

XVIII

Recommendations and Conclusion

INTRODUCTION

The Law Commission of Canada identified certain criteria to be used in assessing the options available to a government to address reports of institutional abuse. It also articulated five general principles that should govern how any reported institutional abuse should be handled. It then examined the relative merits of various existing options according to these criteria and principles. The enumerated needs or interests of true victims of abuse (or “survivors”) were regarded to be of foremost importance; they acted as the foundation for the Law Commission’s assessment of the approaches to reported institutional abuse. I have found the Law Commission’s analysis to be extremely helpful in identifying the needs of survivors and the criteria and principles to be used to examine the merits of various approaches. Indeed, I have referred extensively to this analysis in the pages that follow.

The Law Commission also recognized that considerations other than the needs of survivors must be built into the assessment process: for example, “equity and procedural fairness for everyone involved in allegations of abuse.” Of course, I share the Law Commission’s view that fairness for all affected parties must be considered in assessing any approach to reported institutional abuse. However, I hold a somewhat different view as to how fairness is to be achieved, particularly for alleged abusers, within a government redress program. As will be developed below, I contemplate a role for alleged abusers that enhances the credibility of a redress program, while remaining compatible with the needs and interests of all affected parties, including true victims of abuse.

Certain additional issues, such as the interplay between the criminal process, disciplinary proceedings, and any redress program are given more importance in my recommendations than they have been given in the Law Commission Report, given their significance to the Nova Scotia situation. I also depart from the Law Commission on some other issues, for example, on the timing of apologies to victims of abuse. These and other points are more fully developed below.

It has been suggested by some Nova Scotia past and current employees that the judicial process, in particular the criminal process, should be utilized to validate claims. They see little or

no role for specially designed redress programs in any government response to reports of institutional abuse.

Given the design of the Nova Scotia Compensation Program, it is not surprising that employees have taken that position. However, not all alleged abuse cases, whatever their merits, may be expected to proceed to criminal trial. Suspects may be dead or their whereabouts unknown. There may be legal or constitutional impediments to prosecution, unrelated to the merits of the allegations themselves. A case may not proceed because the available evidence cannot meet the criminal standard of proof beyond a reasonable doubt, which, of course, has no application to civil or administrative proceedings. Further, as developed below, I am satisfied that procedures may be crafted that are less rigorous than judicial or administrative proceedings, but remain fair to affected employees.

Ultimately, I share the Law Commission's view that redress programs, if properly designed and implemented, may appropriately form part of a government response to reported institutional abuse. Indeed, in some circumstances, such redress programs can serve as credible and fair alternatives to traditional litigation. There is also no doubt that a properly designed redress program can sometimes best meet the needs of true victims of abuse.

In formulating recommendations, I must be mindful of the fact, earlier alluded to, that there can be no perfect template for a government response to reports of institutional abuse. Too many variables are operative to enable such a template to be created. Indeed, one of the failings of the Nova Scotia program was that its designers too easily borrowed from the experience in other jurisdictions without sufficient regard for local circumstances. For example, Nova Scotia was confronted with a situation in which a number of current employees were accused of abuse, requiring a finely crafted response that fully accommodated their fairness interests. The Ontario programs, which Nova Scotia borrowed from, albeit imperfectly, did not need to confront the same difficulties – certainly not to the same degree. What this means is that my recommendations are not intended to predetermine a government's response to reports of institutional abuse in every situation, but to guide governments towards creative responses that recognize and address the appropriate considerations.

GENERAL CONSIDERATIONS IN DESIGNING A GOVERNMENT RESPONSE

Certain considerations should figure prominently in designing any government response to reports of physical or sexual abuse allegedly perpetrated by employees upon residents of youth institutions. These general considerations are contained in recommendations 1 to 14. More specific recommendations, that apply these general considerations, then follow. Some of these considerations are drawn from the criteria and principles identified by the Law Commission of Canada. I note here at once that programs that are directed to inter-resident abuse, or remedying wrongs other than physical or sexual abuse, will necessarily have regard to additional or different considerations. For designers of those programs, what follows may be useful only in identifying points of similarity or departure.

1. A government response should respect those who were truly abused, engage them in the creation and implementation of any redress process, and offer them comprehensive information throughout so they can make informed choices about their participation in the process.

This language is largely drawn from the Law Commission's report. As the Law Commission reflected, where government only *consults* victim representatives in the design of a government response, or presents a redress program on a 'take-it-or-leave-it' basis, its approach does not promote the principles of respect, engagement, choice and fairness. These principles require full participation by victim representatives in the design process.

Where a redress program is contemplated, full participation will generally require funding to facilitate the creation of a claimant advocacy group and its involvement in designing and implementing an appropriate program. This reflects the usual lack of resources on the part of claimants. Full participation will also generally require funding of professional assistance for such a group and/or for potential claimants. This may involve the payment of legal fees for multiple lawyers representing claimants in a redress program or, as was done for Grandview claimants, a requirement that claimants obtain independent legal advice, at the government's expense, before agreeing to participate in the program.

2. Where the government response involves monetary compensation for abuse and its effects, any validation process to determine whether, and in what circumstances, abuse occurred, must be credible and fair.

3. Findings expressly or by implication made in prior judicial or administrative proceedings should generally obviate the need for further validation of those findings as a precondition to obtaining redress.

4. A credible and fair validation process is one that credibly separates out true and false allegations of abuse, and is procedurally fair to those most affected by it, particularly claimants and those against whom abuse is alleged. This means that such a process must

include procedural safeguards to protect against false accusations and appropriate measures to respect the dignity and legitimate privacy interests of both claimants and alleged abusers.

5. A government response should strive to hold those who are responsible for abuse, if it occurred, accountable. Accountability extends to both abusers and those individuals, organizations or governments whose actions or inactions enabled abuse to occur. As noted by the Law Commission, these individuals may include “the actual abusers, co-workers who permitted the abuse to continue, supervisors or heads of institutions that failed to appropriately respond to complaints, or those who permitted institutions to operate without adequate oversight.”

6. A government response should strive to address the full range of needs of those who were truly abused. Those needs – for example, the need to see that perpetrators are held accountable – will often not be exclusive to abuse victims, but coincide with the larger public or societal interest. The needs of abuse victims may be met, for example, by monetary compensation, counselling, education and retraining, medical or dental services, acknowledgments and apologies, and establishing a historical record of the abuse.

7. A government response must recognize and reconcile competing needs and interests. For example, the desirability that those victimized maintain their confidentiality may, at times, conflict with the societal need to prevent future abuse and prosecute the guilty. The desirability that the government adopt a process that does not compound the harm done to abuse victims may compete with the interest in ensuring that individuals are not falsely stigmatized as abusers. Ultimately, an appropriate balance must be struck.

As I earlier noted, the Law Commission identified and focussed on the needs of those who have suffered abuse, resolving to keep their interests foremost. I recognize the concerns that motivated this focus – namely, that any government response is, after all, intended to address the harm they suffered, and the fact that traditionally they have had the weakest voice and their needs subordinated to other concerns, such as punishing perpetrators. That being said, it is important to resist designing a government response that serves their needs virtually to the exclusion of others. Such a response lacks credibility and, thus, ultimately, may not even well serve true victims of abuse. I later address how this balance should be struck.

8. A government response should strive to address the needs of the families and communities of true victims.

9. A government response, particularly where it involves a validation process, should endeavour to minimize the potential harm of the process itself upon those affected. This means that such a process should not unnecessarily or gratuitously compound the emotional, psychological or physical impact of prior abuse felt by true victims. This also means that such a process should not unnecessarily or gratuitously harm those who are innocent of abuse or of wrongdoing.

10. A government response should be enduring. That is, it should complement what must follow. This means that, where abuse has occurred, the response should contribute to reconciliation and healing. Whether or not abuse has occurred, the response should recognize the need for its institutions to operate safely and effectively in the future. It should promote a healthy environment at the institutions, both for their residents and for those who work there.

There are at least two aspects to this recommendation. A process that further alienates true victims of abuse from their government is unlikely to promote reconciliation and healing. On the other hand, a process that is demonstrably unfair to employees is likely to demoralize current staff and dissuade highly qualified individuals from seeking employment.

11. A government response should strive to prevent abuse from occurring in the future and contribute to public education and awareness.

One of government's highest priorities is to ensure that young people under its control or supervision are protected from ongoing or future abuse.

12. A government response should, itself, be transparent; that is, it should permit the public to understand and evaluate it. Government and its officials should also be accountable for its design and implementation. This means, in part, that elected officials must be fully and accurately informed as to the available options and then provide appropriate direction and input into the design and implementation of such a response.

13. A government response must be fiscally responsible.

14. A government response should build in, from the outset, mechanisms to permit ongoing assessment and improvement. However, a response should be designed to avoid, wherever possible, changes mid-stream that may compound the harm to those affected.

15. A multi-faceted government response must be integrated and coordinated. This means, in part, that government ministries, social or investigative agencies and others should not operate at cross-purposes, unnecessarily duplicate efforts or waste valuable resources.

16. A government response should be mindful of an ongoing or contemplated criminal investigation or prosecution. Of paramount concern is that any government response not interfere with such proceedings. This means both that government should consult with law enforcement agencies in the design and implementation of its response and that the design should give appropriate recognition to such criminal proceedings.

17. A government response should strive to ensure that individuals who are similarly situated be treated similarly. Generally, there should be consistency in the compensation

awarded to similarly situated victims. There should be consistency in the interim measures taken by government respecting alleged abusers who are similarly situated. Put simply, arbitrary distinctions should not be drawn between the treatment of affected parties.

18. A government response should be designed to prevent discriminatory treatment of claimants based on grounds such as age, race, ancestry, religion, creed, place of origin, colour and ethnic origin, gender, sexual orientation, or disability. Equally important, consideration need be given to how a government response can ensure inclusiveness, respect and engagement of all claimants. Such consideration may extend to many aspects of the government response: for example, consultation or partnership with representative community groups, the selection of program designers, administrators and fact finders, and the formation of claimant advocacy groups or joint advisory or implementation committees.

Many of the considerations contained in recommendations 1 to 18 overlap. For example, where investigative agencies unnecessarily duplicate efforts through the investigation of abuse claims (addressed in recommendation 15), true victims may be repeatedly and unnecessarily compelled to relive their abuse, compounding the impact of that abuse on their lives (contrary to recommendation 9).

INITIAL RESPONSE TO REPORTS OF INSTITUTIONAL ABUSE

19. In general, the initial response by government to reported institutional abuse by an employee on a resident should include:

- (a) documentation of the allegation;**
- (b) absent exceptional circumstances, removal of the alleged abuser from the immediate environment;**
- (c) relocation of the alleged victim(s) or witness(es), where a credible basis exists for believing that these individuals will otherwise not be secure or protected from employees or fellow residents;**
- (d) appropriate reporting within the institution and to the Ministry involved;**
- (e) fulfilment of any statutory reporting requirement;**
- (f) where the allegation involves criminality, referral to the appropriate law enforcement agency for investigation.**

20. Policies, procedures or protocols (“policies”) should exist to address all of these matters. As well, such policies should specifically articulate the obligation of all employees to intervene to protect residents from abuse.

21. Such policies should be created in advance rather than at the time of a crisis. They should be developed, where possible, after full consultation with affected parties. Employees should be fully educated and trained as to these policies. Institutions should ensure that residents are familiar with those policies that directly affect them.

Some of these policies already exist in Nova Scotia. My mandate did not extend to a review of each of them. Instead, I have focussed in the following recommendations on areas of particular relevance to the issues raised in the course of my review.

THE INTERIM STATUS OF ALLEGED ABUSERS

22. Such policies should specifically address the status of current employees against whom allegations of abuse have been made, pending a determination as to whether abuse occurred. While the paramount consideration must be the safety and security of current residents, these policies should reflect a consistency of approach, procedural fairness to affected employees, recognition that no findings of abuse have been made, and sensitivity to the impact of allegations upon the affected employees.

23. In this context, ‘abuse’ includes, but may not be confined to, physical or sexual abuse. However, the term ‘abuse’ should not be so broadly interpreted as to trivialize its meaning and prevent the effective operation of the institution.

24. Generally, where physical or sexual abuse has been alleged against a current employee, that employee should not continue to work in the immediate environment in which the abuse allegations were made. This approach protects not only the residents, but also affected employees from false accusations.

Such a policy reduces speculation about the truth of each allegation. Thus, each employee, in this respect, is treated equally. This ultimately promotes greater fairness to employees and their families.

25. Depending on the circumstances, removal from the immediate environment may involve re-assignment of the employee to other duties, suspension with pay, or, in limited circumstances,¹ immediate termination. In determining which option to adopt, the government should not act arbitrarily. Similarly situated employees should be dealt with similarly. An employee's reassignment or employment status should generally be revisited upon completion of any police or children's aid society investigation, after any criminal charges are laid, after any criminal case is completed, and upon completion of any internal investigation.

26. Sensitivity to the impact of allegations upon affected employees means, in the least, that allegations be addressed discretely as circumstances permit and, where information pertaining to the allegations is disseminated, that the status of the allegations *as allegations only* be articulated. In particular, appropriate recognition must be given to the stigma visited on an employee by allegations of sexual or physical abuse.

