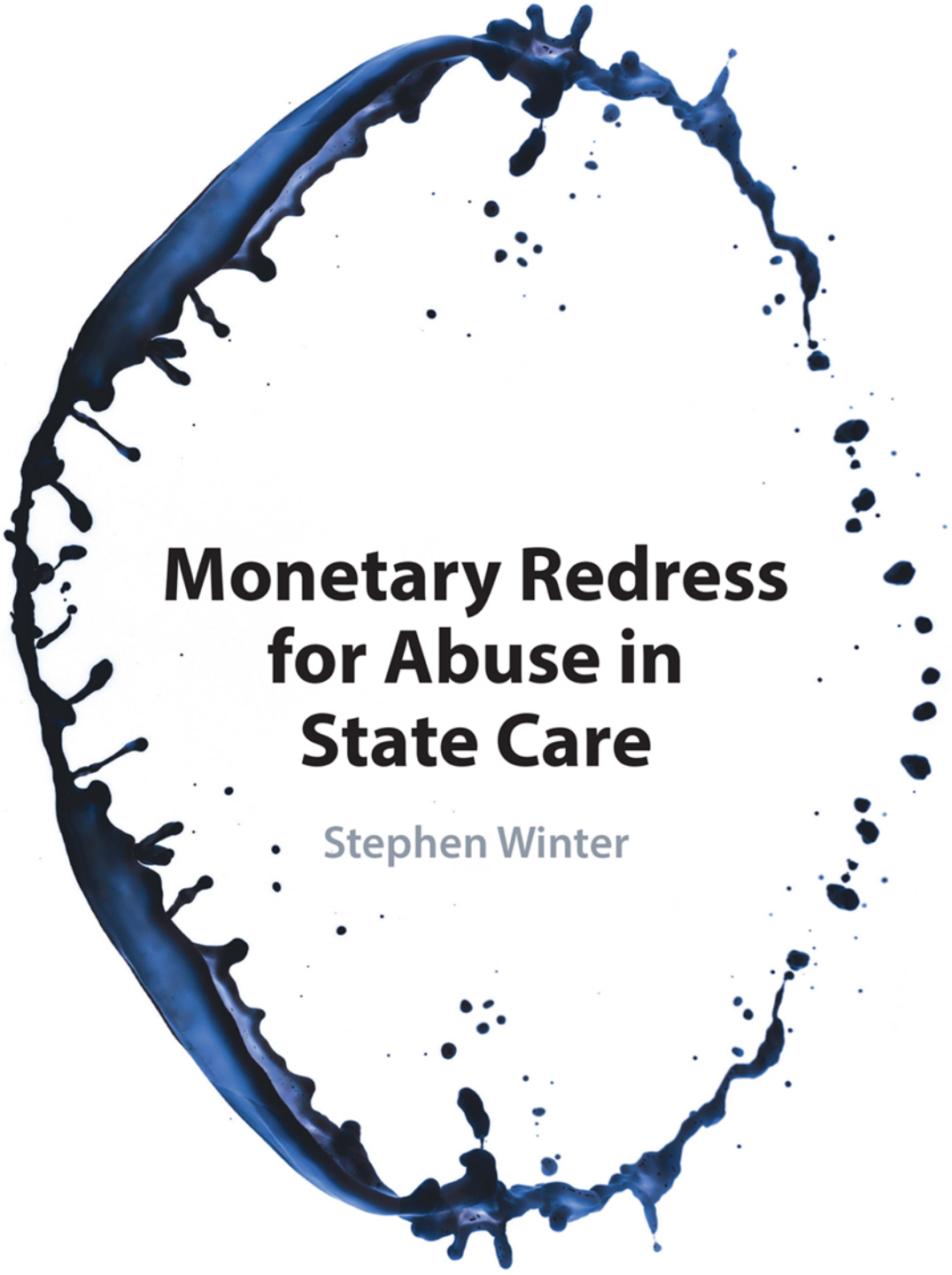

Monetary Redress for Abuse in State Care

Stephen Winter

CAMBRIDGE

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MONETARY REDRESS FOR ABUSE IN STATE CARE

Investigating a fast-developing field of public policy, Stephen Winter examines how states redress injuries suffered by young people in state care. Considering ten illustrative exemplar programmes from Australia, Canada, Ireland, and Aotearoa New Zealand, Winter explores how redress programmes attempt to resolve the anguish, injustice, and legacies of trauma that survivors experience. Drawing from interviews with key stakeholders and a rich trove of documentary research, this book analyses how policymakers should navigate the trade-offs that survivors face between having their injuries acknowledged and the difficult, often retraumatising, experience of attaining redress. A timely critical engagement with this contentious policy domain, Winter presents empirically driven recommendations and a compelling argument for participatory, flexible, and survivor-focussed programmes. This title is also available as Open Access on Cambridge Core.

STEPHEN WINTER is Associate Professor of Political Theory at the University of Auckland and a leading expert in state redress programmes. He is the author of *Transitional Justice in Established Democracies: A Political Theory* (2014) and co-editor of *Magna Carta and New Zealand: History, Politics and Law in Aotearoa* (2017).

