
- Whether the applicant made complaints about the abuse
- Who committed the acts that were alleged and what was their relationship to the claimant?
- How frequent was the abuse and/ or mistreatment alleged? Was it an isolated act or a series of acts?
- What was the nature and severity of the abuse and/ or mistreatment?
- What was the impact on the applicant? What were the consequences? Has the applicant sought any treatment, and if so, what?
- Have criminal charges been laid? If so, what was the result?[179]
- Was the applicant ever held in Churchill House?

The Agreement provided that the adjudicator will 'assess the claim on the basis of a finding of credibility of the applicant'.[180] In considering their decisions, the adjudicators relied on the written application of the applicant and any supporting documentation (for example therapist/ counselling reports, medical records),[181] the oral testimony of the applicant and other witnesses such as the woman's therapist, the Crown Ward file and any material supplied by the investigators. The adjudicators recognised that while:

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177 Grandview Agreement, cl. 8.5.

178 Paraphrased from Grandview Agreement, cl 4.2.5.

179 Note that the Agreement makes it clear that neither the laying of criminal charges or the achievement of a conviction are preconditions to being able to access benefits available under the Agreement. See Grandview Agreement, cl. 4.2.5(H).

180 Grandview Agreement, cl 4.2.3.

181 It was also possible for the adjudication to be conducted on the written application on its own, ie a documentary hearing. This is contemplated in the Grandview Agreement, cl. 8.7.

> ...the Grandview file provided some helpful information, ... they represented only a partial view, and perhaps a deliberately distorted description of the Applicant's stay at Grandview, recorded from the perspective of the institution.[182]

In the end it was the oral testimony that was the prime focus of the validation process. Like other legal processes, this involved assessing the woman's credibility. In their report on the Grandview hearing process, the adjudicators made a number of comments about the assumptions that often lay behind assessments of credibility in traditional legal processes and the way in which it was decided to approach 'credibility' under the Agreement. For example, the adjudicators noted that demeanour, commonly relied on in assessing credibility, has a complex relationship to truth-telling:

> Demeanour may vary depending upon a witness's race, gender, cultural background, class, personality and emotional or psychological state and these variations may have no bearing on the witnesses' truth telling.[183]

The adjudicators were aware that for many of the survivors, the process of having to recount these, frequently explicit, events was embarrassing and traumatic and that this may have a negative impact on the ability to convey the full story in a 'convincing' manner. For example, women would often speak in a halting manner and avoid eye contact.[184] The adjudicators were also cognisant of the ways in which survivors of institutional abuse might present as poor witnesses due to their experiences and the long term consequences of those experiences. Factors such as a criminal background, drug and alcohol dependency, inability to recall events with accuracy, are frequently used to discredit plaintiffs in tort (and criminal) cases.[185] This difficulty was captured by one of the adjudicators when asked whether she thought that the Grandview survivors would have been successful in a civil trial:

> I think they would have been victims on the altar of the justice system in Canada. They would have been re-victimised all over again, they would have been ridiculed, their dirty laundry would have been held up to the light and with no understanding of why. I think probably,

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182 *Grandview Adjudicators Report*, above n58 at 13. See also Kaufman, above n18 at 345. It is important to note that the caution about documents presenting the institution's view (or staff member's view) relates to what is included as well as what is omitted.

183 *Grandview Adjudicators Report*, above n58 at 14

184 Ibid at 14.

185 See recent study in Australia regarding sexual assault criminal trials: Denise Lievore, *Victim Credibility in Adult Sexual Assault Cases*, Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice No 288, 2004.

> there were some people who could have done it but they were very minimal, there were very few.[186]

Similarly another professional involved in the Grandview Agreement commented:

> ...the primary barrier ... [faced by] women who have lived lives of abuse is the disintegrated nature of the lives they lived...antithetical to what's required [by] the litigation process.[187]

The emphasis on the risk of false claims and the way in which the Grandview Agreement sought to respond to this is further explored below.

The written decision

The adjudicators, in consultation with the Government and the GSSG, developed a template for the writing of decisions.[188] The adjudicators treated the *decision* and the *reasons* for the decision as separate documents.[189] The *decision* was crafted for both parties, the applicant and the Government. It was a single page document setting out the basic determination: ie, whether the claim was made out and the amount of compensation awarded. This document, and its formal reference to legal requirements such as the burden of proof, was designed to satisfy the legal and accountability requirements of government.[190]

By contrast, the *reasons* for the decision were primarily written for the applicant.[191] These were provided in clear and accessible language and were designed to reflect, as much as possible, the woman's experience at Grandview.[192] This document was around ten pages in length and sought to convey to the applicant her story and how the decision had been reached. It included both a 'narrative account of the incidents of abuse' and 'a description of the consequences of the abuse':

> At the outset, the Adjudicators agreed that ... [the account of the incidents of abuse] should be quite detailed so as to capture the extent and range of abuse and mistreatment that occurred at Grandview, using the Applicants' own words to the greatest extent possible. In this way, each decision created a detailed historical record of what transpired. ... By contrast, references in the decision to the detrimental effect of the abuse on the Applicants' lives were deliberately

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186 Interview #7. See also *Grandview Adjudicators Report*, above n58 at 22.

187 Interview #4.

188 Most decisions/ reasons conformed to this template. However, in some cases an individual adjudicator departed from the template 'where particular cases warranted': *Grandview Adjudicators Report*, above n58 at 16.

189 Interview #3.

190 Interview #6.

191 *Grandview Adjudicators Report*, above n58 at 17. See also Kaufman, above n18 at 346; and Interview #3.