POLICIES RESPECTING INTERNAL INVESTIGATIONS

27. Policies should specifically address how and when internal investigations of current employees are to be conducted and by whom. Such policies, which may be internal or joint policies shared with police, children's aid societies and others, should specifically address the interaction between internal and external investigations. Matters that should be addressed include:

- (a) how an initial report of abuse should be received and recorded;**
- (b) the relative roles of police, children's aid societies and internal investigators in the investigation of abuse complaints;**
- (c) interviewing techniques that enhance or detract from the accuracy, reliability and completeness of a resident's or witness' account;**
- (d) the assignment of investigators with specialized training and skills respecting abuse cases, and where applicable, sexual abuse cases;**
- (e) the desirability of early videotaping of interviews, subject to limited exceptions;**
- (f) procedures for videotaping, and retention and access to videotapes;**

¹For example, where the employee admits the wrongdoing.

- (g) **medical examinations of the resident, where applicable;**
- (h) **the exchange of information between the police, children’s aid societies and the applicable institution and/or Ministry;**
- (i) **the status of any internal investigation pending an ongoing children’s aid society or police investigation, or criminal charges;**
- (j) **when a support person will be permitted to remain with a resident or witness during interviews;**
- (k) **the manner in which a suspected employee is notified that an allegation has been made against him or her;**
- (l) **at what stage of the investigation should the suspected employee be given an opportunity to address the allegations, and what information should be provided to that employee and/or his or her counsel to enable them to address the allegations.**

THE NATURE AND TIMING OF INTERNAL INVESTIGATIONS

Having outlined the subject matters that should be addressed in government policies, I now wish to set out some of the critical components of such policies. What follows is not intended to be exhaustive, but to simply address issues that figured prominently during my review.

In *Protecting Our Students: A Review to identify and prevent sexual misconduct in Ontario schools*,² the Honourable Sydney L. Robins makes a number of important recommendations as to the policies that should govern the investigation of sexual abuse allegations made by students against their teachers in Ontario schools. These recommendations are commendable. Many have equal application to the matter under consideration here. In particular, I have adopted a number of these recommendations, with appropriate amendment, that concern the conduct of internal investigations, employment status pending investigations or charges, and the interplay between internal and external investigations of sexual abuse. In my view, they have great relevance to the problems I have identified in Nova Scotia, particularly as to the interplay between the IIU and RCMP investigations.

28. Where criminal abuse is alleged, it should be investigated by the police, together with the local children’s aid society, if the allegation falls within the society’s mandate. Generally, any internal investigation should be deferred, pending conclusion of any ongoing or contemplated police investigation or resolution of any criminal charges.

This recommendation recognizes that the police are generally better situated to investigate allegations of criminal abuse. They have specialized training and skills in this area. Further, they are seen as independent of the applicable Ministry or the institution where abuse allegedly occurred. The criminal investigation may obviate any need to conduct a separate internal investigation. Reliance may often be placed on the fruits of the investigation, or on any resulting

²Toronto: Ontario Ministry of the Attorney General, 2000 (hereinafter “Robins”).

criminal prosecution. A concurrent internal investigation may contaminate the criminal investigation through suggestive or otherwise inappropriate or incomplete questioning. It may also compete for relevant documentation and, indeed, may obtain such documents in a way that compromises their subsequent admission in any criminal prosecution. Equally important, the desirability of minimizing trauma to true victims of abuse is potentially undermined by a multiplicity of interviews where individuals are asked to recount and relive their experiences.

In deciding how or when to conduct an internal investigation, consideration must be given to the impact of that decision upon a potential or ongoing criminal investigation or prosecution. Absent exceptional circumstances, a government response should recognize the primacy of a timely, effective and fair criminal investigation. Of course, information sharing should occur, as should ongoing dialogue as to the status of active investigations. However, I am not convinced – and the Nova Scotia experience is somewhat confirmatory – that joint investigations by police and internal investigators will generally be successful.

29. Although an internal investigation should generally be deferred to await the completion of a criminal investigation, the decision by government as to whether an employee should be terminated or otherwise disciplined, and any disciplinary proceedings themselves, should not be so delayed as to irremediably prejudice the employee and prevent his or her re-integration into the work environment, if exonerated.

30. A full internal investigation of allegations of sexual or physical abuse may be required where:

- (a) no criminal investigation or prosecution is initiated;**
- (b) criminal charges are withdrawn, stayed or dismissed;**
- (c) further deferral of an internal investigation would irremediably prejudice the employee and prevent his or her re-integration into the work environment, if exonerated.**

31. Any such internal investigation should be conducted by individuals with specialized training and skills respecting abuse cases and, where applicable, sexual abuse cases. This may mean that outside investigators need to be retained to conduct the investigation. Where the allegations are not isolated or raise systemic issues about the institution's conduct, outside investigators may also be desirable to foster independence.

32. Any such internal investigation should be mindful of the desirability of:

- (a) avoiding or reducing trauma to a resident or any witness through unnecessary or inappropriate questioning;**
- (b) drawing upon pre-existing evidence, such as interviews already conducted by the police, where applicable;**
- (c) respecting the privacy interests of all affected parties, to the extent possible and as not incompatible with any statutory duty to report suspected abuse;**
- (d) ensuring fairness to any employee against whom a complaint has been made;**

- (e) **ensuring an accurate determination, free from stereotypical notions about abuse, residents or employees.**

33. No individuals should be provided with assurances of confidentiality that are incompatible with any statutory obligation to report suspected abuse and that potentially expose others to the risk of abuse in the future. The desire for confidentiality can, of course, be considered in the exercise of discretion as to how and whether further proceedings will be conducted.

34. In reporting and describing alleged abuse, residents should be made to feel that their accounts will not be summarily discounted or minimized because they are residents and their alleged abusers are employees. Employees should be made to feel that complaints will not simply be accepted at face value because they are made by young people.

For the reasons earlier noted, it is generally preferable that an internal investigation be deferred where criminality is alleged. A criminal conviction or a determination by the police that an allegation is false may obviate any need for an internal investigation, or at least any extensive investigation. However, the criminal investigation or prosecution may not resolve the question whether the employee should be terminated or otherwise disciplined. The failure to convict beyond a reasonable doubt is not incompatible with a finding of abuse on the lesser standard of proof required in a disciplinary proceeding. Similarly, a charge may not result in a conviction for reasons unrelated to the merits of the allegations themselves. These and other circumstances may invite an internal investigation and disciplinary proceedings. Such an internal investigation, if it must be conducted, should strive to draw upon work already done and avoid unnecessary, and sometimes traumatizing, re-interviewing of witnesses.

Finally, I wish to note that not every allegation of impropriety is criminal in nature or should be regarded as such. For example, an allegation that a body search was overly invasive may, in some circumstances, raise concerns that a resident was sexually assaulted. However, where the body search was conducted in the presence of others, was done in accordance with documented policies, and was not accompanied by other indicia of criminality, it may more properly be viewed as a complaint as to how body searches should be conducted, rather than an allegation of criminality.

PROTECTING RESIDENTS FROM ABUSE

35. Protecting residents from abuse includes protection from the adverse effects of abuse and of having disclosed that abuse. This means that Government should ensure that abused residents have access to appropriate support persons. An appropriate support person may also foster an environment more conducive to full disclosure. Policies should address both the availability of support persons and of counselling and therapy for those who allegedly were victims of institutional abuse.

As Mr. Robins noted in his Report, policies should not presume that every individual should have a support person present during the interviewing process or that any person chosen by the complainant should be present. There will be situations in which specific support persons will inhibit disclosure or an accurate rendition of events.

In some circumstances, it may be necessary to ensure that residents are provided with access to counselling or therapy at the earliest stages. This issue is further addressed in later recommendations.

AUDITS OF EXISTING POLICIES

36. An audit of existing policies, procedures and protocols represents one appropriate way in which government can ensure that current residents are protected from abuse. The audit should not amount to, or substitute for, an investigation of specific allegations of abuse. It should be conducted by a person with experience and training in the auditing of youth institutions and in best practices concerning policies, procedures and protocols pertaining to abuse and its reporting.

Not every allegation of abuse should trigger an outside audit of existing practices. The totality of circumstances, including the nature and number of the allegations, the alleged offence dates, the involvement already of outside agencies, such as the Ombudsmen's Office, whether systemic or widespread abuse is alleged, and whether it is alleged that the complaint was mishandled or ignored by the authorities, need to be considered in making this determination.

TRADITIONAL LITIGATION AND OTHER ALTERNATIVES

General Observations

I agree, in general, with the Law Commission's analysis of the needs and interests of true victims of abuse and with its conclusions as to the extent to which various options available to government meet those needs. Where institutional abuse is alleged, government must consider its alternative responses. One component of an appropriate government response to reports of institutional abuse will generally include some recognition that true victims of abuse should receive monetary compensation and other benefits for any injury or harm they have endured. Monetary compensation will most frequently take place within the context of a civil action initiated by the alleged victim or within the framework of a program designed specifically to provide such compensation and other benefits to victims of institutional abuse ("a redress program"). The most vexing problem for government is to determine when, if at all, a redress program is an appropriate component of a government response to reported institutional abuse, and how such a program should be designed and implemented.

Consideration of this problem requires (a) an open-minded, stereotype-free approach to issues surrounding reports of institutional abuse, and (b) an accurate understanding of traditional

litigation and the available alternatives. In my view, a number of Nova Scotia officials did not approach the issues surrounding institutional abuse in an open-minded, stereotype-free way. Further, these officials had an imperfect understanding of both the flexibility of traditional litigation, and the minimal requirements for a Compensation Program that would be credible, fair, effective and fiscally responsible.

Avoidance of Speculative Myths, Stereotypes and Generalized Assumptions

37. When a government receives reports of institutional abuse, it must approach these reports in an open-minded way. Government must avoid “speculative myths, stereotypes and generalized assumptions”³ surrounding the credibility of young people, abuse or its victims: for example, notions that young people are inherently unreliable, or that only claims contemporaneously voiced are likely to be true.

38. At the same time, government must not substitute equally untenable assumptions or stereotypes: for example, notions that those who allege abuse almost inevitably were abused, or that traditional indicia of unreliability (such as past criminality) have no relevance to abuse allegations. The perpetuation of myths, stereotypes and assumptions – on either side of the abuse issue – may skew an investigative process and lead to unwarranted conclusions that abuse did or did not occur. Similarly, such perpetuation may prevent government from formulating an objective, open-minded and credible response to reported institutional abuse.

39. Further, government must educate the public to recognize, and avoid, myths, stereotypes and assumptions. Although government must be alert to public opinion, it cannot be swept away by an uninformed public. In this regard, it must lead, not simply follow.

As reflected in my earlier analysis, I am of the view that the Nova Scotia government uncritically assumed that virtually all abuse claims were true. This assumption coloured its approach. It did little to ensure that the public remained open-minded about this issue, pending a determination of the true facts. It was too easily swayed by concerns as to how it would be perceived in the eyes of the public. In fairness, it was caught up in a groundswell of public opinion, fuelled by some media members, and an understandable concern that victims of abuse be seen to be dealt with sensitively.

Credible Validation within Either Traditional Litigation or Redress Programs

More often than not, where institutional abuse is alleged, its existence, or at least its prevalence, is in dispute. Where alleged abusers have been identified, they frequently deny that

³This phrase is taken from the Supreme Court of Canada’s judgment in *R. v. Mills*, [1999] 3 S.C.R. 668; 139 C.C.C. (3d) 321.

they committed such abuse and challenge the honesty or the reliability of their accusers. Other times, the alleged abusers may no longer be alive or available, or their position as to whether abuse occurred may not be known. It follows that government is often not well situated – in the absence of a prior judicial or administrative determination – to readily admit that reported abuse was committed by its employees, without some further fact finding or validation process.

Fiscal responsibility, a sense of fairness to its former and current employees, and the desirability of not unjustly enriching undeserving claimants, compel government to insist on a credible validation process as a precondition to paying out monetary compensation to abuse claimants. That being said, absent agreed upon facts, credible validation is traditionally found only through litigation, whether criminal, civil or administrative. In particular, civil litigation contemplates that an abuse claimant may initiate an action for damages resulting from the abuse. In Canada, litigation is based on the adversarial system, the theory being that the truth is best advanced through a process that pits one adversary against another.

Here is where government must wrestle with competing interests. On the one hand, credible validation traditionally would be established through adversarial litigation. On the other hand, there is a legitimate concern that true abuse victims not be re-victimized through highly adversarial litigation that would force them to relive their abuse, see their veracity denied and, in some cases, subject them to publicity causing shame, embarrassment and even ridicule. The latter might be of particular concern for those who have put their prior lives as young offenders behind them. Their backgrounds may not even be known to family members or friends. The prospect of a public, and highly adversarial, airing of their claims of abuse could inhibit even the most truthful victim from coming forward. Government has an obvious interest in preventing re-victimization and offering redress to true abuse victims, particularly those who were abused while under its care or supervision.

As I have reflected in earlier chapters, the potential re-victimization of abuse victims represented a legitimate concern that influenced those who designed the Nova Scotia Government's response to reported abuse. It also explains, in part, why the Government chose to adopt an alternative to traditional litigation to address reported institutional abuse.

I earlier found that the Nova Scotia Government fundamentally erred when it designed the Compensation Program by assuming that only an ADR process which excluded employees from meaningful participation, and which sheltered claimants from a critical evaluation of their claims, could accommodate the needs of true victims of abuse. Cabinet was effectively asked to choose between not accommodating victims by forcing them to pursue what was described, erroneously, as traditional litigation, and accommodating victims through an alternative process. To appreciate not only how the Government erred, but also what valid alternatives are available to address reported abuse, one needs to consider the range of mechanisms that may be employed to validate claims.

