

Compensation, Reparations and Redress

Models of Compensation: Ireland – the Compensatory Advisory Committee, the Commission To Inquire Into Child Abuse and the Residential Institutions Redress Board.

From the mid 19th century in both Britain and Ireland, there arose a widespread practice of removing children from families and placing them in industrial schools, reformatories, orphanages, children's homes, hospitals and various other institutions (some children were sent to work on farms as labourers, for example).

From where did these children come? They were in many cases illegitimate children, or children from "broken homes", child offenders and children who became wards of the state through various circumstances. Institutions were run almost exclusively by religious orders. The practice continued in the 20th century, up to the early 1970s. Assaults and abuses seem to have been commonplace.

It is instructive to examine the operation of the Irish scheme because it involves compensation of victims whose injuries were sustained in similar circumstance. It was often the same religious orders who ran institutions in Canada, Australia and the other colonies where Indians (as they were referred to in Canada), Indigenous Members of the Stolen Generations and Wards of State were housed, and where subsequent abuses took place.

BACKGROUND

In the early 1970s, a committee headed by a judge of the Children's Court produced *The Kennedy Report* – an investigation into conditions in Irish residential institutions for children. It found children living in deprivation, institutions understaffed and staffed by unqualified people. Institutions were under-funded. There was no education or training for the children and an absence of record keeping (even of minimal information) concerning the children. Two institutions were deemed so inadequate they were closed immediately. The institutional system was abolished shortly afterwards in favour of "group housing". *The Kennedy Report* also found that statutory obligations on the relevant government departments under whose remit these institutions operated to inspect these schools at least once a year had not been met.

In the 1990s, victims and survivors of the institutions began taking court actions against the perpetrators of child abuse, the Department of Education and Science and the religious orders.

In 1999, a 3-part documentary series called 'States of Fear' was broadcast. The Prime Minister of Ireland, Taoiseach Bertie Ahern, responded by issuing an apology.

"On behalf of the State and all the citizens of the State, the Government wishes to make a sincere and long overdue apology to the victims of childhood abuse for our collective failure to intervene, to detect their pain, to come to their rescue.

LITIGATION

The *Statute of Limitations (Amendment) Act 2000* soon followed, altering Limitations legislation retrospectively to facilitate litigation in the interests of justice. If a person suffers from psychological injury due to child abuse, they shall be deemed to be under a disability. The normal 3-year period of limitations does not commence until they overcome the psychological injury. This approach takes account of a recognised tendency of abuse victims to delay reporting the crime. A similar amendment in Australia would overcome the hurdles in *Cubillo* and *Gunner*.

CRIMINAL PROCEEDINGS

Following allegations of abuse in institutions, investigations were carried out by the Irish police and files passed to Director of Public Prosecutions in a number of instances. The lapse in time, often over 30 years, presents difficulties and the DPP is reluctant to proceed. Whatever the difficulties, it contrasts with the complete lack of prosecutorial interest in crimes committed against members of the Stolen Generation.

THE COMMISSION TO INQUIRE INTO CHILD ABUSE (LAFFOY COMMISSION)

Set up under the *Commission to Inquire into Child Abuse Act 2000*, the Commission was to listen to people who have been abused during childhood in an institution tell their story of abuse. The Commission was then to inquire into the abuse of children since 1940, find out why it occurred and who was responsible. Four areas of abuse were examined – neglect, physical, sexual and emotional abuse.

It emerged from documents discovered in the course of the Commission's work that there had been vaccination trials carried out on children resident in the institutions in the years 1960, 1961, 1970 and 1973. Further investigation of this aspect of abuse was deemed ultra vires for the Laffoy Commission and a separate inquiry was to investigate the vaccine trials.

At the end of the process, the Commission is scheduled to report **directly to the public** on the results of the inquiry, any recommendations stemming from those results, what steps should be taken to deal with any continuing effects of abuse and what protections need to be put in place to prevent the abuse of children in State care from taking place now and in the future.

Victims and survivors get a choice as to how they want to tell and record their story. They may approach either the Confidential Committee or Investigative Committee. Evidence is taken on oath and failure to appear or co-operate with the committees can constitute an offence.

Confidential Committee

For survivors who don't want to be involved in investigative proceedings.

Hearings to be held in private before two committee members.

No cross-examination.

