14

Conclusion

14.1 Introduction

It might seem natural to conclude this book with a detailed blueprint for designing a redress programme. But that would be antithetical to my argument that survivors and other stakeholders should participate in co-designing redress policy. Outsiders can make recommendations, but better programmes demand local ownership and participation. Part of the reason is practical. Redress programmes must operate in distinctive socio-political contexts that shape their potentialities. They need to draw upon available capacities for providing records, psychological support, legal expertise, and many other services. Because the programme's quality depends on the commitments that stakeholders are able and willing to make, those stakeholders must be part of the policymaking process. Redress programmes always involve trade-offs between competing values. It is, therefore, vital that survivors participate as equals in designing and delivering redress programmes. Decisions about programme design are likely to be better made when those decisions include those most closely affected. Moreover, survivors' experience of injurious care and its consequences can anticipate potential problems, help solve problems when they emerge, and lend the programme credibility. And finally, participation can help overcome alienation and mistrust. Too many survivors have a history of decisions being made for them by those who claimed to be working for their best interests. If redress is foisted upon survivors, it will reproduce the same structures that injured them. A report criticising New Zealand's HCP captures the point:

> If Claimants experienced an overwhelming sense of helplessness and lack of control over their lives while under care, contemporary efforts to provide a mechanism for making a claim have reproduced feelings of helplessness and despair. (Ministry of Social Development 2018c: 22)

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Because marginalised survivors can struggle to be effective participants, there are real dangers that professionals will dominate policymaking and implementation (Murray 2015: 178). Survivors may need support to offset participatory disadvantages. Survivors can and should participate in every phase of policymaking: deciding the programme's administrative structure, which injuries will be eligible for redress, how claims will be assessed, how support will be provided, and how monetary payments will be valued. The fact that people will reasonably disagree about each of these decisions underscores the need for robust and transparent design processes.

14.2 Enabling Choice

While policymaking can try to be open and democratic, for practical reasons participation is inevitably limited. While many hundreds of survivors could participate in redress programme design, many thousands more will pursue claims. Survivors are a diverse group of people with differing capacities and needs. They will, as a result, need to pursue redress in different ways. That diversity underpins the argument for flexible programmes in which survivors control how they pursue redress. If survivors are to control their redress journey, they need to be able to choose between different options. That is an important reason to offer pathways that differ according to the injuries they redress, the evidence required, the tools and processes used by assessors, the support survivors need, and the payments they receive. As that is one of this book's major arguments, I will say a little more about each point.

Survivors experience many different types of injuries. Although survivors' complex lived experiences are not easily sorted into distinct categories, some of that diversity can be captured by the distinctions between interactional and structural causes, between individual and collective effects, and between injurious acts and their damaging consequences. Programmes can use the differing costs and benefits associated with claims for each type of injury to develop distinct pathways. Moreover, these pathways might be administered by different agencies that respond to their differing operational needs. These agencies could have different budgetary and staffing arrangements to meet their distinctive demands.

When developing these pathways, policymakers need to decide what evidence will validate claims and how the programme will get that information. These decisions are intertwined: the processes chosen will

affect what information is gathered and its complexion. Programmes should provide survivors with pathways that offer differing ways of providing evidence. The psychological difficulties that many survivors experience when giving verbal testimony suggest that programmes should have one or more pathways that minimise the use of interviews. Chapter 3 notes how the Van Boven/Bassiouni Principles' backing for 'effective access' supports programmes that offer quick and low-cost (in all the relevant senses) pathways. However, despite the costs involved, for many survivors the participatory value of testifying and having their experiences acknowledged and validated are among the principal benefits they get from redress.