The most rigorous validation process is to be found within the criminal justice system. Proof of criminality must be established beyond a reasonable doubt. Formal rules of evidence exist that restrict, often to the benefit of the accused, the kind of evidence that can be introduced.

That being said, even the criminal justice system has recognized that sexual complainants are often deeply affected by their involvement as witnesses in the criminal process. As a result, judicial and legislative initiatives have accommodated these individuals “in ways which remain consistent with the presumption of innocence and the right of an accused to make full answer and defence.”⁴ Judges will generally prohibit the publication of the names of sexual complainants or information that might lead to their identification. In exceptional circumstances, the court may exclude all or any members of the public from the court room. Young people may be permitted to testify behind a screen, accompanied by a support person, or may be permitted to adopt a videotape made within a reasonable time after the alleged offence in which he or she described the acts complained of, without necessarily having to detail the allegations orally in court. Significant limitations are placed on the ability of the accused to access confidential records pertaining to complainants or adduce evidence of prior sexual activity engaged in by the complainant.

What is common to these evidentiary and procedural rules is that they appropriately balance the legitimate emotional well-being and privacy interests of complainants with the need to discover the truth in a manner compatible with the presumption of innocence and the accused’s right to make full answer and defence. As the Honourable Sydney Robins noted,⁵

A proper understanding of these rules does not invite indiscriminating acceptance of any witnesses or the relaxation of the standard of proof, but instead, a means to make evidence more accessible to the process. It is not the accused alone who have rights which are to be safeguarded. Child witnesses or sexual complainants must be treated with due regard for their dignity and legitimate privacy interests; the potentially devastating effects of the court process upon them should be recognized; and their evidence (and that of all witnesses) should be evaluated free from speculative myths, stereotypes and generalized assumptions.

Two important points may be drawn from this analysis of the criminal process. First, given the credibility and the rigour of the criminal process, government should not generally compel claimants, whose victimization has been proven in a criminal court room, to re-prove their abuse to obtain redress. Second, the criminal evidentiary and procedural rules are still to be regarded as imperfect in protecting the emotional well-being and privacy interests of true victims of abuse. Because those accused of crimes are subject to conviction and imprisonment, their rights figure prominently, as they should, in the balance drawn between the interests of complainants and accused. As well, the Law Commission noted that witnesses at a criminal trial do not control the process and may not be kept fully informed of its progress and consequences. Accordingly, the criminal process does not meet the full range of needs of true victims of abuse.

As one moves away from the criminal process and along a continuum that includes civil

⁴Robins, at p. 223. I am indebted to the Honourable Sydney Robins for his helpful analysis of how witnesses are accommodated in criminal and non-criminal proceedings, which I rely upon heavily in this section of my Report.

⁵Robins, at p. 224

and administrative litigation, ADR conducted within a litigation framework and a specially designed redress program, protecting the emotional well-being and privacy interests of complainants remains of concern. Such individuals may be harmed and re-victimized by their exposure to these processes as well. However, there are important distinctions to be drawn between criminal and non-criminal proceedings. First, some rules that are necessary to uphold the presumption of innocence in the criminal context may be unnecessary to meet the interests of the opposing party in non-criminal proceedings. Second, in non-criminal proceedings to which the government is a party, government can show sensitivity to the interests of complainants even while testing the veracity of their claims. For example, government may choose, as a matter of policy, to waive what some might say are technical defences – such as limitation periods – that might defeat a determination of whether abuse in fact occurred. Third, once one moves away from criminal and civil court rooms (where the rules are determined by judges and legislatures), the parties may craft their own rules to appropriately balance the interests of affected parties. So, for example, the parties may agree that the fact finding remains confidential, an important component for complainants who would otherwise risk public exposure as former offenders. What is important to remember is that this can be done as part of a specially designed redress program or, indeed, even as part of traditional litigation.

Traditional litigation not only permits the accommodation of witnesses alleging abuse, even within the adversarial process, but contemplates resort to ADR as incidental to the litigation. In other words, on consent, parties can structure, even within traditional litigation, mediation or other ADR processes to resolve some, most or all of the disputed issues in the proceeding. The parties can agree on the rules to govern the ADR process. These rules can, again, accommodate witnesses in a way that is compatible with a number of their needs.

Of course, in some respects, this is what the Nova Scotia Government thought it was doing in designing and implementing the Compensation Program: moving to an ADR process that sensitively served the interests of the complainants and prevented their potential re-victimization through traditional litigation. However, fundamental in any balancing of the interests of both complainants and adverse parties is a recognition that the process must resolve disputed facts in a way that is credible and fair. The *balancing* of interests means that the complainants' interests can be accommodated in important ways, but only to a point that remains consistent with a credible and fair fact finding process.

In our interviews with several persons involved in the design of the Nova Scotia Compensation Program, they made the point that the decision to compensate individual claimants was made without prejudice to the employees implicated as abusers. Indeed, no admissions of liability were made. Settlements and file review decisions were confidential and were not legally binding upon employees. Employees were required to make no financial contribution to the process. They would benefit from the fullest of legal and constitutional protections should they have to defend themselves in criminal or disciplinary hearings. Accordingly, it was said, employees were not prejudiced by the process.

As I earlier noted, there are serious difficulties with the view that employees were not prejudiced by the Nova Scotia response. The compensation of many hundreds of claimants,

coupled with a very public apology offered up by Government and the reassignment or suspension of staff, sent a very clear message, particularly in small communities, that the guilt of employees had been determined. Whatever the precise design of a redress or compensation program, it is difficult to contend that staff at the subject institution(s) suffer no prejudice when government agrees to award monetary compensation and non-monetary benefits to many members of the community.

But leaving aside prejudice to employees for a moment, in my view, adoption of a process that does not *credibly* evaluate the legitimacy of individual abuse claims undermines the integrity of the process itself. It violates a government's moral and fiscal responsibility to the public. Arguably, it also violates a government's duty of care towards its own employees.

40. Whether a government responds to reported institutional abuse within a litigation framework or through a special redress program, its response can only be credible if the validation of individual claims is itself credible.

41. Procedures required to validate an abuse allegation in a criminal or civil court room, where liability must be publicly determined, may not be required to validate such an allegation in an ADR process, whether conducted within a litigation framework or as part of a redress program. It is relevant that such a process may involve no binding findings of legal liability, may be confidential, and may not require that the alleged perpetrator contribute to any financial settlement or award. This permits *some* relaxation of the validation procedures, but not at the expense of basic accuracy, as well as fairness to all affected parties.

THE MINIMUM REQUIREMENTS OF A CREDIBLE VALIDATION PROCESS

Where is the balance to be appropriately struck? The following recommendations address this issue. Although the commentary that accompanies them is sometimes framed in terms of a redress program, these recommendations also have application to an ADR process conducted within a framework of traditional litigation.

42. Where serious allegations of sexual or physical abuse have been made,⁶ a credible validation process should generally involve, at a minimum, the following:

- (a) proof under oath, affirmation or an equivalent;**

⁶As earlier noted, I need not address claims that are not dependent upon allegations of abuse specific to the claimant, but rather conditions or circumstances applicable to all residents – for example, a claim that residential schools for aboriginal children deprived them of their culture, families and language. If it were determined that such claims are compensable (which I gather is not the position of the federal government), validation would only require proof that the claimant attended the institution for a particular period of time. To be clear, I express no opinion on whether such claims are properly compensable.

A requirement that any witness, including a claimant, provide his or her account under oath enhances the credibility of a validation process and is not incompatible with the desirability of accommodating true victims of abuse. Redress programs other than the Nova Scotia Compensation Program have utilized this requirement, without any obvious concern on the part of claimants or their advocacy groups.⁷

(b) the opportunity to challenge the account given by the claimant;

In my view, any validation process that does not permit *some* opportunity to challenge the claimant's account is critically flawed. Traditional litigation requires that this opportunity be afforded through cross-examination by the opposing party or counsel. As I discuss below, given the nature of an ADR process, this requirement may be satisfied by procedures that fall short of traditional cross-examination. For example, the opportunity to challenge the account given by the claimant may be afforded through questioning by the fact finder, accompanied by a full opportunity for opposing counsel to propose suitable questions. This approach, which also finds recognition in some legal systems, has been adopted by the federal Government and certain claimants' groups in pilot projects pertaining to Indian Residential Schools.

(c) the opportunity for the parties to tender witnesses and documents supporting or challenging the claimant's account;

(d) the obligation for government to consider whether there is available evidence, including that of the alleged abuser, to challenge the claim. Where credible evidence is available, the government must consider tendering that evidence in support of its position. Generally, the alleged abuser should be given the opportunity to provide his or her account;

It will be recalled that the first pilot project framework agreement pertaining to Indian Residential Schools, described in Chapter XVI, contains an example of this requirement:

28. For the credibility of the validation process, Canada will attempt to contact persons alleged to have committed acts of abuse and they will be given the opportunity to provide their story to the neutral fact finder. For the safety of the survivor, the person will be first advised in writing about the process and in a general way about the allegations. Only if the person decides to participate will more specifics of the allegations be provided.

(In New Brunswick, whenever the name of an alleged abuser was provided by the claimant, the named individual was contacted by the Government to obtain his or her side of the story. However, it is unclear to what extent that information affected the process that followed.)

The Law Commission's comments on this issue also bear repeating. In one passage,

⁷Interviews of claimants were conducted under oath beginning in January 1997.

which addressed the procedures for validating claims, the Commission said this:

[I]t is essential that the validation process be sufficiently credible that workers at institutions do not have their reputations unfairly impugned. This may even require that they be provided with an opportunity to clear their names should a claimant identify them, even confidentially, as an abuser or a passive but knowing bystander.

However, in another passage, which addressed whether a redress program is fair to those affected, the Law Commission said this:

The absence of alleged perpetrators from redress programs has caused a concern about the fairness of these programs. Persons associated with the institutions where abuse is alleged to have occurred have protested, in some cases, that their reputations are being undermined through a process which allows them no opportunity to counter the allegations that have been made. To put it simply, they do not have an opportunity to tell their side of the story. How damaging is this to the legitimacy of redress programs?

Redress programs do not balance the interests of all parties in the way that civil and criminal processes do because they do not have the same purpose as those processes. No individual will be convicted of a crime or ordered to pay damages as a result of redress program. It is true that redress is based on a claim of wrongdoing, and where that claim alleges physical or sexual abuse, it must be based on an allegation against an individual wrongdoer. That alleged wrongdoer does not then have an opportunity to respond to the allegation.

There is a trade-off, however. The redress program is confidential. The alleged perpetrator does not have an opportunity to reply, but neither is he or she called to account or made legally liable for the wrongs he or she is alleged to have committed.

One may argue that the reputation of those who were employees at these institutions is tarnished by the fact of a redress program. There are two aspects of this concern. First, totally innocent employees may have no way of publicly clearing their names. Second, employees collectively have no way of refuting general allegations. To a large extent, however, this is unavoidable. The reputations of an institution and its former employees are tarnished once widespread allegations of abuse emerge, whether or not there have been criminal convictions or judgements in civil actions. The public judges much more rapidly and harshly than the courts, and does so regardless of the existence of a redress program. Recovering from allegations that may never be proven (or disproven) is a big hurdle for institutions as well as individuals.

The fairness that operates in a redress program is a kind of collective fairness. It says, "harms were done to innocent children -- we will provide redress for those harms," without further burdening victims with the rigours of a civil action. In turn, they will accept lesser compensation than that to which they may be entitled under the law. Redress programs should be considered fair when they incorporate a validation process that is based on objective, consistent and relevant criteria. Fairness in our society does not begin and end

with the adversarial processes of civil courts.

In my respectful view, it is difficult to reconcile these two passages. If the credibility of a validation process may require that employees be provided with an opportunity to clear their names from unfairly being impugned – a proposition with which I agree – it would seem to follow that a validation process that does not permit the alleged abuser to do so cannot be regarded as fair. I do not accept that the notions that innocent employees are inevitably tarnished or that their damaged reputations may be subsumed within a kind of ‘collective fairness’ permit a process to be described as fair which provides them with no opportunity to respond. While I agree that fairness does not begin and end with the adversarial processes of civil courts, the point here is that alleged abusers can be given an opportunity to be heard without engaging all of the adversarial processes of civil courts.

It should also be remembered that there are reasons why, in many situations, the alleged abusers will not be heard from in the validation process. They may not wish to be heard, may be deceased or their whereabouts unknown. More importantly, they may have been given an opportunity to be fully heard through criminal or disciplinary proceedings that have already taken place. The results of those proceedings may obviate the need for further validation within an ADR process.

This recommendation places an onus on Government to at least consider whether credible evidence exists to challenge the claim and to further consider whether such evidence should be tendered. It also places an onus on Government to provide the alleged abuser, whether or not Government regards him or her as credible, with an opportunity to be heard.