Survivors may bring a person with them for support (reasonable costs of bringing a person in support to be met by scheme).

Hearing may be audio recorded, but survivor can object to any recording.

No-one the subject of an allegation at this committee will be named in a report.

At the end of the process the committee will issue a general report on its findings, without naming survivors, perpetrators or institutions.

Investigative Committee

Full inquiry and full investigation of allegations.

Victims/survivors can produce evidence.

Committee can test evidence and rule on cases of child abuse.

Victims submit an initial application. An officer of the committee investigates and notifies all parties of the hearing.

Any person or institution accused is notified.

Both victims and accused may be legally represented.

Both victims and accused may be questioned on the evidence they provide.

Committee can compel attendance of witnesses and production of documents.

Committee to publish its findings at the end of the process, naming institutions and responsible persons or managers of the institutions.

Analysis of persons giving evidence to the Laffoy Commission

	Confidential Committee (1,192)	Investigation Committee (1,957)	Total (3,149)
Men	650	1,406	2,056 (65%)
Women	542	551	1,093 (35%)
60 years of age or older	301	440	741 (24%)
Resident outside the State	378	670	1,048 (33%)

THE COMPENSATORY ADVISORY COMMITTEE (CAC)

The committee was set a task - to devise a scheme that would be fair, reasonable and would provide individual assessments consistent with court awards in similar personal injury cases or likely pay-outs from future court awards. The scheme was to provide predictability, sensitivity and flexibility.

It is difficult to devise by mathematical formula a scheme as to what the correct level of compensation is for a victim of child abuse. Rather than accept the often voiced and unsubstantiated claim that that no money can compensate, by taking all relevant considerations into account it can become a matter of judgment - the kind of judgment courts are used to making. The CAC examined some recent awards of damages for personal injury from the Irish courts for comparative purposes.

The scheme does not seek to put the injured person in the position in which they were prior to abuse taking place. It seeks to provide solace for victims, an attempt to put right a grave wrong. Awards can provide victims with tangible recognition of the serious hurt and injury caused. Secondly, redress can “allow many of those victims to pass the remainder of their years with a degree of physical and mental comfort which would otherwise not be readily obtainable.”

The CAC considered four areas of injury and abuse: severity; extent of physical and mental injury suffered; psycho-social sequelae; and loss of opportunity resulting from abuse.

Weighting scale for evaluation of severity of abuse and consequential injury

Constitutive elements of redress	Severity of abuse	Severity of injury resulting from abuse		
		Medically verified physical/psychiatric illness	Psycho-social sequelae	Loss of opportunity
Weighting	1-25	1-30	1-30	1-15

Redress Bands

Redress Band	Total weighting for severity of abuse and injury/effects of abuse	Award payable by way of redress
V	70 or more	€200,000 - €300,000
IV	55-69	€150,000 - €200,000
III	40-54	€100,000 – €150,000
II	25-39	€50,000 – €100,000
I	Less than 25	Up to €50,000

Additional redress on the principle of aggravated damages

The Redress Board may go outside the scheme if necessary to make a payment that is fair and reasonable in the circumstances, in the interests of justice. This includes aggravated damages (but not exemplary or punitive damages) and amounts to cover reasonable medical treatment arising from abuse.

Where the injury suffered by an applicant was not restricted to specific acts of abuse, but was exacerbated by the general climate of fear and oppression which pervaded the institution in which he or she was resident, additional redress may be awarded by the Board. Without going into any question of fault on the part of any person or institution, the Board may make such an additional award where it is satisfied that it is appropriate to do so having regard to the exceptional circumstances of the case. Such additional award may not exceed 20 per cent of the redress otherwise payable as a result of the Board's assessment of the severity of the abuse and the injury suffered by the applicant.

In the opinion of the Board, two factors must be taken into account in the application of the principle of aggravated damages in the context of the redress scheme. First, the level of "aggravation" which would attract an additional award must take into account that the very essence of the scheme is to provide redress for the serious hurt suffered by applicants who have been abused. Secondly, factors which in other cases might be taken to justify an award of aggravated damages will normally have already been taken into account by the Board in its assessment of the severity of the abuse or of the injuries suffered by the applicant. It is the view of the Board that additional awards on the basis of aggravated damages will only be made in exceptional circumstances.