MONETARY REDRESS FOR ABUSE IN STATE CARE

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For Roxane, Emma, and William

iustitia suum cuique distribuit
—Cicero

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TABLES

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ABBREVIATIONS

ADR	alternative dispute resolution
AFN	Assembly of First Nations (Canada)
ALS	Aboriginal Legal Service (Australia)
AUD	Australian dollars
CDN	Canadian/Canadian dollars
CEP	Common Experience Payments (Canada)
CLAS	Confidential Listening and Assistance Service (New Zealand)
HCP	Historic Claims Process (New Zealand)
IAP	Independent Assessment Process (Canada)
IRSRC	Indian Residential Schools Resolution Canada
IRSSA	Indian Residential Schools Settlement Agreement (Canada)
MSD	Ministry of Social Development (New Zealand)
NAC	National Administrative Committee (Canada)
NARA	National Research and Analysis Unit (Canada)
NGO	non-governmental organisation
NRS	National Redress Scheme (Australia)
NZD	New Zealand dollars
RHSP	Resolutions Health Support Program (Canada)
SAO	Settlement Agreement Operations Branch (Canada)
TRC	Truth and Reconciliation Commission (Canada)
the VBB Principles	Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (United Nations)

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PART I

1

Introducing Monetary Redress

1.1 Introduction

Keith Wiffin's father died when he was eight years old (Wiffin 2020a). The loss led to his getting into trouble, and, in 1970, when Wiffin was ten, his mother approached Aotearoa New Zealand's Child Welfare service for help with him and his three siblings. Wiffin was taken into state care that November and driven to the notorious Epuni Boys Home in Lower Hutt. There he would be physically and sexually abused for nine months before being moved to another residence. Wiffin would spend five years in care, including a further stint at Epuni. Wiffin is one of hundreds of thousands of people around the world who experienced systemic cruelty, abuse, and neglect while in state care. He is a survivor (or care leaver).[1]

The mistreatment of survivors is the focus of a growing number of public inquiries, popular films and books, court cases, and scholarly works. Many public care institutions were systemically injurious and there is now a broad international consensus that states should bear remedial responsibilities. These responsibilities are discharged, in part, through monetary redress programmes. The first monetary redress programme for survivors of institutional abuse began in 1993. It emerged from a negotiated settlement between several churches, the Province of Ontario (Canada), and survivors of St John's and St Joseph's training schools (Shea 1999: 35–38). The programme paid CDN$14.5 million[2] to 565 survivors. More programmes quickly followed, first in Canada and then internationally. The speed of development is remarkable. A field of public policy wholly unforeseen during Keith Wiffin's youth in the 1960s

[1] I use 'survivor' and 'care leaver' interchangeably. Both terms have their benefits and drawbacks. Some authors prefer 'care experienced persons', but that seems verbose to me. I avoid using the term 'victims' as it can connote an image of individuals who are passively defined by the actions of others.

[2] Appendix 1 provides a table of factors for converting currency values into 2021 US dollars.

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became ordinary during the post-Cold War era. Now, in the 'post-post-Cold War' period of the 2020s, it is time to examine its practice critically.

The need for critical reflection arises because normalcy has not led to routinisation. Actual redress programmes differ greatly. Nor is there improvement in implementation. Some are better than others and programmes are better (or worse) in different ways. Monetary redress is 'possibly the most contentious' remedial measure used by states (Senate Community Affairs References Committee 2004: 225). There is reason for contention. Most claims are difficult to authenticate because good information about non-recent (historic)[3] abuse is rare and its long-term effects are uncertain. Poor quality evidence contributes to programme delays and increases the burdens on survivors. It also raises questions about the authenticity of their claims.

These evidential concerns are aggravated by the high costs involved. The most expensive programme to date, Canada's Indian Residential Schools Settlement Agreement (IRSSA), provided over CDN$5 billion in payments between 2006 and 2016. Yet, despite the large numbers involved, money is only part of what redress involves. Survivors emphasise the value of telling their stories and of having their experiences acknowledged (Jay et al. 2019: 59). As one interviewee related,

> Almost everyone that we've talked to said, 'But I'm really glad that I did it because I was able to actually tell people what happened and have them acknowledge it . . .'. What I have heard from a lot of people is the money didn't matter, it was my 'getting my day in court'. Sort of; it was important for them. (CDN Interview 7)

These good news reports are counterbalanced by survivors who were re-abused by redress. When Keith Wiffin first sought redress in 2003, he approached New Zealand's Ministry of Social Development (MSD). With small prospects for success in court, Wiffin entered New Zealand's nascent redress programme in 2008. He would be ill-treated by that 'thoroughly disrespectful and contemptuous' process for two years, before being sent a cheque for NZD$20,000 (Wiffin 2020b: 14). Unfortunately, Wiffin's damaging experience is all too common. Other

[3] I will not need a precise definition as to what makes an injury and any resulting claims non-recent. Generally, I use the term to refer to injuries that happened a sufficiently long time back so that the passage of time affects the prospect of successful litigation. Associated literature often uses terms such as 'historic injuries' or 'historic claims'. I use 'non-recent' to avoid the implication that these injuries and claims are part of history and, by implication, not matters of present concern (Daly and Davis 2021: 1, fn 1).

survivors describe New Zealand's process as 'worse than the abuse itself' because it was 'disrespectful, drawn-out, and sometimes traumatising' (The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2020b: 25). Moreover, satisfaction with redress can be short-lived (Reimer et al. 2010: 47). Money is quickly spent, while memories of injury and its long-term consequences remain.

Contention over monetary redress encourages some people to think about replacing it with other remedial measures. I agree that monetary redress should operate as part of a holistic suite of remedial measures. But other remedies should not displace the survivors' rights. Not only do survivors have a right to full compensation, they are 'highly disadvantaged' populations that are characterised by high rates of ill health, homelessness, unemployment, and illiteracy (Haase 2015: 7). To illustrate, a 2011 Australian study found that 40 per cent of 'long-term homeless people' in Melbourne were care leavers (Johnson et al. 2011: 9). In straitened circumstances, redress can provide a lifeline of hope and survivors consistently emphasise the importance of money. A study in Northern Ireland found that compensation was the most frequently stated remedial demand, mentioned by 80 per cent of a study of forty-three survivors (Lundy 2020: 261). Similarly, a larger study of 564 Queensland survivors asked which forms of redress they had found helpful (respondents could select multiple answers): monetary redress was the most commonly mentioned remedy, cited by 59 per cent of respondents (Watson 2011: 38). By comparison, 44 per cent indicated that they found an apology helpful, while the next most popular form of assistance was face-to-face counselling (30 per cent). The results varied slightly by gender. A total of 66 per cent of male respondents specified money as helpful, compared to 56 per cent of female respondents. There was no variance between Indigenous[4] and non-Indigenous respondents.