It is important to remember that a number of claimants involved in the Nova Scotia Compensation Program, with whom I spoke, recognized that alleged abusers should be given an opportunity to be heard during any validation process. They expressed their concern that false or exaggerated claims had tarred them all in the public’s mind as frauds or con artists. This sentiment has also been expressed by survivors’ groups formed to address alleged abuse in Indian Residential Schools. As reflected in the principles agreed upon between those groups and the federal Government, “survivors have been strong supporters of the need for integrity and public credibility as resolutions are achieved.” They understand that a credible and fair validation process ultimately benefits true victims of abuse.

(e) fact finding by one or more independent adjudicators experienced in evaluating credibility and reliability for these or analogous types of claims;

Perceived independence of an adjudicator or fact finder is undermined by a process, as incorporated into the Nova Scotia Memorandum of Understanding, that permits the claimant or government to unilaterally choose the fact finder desired. The perception, accurate or not, is thereby created that the fact finder is not neutral and may be inclined to support the position of the party that chose him or her. Such a process is unlikely to foster public acceptance, nor should it.

That being said, certain cases invite particular expertise or background, so long as

independence or impartiality are not compromised. For example, a claim raising issues unique to the aboriginal community may invite involvement of an aboriginal fact finder or, in the least, a fact finder well conversant with such issues. Accordingly, a process can be designed to permit the parties to mutually agree upon a fact finder or a category of fact finders to address a particular kind of claim. The Law Commission noted that, beyond ensuring professional expertise, some programs have tried to ensure that the personal characteristics of fact finders are likely to ease the stress of the process for applicants. For example, in recognition of the fact that all Grandview claimants were women, all fact finders were women and one was an aboriginal woman. At least some of the federal Government's pilot projects contemplate that the claimant can choose the gender, though not the identity, of the fact finders. Again, it must be emphasized that skilled and experienced adjudicators can be sensitive to the needs of claimants in a way that remains compatible with an open-minded and untainted evaluation of credibility and reliability.

(f) an appropriate burden of proof to validate a claim;

Most redress programs adopt the civil standard, namely, the balance of probabilities, with the burden resting on the claimant. The criminal standard of proof beyond a reasonable doubt is unsuited to this process, and would create an undue disincentive for true victims of abuse to resort to the process.

(g) rules for the mutual disclosure of documentation, consistent with the practice in civil actions, or otherwise as may be agreed upon.

There are two components of this requirement. First, there should be provisions for the exchange, in a timely way, of relevant documentation. Second, these provisions should accord with the spirit of jurisprudence and/or existing legislation preventing undue intrusion upon the dignity and legitimate private interests of affected parties. The Nova Scotia program ultimately required claimants to waive confidentiality pertaining to medical and other records, whatever their contents or relevance to the process. In this regard, the Nova Scotia program moved from one end of the spectrum (decision making based on inadequate documentation) to the other.

43. Generally, a validation process should not rely upon a written record only. An oral hearing provides the fact finder(s) with an opportunity to assess the credibility or reliability of the witnesses, including the claimant. It facilitates any challenge to that evidence. As well, as the Law Commission noted, it provides an opportunity for claimants to describe directly in their own words the abuse they allegedly suffered and the impact it had on their lives. This can, itself, have a therapeutic value and contribute to the sense of respect and engagement that should be felt by claimants.

A program may provide that an oral hearing can be dispensed with, where the claimant and the Government consent, and the alleged abuser does not seek an opportunity to be heard. As well, to the extent that programs may provide for hearings to address issues other than the validation of the abuse allegation itself, it will not always be necessary that such hearings be

conducted in person.

ACCOMMODATIONS WITHIN A CREDIBLE VALIDATION PROCESS

A validation process cannot guarantee that false or exaggerated claims are not compensated. It cannot be so rigorous and adversarial that it offers no real alternative for a claimant to adversarial litigation. It should accommodate the needs and legitimate privacy interests of true victims of abuse to an extent compatible with basic fairness to other affected parties, most particularly alleged abusers. On the other hand, as the Law Commission stated, it must be sufficiently rigorous that it has credibility with program funders, true victims of abuse and the public, by minimizing the potential for exploitation of the program through fraudulent claims.

I have outlined the minimum requirements of a validation process to ensure its credibility. I now address those accommodations that may be made to claimants, and in some respects to other affected parties, that are compatible with a credible, fair and accurate validation process:

44. A credible, fair and accurate validation process can accommodate the needs and interests of affected parties, including true victims of abuse, in ways that include the following:

- (a) it may be conducted in private;**
- (b) it may provide for the disposition of documents, transcripts and notes following the completion of the validation process;**

Examples of such provisions are contained in the Grandview agreement, and in the federal Government pilot project agreements. The interplay between such provisions and freedom of information legislation may arise, and will have to be dealt with. Access to materials generated during the Grandview program became an issue in several criminal proceedings. As well, governments have certain statutory obligations to maintain documents that must be recognized.

- (c) it may impose limitations upon access to confidential records, consistent with the principles enunciated by the Supreme Court of Canada in *R. v. O'Connor*⁸ and analogous legislation;**

Limitations on access to confidential records appropriately exist in criminal and civil proceedings. It is doubtful whether these are properly characterized as ‘accommodations’ to witnesses.

- (d) it may permit the presence of a support person during the claimant’s testimony or at other times during the process;**

The *Criminal Code* permits support persons to be present for the testimony of young

⁸[1995] 4 S.C.R. 411; 89 C.C.C. (3d) 109.

persons in limited circumstances. There is little reason why an ADR process cannot be even more accommodating in this regard.

(e) it may limit the number of persons attending the fact finding hearing;

For example, federal Government pilot project agreements limit those attending a fact finding session.

(f) it may provide for an informal hearing room and other physical arrangements to minimize the adverse effects of the process;

For example, the Grandview agreement permitted hearings to take place where the claimant was incarcerated or at the claimant's home.

(g) it may limit the right of opposing counsel to cross-examine the claimant, provided that questioning can be directed to the claimant through the fact finder;

Some of the federal Government pilot project agreements provide that the parties may give to the fact finder, in advance, a list of questions they would like the fact finder to ask the individual survivor (or a list of issues they would like to have explored). During the session itself, counsel for Canada and for the alleged survivor may approach the fact finder together to raise additional questions they would like the fact finder to ask. Alleged survivors cannot be cross-examined by counsel.

(h) it may provide for arrangements to prevent a face-to-face encounter between the claimant and the alleged abuser, except where necessary to establish identity;

The *Criminal Code* contains provisions that prevent individuals charged with certain crimes, such as sexual assault, from personally cross-examining the complainant. Counsel may be appointed to conduct the cross-examinations. As well, in specified circumstances, a young person can testify with the benefit of a screen that prevents that person from seeing the accused person. Again, an ADR process can be more accommodating in this regard. For example, one of the federal Government pilot project agreements provides that "if a person alleged to have committed acts of abuse decides to tell his or her story to the neutral fact finder, it will be in a different location than where the survivor tells his or her story, and at a later time." There will be circumstances under which the claimant is content that the alleged abuser is present when the claimant's story is told and, indeed, wishes to be present when the alleged abuser's story is told. It may also be unnecessary to change the location of a fact finding session if the claimant and the alleged abuser appear at different times. Whenever accommodation is made to the interests of claimants, however, government should ensure, where applicable, that alleged abusers are aware of the allegations made against them, so that they are able to respond.

(i) it may require undertakings signed by participants as to confidentiality,

where not inconsistent with statutory obligations;

The federal Government pilot project agreements contemplate that all information relating to the process, including any settlement, shall be kept confidential, except where the information discloses abuse of a child who is presently a minor. This provision is obviously intended to address the statutory obligation to report suspected child abuse.

- (j) it may provide for evidence to be taken by video-conferencing or other comparable means;**
- (k) it may allow claimants or analogous witnesses to adopt prior videotaped statements as their account, thereby reducing the need to fully recount their alleged victimization.**

Again, the *Criminal Code* provides that, under limited circumstances, a young person may adopt a prior videotaped statement. This does not foreclose cross-examination, but obviates the need to fully recount sensitive events in examination in chief. The accommodation described above is more generous to claimants. Preconditions imposed under the *Criminal Code* would disqualify many claimants from the application of the provisions, by reason of their age or the circumstances under which the videotapes were taken. An ADR process can be more accommodating in this regard.

- (l) it may establish rules to encourage timely admissions of fact, and excuse witnesses from having to recount facts that have been agreed upon.**

For example, federal Government pilot project agreements establish such rules.

PRIOR VALIDATION OF ABUSE

- 45. Credible validation may be established through findings made in judicial proceedings or administrative hearings to which the alleged abuser was a party.**
- 46. Where a trial judge has found in a criminal case that the complainant or other witness at trial has been abused by a government employee, at a proceeding to which the employee was a party, then it is appropriate for government to regard this abuse as validated for the purpose of determining whether compensation will be awarded. Such findings may be found in reasons for conviction or sentence or may be implicit in the verdict rendered.**
- 47. Where a finding that the complainant has been abused by a government employee is implicit in a jury's verdict of guilt in a criminal case, then it is appropriate for government to regard this abuse as validated for the purpose of determining whether compensation will be awarded.**
- 48. Where an adjudicator has determined, on a balance of probabilities, that the complainant or a witness has been abused by a government employee, at a proceeding to which the employee was a party, then it is appropriate for government to regard this abuse as validated for the purpose of determining whether compensation will be awarded.**
- 49. Absent exceptional circumstances, such as the availability of fresh evidence that casts serious doubt upon the earlier findings of fact, government should not compel such complainants or witnesses to re-prove their own victimization for the purpose of obtaining compensation or other redress.**
- 50. Where prior judicial or administrative findings obviate the need for further validation, government should strive to resolve outstanding issues in a way that does not compound the impact of abuse upon the complainants or witnesses. Non-adversarial means should be resorted to wherever possible.**

I considered, and ultimately did not adopt, the position that prior judicial or administrative findings can only be utilized to obviate the need for further validation when any appeals or judicial reviews that could disturb those findings have been finally disposed of. Although the lack of finality of judicial or administrative proceedings can properly be considered, I do not regard it appropriate, as an inflexible or even a presumptive rule, that findings may only be resorted to once all appeals or reviews have been concluded. An appropriate balance of competing interests, including the desirability that validation proceed in a timely way, generally favours an approach that does not defer use of such findings until all appellate proceedings – which can themselves be very lengthy – have been exhausted.

LOWER VALIDATION REQUIREMENTS

Once Abuse Has Been Validated

51. (1) The validation requirements, earlier outlined, pertain to proof of the abuse alleged. Once abuse has been validated, an ADR process can be designed to facilitate the determination of what impact that abuse had, and what benefits should be conferred upon, the validated claimant.

(2) Given the diminished interest that employees have in these determinations, as opposed to a determination whether abuse occurred, a program is entitled to design a process that better accommodates a validated claimant, and further minimizes any potential harm from the process itself.

Once the nature and extent of abuse itself has been determined, then the extent of injury, harm or loss (“the impact”) must also be determined, as must the benefits, monetary and otherwise, that should flow from those findings. There is an infinite variety of ways that the impact of abuse on an individual claimant, as well as the appropriate benefits, can be determined. My review of the government programs outside of Nova Scotia reveal some of these approaches.

The fact finder can be charged with the responsibility of making these determinations. Alternatively, the fact finder can make some of these determinations only, leaving the balance to be resolved through mediation or an implementation or advisory committee.

For example, for Grandview, the Eligibility and Implementation Committee was established to oversee and superintend the implementation of the benefits package. This committee was composed of claimant and government representatives, together with a jointly appointed chair.

Other programs also established committees to address various non-monetary benefits. The federal Government pilot project agreements contemplate that the fact finders will only determine what abuse, if any, did or did not occur, and then provide a non-binding opinion on the effect of any abuse on the survivor and its impact on the survivor’s life. The legal significance of the findings will only be decided by the fact finders if the parties are unable to agree. The fact finders do not determine the appropriate amount of monetary compensation. That is to be resolved through negotiation, then mediation, if necessary. If mediation is unsuccessful, the parties are to meet to determine other options.

A program may also facilitate these determinations in a variety of ways. For example, a compensation grid may establish a range of monetary compensation based not only upon the type, severity and duration of abuse, but upon the types of impact identified. Or, the program may specify the types of materials, such as psychiatric, psychological or medical reports, that may be relied upon to support these determinations.

Two points are significant here. First, redress should be based not only upon the acts of

abuse perpetrated on a claimant, but also upon the specific impact of that abuse on the individual claimant. Second, once abuse is validated, a process can be designed to facilitate the determinations that then have to be made in ways that are even more solicitous of the needs and interests of validated claimants. Not only are concerns about false or exaggerated claims less significant, but individuals found to be abusers have little or no remaining interest in these determinations that engage fairness concerns.

I should also point out, as I later recommend, that lower validation requirements will be adequate for certain non-monetary benefits, such as interim counselling, even for claimants whose abuse has not been validated.⁹

Where Allegations Do Not Involve Criminality

52. Where allegations involve non-criminal conduct or conduct regarded as acceptable when it occurred, validation may be less important, since the prejudice to those against whom these allegations are made is less palpable.

Where Counselling or Therapy is Sought

53. Interim counselling may be provided immediately to claimants, without true validation of the merits of their claims.

Counselling may be directed not only to the effects of abuse, but also to providing appropriate psychological and emotional support for participation in an ADR process. It follows that insistence upon complete validation as a precondition to such counselling would be self-defeating and prevent some true victims of abuse from participating in the process. Indeed, the need for counselling for some true victims of abuse may be pressing. Further, as the Law Commission noted, counselling is a general social good, regardless of the reason that it is needed, and it often replicates services available through other government programs. Accordingly, claimants are unlikely to be regarded as being unjustly enriched by obtaining counselling without adequate validation.