192 *Grandview Adjudicators Report*, above n58 at 17.

> left brief to avoid 'freezing' the survivors' lives in relation to the damage done, or 'labelling' a survivor in stereotypical terminology. These practices were adopted in light of the goal of the Agreement to make the process one in which healing could take place.[193]

The adjudicators thought it important to reflect in their reasons for decision on incidents that were not compensable under the Agreement, but which the woman described during the hearing as harmful.[194] This enabled the adjudicators to indicate that they had 'heard' the woman's story, that it was acknowledged in full, even where compensation was not available. For example, girls were routinely subjected to a vaginal examination when admitted to the school, and after any time off the premises. While these examinations were not generally compensable under the Agreement,[195] many of the survivors experienced them as degrading and invasive.

The written decisions did not 'affix liability' against any individuals employed at Grandview (or fellow residents); no individuals are named in these decisions as perpetrators or offenders.[196]

The adjudicators established a system in which another adjudicator would review decisions, to ensure not only consistency in awards but also clarity in expression and whether there was a need for greater elaboration. The final decision remained with the adjudicator who heard the case. Where a particular application raised more complex questions, such as the interpretation of the Agreement, the draft decision would be circulated to all adjudicators for comment.[197]

The adjudicators agreed that it was important that their decisions were rendered in a timely fashion and sought to do so within 30 days of the hearing.[198]

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193 Ibid at 16.

194 Ibid at 17.

195 However, if the vaginal examination was 'arbitrary or exploitative...for which no reasonable medical justification existed and which resulted in demonstrable harm' it could be compensable: see definition of 'abuse' in Grandview Agreement.

196 *Grandview Adjudicators Report*, above n58 at 16.

197 Ibid at 17-18.

198 Interview #2.

The evaluator found that women were overwhelmingly positive about the written reasons for the decision.[199] Almost 87% indicated that the written reasons were 'very important' to them. Some of the comments included:

> *It felt good to see I was not the one that was wrong. I do not have to be ashamed anymore.*
>
> *It was an acknowledgement by the government. It helped me understand why my whole life had gone so wrong.*
>
> *I still haven't been able to read it completely, but what I did read was validating and supportive.*[200]

PART THREE: Reflections on the Grandview approach

In this section we discuss some of the key features of the Grandview Agreement with a view to assessing the extent to which it represented a novel and innovative model for responding to institutional harms.

An approach that reflected feminist knowledge

It is often claimed that the Grandview Agreement, and the process that took place to put it into effect, was a 'feminist' adjudication process. But there is also disagreement about what would constitute a feminist process and the matter is very much subject to debate, not least among those interviewed for this research.[201] Some of the comments made by the adjudicators include:

> ...I don't think any one of us would say we achieved it; a feminist ADR.[202]
>
> [after a seminar about the Grandview Agreement]...one of the young women asked... 'But what is explicitly feminist about...[it]?' and we couldn't really answer that question...and at some level, you could hear somebody say 'wasn't it just a good adjudication process?'[203]

The important influence of feminist understandings about violence against women and an awareness of how these are often dismissed by the legal system is evident in a

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199 Note that this does not mean that they were happy with the actual determination (ie the financial award) – in fact here there was considerable differences in satisfaction, almost 48% were 'very satisfied', 41.3% were 'somewhat satisfied' and 10.8% were 'not at all satisfied'. For those women who were dissatisfied, this was connected to the level of financial compensation they were awarded (and in particular a view that men had received higher awards under the Helpline Reconciliation Agreement), a feeling that the Agreement was a 'set up' by the Government, and difficulties some women had in accessing their financial award, particularly those residing outside Ontario who were still subject to the effect that the award would have on their access to other government welfare benefits: Leach, *Evaluation*, above n23 at 34-35.

200 Ibid at 36.

201 These debates are certainly reflected in the interviews conducted with key professionals for this research, not only between different key professionals but also in the content of each individual's reflection on the Agreement a number of years afterwards.

202 Interview #2.

203 Interview #3. The same point was made in Interview #4.

number of aspects of the Agreement. What is particularly interesting is that the Grandview agreement was designed very early in the recent history of the development of redress packages.

It is clear that feminist understandings, for example, of the tendency to dismiss or trivialise claims by women about violence against them, emerge from some of the following aspects of the process:

- the active involvement of victims/ survivors in the design of the package;
- the appointment of adjudicators with extensive knowledge of violence against women and children;
- the 'claimant-centred' adjudication process;[204] and
- the approach taken to historical evidence and the assessment of credibility particularly in the context of recurrent concern about 'fraudulent claims'.

Some of these features have been detailed in the discussion of the formation and implementation of the Agreement above. In this section we discuss two of the other aspects – the claimant centred process and the approach taken to the concern about false claims.

A claimant-centred adjudication process

The Report by the Grandview Adjudicators and the Report of the Aboriginal Adjudicator provides a wealth of information about the pains taken by the Adjudicators to put in place a validation process that achieved the goals of the Agreement. Much of this is attributable to the close involvement of the victim/ survivors in the design of the process, and in particular, from their ability to articulate what they sought from negotiating and engaging in the Grandview Agreement. As Feldthusen, Hankivsky and Greaves note, unlike the other compensation mechanisms, the Grandview process was explicitly focused (and centred) on the claimants. We have already discussed the attention the adjudicators paid to the hearings themselves, to the ways in which they tried to allow applicants some control over the presentation of their stories, and the attention paid to writing the reasons for the decision, while also ensuring the formal decision satisfied all necessary legal and administrative

204 This is the characterisation used by Feldthusen, Hankivsky & Greaves, above n24 at 88

requirements.[205] It is significant that in the comparative study conducted by Feldthusen and colleagues it was found that the factor that 'really distinguishes' the Grandview claimants from tort or CICB claimants, was 'their reactions to the adjudication itself'.[206] As noted earlier, many Grandview survivors made reference to 'feeling comfortable, calm, "listened to" and "believed"'. These types of comments are also echoed in the Evaluation report. This generally positive response suggests that the process went at least some way toward meeting the needs of these particular survivors of institutional abuse.