There are clear administrative cost differences between pathways that prioritise records over those that centre on oral testimony. To illustrate, one source suggests that Canada spent CDN$969.7 million administering the IAP (Independent Assessment Process Oversight Committee 2021: 60). That figure excludes CDN$55.5 million per year from Health Canada for health and cultural support (Office of Audit and Evaluation 2016: 1).[1] It also excludes the nearly CDN$1 billion in fees charged by survivors' legal counsel, half paid by survivors.[2] With 38,276 claims, CDN$969.7 million represents an average of CDN$25,334 per claim. By contrast, Canada spent around CDN$140 million (plus costs incurred by Health Canada) to administer the CEP's 105,530 applications, an average of CDN$1,327 per claim. The roughly 2000 per cent difference is clearly explained by the differing evidentiary demands. Concerned solely with records, the CEP needed relatively little information. Because it was more comprehensive, the IAP sought much more evidence and cost much more.

Differing pathways to redress can use differing assessment techniques. While all programmes need to use a range of assessment tools, they can craft pathways that accentuate the role of some and minimise others. Chapter 11 describes how assessors applying rules can work faster and more fairly than when they use factors. Factors impose higher costs on survivors but are necessary for comprehensive and flexible responses. Efficient programmes will only use high cost and intrusive assessment

[1] Health Canada's CDN$55.5 million per year included work done for the CEP and TRC.

[2] Legal counsel were eligible for 30 per cent of the survivors' IAP settlements, half paid by survivors. The state's share, 15 per cent of CDN$3.2 billion, totalled around CDN$480 million. The share paid by survivors was less because some lawyers did not charge survivors.

techniques when those are needed to acknowledge the survivors' individual experiences. Programmes can also craft fast or slow track pathways, have differing degrees of transparency regarding assessment criteria, and different standards of evidence. Although circumstances vary, the exemplars indicate that programmes redressing structural and/or collectively experienced injuries can use rules, avoid comprehensive assessments, and have more transparent criteria than those that aim to comprehend an individual's injurious experiences. A programme that has at least one pathway designed for quick redress might use that pathway to provide interim/provisional payments.

Chapter 13 discusses how programmes might set the value of payments. There are countervailing virtues and vices to differing techniques, but my key argument is that survivors should receive full compensation (or a credible estimate of full compensation) for any injury they have redressed. Having discrete pathways for different types of injuries permits payment values to vary. Some survivors will wish to get as much money as possible, enduring greater costs in the pursuit. Others will prefer a quicker pathway that remedies a narrower range of injuries but provides less money. A 2015 submission by the Alliance for Forgotten Australians indicates that

> two-tier schemes ... are a good way of ensuring all survivors can relatively easily claim a base amount without having to go through the additional trauma of producing a more detailed and documented account of their suffering. Those who are able and ready to do so can claim the higher level of reparation, with appropriate support and guidance. (Alliance for Forgotten Australians 2015: 11–12)

I agree that redress programmes should offer a substantial base payment to all eligible survivors. Additional pathways might be more factor-based and more individuated, attempting a more precise match between the severity of injury and payment values. There are, as always, trade-offs involved: greater precision will tend to increase the costs of assessment. Balancing the costs of precision against the survivors' claims to full compensation, policymakers might consider using reasonably large increments between settlement values to reduce procedural costs.

As the previous quote from the Alliance indicates, the strategy of offering differing pathways to redress enjoys support among survivors. Patricia Lundy's work with North Irish survivors reports 'broad agreement' on the appeal of a programme that has both 'a broad common experience payment and an optional individual assessment' process

(Lundy and Mahoney 2018: 270). Similar arguments can be found elsewhere (Senate Community Affairs References Committee 2009: 54; Open Place 2014; Royal Commission into Institutional Responses to Child Sexual Abuse 2015b: 251; The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021: 292, 309; Kendrick, McGregor, and Carmichael 2018a: 51). Adding to the textual support, oblique empirical evidence of survivor-support for the strategy appears in the high numbers of survivors engaged in Canada's IRSSA. IRSSA was also the most disaggregated exemplar, with multiple pathways that distinguished the CEP, Personal Credits, and IAP, with the IAP itself comprising a series of sub-pathways to redress. The CEP validated a few more claims than its original population estimate. But the IAP received more than three times its expected application numbers. The data is merely suggestive, more research would be needed for stronger claims. Nevertheless, Canada's high application numbers is evidence supporting that programme's flexible structure.