Money enables survivors to exercise agency (Dion Stout and Harp 2007: 27). And redress can provide life-changing amounts of money.

[4] This study uses 'Indigenous' to refer to persons and peoples who are inheritors and practitioners of unique cultures and 'have retained social, cultural, economic and political characteristics that are distinct from those of the dominant [settler] societies in which they live' (United Nations: Department of Economic and Social Affairs Indigenous Peoples, 2021). Some people object to the abstract concept of Indigenous, preferring to identify with a specific people or nation. But few sources provide data about redress at that more granular level. Using the more abstract concept also draws attention to the comparative and contrasting roles of Indigenous peoples and persons in different exemplar programmes.

However, the positive potential of these programmes is balanced by a range of legal and ethical questions. As previously mentioned, the psychological costs of participating in redress can be severe. In every programme with which I am familiar, survivors found the process of getting redress personally difficult. Redress programmes engage with deeply personal, even shameful, experiences. Jim Miller describes Canada's redress process as 'traumatic' and quotes a participating survivor who said that the process made him

> relive it [the abuse] all over. I started crying. I couldn't help it. It was like I was back there again and I had buried it. (Miller 2017: 180)

The challenges involved go beyond retraumatisation.[5] For example, privacy demands complicate a programme's work, affecting how it acquires information about survivors, how it stores that information, and how it disburses payments. Those (and other) large legal and ethical questions inform a range of more mundane policy design issues at the operative and logistical levels. As further illustrative examples, policymakers must decide who the relevant wrongdoers are and what the relevant wrongdoing is. Someone must decide if the programme's remit should be set by what was illegal at the time of commission or whether to redress historically normal practices, such as corporal punishment. Should the programme focus on injurious acts that occurred when in care? Or should the scope include long-term damage that may (or may not) be linked to injurious care experiences? And who should deliver redress? Is it better to risk impartiality by using the well-resourced infrastructure of a permanent government ministry, or operate independently, at arm's-length from the offending state? Should the programme be staffed by contract workers, by permanent civil servants, or by survivors themselves? Each of these questions, and others, is difficult to answer, and the decisions made will shape the participants' redress experiences profoundly.

An Irish care advocate once related an anecdote to me underlining the magnitude of small details. Her story concerned the quality of refreshments provided at investigative hearings in Dublin. When a programme official offered her companion 'a basic cup of tea that wasn't decent', she rejected the overture, insisting that she, and all other survivors, receive a

[5] Retraumatisation refers to the harmful results of recalling traumatic events and can include various psychological and physiological symptoms (Duckworth and Follette 2012: 3).

'proper biscuit and proper tea' (IR Interview 9). The anecdote points to the importance of subtle communicative cues: the offer of cheap biscuits implied that survivors did not warrant better refreshments – it was a slighting insult. Such subtleties can be important. The quality of a programme depends, at least in part, on the way it treats survivors and most of a survivor's experience with a redress programme is made up of such mundane interactions.

To develop better redress programmes, it is important to study existing programmes in depth and critically. This is a difficult and contentious policy domain. While monetary redress provides significant benefits, it is not an all-things-considered good for many survivors. And not all programmes are equal. The aim of this book is to better understand monetary redress so as to help policymakers design better programmes.

1.2 Major Themes and Argument

As a field of public policy, monetary redress for survivors of abuse in care is relatively novel, prominent, and politically sensitive. This section describes two overarching tensions that reappear in different ways in all redress programmes, and what I see as the best strategic response available – the need for flexible, survivor-focussed programmes. These tensions and that strategic response shape the remainder of this book.

The first tension arises from an observation that constitutes my point of departure. I understand state redress programmes as a form of public policy. That perspective illuminates some key problems that these programmes confront. Monetary redress attempts to remedy intimate and grievous injustices, including childhood abuse and neglect, that affect who survivors are as persons. Yet redress policy works through impersonal bureaucracies. Filling out forms and getting redress in accord with regulations interpreted by public officials can be deeply unsatisfying. But the problem goes deeper, embracing the impersonal character of the responding state. In cases of non-recent injury, often the people who ran the institutions and committed the actual abuses are long past any accountability. They are either dead or so elderly and infirm that they cannot discharge their remedial obligations. The state's vicarious responsibility is a distinctly inferior alternative. The state cannot experience guilt and remorse for past crimes; instead it is impersonated by non-offending officials. As an impersonal process, state redress struggles to satisfy survivors' demands for accountability. The resulting tensions

between the demands of very personal injuries and impersonal public policy are significant and incurable.

A second theme, overlapping at points with the first, concerns tensions between the public and private. The study focusses on state redress because, as public policy, these programmes answer to distinct political demands. However, care institutions operated in interstitial spaces between the public and private. When taking on responsibilities for care (often becoming the survivor's legal parent), states adopted a role usually associated with the private sphere. Moreover, the state's involvement in care frequently responded to private concerns of personal morality, such as family separation, alcoholism, and poverty. A comprehensive remedy requires that the survivor's life history, including their injuries, becomes publicly knowable and subject to public criteria, creating an objective representation of private suffering. Moreover, public values constrain the state's response to private suffering, yet the values of good public policy, such as efficiency and transparency, often conflict with private remedial demands. To make an obvious point, money spent on state redress programmes must be spent in a way that satisfies the legal requirements for public expenditures, and those public regulations can hamper efforts to meet the private needs and wants of survivors. Redress unfolds within the existing institutional forms of the state. These institutions make redress possible while constraining what it can be. The resulting tensions spill over into another. The survivors' injuries often flow from invidious forms of collective politics and public policy, yet there is a persistent tendency for redress programmes to convert the collective politics of systemically injurious care into a series of individual private transactions (James 2021: 376).