Accordingly, an additional award based on the principle of aggravated damages will only be made where the Board is satisfied that the manner in which the applicant was abused was so oppressive or outrageous that an award based solely on the constitutive elements of redress does not represent an award which is fair and reasonable having regard to the unique circumstances of the applicant.

No additional redress is payable on the principle of punitive or exemplary damages.

The following are examples of injury for which redress may be payable. In every case the Redress Board will have to be satisfied that the particular injury resulted “as a consequence of the abuse” suffered by the applicant.

NATURE OF INJURY	EXAMPLES
<p>PHYSICAL OR PSYCHIATRIC ILLNESS</p> <p>1. Physical injury</p> <p>2. Physical illness</p> <p>3. Psychiatric illness</p>	<p>1. Loss of sight or hearing. Loss of or damage to teeth. Permanent scar(s)/disfigurement.</p> <p>2. Sexually transmitted diseases. Respiratory diseases. Skin diseases.</p> <p>3. Severe depression with suicide attempts. Personality disorder. Post-traumatic stress disorder.</p>
<p>PSYCHOLOGICAL INJURY</p> <p>1. Emotional disorder</p> <p>2. Cognitive impairment/ educational retardation</p> <p>3. Psychosocial maladjustment</p> <p>4. Anti-social behaviour</p>	<p>1. Inability to show affection or trust Low self-esteem; persistent feelings of shame or guilt. Recurrent nightmares or flashbacks.</p> <p>2. Literacy level well below capability. Impoverished thought processes. Limited vocabulary leading to communication difficulties.</p> <p>3. Marital difficulties involving sexual dysfunction. Low frustration tolerance. Shyness and withdrawal from mixing with people.</p> <p>4. Substance abuse. Compulsive stealing. Physical aggressiveness.</p>
<p>LOSS OF OPPORTUNITY</p>	<p>1. Having to refuse employment opportunity/ promotion because of illiteracy.</p> <p>2. Need to concoct a false identity and to live a lie with work-mates.</p> <p>3. Unable to pursue certain occupations, e.g. police, because of “record”.</p>

Non-exhaustive examples of factors to be considered in weighing severity of abuse

TYPE OF ABUSE	EXAMPLES
SEXUAL ABUSE	<p>Violent anal or vaginal penetration.</p> <p>Victim made to masturbate member of staff or perform oral-genital acts.</p> <p>Sexual kissing; indecent touching of private parts over clothing.</p>
PHYSICAL	<p>Serious injuries requiring hospitalisation; profound deafness caused by blows to ears.</p> <p>Severe beating causing e.g. a fractured limb or leaving permanent scars.</p> <p>Corporal punishment more severe than was legally sanctioned at the time, but leaving no permanent physical signs; Gross over-work involving inadequate rest, recreation and sleep.</p>
EMOTIONAL	<p>Depersonalisation e.g. through family ties being severed without justification or through deprivation of affection.</p> <p>General climate of fear and apprehension.</p> <p>Stigmatisation by staff, e.g. through repeated racist remarks or hurtful references to parents</p>
NEGLECT	<p>Severe malnutrition; failure to protect child against abusive placements; inadequate guarding against dangerous equipment in work-place.</p> <p>Failure to provide legally prescribed minimum of school instruction; lack of appropriate vocational training and training in life skills.</p> <p>Inadequate clothing, bedding or heating.</p>

THE RESIDENTIAL INSTITUTIONS REDRESS BOARD (RIRB).

The *Residential Institutions Redress Act 2002* set up the RIRB to make fair and reasonable awards to those abused as children while resident in institutions subject to State regulation and inspection.

It is worth noting the timeframe within which the Irish Government operated.

- 1999 - 'States of Fear' documentary and PM's apology;
- 2000-01 - Statute of Limitations amended; Commission of Inquiry;
Compensation Advisory Committee;
- 2002 - Redress scheme in place.

The RIRB is wholly independent, chaired by judge. In December 2002, the first applications were received. The application period within which victims and survivors could apply to the RIRB was three years – from December 2002 to December 2005. A total of 2,667 applications finalised in 2006, according to the *Annual Report of the Residential Institutions Redress Board 2006*. Advertisements communicating the Board's activities were placed in the global press and Irish publications such as 'Irish Echo'. Board officers travelled to the US and the UK to hear evidence and take submissions.