A program may provide that something short of validation is necessary to obtain interim counselling. For example, the Grandview agreement provided that an application for counselling was to be accompanied by a treatment plan by an experienced therapist, supporting the claimant's position that her experiences at Grandview likely caused or contributed to her present circumstances and that counselling was needed. Alternatively, an applicant could request an assessment by a government-approved counsellor. Interim counselling could thereafter be approved by the Eligibility and Implementation Committee and commenced, subject to later

⁹This contemplates two scenarios: interim non-monetary benefits pending validation of abuse, or certain non-monetary benefits being conferred without any necessity of validation. This does not contemplate non-monetary benefits for individuals whose abuse claims were submitted for validation and rejected.

confirmation by the adjudicator.

While this precondition for interim counselling is not unreasonable, and imposes no real validation requirement, a program may also reasonably award interim counselling or therapy without any precondition other than the fact that a claim has been made. For example, the Kingsclear program in New Brunswick required no validation as a precondition for such counselling. Neither did the Nova Scotia Compensation Program. In my view, the nature of counselling distinguishes it from benefits such as monetary compensation.

Whichever approach is taken – and either is reasonable – an ADR process must be careful not to tie the need for therapy, whether interim or long-term, too closely to the alleged institutional abuse. Institutional abuse may be preceded or followed by abuse at home or elsewhere. It is often difficult to identify those psychological difficulties attributable to institutional abuse as opposed to other causes, nor should it be necessary to do so. I approve of the approach that permits counselling to be provided where institutional abuse *may* simply have *contributed* to the claimant's circumstances or difficulties that require intervention.

Determinations as to whether interim counselling should be provided can be made by advisory committees set up, in whole or in part, for that purpose. The George Epoch program took an interesting approach. A Counselling Advisory Group addressed counselling issues. As well, a Coordinating Therapist was appointed to spearhead decisions made as to counselling and their implementation.

54. A program may provide long-term counselling to claimants, either as part of a larger redress package which includes monetary compensation, or on its own. A free-standing program which only awards counselling or therapy (or related non-monetary benefits) may reasonably do so without true validation of any claimed abuse.

Two points are significant here. First, a program may be designed to provide interim counselling while deferring the validation of abuse until the completion of any criminal process or a specially designed validation process. As I later indicate, one reasonable alternative which is available for government to address the interplay between criminal proceedings and a compensation program is to defer determinations of compensation, while ensuring that the immediate needs of claimants are met through interim counselling.

Second, for a number of reasons, some of which are outlined in later recommendations, government may choose not to address reported institutional abuse through a comprehensive redress program. In such circumstances, it may nonetheless create a program that provides counselling or therapy only. I am of the view that a government could reasonably create a free-standing program that provides counselling or therapy without true validation of any claimed abuse. Put simply, the absence of a true validation process is unlikely to produce a multitude of false or exaggerated claims of abuse where the expectation is only that counselling or therapy will be provided.

In British Columbia, the Residential Historical Abuse Program provides counselling and therapy to individuals who allege they were sexually abused while institutionalized under provincial care or supervision. Verification that the individual was resident when the abuse allegedly occurred is sufficient. The Deaf, Hard of Hearing and Deaf-Blind Well-Being Program in British Columbia also provides specialized therapeutic services.

DETERMINING WHEN TO ADOPT A REDRESS PROGRAM

Relevant Considerations

The Law Commission determined that civil litigation may meet many of the needs of true victims of abuse, while satisfying other considerations, such as fairness. It noted that civil litigation has rules that, in theory, ensure fairness to all affected parties, and it can result in public accountability for defendants and monetary redress for plaintiffs. It may also serve a preventative and educational role. However, as an adversarial process, it is less likely to meet non-monetary needs of victims, their families or communities. As well, as the Commission noted, civil litigation may not be fully accessible to victims, given the costs of mounting a civil suit, and the fact that the adversarial process may be harmful to an emotionally fragile victim. However, as I have reflected above, traditional litigation also contemplates that lawsuits will be settled or that, as an incident to litigation, ADR be undertaken. The Law Commission suggested, as do I, that a different assessment of the civil justice system must be undertaken when ADR is resorted to. An ADR process incidental to litigation may also meet many of the needs and interests of true victims of abuse.

Accepting that a credible and fair validation process can be designed within the framework of traditional litigation or as part of a specially designed redress program, when, if at all, should a redress program be adopted as part of a government response?

55. In determining whether a redress program should be adopted, rejected or deferred, the following should be considered:

- (a) the extent to which widespread or systemic abuse is involved;**
- (b) the status of criminal proceedings;**
- (c) the extent to which current employees are allegedly involved;**
- (d) the needs and interests of true victims of abuse;**
- (e) whether a redress program is fiscally responsible. This will depend, in part, on whether the government can credibly determine the likely outside limits of its financial exposure to potential claims.**

Widespread or Systemic Abuse

An evidentiary foundation

56. Widespread or systemic abuse is not adequately addressed solely through the criminal process or may not be adequately addressed through civil actions brought by individual complainants against government or their alleged abusers. Where a credible basis exists for believing that widespread or systemic abuse has occurred, a redress program may reasonably form part of a government response.

Several points must be made here. First, the criminal process and individual civil suits generally cannot address systemic abuse. They are designed to fix liability, punish a specific abuser and, through the civil process, also provide redress to an individual plaintiff. Although a civil suit against government may address some systemic issues – since the liability of government and senior officials or staff may be in issue – and provide the impetus for change, the scope of a civil trial remains relatively narrow and generally does not invite a comprehensive examination of institutional policies and practices. Indeed, civil liability may be grounded in the vicarious liability of government, rather than upon any finding of systemic failures. As well, the settlement of civil actions – based on the instructions of individual plaintiffs – may mean that no systemic findings are made.

Second, multiple abuse claims should be addressed by government in a consistent way. Similarly situated claimants should be responded to similarly. As well, investigation preceding a determination as to the validity of multiple claims is best done globally, rather than considering each claim in isolation. This may enure to the benefit of an individual claimant, whose claim is corroborated by evidence that surfaces in relation to another claim, or to the detriment of the claimant, where evidence of collusion or contamination surfaces.

Third, even recognizing that an ADR process within a traditional litigation framework may be designed to accommodate the needs of true abuse victims, it may be more efficient and equitable that such accommodation be designed more globally through a redress program, rather than negotiated with each of many claimants or their counsel. As the Law Commission noted, a redress program is designed, in part, to better manage the costs of responding to claims for compensation, by avoiding the costs of defending against individual civil suits. As the Commission further noted, government is better positioned to “marshal non-financial benefits such as counsellors, therapists and education or training programs more efficiently.”

Finally, the very creation of a specially designed redress program signals government’s commitment to address the needs of true victims of abuse, contributing to the healing process and fostering reconciliation.

It follows that a redress program, rather than resort to traditional litigation, may be more attractive where there is a credible basis for believing that widespread or systemic abuse occurred. (Of course, a redress program may form only part of a government response to reported institutional abuse. For example, as was recognized in Nova Scotia, protection against future abuse also required an audit of existing policies concerning institutional abuse and its reporting.)

The challenge – as demonstrated in Nova Scotia – is in how a government is to determine whether a credible basis exists for believing that widespread or systemic abuse has occurred. In Nova Scotia, the government appointed Mr. Stratton, a well respected former Chief Justice, to determine whether the Government was liable for abuse. I have already articulated the problems with this aspect of the Government’s response. The terms of reference were ill-defined and made it inevitable that Mr. Stratton would find some abuse, and hence an ADR process would be engaged. The investigation itself was flawed and may have contributed to later difficulties in properly validating claims. It was unfortunate that Mr. Stratton publicly made findings of fact, albeit qualified, given the limitations upon his investigation. However, many of these failings should not be visited upon Mr. Stratton, since he did not contemplate that his findings would obviate the need for proper validation of individual claims.

How, then, can a credible basis (“an evidentiary foundation”) for believing that widespread or systemic abuse has occurred, be established?

57. An evidentiary foundation for widespread or systemic abuse may be derived from all or any of the following:

- (a) prior criminal proceedings;**
- (b) prior administrative proceedings;**
- (c) a public inquiry;**
- (d) a police investigation;**
- (e) an independent investigation specifically mandated to address this issue.**

Findings made in criminal and administrative proceedings may provide the evidentiary foundation, without more, to establish a specially designed redress program. The more contentious issues arise when government must look elsewhere to see if any such foundation exists.

Use of an independent investigation

58. Generally, an independent investigation is not a preferred approach. It should only be undertaken, and relied upon, if:

- (a) no specific ‘findings’ of abuse are made;**
- (b) its limited objectives are explained by government to the public;**
- (c) the investigation is not viewed as a substitute for a credible, fair and accurate validation process to evaluate individual claims;**
- (d) the way in which it is conducted does not interfere with, or compromise, any existing or contemplated criminal investigation or prosecution; and**
- (e) it is conducted as part of an ongoing criminal investigation, or otherwise, with the assistance of investigators with specialized skills and training.**

I do not generally support the creation of a separate investigation – independent of the police – to determine whether widespread or systemic abuse occurred. I have articulated certain preconditions to the use of such an investigation, most of which were not met by the Stratton investigation. In my respectful view, there appears to be little merit and obvious pitfalls in proceeding this way.

Public inquiries

Public inquiries are an obvious means of establishing whether an evidentiary foundation exists for widespread or systemic abuse. It is true that inquiries are legally precluded from making findings of criminal or civil liability against individuals, since “they cannot provide the evidentiary or procedural safeguards which prevail at trial.”¹⁰ However, they are able to address systemic issues, and make findings of misconduct necessary to carry out their mandates. It follows that they can determine whether or not systemic abuse exists. If it does, they can make officials and governments publicly accountable for systemic failures, make recommendations to prevent future abuse and educate the public. Public inquiries can therefore meet some of the needs of affected parties, including true victims of abuse.

The Law Commission argued that public inquiries may also delay appropriate compensation and divert financial resources from true victims of abuse. This has been the criticism of the approach taken in Newfoundland to the Mount Cashel affair, and these two concerns were cited by the Nova Scotia Government as reasons to bypass a public inquiry.¹¹ I agree that the first concern is legitimate: in some circumstances, a public inquiry may delay compensation.¹² I am less confident that the second concern could ever be validly raised to justify bypassing a public inquiry.

Public inquiries can also stigmatize alleged abusers. The NSGEU favoured a public inquiry from the early stages of the Government’s response. One can see in the Nova Scotia context how a public inquiry would be viewed more favourably by employees than their exclusion from an ADR process. That being said, the absence of the full protections afforded to defendants in criminal or civil proceedings and the mandate of a public inquiry may mean that allegations of abuse are easily made, but not necessarily resolved, at such an inquiry.

¹⁰*Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440 at 470-471.

¹¹The internal documents suggest that these reasons alone do not entirely explain the Government’s resistance to a public inquiry. Public inquiries often reflect poorly on government in general, whether or not its findings are attributable to the current Government or its elected officials.

¹²However, this is not necessarily the case: for example, where criminal convictions have clearly established the facts and would permit some claimants to be immediately compensated, despite the need for a public inquiry to address broader issues.

Finally, I am aware that the jurisprudence permits public inquiries to be held before related criminal proceedings are commenced or completed. However, there is little doubt that public inquiries may make concurrent police investigations or prosecutions more difficult.

In summary, there are factors for and against the use of public inquiries to determine whether widespread or systemic abuse occurred. Where there are obvious long-standing systemic issues, where government's own conduct may be implicated, and where recommendations may be directed to government to effectively address these issues, a public inquiry may be of great benefit. Where there is an allegation that government has covered up its prior misconduct, unless such an allegation is patently false, a public inquiry may be required to 'clear the air.'

In my view, a compelling case can be made that the Nova Scotia Government should have called a public inquiry. A number of civil suits had raised concerns about the possibility of widespread or systemic abuse and about the actions or inactions of government officials. No significant police investigation was then ongoing. Some criminal convictions had already taken place. The MacDougall proceedings had raised – with justification – issues surrounding the Government's conduct concerning him and, potentially, others. There were obvious systemic issues about how abuse – whether or not widespread – had been allowed to occur. It appears that the NSGEU would have supported a public inquiry. The alternative which Government chose, particularly the Stratton investigation, may have been superficially more attractive than a public inquiry, but it was flawed. Put simply, a public inquiry was a more than reasonable alternative for the Nova Scotia Government.

I should note here that some employees have urged me to recommend that a public inquiry be conducted now. Other employees, current and past, do not support such a recommendation. I am of the view that a public inquiry at this stage – whatever its merits might have been at an earlier stage – would be problematic. The Stratton investigation, Operation Hope, the IIU, the Compensation Program, the Samuels-Stewart audit, as well as this review, have all examined, with varying degrees of success and foci, the issues of concern. It would be difficult, if not impossible, for a public inquiry to obtain evidence uncontaminated by these prior events, and it would be unlikely to contribute at this point in a sufficiently meaningful way to a resolution of the issues.