A flexible programme would permit survivors to change pathways. Survivors may originally approach a programme as an instrument for a quick base-level payment, but then wish to change to a more comprehensive and participatory process. Conversely, survivors who confront psychological barriers when pursuing payments for interactional injuries may prefer to shift onto a pathway redressing structural injuries. Because different survivors will have different preferences at different times as to how they balance participatory costs and payment values, policymakers should permit movement between different pathways. Procedural choice enables survivors to exercise more control throughout the redress process.

A programme that enables survivors' choice will necessarily be complicated simply because survivors have different options from which to choose. There are tensions between enabling survivor choice and concerns with well-being. Choice entails complexity and complexity is not good for everyone. However, while many survivors will struggle to participate effectively, many others are fully capable. Survivors are not homogenous; they have differing capacities and needs. A programme that enables choice will better enable survivors to control their journey through redress. It will also, therefore, need to support survivors to navigate complexity. That entails holistic and robust support from counsellors, medical professionals, archivists, lawyers, and community workers. Survivors who choose longer, more difficult, pathways to redress will need long-term support. I think that support is best provided by local and accessible community agencies that work with survivors

through the redress process and beyond. However, programmes need to ensure support is accessible to all survivors.

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One of my key arguments is that policymakers must balance a survivor-focussed approach to redress policy with attention to the state's interests. Ignoring the interests of those states that provide redress programmes would not only be foolish, it would be wrong. As a matter of policy, states cannot underwrite redress programmes with blank cheques. Although Chapter 13 argues that credible efforts at full compensation lie within their fiscal capacities, the costs should be predictable and feasible. Obvious techniques include better modelling of application numbers, capping budgets, recruiting funds from NGOs, imposing closing dates, and moving late applications into lower-paying successor programmes. Because previous chapters discuss those techniques, here I turn to some potential cost savings that flow from flexible programme design.

The previous section sketches how programmes can offer survivors different pathways to redress. A flexible approach enables survivors to control how they participate in redress. But it could also be a technique for limiting administrative costs. Recall that Canada spent around CDN$1,327 to administer each of the CEP's 105,530 applications as compared to the IAP's average of more than CDN$25,334. The total cost differences are also stark. The CEP paid out CDN$1.622 billion to survivors: the IAP paid CDN$3.2 billion. Offering two pathways enabled most applicants to seek a CEP payment only. The same point applies to Queensland Redress's 7,168 Level 1 payments, which more than doubled its 3,481 Level 2 payments. Had those programmes been unitary, like Ireland's RIRB or New Zealand's HCP, potentially many more survivors would have sought higher paying redress through more costly procedures. Offering multiple pathways is not only good for survivors; it may save billions of dollars.

That point, however, must be balanced against the procedural costs of running a more complex programme. The complexity of Canada's IAP helps explain why it was the costliest exemplar to administer. By comparison, the RIRB's unitary programme spent €69 million on administrative costs (excluding legal fees) for 16,649 applicants – an average of €4,144 – less than a third of the IAP's average.[3] The RIRB's per claim

[3] Those raw figures may have multiple explanations, Canadian geography is an obvious difference.

administrative cost remains, however, more than triple that of the CEP. Policymakers must balance the flexibility of a more complex programme with the associated administrative costs, nevertheless, the exemplars suggest that many survivors will accept limited redress, eschewing the difficulties associated with more comprehensive pathways. Therefore, by offering a low-cost pathway, programmes may realise procedural cost savings while reducing the total cost of redress payments.