I argue that the best response to these challenges begins by recognising that trade-offs pervade every redress programme. The fact that redress always involves multiple trade-offs between important values means that the concept of a completely successful redress programme is analytically unhelpful. The non-ideal context of actual public policy involves institutional constraints and systemic wrongdoing, resource scarcities (examples include money and time), and the need to co-ordinate the uncertain judgements and reactions of other agents. These factors mean that every programme will fall short when measured against one or another reasonable value. I think that the best approach to the inevitability of trade-offs is to develop flexible redress programmes that respond to what survivors are able and want to do. Flexibility means different things for different parts of a programme. But, as a general rule,

survivors should be able to select the path (or paths) through redress that work best for them. Being responsive to the needs and wants of different survivors is what survivor-focussed redress requires.

1.3 The Scope of the Book

The diverse applications of monetary remedies for injury range across cultures and times, and from the constitutional demands of transitional justice to quotidian responses to everyday setbacks. This book addresses large and recent programmes of monetary payments made to discharge remedial obligations that states owe to individuals as a response to injuries that these individuals experienced while in care as young people. I will sketch the contours of the study by examining the component parts of that statement.

Redress means to repair, to rectify, or to correct. The term can be used quite generically – one might redress a fault in an engine or a problem with grammar. However, because they remedy injuries, the redress programmes that I consider engage moral demands. 'Injury' combines a sense of violation with that of a valid claim – to be injured is to be treated in a way otherwise than one has a right to expect.[6] Examples of injurious acts include sexual, physical, and emotional abuse. Injuring someone in any of these ways creates a (presumptive) redress claim. Injurious acts can lead to consequential harms. I use 'harm' to refer to damage resultant from an injury. Some harms, such as psychological disorders, can emerge long after the original injury. When the discussion demands reference to both injurious acts and harms, I use more capacious terms such as 'injurious experience'. Chapter 2 further attends to these conceptual matters.

Redress aims to rectify an injurious experience by discharging all, or part, of a remedial obligation owed by an offender to the survivor. A remedial purpose distinguishes redress programme from other public policies that respond to need or interest. Since offenders can offer various types of potential remedies, 'redress' can refer to a range of remedial measures. Monetary payments are one element within a transnational rectificatory policy genre that includes public inquiries and criminal trials; political apologies and memorials; medical care and psychological counselling; and access to personal records and help with family

[6] The Latin origins of the word make this clear. *Jus* means a claim or right. *In-jus* is a violated claim.

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reconnections. Monetary redress is part of a more complex policy realm. Later, I will argue that monetary redress programmes are best when part of a holistic suit of complementary initiatives. But the work of monetary redress is sufficient to occupy this study. While one cannot lose sight of the larger remedial picture, a narrower focus on monetary redress permits greater analytic depth.

Understanding state redress as a form of public policy highlights the distinct character of states as moral agents. States do things that individuals cannot, such as make laws. Equally, there are things that individuals do that states cannot – I previously mentioned the state's lack of remorse. Moreover, a focus on redress as public policy directs attention to programmes implemented by the executive branch. Executive delivery is a distinguishing characteristic because these programmes displace the arm of government normally responsible for determining compensation – the judiciary. As Chapter 3 describes, monetary redress programmes develop out of the tort law's failure to address non-recent abuse claims appropriately. That means redress programmes aim to satisfy legal demands through quasi-legal means.

Monetary redress programmes are a type of alternative dispute resolution (ADR). The ADR genus encompasses a variety of proceedings (for an overview see Macleod and Hodges 2017). Redress programmes can be distinguished from their ADR counterparts because in a redress programme the state accepts the liability to pay certain types of claims prior to engaging with applicants. This is an important point. In most judicial and ADR proceedings, liability is the primary matter to be settled, by contrast, redress programmes 'do not make findings of liability' (Daly and Davis 2021: 443). Instead, redress involves the state accepting liability for claims that meet a set of prescribed conditions and then inviting applicants to demonstrate that they meet those conditions. This structure, in which responsibility is accepted at the outset of the programme, differs in an obvious and salient manner from proceedings in which a defendant's liability (if any) is an outcome of the process, not a precondition of it. The discharge of state liability also distinguishes redress programmes from victims-of-crime compensation programmes wherein the state provides a form of public insurance to alleviate injuries for which it does not accept responsibility. Moreover, a focus on state responsibility limits the ambit of the study by excluding wholly non-state programmes. However, the study includes programmes wherein states work with NGOs to deliver redress.

Because it is a study in public policy, the book focusses on large redress programmes, defined as having more than 500 applicants. While governments sometimes make ad hoc remedial payments to individuals, the complexities of administering a large (and often uncertain) number of claimants within a single process pose distinct design challenges. For example, large application numbers create the need to manage a large amount of personal information. Obtaining and managing that information involves substantial burdens for both states and survivors. Indeed, a programme's informational demands are a significant factor in shaping the way it operates and how survivors experience it.

As a further restriction, the study primarily concerns responses to injurious institutional care. Both 'care' and 'institution' are contested terms. Many survivors object to describing their experiences as 'care', arguing that their systemically injurious experiences did not, and could not, constitute care. Nevertheless, the study focuses on responses to abuse within institutions charged with the care of young persons, even if they manifestly failed to meet that obligation. The term 'institution' also deserves brief elaboration. Some of the programmes redress injuries inflicted within 'total' residential institutions in which both staff and survivors slept, worked, studied, and recreated (Daly 2014: 15–16). Total institutions enclose their residents' entire life, who rarely experience unmediated contact with the outside world (Goffman 1961). When institutions govern whole lives, residents are made acutely vulnerable. However, while total institutions feature prominently in care leaver histories, redress programmes often encompass a broader range of more or less formal care placements.

Finally, I focus on redress payments for individual survivors. Other policy initiatives respond to large groups or peoples, but here I attend to programmes that address individual human beings. My remit is further limited to redress for individuals who were injured as children or young persons. The United Nations defines 'children or young persons' as people below the age of twenty-five (United Nations 2019). Most survivors were much younger when placed in care. Young people have distinct vulnerabilities (see, Johnson, Browne, and Hamilton-Giachritsis 2006). As Chapter 2 discusses, injuries inflicted in childhood can have lifelong developmental effects, while their age and legal status at the time of the initial injury can affect the survivor's present legal options.