Legal expenses

A reasonable amount for legal expenses incurred by the applicant in the preparation and presentation of the application to the Board will be reimbursed.

Medical expenses

An award by the Board may include an award for medical expenses incurred or to be incurred in respect of medical treatment for the injury suffered by the applicant. The award will, for example, include the expense of medical treatment (including psychiatric treatment) for the injury resulting from the abuse which it was reasonable for the applicant to receive in the past and/or which appears to the Board, on the basis of the medical evidence available to it, to be reasonable for him or her to receive in the future. The award for medical expenses will take the form of an additional award assessed on the basis of the evidence available to the Board.

Hearings Procedure

The hearing will normally be in the Board's premises in Dublin, but arrangements may be made in the case of applicants living more than 50 miles from Dublin for hearings to be held at a more convenient venue within the State, as considered appropriate by the Board.

With regard to applications from persons living outside the State, the Board has decided that it will as a general rule continue to conduct settlements and/or hearings of applications at its premises in Dublin, all reasonable expenses incurred by an applicant travelling to Dublin for a successfully concluded settlement or for a hearing will be met by the Board.

Where travel to Dublin by a person living outside the State is impossible or too great a burden, the Board will make every effort to settle the application informally (that is, without the need for a hearing) and will for this purpose enter into negotiations in Ireland and/or by telephone, mail or otherwise with a view to reaching a settlement acceptable to the applicant. In the small number of cases where a settlement of this kind is not possible, and the applicant satisfies the Board that he or she is unable to travel to Dublin, the Board will be willing to consider an application (supported by appropriate evidence) to hear the oral evidence of the applicant at a suitable location close to his or her place of residence.

Special requirements

Applicants or their legal representative should inform the Board in advance if an applicant has any special needs at the hearing, such as documents in large print, wheelchair or other access requirements or, in the case of those with hearing difficulties, a person to sign. Wheelchair users have access to the Board's hearing rooms at Clonskeagh and the toilets are suitable for persons with disabilities. If the hearing is to be held elsewhere please advise the Board of any special access needs. An applicant who has a hearing or reading difficulty may bring someone with him or her to the hearing or may request the Board in advance to provide someone to help. It is noted that there are no child-care facilities at any hearing centre, but the Board will pay **the reasonable cost of child-care** while an applicant is attending a hearing.

Expenses

In relation to attendance at hearings, the Board will normally pay all reasonable travelling expenses, a subsistence allowance and, if a person takes time off work to attend a hearing, his or her loss of wages, as follows:

Travel expenses of the applicant by train or bus between his or her home and the hearing venue. Travel expenses of any person who needs to come with the applicant because he or she cannot travel alone or needs their assistance or **moral support** at the hearing. Travel expenses of any person who is giving oral evidence on behalf of the applicant (provided the Board has agreed beforehand that he or she needs to come to the hearing).

The wages or salary lost by the applicant, a person giving the applicant necessary assistance or a witness on behalf of the applicant, as a result of attending the hearing. Lost wages or salary means the actual net loss after deductions for tax and social welfare, and should be set out in a letter from the employer of the person concerned.

A subsistence allowance will normally be paid if the applicant is absent from home or otherwise stays at the hearing venue for more than five hours. The **cost of a baby-sitter or carer** actually incurred (if supported by a letter from the sitter/carers confirming the payment).

Unless agreed beforehand, the Board will not pay for the expense of a witness from outside the State.

The Board will not pay any expenses incurred by an applicant travelling to meet his or her solicitor for consultation purposes. The Board will consider claims for travel expenses incurred in attending medical appointments, counsellors and other professional advisers in connection with the applicant's injuries or his or her application for redress; but it will be for the Board to decide what expenses will be allowed in respect of any individual applicant.

Criteria for Eligibility

A person who makes an application for redress must establish four matters to the satisfaction of the Board in order to qualify for an award:

- (i) His or her identity;
- (ii) His or her residence during childhood (i.e. while under the age of 18 years) in an institution listed in the schedule to the Act;
- (iii) He or she was abused while so resident and suffered injury, and that injury is consistent with any abuse alleged to have occurred while resident.