Survivors should not be asked to accept less money in exchange for settling quickly. But if they can choose which of their claims to redress, some may prefer to collect lower payments through faster processes. It is important that survivors retain the option of pursuing all their meritorious claims, even those that require in-depth investigations. Not only do their claims merit redress, the process has intrinsic value. Still, it is expedient if a more accessible pathway supplants, for those who so choose, the pursuit of more comprehensive redress, thereby helping make redress more efficient. Redress must be survivor-focussed. But it also must respect the interests and capabilities of states. Policymakers should recognise and secure any benefits for the taxpaying citizenry that flow from providing survivors with options.

Survivors who pursue pathways that circumscribe the injuries eligible for redress should be left free to pursue unredressed claims through other redress pathways or through the courts.[4] Lower-paying pathways redress a limited ambit of eligible injuries: they should not impose arbitrary limits on compensation. No one should be asked to waive unredressed claims in exchange for a token payment. Only once an injury has been fully redressed might survivors be asked to sign a waiver releasing the state (or other organisations) from further claims. If redress is limited, then survivors need to have fair and accessible processes for pursuing outstanding claims through the courts. Making litigation accessible may require an independent review of the challenges involved in litigating

[4] As an alternative, a redress programme might pay non-compensatory values while encouraging survivors to pursue full compensation through the courts. Adopting this approach, the Shaw Commission argues that survivors could have the value of their redress payment subtracted from any subsequent court award (The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021: 312). One obvious disadvantage of this approach is that it would make the redress programme less effective, because redress would not provide a complete framework. Survivors seeking full compensation (which is their right) would need to make more than one claim for the same injury and state institutions would need to assess that claim under two different regulatory frameworks. Moreover, New Zealand's courts remain inhospitable to non-recent claims.

non-recent abuse. That review could look at a range of issues including statutes of limitations, the burden of evidence, and the use of model litigant strategies for states. The review could then support the necessary legislative change, a process that has already happened in several Australian states. If litigating becomes easier, that will put competitive pressure on a redress programme to remain attractive to survivors.

14.3 Holism

This study focuses on monetary redress. That narrow scope is an analytic technique, not a recommendation. Chapter 1 observes that monetary redress operates alongside other initiatives, including 'public inquiries and criminal trials; political apologies and memorials; medical and psychological care and counselling; and access to personal records and help with family reconnections'. Some of those initiatives are necessary to monetary redress, for example, a programme that respects the well-being of survivors must provide counselling and Chapter 12 argues for a holistic range of support for survivors throughout the redress process.

A holistic remedial strategy should also involve non-monetary initiatives. The VBB principles advocate a range of rehabilitative, restitutive, satisfaction measures, to be provided alongside compensation. For example, survivor memorials can be an important means of publicly recognising survivors – a form of satisfaction. In Perth, for example, there are two public memorials for survivors. One is located on the waterfront and recognises the experience of child migrants, the other, a memorial for the Forgotten Australians, is downtown and located in a civic square that includes the state library, museum, and art gallery. Reflecting the importance of these memorials, I was told that child migrants often take visitors to see 'their' memorial (AU Interview 6). I can personally confirm the claim. Other survivors are

> . . . proud that there is that [Forgotten Australians] memorial there and it is in a prominent place. It is in a lovely spot, so it is not tucked away out of sight. It is right in front of the museum in a very busy part of the Cultural Centre. It is in a respectful position. (AU Interview 6)

I suspect that remedial measures have interactive effects. Perth's memorials reinforce the public recognition of survivors in ways that continued to resonate after Redress WA ended. It is likely that a larger context shapes how monetary redress operates and how it is understood, both of which, in turn, affect survivors' redress experiences. As a result, a full

appraisal of monetary redress must encompass a broad range of initiatives. I do not pretend to offer that here, instead, I will address some points supporting the value of a holistic remedial strategy.

A holistic approach to redress responds to the complexity of the survivors' injurious experiences. For many, being taken into care resulted from societal injustices involving colonialism, race, class, gender, and wealth. Survivors continue to experience overlapping disadvantages that stem from enduring societal injustices. Their complex histories of disadvantage and marginality demand maximally holistic responses. The alienating effects of societal injustice can mean that survivors do not identify as full members of the polity (Nobles 2014: 19, 131) and survivors who do not see themselves as respected members of the polity may forego the potential participatory benefits of redress.