In summary, the study addresses large programmes of monetary payments made by states to individual survivors to discharge remedial obligations owed because these survivors experienced one or more

significant injuries while in care as a child or young person. That limited ambit enables robust comparisons: allowing 'like with like' juxtapositions of different programmes. However, this focus does not limit the study's broad relevance. Anyone interested in the logistical, political, and ethical challenges of operating large compensation schemes is likely to learn from this book. Significant portions of the discussion are relevant to non-state programmes and the narrow focus on care leavers shapes, but does not eliminate, the discussion's relevance to other fields. The problems inherent to monetary redress are not restricted to programmes within my scope, which means that the policy challenges I address are likely to arise elsewhere.

***

My approach is informed by the historical institutionalist school of thought. It is, therefore, sensitive to the roles played by laws and regulations; norms and conventions; and the authoritative and accountability structures that comprise institutions. Most historical institutionalists engage in causal analysis, but it should be clear that is not my purpose. I explore the institutional forms that constitute redress programmes because they shape what participants do and experience. In short, this study addresses the effects of institutions on both individuals and organisations in the field of redress activity and offers policy recommendations. Informed by scholarship, stakeholder judgements, and my own analysis, the approach is first descriptive and qualitative, then prescriptive.

Institutional outcomes depend on empirical factors. Relevant considerations include the character of the authorising law and regulations; the capacities of participants; their interests, values, and beliefs; and the socio-economic context in which the institution operates (David 2017: 155). To capture those features, the study describes ten exemplar redress programmes from Australia, Canada, Ireland, and Aotearoa New Zealand. Table 1.1 sets out the programmes and the dates during which they accepted applications from survivors.

As Chapter 2 describes, the four countries of Australia, Canada, Ireland, and New Zealand have parallel social histories of abuse in care. These ten exemplar programmes were selected because they are both large and recent, which meant I could interview participants. The exemplar programmes are very different from one another. For example, payment values differ substantially, ranging from a few hundred dollars

Table 1.1. *Exemplar programmes: information summary*

Country	Programme name[1]		Dates applications accepted
Australia	The Forde Foundation		2000–[30 Dec 2018]*
	Queensland Redress		1 Oct 2007–30 Sept 2008
	Redress WA (Western Australia)		1 May 2008–30 April 2009
Canada	Indian Residential Schools Settlement Agreement (IRSSA)	Common Experience Payment (CEP)	19 Sept 07–9 Sept 11
		Personal Credits	1 Jan 2014–31 Aug 2015
		Individual Assessment Programme (IAP)	19 Sept 2007–19 Sep 2012
Ireland	Industrial Schools (RIRB)		1 Jan 2003–17 Sept 2011
	Caranua		6 Jan 2014–11 Dec 2020
	Magdalene Laundries		June 2013–[31 Dec 2018]*
New Zealand	Historic Claims Process (HCP)		2006–[31 Dec 2018]*

* These programmes continue at the time of writing (early 2022). Dates enclosed in square brackets are rough end points for data collection.

[1] These are abbreviated names. Chapters 4–7 give more information about each programme.

in Queensland's Forde Foundation to hundreds of thousands in Canada's IAP. Seven of the programmes made cash payments to survivors, the other three required survivors to apply for monies that were then paid to third parties. The programmes also vary in terms of the injuries eligible for redress, the number of institutions involved, the numbers of applicants, and the period during which the programme accepted

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applications. Across these points, and many others, diversity spurs critical reflection and offers learning opportunities.

The exemplars are not case studies in the traditional sense of providing data for testing hypotheses. Instead, information about their operation underpins the design-oriented analysis and recommendations I present in Part III. Knowing a bit about how policy works is an important precursor to advocacy (Mintrom 2012: 210). Without that knowledge, one risks making recommendations that are infeasible or, indeed, create unforeseen costs. Analysis of contemporary practice can help identify challenges and opportunities that can inform strategic responses.

Further distinguishing my approach from that of the traditional case study, I do not limit my discussion to exemplar programmes only. The study periodically draws from other programmes in Australia and Canada, alongside Northern Irish, Scottish, and Swedish initiatives. Taking what has been called an 'integrative' approach (Whittemore and Knafl 2005), I use information from public hearings, reports, regulations, and statutes to provide raw data and operative descriptions. I also draw from survivor testimony and biographies, along with opinion pieces and newspaper articles in combination with an interdisciplinary body of academic literature.

I conducted 240 hours of semi-structured information interviews between November 2014 and July 2017 with stakeholders in the ten exemplar programmes. The sixty-three interviewees were all senior officials or practitioners with experience in redress policy design and/or delivery. With two exceptions, the interviews were audio-recorded and then transcribed. Participants were offered the chance to review and amend the transcripts. Because any informant's knowledge and perspective is partial, interviews were conducted with experts from different types of organisations. Interviewees came from three general organisation types. Advocate interviewees were representatives of survivor advocacy groups. Service interviewees were drawn from community agencies providing services to survivors. State interviewees were public officials responsible for developing and implementing redress programmes. Some organisations combine functions. Redress programmes operate through networks of mutual reliance; therefore, guarantees of anonymity helped mitigate any concerns for the well-being, both personal and institutional, of interviewees. I cite interview transcripts by country and number, enabling readers to cross-reference more information in Appendix 2, which lists the time, date, and type of interview.

Invitations for interviews were sent to both individuals and organisations identified as potential key stakeholders. I sent organisational invitations to senior managers who might nominate a colleague or participate themselves. For public servants, I often sent invitations to a general contact address before being directed to an appropriate official. Two respondents declined to be interviewed because they did not have appropriate expertise. Logistical difficulties prevented interviews with three respondents. Another refused to participate.[7] That refusal was a marked exception. Most people and organisations were unstinting and I am very grateful for their generosity in sharing their experience and insights.