Police investigations

I have earlier reflected that Government should consult with law enforcement agencies as to any proposed response to reported institutional abuse that might detrimentally affect an ongoing or contemplated criminal investigation or prosecution. As well, Government can determine, on an informal basis, whether any investigation has developed to the point that the police have formed credible grounds for believing that widespread or systemic abuse has occurred. I recognize that such grounds do not constitute proof and are not a *substitute for a true validation process*. However, such information can be important in determining whether widespread or systemic abuse likely occurred and, therefore, whether a redress program should be considered.

The Status of Criminal Proceedings

The Extent to which Current Employees are Allegedly Involved

These two considerations, which I identified as significant to whether a redress program should be adopted, rejected or deferred, are most conveniently dealt with together. They are both particularly relevant to whether a redress program, even if contemplated, should be deferred.

In recommendation 16, I stated, as a general principle, that “a government response should be mindful of an ongoing or contemplated criminal investigation or prosecution. A paramount concern is that any government response not interfere with an ongoing or contemplated criminal investigation or prosecution. This means both that government should consult with law enforcement agencies in the design and implementation of its response and that the design should give appropriate recognition to such criminal proceedings.”

There is no doubt that the needs of true victims of abuse cannot be fully met by the criminal process alone. Other than holding perpetrators responsible for their conduct and, sometimes obtaining acknowledgement and an apology through a guilty plea, victims must generally look elsewhere for redress. Further, the criminal process generally does not address systemic issues, for example, how abuse was allowed to occur. Accordingly, the interplay between the criminal process and any other government response must be complementary.

Recommendations 29 and 30 reflect the concerns that generally favour the deferral of internal disciplinary investigations until related criminal investigations or prosecutions are completed. Nonetheless, I recognized that disciplinary proceedings should not be so delayed as to irremediably prejudice the employee and prevent his or her re-integration into the work environment, if exonerated.

The concerns that generally favour deferral of disciplinary proceedings, earlier discussed, also have application to a redress program that must investigate and validate claims. The police are generally better situated to investigate allegations of criminal abuse. They have specialized

training and skills in this area. The criminal investigation may obviate any need to conduct a separate validation process. Reliance may often be placed on the fruits of the investigation, or on any resulting criminal prosecution. A concurrent investigation for validating compensation claims may contaminate the criminal investigation through suggestive or otherwise inappropriate or incomplete questioning. An incomplete or inaccurate statement taken from a complainant can undermine – sometimes unfairly – the credibility of that complainant at the criminal trial, even though, for example, omissions in a statement are more properly attributable to the statement-taker than to the statement-giver. The validation process may compete with the criminal investigation for relevant documentation and, indeed, may obtain such documents in a way that compromises their subsequent admission in any criminal prosecution. The desirability of minimizing trauma to true victims of abuse is potentially undermined by a multiplicity of interviews where individuals are asked to recount and relive their experiences.

There are additional concerns. The fact that compensation has been agreed upon, or even paid out, before a criminal prosecution, may make the complainant an easy target for cross-examination.¹³ Conversely, the fact that compensation has been paid out, and the government has apologized for abuse, may, if it becomes known to a judge or jury, erode the presumption of innocence.

The extent to which current employees are allegedly involved is also particularly relevant to the design and timing of any redress program. Allegations against current employees engage disciplinary issues and, as a result, the concerns raised about the interplay between the criminal and disciplinary processes. Even where the criminal process is not involved, a redress program must consider its impact on the ability of government to determine the facts for disciplinary purposes.

59. Generally, though not invariably, the investigation and validation of claims for compensation should be deferred to await the completion of related criminal investigations or prosecutions. In this context, the appropriate balancing of interests may not require that such deferral await the completion of any appellate criminal proceedings.

There may be circumstances where the balancing of interests favours the investigation and validation of compensation claims prior to the completion of related criminal investigations or trials: for example, where the criminal trial does not involve issues of credibility, but legal or *Charter* issues only, validation may not have to be deferred. Or, where the disciplinary process cannot fairly await the completion of related criminal proceedings (as per recommendations 29 and 30), there may be less concern about addressing compensation issues in advance of any criminal disposition.

The Needs and Interests of True Victims of Abuse

¹³I recognize that a motive to fabricate or exaggerate may be said to exist even where there is some expectation that compensation will be available in the future.

The needs and interests of true victims of abuse must figure prominently in any determination whether a redress program should be adopted, rejected or deferred.

I have already reflected the ways in which a redress program advances the needs of abuse victims in ways that other government responses do not. Where an evidentiary foundation exists to believe that widespread or systemic abuse exists, and there are no contemplated or existing criminal investigations or prosecutions, or such proceeding have been completed, a specially designed redress program is an attractive option for government.

In some respects, the deferral of a redress program may be less capable of meeting the needs of true victims of abuse. Deferral will often heighten anxiety, prevent closure, and delay any reconciliation and healing that would flow from both government's recognition of a claimant's victimization and the monetary and non-monetary redress that might be provided. A deferred redress program might ultimately process claims in an expeditious way, but cannot be said to offer benefits in a more timely way, a feature generally cited in support of the use of such a program.

On the other hand, deferral may ultimately minimize trauma by avoiding the necessity of being interviewed or having to testify and relive painful experiences a number of times. A decision not to address compensation until the completion of any criminal process may make it more likely that perpetrators will be found criminally accountable, and less likely that false or exaggerated allegations are advanced in a criminal process.

It must be recognized that claimants remain entitled to initiate and advance a civil suit, or a criminal injuries compensation board claim, even while criminal proceedings are pending. It must also be recognized, as reflected in recommendations 53 and 54, that some benefits, particularly counselling or therapy, need not await validation. Put simply, even where validation and a determination of full redress is deferred, a claimant has options both within and outside a redress program to address his or her needs.

Fiscal Responsibility

60. Government should generally not commit itself to a redress program unless it is in a position to determine, on a credible basis, the likely outside limits of financial exposure to potential claims.

A case can be made for the proposition that a specially designed redress program may ultimately cost government less than responding to individual civil lawsuits, even acknowledging that traditional litigation need not involve a fully adversarial process. In this regard, one must include not only those costs associated with the defence of claims, and any damages to be paid, but the overall costs to the administration of justice (including the assignment of judges and the devotion of court resources to multiple lawsuits). Even if it cannot be definitively shown that a redress program would cost government less than traditional litigation, it would not necessarily follow that a redress program could not be adopted. A case can be made for the proposition that any additional costs associated with a redress program may be offset by its benefits to true victims

of abuse and society as a whole.

However, government must be able to credibly evaluate the likely costs of a redress program and the other options. I have earlier concluded that the Nova Scotia Government's evaluation of the costs of its available options was critically flawed, and contributed to the decision to adopt the Compensation Program, despite its serious shortcomings.

For a government to evaluate the likely costs of a redress program, it must be able to credibly determine its likely outside financial exposure to potential claims. In other words, it must credibly assess the number of claims likely to be made and the likely financial exposure associated with these claims. As the Law Commission noted, "[a]n accurate estimate of the number of potential claimants and the level of benefits to be paid out is an essential element in the design of a redress program."

A completely open-ended redress program is not fiscally responsible. Further, it may compel changes or cancellation of the program based solely upon the unavailability of financial resources, adversely affecting the emotional well-being of legitimate claimants for compensation or other redress. The significance of this point to the Nova Scotia experience is obvious.

61. Government may determine, on a credible basis, the likely outside financial exposure to potential claims in a variety of ways:

(a) the subject institutions may encompass a finite and limited number of potential claimants;

The Nova Scotia program cannot reasonably be so regarded, given the number of residents who passed through the subject institutions.

(b) by providing a deadline for the submission of notices of intended claims that predates a final determination of the precise components of the redress program;

(c) by limiting the program, at least on a pilot basis, to a specific institution, specific years, specific age groups or other limiting criteria.

Balancing the Relevant Considerations

62. Where

(a) an evidentiary foundation exists to believe that widespread or systemic abuse occurred,

(b) no related criminal investigations or prosecutions exist or are contemplated, or such proceedings have been completed, and

(c) government is in a position to determine, on a credible basis, the likely

outside limits of financial exposure to potential claims,

a specially designed redress program may be an attractive option for a government to address reports of institutional abuse.

63. Where

- (a) an evidentiary foundation exists to believe that widespread or systemic abuse occurred,**
- (b) related criminal investigations or prosecutions *do exist or are contemplated,* and**
- (c) government is in a position to determine, on a credible basis, the likely outside limits of financial exposure to potential claims,**

a specially designed redress program may be an attractive option for a government, provided that:

- (d) counselling or therapy is immediately available to claimants, without true validation of their claims, and**
- (a) claims are processed in an expeditious way, once related criminal investigations or prosecutions relating to that claimant are completed.**

This approach contemplates that a specially designed redress program may be structured and, indeed, commenced, although individual claims may not be processed until the completion of related criminal proceedings. There will, however, be circumstances where even the design of the redress program should be deferred until the completion of criminal proceedings or a public inquiry, should the latter option be pursued.

INVESTIGATIONS TO VALIDATE ABUSE FOR COMPENSATION PURPOSES

There will be circumstances where an investigation needs to be conducted to validate claims of abuse for the purposes of compensation or redress. Examples, such as the situation where criminal or disciplinary proceedings are never initiated, have earlier been given.

64. The preceding Recommendations that govern the conduct of internal disciplinary investigations, particularly Recommendations 32 to 34, have equal application to investigations conducted to validate claims of abuse for the purposes of compensation or redress.

I do not intend to elaborate in any detail on the various methods that may or may not be used to conduct interviews. However, several comments pertaining to the interviewing of claimants are warranted.

Investigators are entitled, indeed obligated, to consider circumstances that may adversely affect the credibility or reliability of a claimant: for example, whether a motive exists to make false or exaggerated allegations; whether the claimant's criminal or anti-social background invites caution; whether there is a potential for collusion or contamination; and whether a pre-existing animus towards government, its institutions or individual employees, unrelated to the alleged abuse, exists.

However, every witness is entitled to respect. Their accounts should be evaluated free from speculative myths, stereotypes and generalized assumptions. In my view, investigators should generally not arrive unexpectedly at a witness' doorstep to conduct an interview.¹⁴ It must be recognized that true victims of abuse may require ongoing support to deal with the memories triggered by such an investigation. Every witness who alleges abuse is generally entitled to have a support person present for interviews. However, investigators may take measures, not inconsistent with the role to be performed by such support persons, to ensure that the integrity of the investigation is not compromised. So, for example, investigators may appropriately limit the support person's active involvement in responding to questions directed to the claimant.

Employees are entitled to be treated with the same respect. Their evidence must also be evaluated free from speculative myths, stereotypes and generalized assumptions.

These comments reflect my concern that, all too often, the conduct of investigative interviews is unduly influenced by preconceived notions about the credibility or reliability of the witnesses under consideration. Open-mindedness and fairness should always be the hallmark of an investigation.

ACCOMMODATION WITHIN A LITIGATION FRAMEWORK

65. Where government chooses to respond to reported institutional abuse within a litigation framework, consideration should be given to how government litigators can accommodate and show sensitivity to the interests and needs of plaintiffs, who may be true victims of abuse, even while testing the veracity of their claims.

As part of such consideration, government can craft principles in writing to guide its litigators, consistent with this recommendation. Such principles would not only include accommodations compatible with the need to critically evaluate a claim, but might include waiver of limitation periods and other defences that are likely to prevent a determination on the merits.

This recommendation addresses the needs of plaintiff litigants. There is, of course, a need for government to show sensitivity in the context of traditional litigation to the needs and interests of former and current employees accused of abuse.

¹⁴There were several allegations made that the IIU engaged in this kind of behaviour. The IIU provided a detailed refutation of these allegations. This recommendation is not dependent on any finding one way or the other.

RANGE OF BENEFITS AVAILABLE TO REDRESS PROGRAMS

- 66. It is appropriate for redress programs to offer some or all of the following benefits:**
- (a) monetary compensation;**
 - (b) financial or debt counselling;**
 - (c) psychological counselling or therapy;**
 - (d) treatment facilities, such as may be provided at alcohol and drug rehabilitation centres;**
 - (e) literacy training, educational upgrading or vocational training and rehabilitation;**
 - (f) educational or vocational assessments and counselling;**
 - (g) medical or dental services that either remove vestiges of a claimants' prior incarceration, such as tattoos, relate to the consequences of institutional abuse or mistreatment, or otherwise affect the claimants' emotional well-being;**
 - (h) payment of miscellaneous expenses, such as child care, transportation, computer and textbook costs, to enable claimants to obtain many of the above benefits;**
 - (i) an acknowledgment and apology, made publicly to survivors generally, privately to validated claimants, or both;**
 - (j) a telephone crisis line;**
 - (k) a historical record of abuse. The contents of, and access to, such a historical record must remain consistent with the fairness to be accorded to alleged abusers who may face criminal or disciplinary proceedings;**
 - (l) a memorial;**
 - (m) programs, actions or commitments that the government may undertake or foster which may provide benefits to survivors or the public generally, such as legislative, policy or research initiatives, public education or the establishment of a healing centre or healing fund to be administered by the community.**

These categories are drawn from a number of the programs examined in Chapter XVI of this Report. Only some of the categories are elaborated upon in the recommendations that follow. Some programs also provide for a contingency fund, in a fixed sum per validated claimant, for miscellaneous expenses not otherwise covered or covered insufficiently.