The claimant-centred approach of the Grandview Agreement is also reflected in other levels of the process, for example, the creation of a specific unit within the Ministry of Justice to administer the Agreement, staffed by people with expertise in the area of violence against women.

The impact of encounters with administration or other support staff cannot be underestimated in terms of the overall 'therapeutic' effect of the redress (or other compensation) package. Feldthusen and colleagues report a number of negative comments made about the administration staff attached to the Ontario CICB. For example one CICB claimant commented:

> *There was one receptionist...she was really snotty and rude. Because of her I felt almost like giving up on it.* [207]

And in a similar vein another commented:

> *I couldn't believe that she [the receptionist] was talking to victims of crime like that...I thought I'd never call again.*[208]

This stands in contrast to the comments made by Grandview claimants, where most were 'satisfied with the "sensitive" and "caring" treatment that they received from all those with whom they came into contact throughout the process'.[209] As one of the adjudicators noted:

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205 See *Grandview Adjudicators Report*, above n58.

206 Feldthusen, Hankivsky & Greaves, above n24 at 89.

207 Feldthusen, Hankivsky & Greaves, above n24 at 87.

208 Ibid at 87.

209 Ibid at 88. Some women did make negative comments, however, even these women that the staff were doing the best they could within the 'constraints that had been placed on them': at 88.

> ...they also had...unbelievably talented staff administering this, and so the claimants would ...meet the staff, get treated respectfully and I think by the time they got to us [the adjudicators], they were expecting people to be nice to them...the whole process prior to the hearing worked well and we started with a huge edge because of that.[210]

The spectre of 'fraudulent' claims

A common theme that runs through some of the literature and commentary in this area is the emphasis on the risk of fraudulent claims:[211] How do we know that people are telling the truth? Do redress programs promote, or at least facilitate, the making of false or exaggerated claims?

Redress programs are particularly susceptible to these claims for a variety of reasons. First, they do not involve the forensic processes that the criminal or civil justice systems use. Unlike the criminal law, proof is not required beyond reasonable doubt; rather, the usual civil burden of proof applies, ie, a claim must be established on the balance of probabilities. Secondly, applicants are not generally subjected to cross-examination – the process is not adversarial but rather more inquisitorial, in the sense that the concern is to investigate, test and ultimately validate a claim.[212]

Finally, as mentioned above, claims of sexual assault, or more generally, claims made by women about sexual abuse or violence, have historically been treated with suspicion by the legal system. For example, it was until recently considered necessary for the testimony of women to be corroborated as women were considered inherently not credible.[213]

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210 Interview #2.

211 Concerns about false claims do not arise only in the context of redress packages, but tend to be constantly raised in the context of allegations of sexual assault (whether in the civil or criminal jurisdictions): For a critical discussion about the concern about false reports and the reporting of sexual assaults in the criminal legal system see Liz Kelly, *Routes to (In)justice: A Research Review on the Reporting, Investigation and Prosecution of Rape Cases*, literature review prepared for the Home Office (2001) at 22-23. Available at http://www.hmcpsi.gov.uk/reports/Rapelitrev.pdf (accessed 30 August 2006). This issue has also been raised in the context of criminal injuries compensation legislation: see discussion in Freckelton, above n35 at 101-105.

212 The IRS system established in 2003 seems to have been an exception to this general proposition; however, it has now been discarded in favour of a more recently developed model: see above n12. Whether the new Independent Assessment Process, that would assess claims concerning physical and sexual abuse and in some instances psychological abuse, will be less legalistic in approach will depend upon the way in which it is implemented and approached by the parties involved.

213 There is a wealth of literature on these issues; for some discussions see Mack, above n132, Hunter, above n132; Lievore, above n185; Wendy Larcombe, 'Cautionary Tales and Telling Anxieties: The Story of the False Complainant' (2002) 16 *Australian Feminist Law Journal* 95; and Dorne Boniface, 'The Common Sense of Jurors vs the Wisdom of the Law: Judicial Directions and Warnings in Sexual Assault Trials' (2005) 28 *University of New South Wales Law Journal* 261

The Grandview Agreement by contrast started from a position of acknowledging that such forms of abuse do in fact take place, on an all too common basis. This refusal to start from the premise that women were lying did not preclude the development of a rigorous validation process. Rather it led the adjudicators to reflect upon the fact that some of the traditional markers of credibility (eg repeated consistency) may not be as helpful as might have been assumed. We return to these issues after discussing the Kaufman report, which brought these concerns to the fore.

False claims and 'true victims'

Shortly after the Grandview Agreement, concerns about false claims in redress schemes received considerable attention in Canada following a review of what is now considered to have been a flawed compensation program in Nova Scotia.