Most interviews were around ninety minutes. Many were considerably longer (the longest was nearly seven hours!). Interviews were semi-structured with questions tailored to the participant's expertise. The interviews concerned the operations of redress programmes and related initiatives, and the effects of those on care leavers and organisations. For several interviewees, contact continued after the original meeting. I was also privileged to join several survivor-oriented events and to visit community centres and other organisations where I sat in on discussions concerning monetary redress. Others provided opportunities for impromptu conversations. These informal discussions are no less important for being unrecognised by citation.

The book has three parts. Part I includes this Introduction, the historical background of Chapter 2, and Chapter 3, which sets out criteria for evaluating redress programmes. Part II describes the ten exemplar programmes, helping ensure that subsequent analysis remains empirically informed. The book's largest component is Part III. Chapters 8–13

[7] Unfortunately, this last absence is significant. Despite over thirty emails and telephone calls throughout 2015 and 2016, Canada's Assembly of First Nations (AFN) did not nominate an interviewee. This gap is regrettable. Although I interviewed other Canadian Indigenous organisations, the AFN is the primary representative body for on-reserve 'status Indians' – it represents band councils and First Nations recognised under Canada's Indian Act, who live on federal Indian reserves. The AFN does not generally represent Inuit, Métis, or Indigenous Canadians who do not live on a reserve. The AFN undertook key roles in the development of IRSSA and its implementation. To compensate for the lack of an interview with AFN representatives, it is helpful that the IRSSA's programmes are the best-documented exemplars. They are the subject of numerous reports and audits, non-governmental critical evaluations, and a range of secondary literature, which present findings from hundreds of interviews with officials, service providers, and survivors. This wealth is a consequence of the attention paid to IRSSA as part of Canada's larger decolonisation efforts.

address how programmes are administered; what injuries are eligible for redress; how survivors provide evidence; how evidence is assessed; what support survivors need; and how redress is paid. Each of these chapters concludes with a set of recommendations engaging with problems that emerged in the exemplars. The result is a wide-ranging assessment of monetary redress programmes that indicates where and why difficulties arise and what policymakers can do in response.

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Keith Wiffin continues to work towards a better redress programme for Aotearoa New Zealand. The difficulties involved in designing a better approach are part of the reason he has spent decades as an advocate. By recognising those difficulties and outlining some strategies for engaging with them, I hope this book can help policymakers like Wiffin. Better redress programmes enable survivors to resolve meritorious claims through processes that are impartial and fair, efficient and accessible, and protect their well-being while providing the support they need to participate. At the same time, redress programmes must offer states an effective and efficient means of discharging their remedial responsibilities. Those demands conflict. Not only do the interests of states and survivors clash, diversity among survivors means that they gain differing benefits from redress and confront different costs in its pursuit. Because the salience of the resulting trade-offs varies for different participants, I advocate flexibility. Flexibility is key to optimising in a policy domain marked by pervasive conflict. But before beginning that argument, I need to describe the injuries that redress programmes seek to remedy. That is the task of the next chapter.

2

Injurious Histories

2.1 Introduction

Every care leaver has a unique history. Some were treated well, while others suffered dreadfully. Most experienced a mix of the good, hurtful, and indifferent that is humanity's usual lot. However, amidst that variance was systemic abuse and neglect. The Australian Senate describes 'wide scale unsafe, improper and unlawful care of children' (Senate Community Affairs References Committee 2004: xvi). Ireland's Ryan Report found that 'violence and beatings were endemic within the system' (Ryan 2009a: 20). Similarly, Canada's Truth and Reconciliation Commission (TRC) found 'institutionalized child neglect, excessive physical punishment, and physical, sexual, and emotional abuse' (The Truth and Reconciliation Commission of Canada 2012: 25). Those descriptions are characteristic of every major report on care experiences in the last two decades.[1] There are, of course, differences – absconding children froze to death in Canada, not Australia. Still, the overall similarities are strong. Around the world, underfunded and underregulated care systems injured young people thought inferior by virtue of their ethnicity, class, perceived morality, or receipt of charity (Ferguson 2007).

Reflecting on evidence from Australia, Canada, Ireland, and New Zealand, this chapter outlines some of the injuries that survivors experience(d). Not all redress programmes respond to the same injuries; I will later argue that programmes should have pathways distinguished by the type of injuries they redress. To help set up that argument, this chapter introduces distinctions between injurious acts and their consequences;

[1] These reports include the following: (Forde 1999; McAleese 2012; Royal Commission into Institutional Responses to Child Sexual Abuse 2017a; Ryan 2009a; Senate Community Affairs References Committee 2001, 2004; The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2020a, 2020b; Wilson and Dodson 1997; The Truth and Reconciliation Commission of Canada 2015b, 2015c).

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between interactional and structural injuries; and between individual and collective injuries.

2.2 Problems with History

Institutional out-of-home care was a nineteenth-century response to changes wrought by colonisation, urbanisation, industrialisation, and the expanding demands of capitalism. By the beginning of the twentieth century, the relevant states had assumed legal responsibility for all children in out-of-home care; however, they often delegated primary care responsibility to third parties. Although only public authorities could legally take a child into care, in practice, family, religious, and community figures put people into care without regard for the law. The survivor might, therefore, never be legally recognised as a ward of the state. And once placed in a care facility, residents were submerged in systems in which they had little voice and less agency.