MONETARY COMPENSATION**Compensation Grid**

- 67. A compensation grid is one valid way to promote greater certainty and consistency**

in the monetary awards given to validated claimants. However, any program must recognize that there is no necessary connection between the nature, severity and duration of abuse, and the impact of that abuse upon its victims. It follows that monetary and non-monetary benefits should not be solely dependent upon the nature, severity and duration of abuse.

The principle that similarly situated individuals should be similarly dealt with requires that there be some consistency in the monetary awards given to validated victims. Such consistency also promotes predictability as to the likely disposition of unresolved claims, thereby facilitating early and less contentious resolution, benefiting all parties. It may permit claimants to make more informed decisions as to whether they will participate in a redress program. Predictability also permits government to estimate and control its costs and make fiscal plans for the future.

As the Law Commission pointed out, attempting to achieve consistency through a grid that places a monetary value or range upon abuse, based upon its type, duration or frequency, may be seen to “dehumanize survivors by subjecting them to formulae or tables for compensation that do not really reflect their unique experiences.” The Nova Scotia experience makes this point well. The grid came to be described privately by many participants as the “meat chart.”

In addition, it is well documented that the impact of abuse on its victim is often not correlated to the type, duration or frequency of abuse. For example, what a grid might characterize as minor sexual or physical assault could have a devastating effect on a particular individual, based on a wide range of factors, including whether the victim’s allegations were initially disbelieved by others. This point was fully explored in Chapter I of this Report. Therefore, a grid based solely upon the type, duration and frequency of abuse is incapable of fully recognizing the impact of abuse upon victims. The Law Commission stated that the “premise is that within the established ranges some differentiation of claims to recognise the unique situation of each claimant is possible, but that the cost and time required to establish anew the amount of every claim would be not justifiable given the desire to make compensation available in a timely and efficient manner.”

That being said, I am of the view that a government is justified in creating a grid to promote greater consistency and certainty in the compensation process. A grid that permits a discretionary increase within each category has *some* ability to recognize the unique impact of abuse upon individuals. Further, grid categories can be based not only upon the nature, severity and duration of abuse, but also upon the level of injury or harm occasioned, or contributed to, by the abuse. This was the approach taken in the Grandview agreement.

No grid will be perfect, but it may be preferable to an open-ended evaluation of each individual claim. As well, a grid’s contents are to be arrived at through the full participation of claimants. Put simply, some concerns are alleviated by their engagement in the process. In my view, in those exceptional cases where the impact of abuse upon its victims is such that the compensation grid is wholly inadequate, the claimant may be better served in resorting to traditional litigation. Again, traditional litigation also contemplates settlement, based upon mutual disclosure of relevant information, including medical evidence. Government may be well situated

to settle a small number of exceptional cases outside a redress program.

Monetary ceilings

68. A redress program should be designed to fairly compensate true victims of abuse, but remain mindful of the overall benefits offered by a redress program and the ways in which the needs of the claimant are better served through this program. It should also not be so generous as to provide an overly powerful incentive to the making of false or exaggerated claims.

Where a grid is employed, a maximum compensable amount is designated for the most serious category of abuse. In Nova Scotia and in New Brunswick, \$120,000 represented the maximum amount compensable. In Grandview, the maximum was set at \$60,000. A maximum compensable amount may be designated even in the absence of a grid.

A determination of the appropriate maximum compensable amount has been said to be an art, not a science. My recommendations cannot purport to fix what the maximum amounts should be. Ultimately, this is an item that is subject to negotiation. However, it should be affected, in part, by the following considerations:

- (a) the amount of money available to the program. This is a political judgment, rather than a legal one;
- (b) the anticipated number of claims and claimants; and
- (c) the likely level of compensation that would be awarded in civil proceedings and the net amounts likely to be left with a successful claimant.

The Law Commission concluded that “[t]he level of benefits must be attractive enough to cause claimants to opt for the program, rather than launch a civil action, but may reasonably be expected to reflect the lower cost and greater certainty of recovery of claimants under a redress program.” Generally, claimants may be motivated to enter into a redress program, despite the possibility of a higher monetary award through litigation, because it better serves their other needs, offering a wider range of benefits, more quickly, in a less adversarial, more private setting. Some suggest that this means that the monetary benefits should be ‘discounted’ to reflect that the needs of claimants are otherwise better served within a redress program.

The suggestion that true abuse victims should receive less than what they would otherwise be entitled to raises obvious concerns, as does the suggestion that their claims should be ‘discounted.’ Indeed, in respect of the federal Government pilot projects, the Government has committed itself “not to try to negotiate less than the amount it believes a court would award.”

Part of the debate here may simply reflect the need for some sensitivity and common sense in the language employed, rather than any real differences in how awards should be quantified.

It is also a matter of common sense that there will be some correlation between the level of monetary benefits and the motivation to submit false or exaggerated claims. Two propositions therefore follow. First, the level of benefits should not be so generous as to unduly encourage fraudulent claims. Second, apart from fairness issues to alleged abusers, higher monetary benefits may require greater scrutiny or verification of individual claims.

Periodic Payments v. Lump Sums

69. A redress program may validly be designed either to provide monetary compensation through lump sum payments, periodic payments or a combination of the two. The needs of validated claimants must figure prominently in the determination as to how monetary compensation is to be paid.

70. Given that the needs of validated claimants will differ, any redress program that presumptively provides monetary compensation through periodic payments should have the flexibility to accommodate the specific needs of individual claimants.

71. It is generally preferable that discretion in individual cases as to the way in which monetary compensation will be awarded not be exercised solely by government officials.

Government may compensate validated victims through periodic payments, lump sums or a combination of the two.

Periodic payments may be said to protect the recipients from themselves. The Nova Scotia program saw abuses in the way some lump sum payments were quickly dissipated and, in some instances, even used to finance illegal activities. Structured payments may also better accord with government's budgetary concerns. Finally, a number of victims, such as those serving lengthy periods of incarceration, may reasonably be regarded as having little or no pressing interest in a lump sum payment.

On the other hand, structured payments may make a redress program less attractive than civil litigation, and may be regarded as patronizing or paternalistic. The imposition of structured payments may be looked upon by claimants who were victimized while under government's control as a further exercise of control by government, antithetical to claimant recovery and healing. Finally, structured payments may interfere with important and legitimate uses that can be made of compensation, such as the acquisition of a home or business.

The way in which monetary compensation is paid to validated claimants is, again, an item that is subject to negotiation. However, I am prepared to say that it would be one reasonable approach, though not the only approach, for a government to promote a program that generally compensates validated claimants through structured payments. It would also be appropriate – indeed desirable – to incorporate provisions that permit relief from structured payments in suitable cases.

Where an advisory group or implementation committee exists as part of a redress program, composed of government, claimant and independent representatives, it may be appropriate to permit such a group or committee to decide whether relief from structured payments in favour of a lump sum payment should be given in particular cases. This would avoid the concern that government not be seen as controlling.

Of course, even where a program provides for lump sum payments, the recipients should always have the option of taking structured payments instead.

It is also appropriate for redress programs to provide for financial counselling, if desired, for recipients of compensation.

COUNSELLING

In my view, counselling or therapy is a benefit of prime importance. Earlier, I addressed the level of validation, if any, needed to support an award of counselling. Here, I address restrictions upon counselling and how this is to be arranged.

The Law Commission reflected that “programs may allocate a specific amount for such services or may undertake to pay a therapist directly. Some programs allow survivors to choose the therapist and the form of therapy they prefer. Others designate those therapists whose services will be remunerated. Frequently there is a ceiling either on the amount allocated to therapy or on the period for which funding will be provided.” In my view, these alternatives, drawn from existing programs, are all reasonable.

72. It is generally preferable that a redress program not simply pay money to a claimant in the expectation that it will be used for counselling or therapy. Instead, the program may pay service providers directly or through a fund, administered by a designated committee or group.

I regard it as reasonable, indeed prudent, for government to insist that it pay therapists directly or that they be paid through an administered fund, rather than create another area for potential financial abuse. A number of programs have proceeded in this way. Of course, this recommendation has no application to any monetary award that the claimant is entitled to apart from any allocation earmarked for counselling or therapy.

73. A redress program may reasonably impose a maximum monetary value on the amount of counselling or therapy which may be obtained. It may also reasonably impose a time frame within which eligible counselling or therapy may be obtained. However, such a program should specifically provide a mechanism for relieving against these restrictions, based upon demonstrated need.

A number of claimants, with whom I spoke, expressed concern over this issue. For some, their eligibility for continued counselling had expired, although their need for such counselling remained. Grandview survivors articulated some of the same concerns.

In my view, it is contrary to the greater public interest to cut off therapy or counselling prematurely and thereby compound the harm caused by abuse. Recognizing that any program must show fiscal responsibility, I am nonetheless of the view that, in this area, undue restrictions upon the continuation of needed counselling or therapy potentially undermine the rationale of a redress program, and ultimately operate to the detriment of society.

74. The discretion whether to relieve against restrictions on counselling or therapy should generally not be exercised by government officials alone, but rather by an advisory or implementation committee, including representatives of government and claimants.

75. A redress program can establish accreditation for eligible counsellors or therapists.

To state the obvious, it is desirable that therapists be competent, experienced and well trained to assist survivors in addressing the impact of institutional abuse and related issues. Accreditation does not guarantee, but does advance, this desirable goal.

As well, it should be noted that poorly qualified therapists or counsellors can foster, however inadvertently, inaccurate accounts of abuse. This is of particular concern where counselling precedes judicial or administrative proceedings or another validation process. I recognize that therapy or counselling is, by its nature, supportive and is not designed to critically evaluate the accuracy or reliability of accounts of abuse communicated. However, the danger that it will have an impact on those accounts is real, and should be avoided wherever possible.

The answer is not to limit access to therapists or counsellors. The need for true victims of abuse is too important, both in dealing with their prior victimization and the impact of the legal proceedings or redress processes themselves. But counsellors or therapists should be sensitive to the forensic issues likely to follow and the need to maintain the integrity of the claimants' independent accounts.

ADDITIONAL NON-MONETARY BENEFITS

76. (1) As earlier indicated, a redress program can provide for a variety of non-monetary benefits to validated claimants, such as educational, vocational or financial counselling, and medical or dental services.

(2) It is again generally preferable that a program not simply pay money to a claimant in the expectation that it will be used for such non-monetary benefits. Instead, the program may pay service providers directly or through an administered fund.

(3) Here too, determinations can be made by an advisory or implementation

committee. A fund can be created to be administered by such a committee. As well, a fixed maximum sum may be designated as the amount that might be made available to individual claimants.

ACKNOWLEDGMENTS AND APOLOGIES

77. A public apology made on behalf of government to abuse survivors, and apologies privately made to individual survivors, promote reconciliation and healing. It follows that such apologies may appropriately form part of a redress program.

78. The timing and the content of apologies, whether publicly made to survivors generally or privately made to individuals, should be mindful of outstanding disputes over the validity of claims of abuse.

The Law Commission stated that “apologies must be delivered in a timely way, given the passage of time that has already taken place since the abuse occurred.” It is true that the earlier an apology is made, the more likely it will contribute to the recovery and healing process. However, it will generally be preferable that apologies be deferred until the conclusion of relevant validation proceedings, be they within the context of a redress program or the court system. Otherwise, the rights of those accused of abuse to a fair hearing may be significantly affected, even where the apology does not specifically identify the abusers.

79. Alternatively, a public apology should expressly recognize that:

- (a) some true victims of abuse have been identified and are therefore appropriately recipients of an apology from government at this time;**
- (b) the apology should not be regarded as an indication of the merits of any individual claims of abuse that remain outstanding.**

For true victims of abuse, this kind of apology might appear qualified, legalistic and, therefore, unhelpful in serving their needs. This supports the view that the preferable course is to defer a public apology until it is unlikely to prejudice an ongoing or contemplated validation proceeding.

BENEFICIARIES OF A REDRESS PROGRAM

80. Benefits may be restricted to those who were actually abused. Alternatively, they may be extended to their families, to those who have been adversely affected by the victims’ destructive behaviour, or to witnesses adversely affected by abuse.

81. Generally, monetary compensation should be restricted to those who were actually abused. However, counselling or therapy may appropriately be extended to family members, particularly since such counselling may reasonably be expected to have a salutary impact on the victims themselves, as well as their families and communities.

For example, the Helpline Reconciliation Agreement (pertaining to St. John's and St. Joseph's) provided counselling to family members.

CONDUCT ATTRACTING REDRESS

82. The breadth of compensable conduct is, ultimately, negotiable. However, some factors upon which this determination might be made include:

- (a) the evidentiary foundation for the conduct under consideration. For example, where there is extensive evidence of physical, but not sexual, abuse, it might be preferable to address only the former within a specially designed redress program;**
- (b) the fiscal implications of such a determination;**
- (c) how interrelated the types of abuse are. It may be impractical to separate out factually interconnected abuse into compensable and non-compensable categories;**
- (d) the likelihood of facilitating an advocacy group for claimants: the more diverse the potential claimants, the less likely that they can speak with one voice;**
- (e) the extent to which the different types of abuse generate significantly different issues;**
- (f) the extent to which physical abuse is alleged to represent conduct which was lawful when it occurred. If this is to be regarded as compensable, it raises very different issues than conduct that was criminal when committed.**

A redress program can narrowly or widely define the conduct that will attract compensation or other redress. In Nova Scotia, both physical and sexual abuse were compensable. The Jericho program compensated sexual abuse only. The George Epoch program compensated for “physical sexual abuse.” Grandview compensated for pain and suffering as a result of abuse and/or mistreatment.