The Nova Scotia Compensation Program (NSCP) was instituted in 1996 to respond to allegations of sexual and/or physical abuse that took place in provincial institutions (allegations first arose in respect of the Shelbourne School for Boys). The NSCP was established shortly after the completion of an independent investigation by Chief Justice Stuart Stratton (the Stratton report) on the nature and extent of abuse in the Nova Scotia provincial institutions.[214] When the NSCP was established it was anticipated that there would be around 178-267 claims, yet by November 1999, 1260 claims had been made.[215] This vast increase obviously created financial problems for the Government. At the same time there was claimed to be 'increasing evidence that many of the claimants' statements were unreliable'.[216] During the course of the NSCP it was suspended and adjusted on two occasions. Amendments made sought to improve the investigation process, impose a deadline for the lodgement of claims, and provide for the periodic payment of awards made. But concerns remained about 'false claims'. Because many of the claims concerned people who were still employed at the time of the program,[217] the controversy was particularly intense.

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214 Stuart Stratton, *Report of an Independent Investigation in Respect of Incidents and Allegations of Sexual and Other Physical Abuse at Five Nova Scotia Residential Institutions* (1995). An audit also formed part of the Nova Scotia Government's response, see Vicki Samuels-Stewart, *In Our care: Abuse and Young Offenders in Custody: An audit of the Shelbourne Youth Centre and the Nova Scotia Youth Centre – Waterville, 1995*, as discussed in Kaufman, above n18 at 9-11

215 Shea, *Redress Programs*, above n15.

216 Briefing note prepared by Barbara Patton, Nova Scotia, Department of Justice, 'Compensation for Institutional Abuse Program', 6 November 1997, p. 2 as cited in Shea, *Redress Programs*, above n15 .

217 There were no current employees at the time that the Grandview Agreement was designed and implemented.

Fred Kaufman, a retired Quebec Court of Appeal Judge, was engaged in 1999 to review the Nova Scotia Government's response to institutional abuse to determine whether it had 'been appropriate, fair and reasonable'.[218] In 2002, Kaufman's scathing critique of the NSCP, and the Government response more generally, was published.[219] Kaufman was critical of the inadequacy of the inquiries that preceded, and provided the foundation for, the creation of the NSCP. While Kaufman recognised the limited resources and short time frame allocated to the conduct of the Stratton Inquiry, he argued that it presented a misleading picture of the extent of abuse. Kaufman was critical of the way in which Stratton received evidence with no opportunity to challenge or investigate the allegations further. While Stratton himself drew attention to some of the limitations of his report, Kaufman claimed that the Government did not take heed of these limitations before it launched into the NSCP.[220]

Kaufman considered that the Nova Scotia Government acted too quickly in instituting the NSCP without due regard to the requirements of validation,[221] without an adequate assessment of the fiscal liability that it would create for the government, and without sufficient consideration of how allegations against current employees would be handled. He concluded that this lack of attention, particularly in terms of validation had been harmful to all involved. In his view, it had left:

> in its wake true victims of abuse who are now assumed by many to have defrauded the government, employees who have been branded as abusers without appropriate recourse, and a public confused and unenlightened about the extent to which young people were or were not abused ...[in Nova Scotia institutions].[222]

While Kaufman was highly critical of the NSCP, it is important to note that he did see benefits in redress systems, and discussed the Grandview Agreement and the Helpline Agreement positively.[223] However, a number of the statements made and measures recommended suggest that Kaufman failed to appreciate the way in which redress

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218 Kaufman, above n18 at 2.

219 Id.

220 Ibid at 13.

221 Ibid at 8.

222 Ibid at 1.

223 Ibid at 332-357.

programs seek to provide a different system of dispute resolution for victims/ survivors of complex harms like institutional child sexual assault.

Kaufman asserted that stereotypes and 'untenable assumptions' operate in both directions. For example, stereotypes such as that contemporaneous complaints are more likely to be true in cases of sexual abuse are just as untenable as those that assert that all allegations of abuse are true or that criminal records are not relevant in assessing credibility.[224]

It would appear that the main concern of Kaufman's report and recommendations was to ensure that only 'true victims' are compensated. Kaufman's frequent references to 'true victims' suggests that there is a category of 'not true' victims; ie, those whose claims are false or those who perhaps are otherwise undeserving of compensation. His report appears somewhat contradictory: while it expressly views the Grandview Agreement as a positive example of a redress package, and notes that there can be '*some* relaxation of the validation procedures,'[225] he nonetheless seems to equate appropriate validation with the criminal law's approach to testing and deciding upon evidence. While Kaufman denies that he reifies the criminal process as the best validation process, he does refer to it as 'the most rigorous validation process'[226] and argues that an alleged perpetrator should be provided with an opportunity to respond to any allegations.[227]

In its report on institutional abuse, the LCC also devoted some attention to the importance of the validation process.[228] The LCC pointed to the fact that while a redress package is not simply about financial compensation, the emphasis on validation invariably foregrounds the financial aspects, often at the expense of the other needs of victims of institutional abuse, such as respect, engagement and the aim of avoiding the anti-therapeutic effects of the legal system. Importantly the LCC

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224 Ibid at 50.

225 Ibid at 50, emphasis in original. Given that redress packages do not make findings of liability, generally are confidential and the perpetrator may not have made any contribution to the financial award.

226 Ibid at 446.

227 Ibid at 430. Yet see discussion in Feldthusen, Hankivsky & Greaves, above n24 at 88 where CICB claimants complain about the change in procedure which meant that the CICB would now notify alleged perpetrators about their claims.