When monetary redress is part of a holistic set of mutually supportive initiatives, it becomes more accessible. This can work in different ways, but to return to an important theme, I think local community agencies can help survivors access redress by providing services that directly support survivors in ways that help them both access redress and see themselves as valued citizens. Having a range of initiatives can optimise the value of redress for survivors (Graycar and Wangmann 2007: 17). Holism can also reduce the risk that survivors see redress as a cynical ploy to buy their silence.

> We're people, not problems to be dealt with as if we're on a conveyor belt. Pay us off, problem solved, pay us off, problem solved. Effective redress should mean so much more than a cash payment. (Anonymous survivor quoted in The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021: 76)

Looking more broadly, holism demands practical consistency across related policy domains. Records access offers an easy example. Too often, freedom of information laws have restricted survivors' access to records (AU Interview 1; IR Interview 11). In part, this is because those laws clearly entail legal obligations on records-holders not to release private information concerning third parties (Murray 2014: 500–1; AU Interview 16). However, when survivors are given records with hundreds of redacted pages, that can impede their redress claims. The risk is not merely hypothetical. In a 2016 New Zealand case, Judge Rebecca Ellis compared some redacted documents with the unredacted versions. Her judgement states, 'that some of the material redacted is plainly relevant to the [survivor's] claim' (*N* v. *The Attorney General* 2016). In other words,

the state's policy on redaction was inconsistent with its redress commitments.

The need for holistic consistency also emerges in expressive terms. A good redress programme acknowledges the survivors' injurious experiences and commits the state to their remedy. If the state is to be consistent, the expressive aspects of other state actions should resonate with that remedial undertaking. A good example of damaging inconsistency occurred in Canada. Canada's TRC ran in parallel with the monetary redress programmes. But the Canadian government's relations with the TRC were often inconsistent with the expressive work of monetary redress. These inconsistencies boiled into public awareness when the TRC sued Canada over the state's refusal to provide documents from the state archives on the residential schools (*Fontaine* v. *Canada (Attorney General)* 2013). The government's argument that it was not legally obliged to provide those records was wrong and at odds with the TRC's purpose. The inconsistency of a government working to obstruct the TRC's investigation while simultaneously working to redress the injuries that the TRC was trying to investigate undermined the IAP's credibility (Sterritt 2014). Similarly, I was told that Australian governments' positive statements about their responsibilities towards survivors were not matched by the necessary funding. As the McClellan Commission increased pressure on services, one interviewee, who managed a local agency, observed they were not getting adequate resources. She worried that she was, in effect, 'administer[ing] a system that is really a front for a failed redress scheme' (AU Interview 17).

Redress programmes consistently confront tensions between the public and the private and between the personal and impersonal. While a politician may be personally committed to redress, the impersonal state is a complex set of pluralistic institutions that is rarely amenable to rapid change. In every aspect of redress, when public policy seeks to remedy private injuries gaps emerge between what people need and what the impersonal state provides. Flexible and holistic remedies that include, but are not restricted to, monetary redress are, I think, a potential strategy for working through those problems. But it will take time and evidence to see what best practice demands. Moreover, participants may need to learn what they can reasonably expect and what state redress cannot deliver.

14.4 In Closing

Monetary redress can be an important measure in overcoming embedded structural injustice. My optimism is not shared by observers who see

redress programmes as a governmentality technique channelling larger political issues of race, class, gender, wealth, and colonial injustice into the narrow framework of redressing abuse. Because survivors' injurious experiences are interwoven with enduring societal injustices, the ameliorative capacity of any monetary redress programme will be limited. But asking a monetary redress programme to remedy all of a nation's ills would impose unreasonable standards for success. After all, no other policy has accomplished that feat. Because monetary redress is not a panacea, it must be accompanied by other progressive measures of structural change (Green 2016: 123).