Some young people resided in foster homes that mimicked a nuclear family. Other residences were associated with agricultural labour, often on private farms. Survivors might live in cottages or group homes in which one or more care staff supervised a small number of young people. Several cottages could constitute a larger complex. For example, in 1961 the Retta Dixon Home in Australia's Northern Territory had eight six-bedroom cottages, accommodating a maximum of eighty residents (Royal Commission into Institutional Responses to Child Sexual Abuse 2015c: 15). Although group homes, farm stays, and foster care were usually preferred, considerations of cost and public convenience meant that many care leavers resided in large institutions. These included residential, industrial, therapeutic, and farm schools, along with orphanages, borstals, reformatories, and psychiatric hospitals. Those institutions could house hundreds of residents and were often operated by charitable societies or religious orders. Bigger institutions often get more public attention – four of the inquiry reports cited in this chapter attend only to large institutions (Forde 1999; Quirke 2013; Ryan 2009a; The Truth and Reconciliation Commission of Canada 2015e).

Being in care meant occupying a marginal social and legal status, and the quality of the historical record reflects that low standing. Redress programmes need information about the survivors' care experience. Every programme confronts major challenges arising from the poor quality of information now available about people when they were in care. There is an ever-growing wealth of care histories, the most notable

include the reports published by large public inquiries (see footnote 1 in this chapter). These reports are authoritative sources of information, providing impetus for establishing redress programmes and evidence for their operations. However, all care history ultimately depends on two major information sources – historical records and present testimony. Both forms of evidence create such difficulties that even basic facts become contestable.

Written records are a major source of evidence in redress. But their poor quality, absence, and incompleteness serve as impediments (Fawcett 2009). Privacy laws impede access, and relevant records are often dispersed across different institutions and organisations, both public and private. If they still exist, those institutions have often changed their names, constitutions, and locations. It is hard to find records; even their present holders may not know what records they have or what they contain. To illustrate the difficulties, Ireland's Ryan Report states that 170,000 people were legally resident in the industrial schools and potentially eligible for redress from the Residential Institutions Redress Board (RIRB) (Ryan 2009b: 41). But the RIRB worked with a much lower figure: it counted 41,000 care leaver records (Private Communication from Theresa Fitzgibbon of the Residential Institutions Redress Unit, 31 August 2015). Later analysis would suggest that the real figure was lower still – around 37,000 (O'Sullivan 2015: 203). In 2019, the Ryan Commission revised its estimate to 'approximately 42,000 or somewhat higher' (Ryan 2019).

The number of care leavers is a basic fact. Uncertainty regarding that fact makes it difficult for a redress programme to estimate the number of survivors it needs to work with. Further uncertainties compound the problem, as policymakers will not know the prevalence of differing injuries; the survivors' post-care mortality rates; whether or not living survivors will learn of the redress programme; and, should the survivor be injured, alive, and know to apply, if they will actually lodge an application. The unsurprising result is that programmes often wildly misestimate expected application numbers.

For survivors, records access provides information about their early lives and family members. Records access is also necessary to identify and correct errors, and, for Indigenous peoples, control over their data is part of sovereignty (Golding et al. 2021: 1637; Kukutai and Taylor 2016). However, archival practices reflect what was thought useful at the time. That rarely included information about the survivors' daily life in care. The lack of information reflects both the low value placed upon survivors and the semi-private nature of care. When the primary carer was a private individual, records are usually very different in quality and kind

when compared to the more formal records of large institutions. Many records were (and are) private property and were destroyed when agencies culled their archives. Some records disappeared when institutions ceased to function. Destruction could also be accidental as flood, fire, and the accidents of time ravaged neglected archives. Canada's TRC devotes two chapters to the inordinate number of fires in residential schools that often destroyed files held on site (The Truth and Reconciliation Commission of Canada 2015c: chapter 38; 2015d: chapter 18). What remains is often meagre, reflecting historical understandings of care as shameful and best concealed. The private lives of young people in care often went unrecorded – no one took photos of them or documented their experiences (Battley 2019).

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Testimony is the second major source of evidence for care histories. Testimony offers information about the direct experience of care and provides historical accounts with authenticity. Providing otherwise unavailable information, the use of testimony in official reports gives survivors voice in the telling of their own stories. Having their words in print enables survivors to see their accounts publicly acknowledged as true. It also provides otherwise bulky bureaucratic reports with human interest as private memories, long thought shameful, are now eagerly sought by inquiries that honour those who produce the most appalling accounts. But testimony also presents the historian with problems, including bias. Sweeping claims about the nature of care are often supported by quotations that might not reflect general experience. The survivors who choose to testify before commissions of inquiry are a self-selected minority, whose experiences may be unrepresentative. For example, a 2014 hearing in Perth for the McClellan Commission heard testimony from eleven survivors, of whom ten had received the maximum payment of AUD$45,000 from Redress WA.[2] Yet Redress WA provided maximum payments to only 20 per cent of validated applications, and not all survivors got redress. The survivors who testified experienced the worst forms of abuse and had the resources needed to obtain commensurate settlements – a rare combination.

[2] The eleventh survivor, 'VV', did not specify their redress quantum; however, their evidence suggests that they also received AUD$45,000 (Royal Commission into Institutional Responses to Child Sexual Abuse 2014c).

Public inquiries respond to that methodological problem by drawing on testimony provided by survivors in private sessions and submissions. However, again they confront bias. Chapter 10 addresses the accuracy of testimony; here I attend to the structuring role played by its collection. Most inquiries enable individual survivors to relate their experiences of care and its consequences to a commissioner in a private session. These private sessions are relatively short. Most last less than two hours and survivors rarely have more than one session. Not only do time limits impose hard restrictions on what can be said, inquiries cue survivors with template narratives (Niezen 2016: 928). Survivors are told to expect and produce graphic testimony about terrible abuse. For example, New Zealand's Shaw Commission instructed survivors to

> Speak about your life before, during and after going into care, as well as the effects of abuse on your family, whānau and communities. (Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-Based Institutions 2020)

The support these inquiries provide – including facial tissues, emotional respite areas, and therapeutic workers – indicate that testimony will (and should) be traumatic. Those expectations shape testimony. Survivors who did not have a traumatic experience may choose not to speak. And when survivors speak, they may accentuate that which they think matches everyone's expectations. My point is not to cast doubt upon their testimony; instead my point is that the collection method(s) affects the available information. The inquiries that inform public understandings of care histories are not exceptions to that broadly recognised rule. And further procedural considerations bear reflection. Commissions of inquiry are limited by available information, as well as their resources, remits, and research methodologies (Scraton 2004). Their work is further shaped by the inquiry's pragmatic needs for information, services, and funding; its need to encourage stakeholder participation, including those who might be comprised by the inquiry; and its need to do (and not do) what will encourage governments to act on its recommendations. All those considerations affect the evidence available to redress policymakers.