228 LCC, above n25 at 316-320.

points out that any validation process should be commensurate with the amount of damages being offered. In other words, it is not appropriate to adopt a process informed by the rigorous processes of the criminal justice system if a modest financial award is available under a redress package. A similar point was made by one of the key professionals involved in Grandview:

> [the government was] satisfied that the process was sufficiently rigorous to provide a sufficient level of comfort that the decisions ultimately to be made were … able to justify the amounts that were going to be [paid].[229]

In addition, the consideration of 'costs' has multiple dimensions – there is not simply the cost of providing compensation and the cost of administering the system, but there are also costs associated with not compensating victims, or with putting in place a system so onerous that it serves to revictimise people. This point was made by one of the key professionals in a follow-up email communication. She continued:

> The costs of doing nothing and maintaining injustice are often undervalued.[230]

One of the interviewees pointed out that the involvement of survivors of Grandview in the design of the package also served a key role in emphasising the importance of the program having some legitimacy.[231] That is, the survivors understood very clearly that it was in their interests that the process be seen to have integrity to ensure that their claims were believed, not only by the adjudicators, but also by the wider community. Suggestions of false claims can quickly bring a program into disrepute (as happened in relation to the Nova Scotia Program).[232]

> [the GSSG and Helpline by being involved in the formation of the Agreements] understood that if false claims were coming through and they were detected, it could have a serious overall impact on the administration of the whole program.[233]

The emphasis on the risk of false claims seems to flow from an assumption that financial compensation is the main reason for entering into a redress process. Yet as Feldthusen, Hankivsky and Greaves point out:

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229 Interview #6.

230 Email communication, Interview #1.

231 Interview #6.

232 Interview #6 notes that one of the measures of success of the Grandview Agreement is that it attracted 'no significant adverse press commentary'.

233 Interview #6.

> It is simply inaccurate to conceptualize, design, operate, and evaluate civil law suits or compensation schemes on the assumption that they exist only to provide monetary compensation to deserving victims.[234]

In their report on the Grandview Agreement, the adjudicators highlighted the way in which some of the traditional markers of truth in the traditional legal system (for example, consistency in evidence, ability to recall all aspects of the event, ability to withstand cross examination) are not necessarily conducive to hearing the full story of what happened. They noted that credibility is traditionally aligned with consistency in evidence, and often defence questioning/cross examination is designed to expose inconsistencies, exploit them and hence suggest that the complaint is false and fabricated. This seems to be based on a 'belief that truth-tellers never change their version of the events'.[235] To address inconsistencies the adjudicators invited applicants to explain them when they arose. In response applicants often explained how frightened, embarrassed or uncomfortable they were in police interviews, that police had interviewed them at home when other family members were present, and so on, and that this led to a truncated account of what had taken place. The adjudicators took the approach that small inconsistencies, so long after the events that were the subject of the complaint, should not necessarily affect the credibility assessment of the claimant, especially given the traumatic nature of the experience.

> ... inconsistencies, factual inconsistencies seemed to me to be understandable, after you're talking about an event that happened so long ago that you tried to repress, that's horrible. And I don't [assess] credibility or trustworthiness [on the sole basis] of factual discrepancies.[236]

The adjudicators also found that the applicants often revealed information, or their lack of memory of certain events in a manner that was against their 'self-interest' in obtaining compensation.

> Many Applicants were frank and forthcoming about their memory gaps. Some openly described how they provoked the ire of guards, with efforts to escape or physical resistance, and some were at pains to explain that not all of the staff and Grandview were abusive...Many applicants described the mistreatment they experienced as less significant than that meted out to other wards, and some explained their own roles in abusing fellow residents. A number of applicants expressly refused to give evidence about incidents of sexual abuse they experienced, saying that the memories are still too painful and that no amount of compensation is worth having to articulate such agony. Evidence such as this often minimized

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234 Feldthusen, Hankivsky & Greaves, above n24 at 112. Emphasis added.

235 *Grandview Adjudicators Report*, above n58 at 14.

236 Interview #2.

> the level of the award for an individual Applicant. However, it was also evidence of the truthfulness and honesty of the witness.[237]

A process towards 'healing'?

Redress packages are often promoted as having therapeutic features (or at least that they minimise the anti-therapeutic elements of civil litigation or the criminal justice system). Do they in fact achieve this therapeutic aim, often couched as reconciliation, healing, redress or reparation?

> [The Grandview Agreement was]...explicitly therapeutic. An alternative dispute resolution process was adopted in part to avoid the perceived anti-therapeutic aspects of civil litigation. The adjudicators were exclusively women with expertise in, and sensitivity to, female sexual abuse. One was an Aboriginal woman who specialized in adjudicating claims from Aboriginal survivors.[238]

In a number of different contexts the Grandview Agreement has been described as a 'healing package'.[239] A majority of the women who participated in the evaluation of the Grandview Agreement (70.5%) agreed either 'somewhat' or 'a lot' that the Agreement had contributed to their healing, however a large proportion (31.5%) also said that the Agreement had not helped them 'very much' or 'not at all'.[240]

> Many pointed out that references to the Agreement as a 'healing package' may have contributed to unrealistic expectations. Healing from abuse is neither short nor linear and no 'package' of awards or benefits could ever provide healing, only support for the process. Neither the process nor the package of benefits will ever undo what happened to them as girls at Grandview.[241]

The key professionals interviewed had a variety of responses to the ascription of the term 'healing package' to the Agreement. One saw the description as 'patronising'[242] another commented that whether it was 'healing' was for the women themselves to determine - the package may well have had quite different effects depending on the situation of each individual woman.[243] Another interviewee said that while it was 'not completely' accurate to describe it as a healing package, that was nonetheless a 'pretty

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237 *Grandview Adjudicators Report*, above n58 at 15.