The meaning of "abuse"

Abuse of a child means –

- (a) the wilful, reckless or negligent infliction of physical injury on, or failure to prevent such injury to, the child;
- (b) the use of the child by a person for sexual arousal or sexual gratification of that person or another person;
- (c) failure to care for the child which results in serious impairment of the physical or mental health or development of the child or serious adverse effects on his or her behaviour or welfare, or
- (d) any other act or omission towards the child which results in serious impairment of the physical or mental health or development of the child or serious adverse effects on his or her behaviour or welfare.

Standard of Proof

Board does not make findings of fault or negligence. Applicants are not required to produce evidence of negligence by a person, the person's employer or a public body. Where there is a conflict of evidence, the making of an award to an applicant does not constitute a finding of fact or fault. The fact that applicants do not have to prove fault separates the RIRB redress scheme from litigation, where proof of negligence and fault is the key to success or failure. Evidence taken at the RIRB is not admissible in either civil or criminal proceedings.

Cross-examination

If a relevant person is named as an abuser, they may question the accuser. Both victims/applicants and people accused of abuse may be legally represented. Legal representatives from each side may question the other side.

Quantum of Redress

Interim payments equivalent to Aus\$ 14,000 (10,000 Euro) are available depending on age and health of applicant. The top pay-out for a worst case scenario is 300,000 Euro (Aus\$ 480,000 approximately). This is close to the only court determined compensation payment in Australia - the Bruce Trevorrow case in South Australia, where an award of Aus\$ 500,000 was made.

Right of Review

Applicants unhappy with a decision or non-decision to compensate can ask for a review. The quantum of a compensation payment can be appealed also.

RIRB compensation in comparison to current Irish Court awards

Cases are still being litigated in Irish courts. Settlements are often confidential, but are rumoured to be in the range of an Australian equivalent of \$420,000-\$560,000 (usually payable by the diocese i.e. the local church region). Courts seem more willing to consider the religious orders vicariously liable. In a recent case, the plaintiff sued three named parties – the Minister for Education, the local health board in whose care the person was placed and the religious order who ran the institution in which the abuse took place. The court found the religious order solely liable for the abuse.

The Compensation Fund

The potential cost of the RIRB to consolidated revenue is estimated at 2 billion Euro (Aus\$ 2.8 billion). The contribution by the Catholic Church, who ran the majority of the institutions in Ireland, was capped at 128 million Euro i.e. Aus\$ 170 million approximately. The churches handed over portfolios of land in lieu of the money. Allegations are that the land is not worth the valuation accepted by the Minister in charge at the time. Recent anecdotal evidence suggests there no visible signs of church land being sold and certainly not in any prominent locations.

Redress Award and Waiver

An applicant who is granted an award must sign a waiver upon acceptance that releases the Department of Education and Science, the religious orders and any other party affected or named from any future proceedings arising out of the same allegations raised at the RIRB.

POINTS OF DISCUSSION

Applicants were the same race, colour, religion and from the same ethnic group as the general population. Did that make it easier to accommodate the notion of redress among the general population?

Would this scheme adequately compensate for the racial and genocidal aspects of Australian Stolen Generation policies? Note – the provisions for aggravated damages and the fact that racial abuse was considered an element of emotional abuse by the CAC.

Quantum of Awards - \$500,000 might allow members of the stolen generation to go back to their country and buy a house or build one. It might “allow many of those victims to pass the remainder of their years with a degree of physical and mental comfort which would otherwise not be readily obtainable.”

What about church-state liability – who pays, who contributes? The Churches argue that they were providing services where the State was unwilling or unable to, that the State abdicated its responsibilities to its citizens.

Is the 2-part process cumbersome? You go to the Laffoy Commission to tell your story, then repeat it at the RIRB to qualify for an award. The ***BRINGING THEM HOME*** report called for a setting to tell your story and a second place for compensation.

FURTHER REFERENCE:

- ❑ Chris Cuneen *Legal and Political Responses to the Stolen Generations: Lessons from Ireland?* [2003] Indigenous Law Bulletin 57.
- ❑ Report of the Compensatory Advisory Committee (The Ryan Report) available at <http://www.rirb.ie/ryanreport.asp> (accessed 7 April 2008).
- ❑ Annual reports of the Residential Institutions Redress Board (RIRB) available at <http://www.rirb.ie/annualReport.asp> (accessed 7 April 2008).
- ❑ Guides to operations and procedures at the RIRB available at <http://www.rirb.ie/application.asp> (accessed 7 April 2008).