PROCESS ISSUES

The Administration of a Redress Program

As the Law Commission noted, the body funding a redress program often takes primary responsibility for administering it. This may create a perception of conflict of interest and may be of concern to true victims who regard government as having already betrayed their trust by allowing the abuse to have occurred. The Law Commission concluded that, where possible, those administering the program should be independent of those funding it.

83. Generally, government should retain responsibility for administering a program it is funding. Accountability to the public and fiscal responsibility make this approach an appropriate one. However, the concerns about a perception of conflict of interest can be addressed through the creation of an advisory body containing representatives of government and victims to address issues that arise in the administration in the program. Such a body should not address the merits of individual cases.

The Law Commission noted that the concerns over a government administered program may also be addressed through the negotiation process leading to the creation of a redress program. Sufficient trust may be established during that process to reduce the concerns. I agree. The administration of some of the programs outlined in Chapter XVI was shared by non-governmental bodies.

Informed Decisions

84. Potential claimants should be informed about available options in an understandable and thorough way.

85. Information should be disseminated about available options in a way that does not compel former residents to disclose their background to their families or friends.

86. This generally means that the media represents the best way to initially inform potential claimants about available options. Press releases, public announcements and advertisements need not be comprehensive, but merely alert the public as to how to initiate contact to learn more about the process.

The Law Commission stated that information about the redress options should be provided in an “impartial manner.” According to the Law Commission, this meant that:

the information should not be provided by someone who has a personal professional stake in representing these potential plaintiffs in a civil action, who relies on them as witnesses in a criminal prosecution, or who counsels them as private clients in a therapeutic setting. Ideally, existing public agencies that offer services to victims (for example, sexual assault centres) could be used as vehicles for dispensing this information.

With respect, it is impractical, and perhaps unwarranted, to suggest that lawyers for former residents cannot be trusted to inform their clients of the redress options available to them. Indeed, those who have retained lawyers to proceed to civil litigation must discuss with their counsel the respective merits of seeking redress from a compensation program rather than through the courts. I note that the Grandview program required that claimants obtain independent legal advice, at the government's expense, before entering into the program. In any event, sexual assault centres may not be well situated to advise potential claimants as to the respective merits of these options.

That being said, I do not entirely disagree with the Law Commission's views in this regard. The Family Services Association in Nova Scotia performed a valuable service in informing prospective claimants about the process in a supportive environment. Where redress programs involve claimant advocacy groups, they also can perform an important role in educating prospective claimants about the options available to them.

87. Any agreement governing a redress program should be written, to the extent possible, in plain language or non-legalistic terms.

Tom Marshall, one of the architects of the Grandview program, stated that the need for plain language reflects the fact that many claimants are less educated and may experience difficulty when attempting to understand an agreement that is set up largely to assist their healing. He felt that the Grandview process could have been improved if there was a booklet distributed to claimants, clarifying the agreement's purpose and terms.

The Formation of a Claimant Advocacy Group

88. The formation of a claimant advocacy group greatly facilitates the creation and implementation of a successful redress agreement. It may provide a single point of access to claimants. It is capable of giving claimants ownership of the programs in a way that multiple lawyers, each representing one or more claimants at a negotiating table, might not. The direct involvement of such advocacy groups with government promotes a degree of trust, and facilitates reconciliation and healing. It also gives a sense of empowerment to the claimants.

89. Government should facilitate the formation of such claimant advocacy groups and their involvement in the creation and implementation of redress agreements. This should often include financial assistance, both to enable such groups to form, and to communicate with and offer support to their constituency. This should often also include financial assistance for legal counsel to advise and represent the group.

90. Where a redress program is under consideration, multiple claimants may have already retained their own counsel to advance potential lawsuits. It must be recognized

that these claimants are fully entitled to pursue lawsuits, with the assistance of counsel. However, it may best serve the needs of claimants generally that their interests be pursued collectively, with greater prominence given to their advocacy group.

In Nova Scotia, the Government was unsuccessful in persuading the many claimant lawyers that the preferable course was to facilitate a claimant advocacy group, itself represented by counsel. Of course, such a model would have inevitably excluded a number of lawyers from continued participation in negotiating a redress program and, perhaps, from participating in seeking redress for claimants.

Some are of the view, as am I, that Nova Scotia officials moved too quickly to reach agreement on the structure of a Compensation Program. In Grandview, negotiations took 10 months; the St. John's and St. Joseph's negotiations took one-and-a-half years. During these more extended negotiations, trust was developed and a consensus more easily reached. In the latter case, a person of the stature of Douglas Roche, now Senator Roche, also facilitated agreement between the parties.

This is not to say that the Nova Scotia Government could have persuaded the claimants' lawyers that their clients' interests would best be represented collectively in the way described in this recommendation, even if the negotiations had lasted longer and been spearheaded by someone else. Nor is this recommendation intended to criticize claimants' lawyers for not stepping aside in favour of a collective approach involving far fewer lawyers.

It must be recognized that the involvement of the many lawyers in the operation of the Nova Scotia Compensation Program was at times unsatisfactory. While some represented their clients well, the quality of representation was uneven. The involvement of so many lawyers, a number of whom had to learn about the Program for the first time, undoubtedly contributed to the overall costs of legal representation – over \$4.5 million. While recognizing that an individual may decide to choose his or her own counsel, there is also no doubt that a specially designed redress program may function more efficiently and effectively for claimants generally where their advocacy group figures more prominently in the design and implementation of the program. This remains compatible with the involvement of lawyers in providing independent legal advice to potential claimants.

Finally, I should note that circumstances may exist that effectively preclude the formation of an effective advocacy group: for example, where claimants are alleged to have abused other claimants.

Consultation with Affected Groups

- 91. Where the government contemplates that its response to reports of institutional abuse may involve alternatives to traditional litigation, it should broadly consult with potentially affected groups to obtain input on the design of that response.**

I recognize that government should not be compelled to bring claimants and those accused of abuse together to negotiate the design of a redress program. Such a requirement would be patently unreasonable. Instead, this recommendation reflects that the flaws in the design of a government response may be avoided through broad consultation with affected parties, unless totally impracticable. In Nova Scotia, such an approach might well have ensured, for example, a credible and fair validation process.

Relinquishing the Right to Sue

92. Generally, a redress program should require that claimants relinquish their right to sue the government as a condition of their participation in the program.

93. A redress program may provide that this right be relinquished at various stages in the process:

- (a) upon filing a demand or claim for compensation within the program;**
- (b) when the demand or claim is submitted for an initial assessment as to whether it will be permitted to be processed within the program;**
- (c) when the claim is submitted to a fact finder for binding determination.**

94. The point at which the right to sue will be relinquished is appropriately the subject of negotiation between the parties. It may be dependent upon many considerations. However, a program that permits opting out after issues of credibility have been determined or after the amount of compensation has been fixed will lack credibility, waste resources, and fail to promote public acceptance of the process.

Dispute Resolution

95. An agreement governing a redress program should specifically address how disputes over its interpretation or generally in the implementation of the program are to be resolved.

The Deadline for Filing a Claim

Rather than recommend a fixed period, my recommendations address those considerations that should affect the decision as to the deadline for claimants to submit a claim for compensation.

96. In setting the deadline for filing a claim for compensation to a redress program, consideration should be given to:

- (a) the extent to which there are difficulties in making the program known to former residents;**
- (b) the recognition that former residents may no longer be in the jurisdiction;**
- (c) the recognition that true abuse victims may find it emotionally challenging to respond, may be at different stages in their personal recovery and, as a result, may require time and support in order to participate in a redress program;**
- (d) the desirability that government ascertain the scope of the potential program before proceeding;**
- (e) the potential number of claimants involved;**
- (f) the desirability that the redress program not be unduly delayed;**
- (g) the desirability of reducing the potential for collusion or contamination of claims.**

In my view, reconciliation of these sometimes competing considerations may support some mechanism to permit out-of-time applications, upon proof of compelling circumstances. Government should always be entitled to waive a time requirement. On the other hand, a program that excludes out-of-time applications *may* be supportable, given the fact that ineligibility for a redress program generally leaves the claimant the option of resorting to traditional avenues of relief.

Another alternative is to create tiers of claimants, based in whole or in part upon when they first initiated a claim for compensation or when they first reported abuse to the authorities. The rigours of the program's approach to validation, and the range of available benefits, may be different, depending upon the tier involved.

This approach was taken for St. John's and St. Joseph's claimants and commends itself to me. It permits government to limit, but not necessarily preclude, applications made after time deadlines for filing claims have expired. This is not only fiscally responsible, but recognizes that some true victims of abuse may be more psychologically capable than others to bring forward claims in a timely way. Nonetheless, although the timing of a claim may influence how it is addressed within a redress program, government should not fall into the error, earlier described, of necessarily correlating the absence of a timely claim with its falsity.

Promoting Consistency in Fact finding

97. A program may reasonably provide for processes that promote procedural and substantive consistency on the part of fact finders, without compromising their independence. Such processes may include:

- (a) **creation of a template by fact finders for their written reasons;**
- (b) **informal review of fellow fact finders' draft reasons by a designated fact finder, or by the full panel of fact finders;**
- (c) **group meetings of fact finders to review the procedures that govern fact finding sessions, and the decisions that have been rendered.**

In Nova Scotia, the sheer number of file reviewers, the way in which they were selected to conduct individual reviews, and the absence of any collective training sessions all worked against any consistency in procedures or results. The Compensation Program was entitled to provide that reviewers' decisions were not binding upon other reviewers. It was also entitled to promote consistency through a book of claimant statements said to represent categories of abuse. However, the approach advocated in the above recommendation, and adopted during the Grandview program, better promotes consistency in procedures and results, and remains compatible with the independence of individual fact finders. Indeed, it represents the practice for many administrative tribunals.

Training for Those Conducting or Administering a Process

The Law Commission suggested that those involved in administering or implementing responses to reported institutional abuse must have sufficient training to ensure that they understand the circumstances of survivors of institutional child abuse. This suggestion forms part of the recommendations that follow.

98. Those involved in the design, administration or implementation of government responses to reported institutional abuse should, by prior experience or training, have an understanding not only of institutional abuse but also, where applicable, of how credibility and reliability are to be assessed, free from speculative myths, stereotypes and generalized assumptions. Their experience and training should enable them to show sensitivity to the vulnerability of true victims of abuse, while remaining open-minded about the issues in dispute in a way that is compatible with a credible and fair program.

99. All or some of the fact finders should have specific experience and training pertaining to discriminatory treatment based on grounds such as age, race, ancestry, religion, creed, place of origin, colour and ethnic origin, gender, sexual orientation, or disability.

100. It may be appropriate that the experience and training of those involved in a government response should be supplemented by training specific to the redress program. Some programs will compel specialized experience or training.

For example, a workshop on aboriginal cultural awareness represents appropriate training for fact finders involved in the federal Government pilot projects.

101. The nature and contents of this training should be the subject of discussions among those who participate in the creation of the redress program.

102. Such training should extend to administrators of the program, those within government who may be mandated to initially vet claims, those who investigate claims and, ultimately, the fact finders.

103. Prior experience and training of fact finders in analogous areas will often be desirable and appropriate. For example, members of a criminal injuries compensation board, former members of the judiciary, human rights or personal injury claims adjudicators, are examples of individuals who are generally well situated, by experience and training, to address these issues. Legal training is generally desirable.

Some of the file reviewers in Nova Scotia had a wealth of experience that fully qualified them to adjudicate abuse claims. Others were less qualified. I was impressed with the selection criteria for Grandview and for St. John's and St. Joseph's. In the latter case, all fact finding was done by designated members of the Ontario Criminal Injuries Compensation Board. The Grandview adjudicators represented a wide range of experienced lawyers and adjudicators.

Appellate Review

A redress program may properly provide, as did Nova Scotia, for a review from an offer made by government to a claimant in negotiations. Or, a program may have a committee vet an application, as was done by the Reconciliation Process Implementation Committee in the St. John's and St. Joseph's program, before submission to the fact finder(s). However, redress programs should generally discourage an appellate process, which, in my view, is largely incompatible with the perceived benefits of an alternative to traditional litigation: speed, reduced costs, finality, and the participation of affected parties in the design of the process itself.

The Law Commission noted that some validation processes provide for a rehearing where new evidence has come to light, or permit a summary reconsideration of the first decision by a panel of other first-instance decision makers. The concern here is to balance the need for finality with the desirability of ensuring that a wrong decision (whether favouring government or the claimant) may be corrected, when new evidence becomes available.

104. Generally, determinations made by the fact finder(s) within a redress program should be final. The goals and rationale of a redress program are largely incompatible with an appellate process. A program may or may not provide for limited review to address jurisdictional error. Some limited mechanism may also be created to revisit decisions based on the availability of fresh evidence. However, there should be a high evidentiary threshold to overcome before a decision should be revisited. Demonstrable fraud may suffice, as may

the availability of new evidence which could not have been discovered through the exercise of due diligence by the party seeking to tender the documentation.

Evaluation of the Government Response

105. A redress program should provide for its own evaluation by participants. This enables government in particular to assess the merits of such a program in the future and to correct any identified flaws in any future programs.

I have reviewed the evaluation done of the Grandview program and found it useful in this regard.