238 Feldthusen, Hankivsky and Greaves, above n24 at 74.

239 See Vella, above n46. Feldthusen, Hankivsky & Greaves, above n24 at 73 notes that 'healing package' is not used in the actual text of the Agreement but it is 'commonly used by government officials and claimants in reference to this complicated agreement'. See also comments by Beverley Mann, one of the executive officers of the GSSG as reported in James Rusk, 'Former Grandview Wards get Compensation Deal: Ontario to Pay Abused Women up to $60 000 Each', *The Globe and Mail*, 1 July 1994.

240 Leach, *Evaluation*, above n23 at v.

241 Id.

242 Interview #3,

243 Interview #4.

good description'.[244] Yet another said this was a useful description as it serves to distinguish the approach advocated by the Agreement from a 'compensation package'.[245]

It is very difficult to draw any definitive conclusions about the effectiveness of the process in assisting survivors to heal, not least because, that requires an assumption that victim/survivors are unwell. As Feldthusen and colleagues point out, care needs to be taken in assuming that 'victims are not coping and that they require legal processes in order to "recover"'. On the contrary, they point out that the reasons given by many victims for seeking compensation[246] are 'consistent with well persons seeking appropriate social responses to injustice'.[247] This does not mean that redress packages should not pay attention to the therapeutic needs of victims, but rather that care needs to be taken in assuming what those needs are and how they can be satisfied.

However much care is taken by those who design such systems in attempting to provide flexible and responsive forms of remedy, and however much those of us familiar with the justice system try to design processes that make the process less intimidating and traumatising than a civil or criminal case, it is still going to be a difficult process for victims to enter into. We cannot expect victims to say how much they 'enjoyed' the process, or how 'happy' they were with it.

Addressing the needs of Aboriginal claimants

Some questions need to be raised about the failure to appoint an Aboriginal adjudicator until 1996, and more generally the failure to consider the specific needs of Aboriginal claimants and the possibility that they experienced harms that were qualitatively different, or experienced different dimensions of harm. This potentially affected a number of aspects of the Agreement, for example:

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244 Interview #7.

245 Interview #5.

246 These included seeking public affirmation, justice, closure, an apology, prevent repetition, and revenge: Feldthusen, Hankivsky & Greaves, above n24 at 69.

247 Ibid at 69.

- The extent to which the design of the Agreement took account of Aboriginal methods and approaches to resolving disputes;
- The extent to which Aboriginal claimants had access to the Agreement;
- The barriers Aboriginal claimants may have encountered in presenting oral evidence to a non-Aboriginal adjudicator; and
- The extent to which the Agreement took account of racialised harm and the way in which race may have compounded other forms of abuse.

While we do not know how many Aboriginal girls attended Grandview, we do know that Aboriginal girls were sent there.[248] Historians have documented the extent to which the legal system was used in a way that resulted in a disproportionately high rate of incarceration for Aboriginal girls.[249] It is difficult to assess what effect the failure to appoint an Aboriginal adjudicator in the first instance had on Aboriginal claimants, but we do know that once she was there, the presence of an Aboriginal face was very important for some women. The Aboriginal adjudicator reported that

> ...they were really glad I was there. They were glad to walk into the room and see an Aboriginal face and to know that they could tell me everything.[250]

She also commented:

> I [the Aboriginal Adjudicator] met one of the girls who was adjudicated by one of the non-native adjudicators before I came on board. She came up and introduced herself to me and said "I heard you came on after I had my hearing. I wish I had you for my hearing. I didn't talk about all the racism and stuff, all the words they called me because I was sitting across from a white woman and I didn't know if she would use it against me or I didn't feel right, I couldn't tell her that part. So I wish you had been on when I did my hearing. She was really nice and everything but you know, do I trust her? Do I say this stuff? I didn't say it, so maybe I got less money". I don't know if she did.[251]

The Aboriginal adjudicator notes that there was very little representation of Aboriginal women 'in any meaningful capacity' in the GSSG,[252] and that this meant that 'there was an *ad hoc* element in the consideration of Aboriginal women's needs'.

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248 The Aboriginal Adjudicator noted in her report that Ojibwe, Cree, Six Nations, Lakota and Metis girls had been identified to date as having been incarcerated at Grandview: *Aboriginal Adjudicator's Report*, above n69 at 1.

249 Sangster, above n49 at 140, 142 and 147.

250 Interview #7.

251 Interview #7.

252 *Aboriginal Adjudicator's Report*, above n69 at 1. A non-Aboriginal adjudicator also commented that she did not think that there was 'much Aboriginal representation' on the GSSG: Interview #1.

She also pointed to concerns about the way in which the process of informing people about the Agreement failed to take account of cultural differences.

> One of the things I focussed on [in my Adjudicator's Report] was of letting it be known in the community, letting it be known by Moccasin telegraph, in native ways of communicating, in our newspapers, in our forums, in how we communicate rather than putting it in the *Globe and Mail* [and the *Toronto Star*]. What very poor person sits around and reads the *Globe and Mail*? Not very many!.... Native people don't read those papers! [253]

The harms compensable under the Agreement via the matrix did not include any specific race-based harms nor did the matrix take into account any racial dimension of forms of abuse. The Aboriginal adjudicator noted that Aboriginal girls who were incarcerated at Grandview suffered individual and systemic based racism including, racial epithets and stereotyping, as well as additional acts of violence simply because they were 'Indian'.[254] Like other institutions housing Aboriginal children at this time, girls at Grandview were told not to use their native languages and some women complained about the loss of culture that they sustained as a consequence of their incarceration.[255] The failure to include race based or cultural harms therefore meant that Aboriginal claimants were unable to be compensated for the full range of harms and injuries that they sustained at Grandview.