A broad-reaching holistic remedial strategy could require profound changes in a polity's constitutional imagination. Where systemically injurious care practices were (are) a colonial technique, policymakers need holistic redress initiatives that enable decolonialisation. Monetary redress programmes can play a part in those larger developments. By working in partnership with Indigenous peoples, redress programmes can enact, in small but important ways, emancipatory political forms. Whatever the survivors' ethnicity, redress programmes can enact the equitable and lawful treatment that every citizen claims as of right in a manner salient to each. But no monetary redress programme can deliver a just society on its own. If states and other constitutionally significant actors do not take consistent remedial steps, they risk submerging the value of redress in the effects of larger societal injustices.

There is reason for optimism. Like any other form of politics, redress politics is productive and creative. Redress programmes do not settle claims, they do not 'turn the page' of history, and they do not reconcile a polity. Instead, redress spurs further political demands. Some of these demands come from survivors. Others will come from groups with similar experiences of injustice. No political society marked by histories of profound injustice will ever see an end to remedial politics. Yet a redress programme must operate within defined boundaries – responding to certain injuries within a certain time period using a specific set of procedures. This has an important consequence. If the scope of atrocity always exceeds any attempt at repair, remedial justice will always be partial and problematic. That fact will always provide material for critics. But I wish to close this book with a brief reflection on whether redress might play a role, perhaps only a small one, in building better polities.

As a matter of theory, redress politics can, potentially, contribute to realising justice and, therefore, be a means of improving society. But I cannot say any exemplar programme was an overall benefit either to

survivors generally or their broader societies. All redress programmes confront serious challenges and, while I offer some suggestions, it is uncertain what best practice requires. State redress is a relatively new domain of policy and analysis is underdeveloped. This study's modest contribution is limited by its short time frame and small-N approach. The existing literature on redress programmes offers little longitudinal data or analysis of interactive effects. In short, there is not much evidence for analysis.

At points, this book touches on the relationships between monetary redress and the larger field of transitional justice. This field offers some insights into the design of better redress programmes and their prospects for success. Matching my argument, the transitional justice literature indicates that better outcomes happen when polities deploy a holistic plurality of initiatives (Olsen, Payne, and Reiter 2010). Redress (or 'reparations', to use the field's preferred term) must be part of a larger suite of measures. And the process takes time. Anja Mihr argues that a generation must pass before transitional justice can consolidate democratisation (Mihr 2018: 402). In the cases that Mihr studies (Germany, Spain, and Turkey), transitional justice accompanied or involved constitutional changes, often driven by broad-based participatory civic engagement, including survivor advocates. The process takes time and, while no outcome is certain, the general sense is that best practice needs local nuance and participation.

As a field of study, transitional justice coalesced during the late 1980s and early 1990s (Arthur 2009). The field has since undergone a series of developmental phases (Balasco 2013). The first wave was marked by advocacy and by scholarly attempts to delimitate the field and to provide causal explanations of how transitional justice evolved. The second wave took a critical turn, interrogating conceptual assumptions and critiquing transitional justice's failings, omissions, and contradictions. Only in the third wave, beginning around ten years ago, did scholars begin to compile and analyse empirical data systemically. By that point, analysts could draw upon decades of data collected across many different polities to see what processes worked, for whom, and in what combinations.[5]

By comparison, redress scholarship and practice are both very new. Although small-scale redress programmes began in the 1990s, the large programmes addressed in this study all took place after the millennium.

[5] As an aside, I note that transitional justice practice long predates its discovery as a policy domain (Elster 2004).

If one were to compare the study of redress policy with the trajectory of transitional justice studies, it appears to me that redress scholarship is in the midst of the second wave. That means, as this study has shown, states are spending billions of dollars to redress abuse in care without good data on the benefits these programmes can deliver and the evils they inflict. This study contributes to filling part of that knowledge gap. But there is much more to be done, and it will take time and robust data collection before the third wave of systemic empirical analysis can really begin.