However, while the Aboriginal adjudicator highlighted these gaps, she was largely positive about the Grandview process for Aboriginal women, given the Agreement's emphasis on 'healing and flexibility'. For example, she noted that the 'principle of convenience to the claimant' adopted in the hearing process (ie in terms of location, timing, presentation of the applicant's story, enabling the applicant to present her story in her own time frame, the taking of breaks etc) was 'crucial' to Aboriginal claimants.[256] She also referred positively to the fact that the hearings (and all the adjudicators) allowed for cultural practices to be incorporated in the hearings, for example using an eagle feather in the taking of the oath and the conduct of 'smudging' ceremonies before the hearings. And she was very positive about the approach taken to decision writing, which enabled a person's whole story to be

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253 Interview #7.

254 For example, The Aboriginal Adjudicator presents evidence that she heard during the hearings that she conducted which suggested that Aboriginal girls were treated worse or 'beaten more' because they were Indian: *Aboriginal Adjudicator's Report*, above n69 at 6

255 See Ibid at 6 and 8.

256 Ibid at 2.

told.[257] She acknowledged the efforts that non-Aboriginal adjudicators made to elicit information from Aboriginal applicants about racism or racial abuse experienced at Grandview.

The use of a matrix and the level of financial awards

> ...[it is] probably the least feminist part of the whole package.[258]

There is a range of views about the use of a matrix to determine the level of financial compensation to be awarded in any redress or compensation program. These kinds of tables or charts, sometimes referred to as grids or tariffs, have a tendency to be viewed as 'meat charts', and risk dehumanising claimants in terms of their injury rather than assessing the individual nature of the harm.[259]

In her evaluation, Deborah Leach noted:

> Several individuals felt that having a matrix to assist in determining the financial awards was unfortunate. They felt using a matrix led to animosities between women related to the amount of their awards and may have fostered a perception of a 'hierarchy of pain'. They also felt while the matrix approach was offensive, no alternative method could be found.[260]

In many ways this criticism of the matrix approach is true of any assessment process that attempts to translate an injury into a monetary figure, including the common law which claims as its main advantage its ability to assess individual harms. But that process is of course also fraught and open to numerous critiques.[261]

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257 Ibid at 3.

258 Interview #5.

259 IHRD, above n21 at [5.1.5] where some of the people interviewed for that research described these grids used in many redress packages as 'meat charts' and the discussion about whether the grids just assess the 'nature of the offence' rather than its impact.

260 Leach, *Evaluation*, above n23 at 58.

261 There are many well known critiques of the common law system of compensation. It has been described as a 'Forensic Lottery' (see Terence Ison, *The Forensic Lottery,* 1967; Peter Cane, *Atiyah's Accidents, Compensation and the Law*, 6th ed (1999) and see more generally, Harold Luntz & David Hambly, *Torts: Cases and Commentary*, 5th ed, chapter 1. In addition to these general critiques, research has criticised damages awards for reflecting stereotypical notions of race and gender which have resulted in smaller awards than would otherwise be granted: See the following articles for discussion of the gendered nature of damages awards: Lucinda Finley, 'Female Trouble: The Implications of Tort Reform for Women' (1997) 64 *Tennessee Law Review* 847; Reg Graycar, 'Hoovering as a Hobby and Other Stories: Gendered Assessments of Personal Injury Damages' (1998) 32 *University of British Columbia Law Review* 1; Jamie Cassels, 'Damages for Lost Earning Capacity: Women and Children Last!' (1992) 71 *Canadian Bar Review* 445; Martha Chamallas, 'The Architecture of Bias: Deep Structures in Tort Law' (1998) 146 *University of Pennsylvania Law Review* 463. For a discussion of the impact of both race and gender on damages awards in the context of the Canadian Indian Residential School system see Diane Rowe, 'Race, Culture and Gender Considerations: Contingent Factors and Damage Awards for Sexual Assault and Abuse', paper prepared for the National Forum on Institutional Liability for Sexual Assault and Abuse, Canadian Institute, 2001, copy on file with authors. See also Lorena Sekwan Fontaine, 'Canadian Residential Schools: the Legacy of Cultural Harm' (2002) 5(17) *Indigenous Law Bulletin* 4.

In his critique of the Nova Scotia Compensation Program, Fred Kaufman, canvasses the advantages and disadvantages of a matrix approach. Amongst the advantages he mentions:

- *consistency in awards* – similarly situated claimants receive similar awards,
- *predictability or certainty* (which would assist potential claimants in making informed decisions about engaging with the redress package. It also assists the government in being able to more accurately assess the cost of the package and therefore contributes to fiscal responsibility).
- *Enables claims to be assessed quicker.*[262]

However, Kaufman points out that in devising a matrix one needs to be aware that 'there is no necessary connection between the nature, severity and duration of abuse, and the impact of that abuse upon its victims'. He concludes that monetary and non-monetary benefits should not be solely dependent upon the nature, severity and duration of abuse'.[263]

The research conducted by Feldthusen, Hankivsky and Greaves also notes some critical comments by victims/ survivors about the matrix/ sliding scale approaches.[264] However, it is difficult to ascribe these to either Grandview or CICB, since both used a matrix/ sliding scale to determine damages awards. Matrix style scales were also criticised by victims/ survivors of institutional abuse who participated in the research by the IHRD as being 'arbitrary and invalid, and are seen by some to result in inappropriately low compensation awards for survivors'.[265]

In the context of Grandview, the matrix attempted to assess both the severity of the abuse and the harm/ injury sustained to reach a financial award. And it must be emphasised that the matrix applied only to the financial component: other benefits available on validation were available to all successful claimants, regardless of the type of injury they had sustained. One adjudicator reported that the matrix assisted in

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262 Kaufman, above n18 at 478

263 Ibid, 478.

264 Feldthusen, Hankivsky & Greaves, above n24 at 109.

265 IHRD, above n21 at [5.1,5].

enhancing fairness between claims: '[it] was incredibly helpful to us, it relieved a lot...it relieved a lot of stress of one's own possibility of unfairness...'[266]

Would a flat sum be a better approach?

While there are numerous issues with matrix approaches, and some grids are better than others, we also need to ask what system of determining a financial award could replace a matrix approach. A number of the professionals involved in the Grandview Agreement suggested that a single flat rate may have been more appropriate.[267]

However as one of them noted:

> they [the GSSG] didn't propose that [a flat sum]. The women were prepared to acknowledge that, even though they all suffered the same amount of pain, there were some different measures of wrong. And somebody who was in that institution for five years, who were put into a hole [Church House] for months on end, who maybe was raped repeatedly, that that person would get a bit more of an acknowledgement than someone else who had an isolated event[268]

In the end however, the matrix as part of the Grandview Agreement was what the GSSG had negotiated, because the 'women wanted to make that distinction'.[269]

A flat sum approach might obviate the need for any validation process (other than an administrative process of confirming attendance at a specific institution).[270] However, this might detract from the therapeutic outcomes/ impacts that are seen as flowing from such a process. Feldthusen and colleagues emphasise the important role of a respectful validation process (whether that be through tort, the CICB or a specifically designed redress package like Grandview).[271] The comments made by the women in the evaluation of the Grandview Agreement and in the subsequent study by

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266 Interview #3.

267 Interview #2, #3.

268 Interview #5.

269 Interview #1. See also Interview #2, where the adjudicator discusses some of the issues with the matrix but that in the end '...we assumed that the parties bargained it, and so we were working with that'. See also Interview #3 where the adjudicator in discussing the role in making awards in a manner that was fair among the women their job was made easier as the GSSG had itself agreed to 'guidelines' in the form of the matrix.

270 The new Settlement Agreement for the IRS, see above n9-11 and infra text, includes both a flat sum component (the common experience payment) as well as a process which allows for more individual based compensation payments for physical, sexual and psychological abuse. The common experience payment will be paid via a simple verification of attendance at an IRS. It is also worth considering the views of survivors of the Woodlands School which reached a court settlement in the middle of 2006 which proposed a grid type payment system. A group of survivors did not approve of this approach suggesting that a flat sum common experience payment would be more appropriate as it recognising the group dimensions of the harm: see Camille Bains 'Woodlands Deal "inhumane"; Abuse Victim Blasts Settlement Offered to School's Survivors', 12 August 2006, *The Globe and Mail*, S3.

271 See Feldthusen, Hankivsky & Greaves, above n24 at 79, 97.

Feldthusen and colleagues demonstrate the importance attached to having a process in which they felt listened to, believed and respected. Not only is a validation process a venue in which to tell their story, but the adjudicator also plays an important role. She represents an independent and authoritative listener who hears the evidence and formally states that the evidence was heard (by someone in a position of authority). From that process, it followed that the government would then provide some compensation, other benefits and an official apology.

Some concluding thoughts

> ... some of the features of the Grandview agreement ...[reflect]... both a litigation approach ...[and].. make the bridge to a more collective, a more long-term attempt to be innovative, but there was a limit obviously to how far it could go, not only because it had to be negotiated with the Government, but also because it was a relatively new way of advancing that type of scheme of compensation.
> ....
> In retrospect I think we could see that there were maybe some flaws in the agreement but nevertheless it was a breakthrough in terms of what existed at the time.[272]

This discussion of some of the features of the Grandview agreement demonstrate how, although it was one of the earliest redress packages, it was extremely innovative. For all the limits of the process, it still remains unique and provides at least some kind of benchmark, as well as some indicator of the pitfalls, for a successful redress program. But we are still left with the question of to what extent redress packages for institutional abuse can move beyond the limits and difficulties encountered in the tort system?[273] What can we learn from Grandview in thinking about some of the comparable harms that have happened in Australia?

In its important report on institutional abuse, the LCC pointed out that :

> Redress programs are always undertaken in the shadow of the formal legal system. This applies whether the disclosure of abuse that prompts the redress program comes about unofficially (for example, through media reports from individual survivors) or officially (such as through the findings of a public inquiry or an investigation by an Ombudsman). Once there has been public exposure of past child abuse in an institution, those employed at, or who were responsible for that institution live under the very real threat of civil litigation, and sometimes, criminal prosecution.[274]

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272 Interview #1.

273 See IHRD, above n21; Bessner, above n26; and Llewellyn, above n26. These three authors all raise, in slightly different ways, that it is not just about tort versus redress, but also redress (based on tort approaches) v redress that aims to be more innovative, more therapeutic and perhaps restorative.

274 LCC, above n25 at 305-306. It is worth noting that the 'shadow of the law' does not mean that we cannot think creatively about redress packages, what harms will be recognised, what benefits will be provided, will

They also stressed that it is important when discussing redress programs that we begin by describing them and 'end[] by *imagining* what else might be done'.[275]

beneficiaries beyond primary victims be recognised, how will evidence be taken etc, as it explored in the LCC at 308-310.

275 Ibid at 108. Emphasis added.