2.3 Survivors' Injuries

Historical uncertainty shapes how redress programmes operate. Nevertheless, programmes need to decide what injuries will be eligible for redress and how to apportion monies to different types of injury.

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Most programmes distinguish between injurious acts and their post-care consequences. Injurious acts include abusive events, such as physical blows, sexual touching, or medical mistreatment, while consequential damage is harm that results from injuries suffered in care. The act/consequence distinction is commonplace, but a better understanding of redress requires two further distinctions: between the interactional and structural causes of injuries, and between individual and collective forms of injury. Those distinctions are analytic. Neither the act/consequence, the structural/interactional nor the individual/collective distinction sort all of the survivors' complex injurious experiences into unique categories. Instead, these distinctions help reveal the complexity of those experiences and inform later analysis.

Catherine Lu distinguishes between interactional and structural injuries according to their causes (Lu 2017: 33–34). Interactional injuries arise from wrongful interpersonal acts, while structural injuries derive from social practices and institutions. Often taking conventional forms, structural injuries are perpetrated as people implement processes, follow rules, and apply norms. To illustrate the interactional/structural distinction, a responsible adult who refuses to permit a child to get needed medical treatment commits an interactional injury. But that failing could have a structural aspect if it results from budget decisions that, when combined with social norms and staffing difficulties, create an environment where disease is rife and treatment difficult. Canada's TRC argues that poor diet and sanitation, overcrowding, and the lack of appropriate isolation facilities aggravated the tuberculosis that killed thousands of Indigenous children (The Truth and Reconciliation Commission of Canada 2015b: 378f). Those are structurally caused injuries, experienced by individuals.

Many injuries have both structural and interactional aspects. Diane Chard describes a physical assault by two staff members in New South Wales as follows:

> [They] beat me while I was in the isolation cell. They bashed me with their hands and feet. They kicked and punched me. They bounced me off every wall. Gordon bashed my ears with his fists. I was bleeding from the ears. I was knocked unconscious and I urinated on myself. (Royal Commission into Institutional Responses to Child Sexual Abuse 2014a: 4960)

It is easy to read this assault as an interactional injury. But its structural aspects are equally important. Chard's assailants were staff members operating within an institutional power dynamic. Structural power

disparities often shape abuse. Not only were there distinctions between staff and residents, there were also informal hierarchies between residents. For example, Queensland's Forde Inquiry was told that 'most of the older boys in Westbrook [Training Centre] had a smaller boy who would act as their "girlfriend" and have to submit sexually' (Forde 1999: 132). Those informal structures could interact with formal aspects of the institution when institutional staff condoned bullying or used bullies to help keep order.

Wherein cause distinguishes interactional and structural injuries, the difference between individual and collective injuries concerns the nature of the injured party. Many survivors experienced their first care-related injury when they were wrongfully removed from their family. That injury has both individual and collective aspects. Not all removals are injurious. Young people entered care for a variety of reasons. Some were orphans. Others had parents who could not, or would not, care for them, and some parents surrendered their children voluntarily. But other children were wrongfully taken into care. Canadian and Australian reports document the genocidal removal of Indigenous children – a clear example of a collective injury (The Truth and Reconciliation Commission of Canada 2015e; Wilson and Dodson 1997). But forced removals were not restricted to Indigenous populations; women housed in Ireland's Magdalene asylums were prohibited from keeping children with them. Prejudice against the needy, the working classes, and minority religions and ethnicities underpinned systemic wrongdoing (Swain and Hillel 2017). If the person, or their family, was poor, disabled, itinerant, homeless, unmarried (either 'fallen' or widowed), Indigenous, unemployed, alcoholic, or criminal, that could justify taking a young person into care. Those removals injured individual young people. They also collectively injured their families, communities and, in the case of Indigenous survivors, their peoples.

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Once in care, survivors could experience a range of differing injuries. Redress programmes often distinguish between physical, sexual, and psychological/emotional abuse. These injuries can have both individual and collective aspects, and interactional and structural causes. A single act can co-create different forms of abuse – to experience sexual or physical abuse usually entails an emotional assault. Despite the public attention paid to physical and sexual abuses, Joanna Penglase argues the

worst abuse was psychological (Penglase 2007: 142–43). *Lost Innocents* echoes her judgement, quoting a Victorian survivor saying, 'the main abuse was psychological'. Survivors were persistently told, '"You're no good." "You will never be any good." "You will amount to nothing", that sort of thing' (Senate Community Affairs References Committee 2001: 83). Survivors were degraded by staff who told them that they were worthless and inferior or offered racist insults. From a structural perspective, frequent abuse contributed to psychologically injurious environments. Young people need environments of security, affection, and love. However, many care leavers were forced to live with their abusers in environments where violence and humiliation were normal.

> The most fundamental need for the emotional development of a young child is to be shown love and affection, to be nurtured and wanted. The lack of these essential human qualities was pervasive in institutions and was commented upon or referred to in literally every submission and story. (Senate Community Affairs References Committee 2004: 92)

Survivors were subject to systemic attacks on their personal and cultural identities. A basic depersonalisation technique was renaming. Many institutions assigned numbers to residents (religious institutions might use saints' names) to sever survivors from their birth families and cultures. Survivors might be falsely told that their parents had died or that they had been abandoned. Siblings were split up and young people were assigned false birthdates and birth locations and given false information about their family (The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021: 30, 250). The ethnicity of many Indigenous children was hidden (The Truth and Reconciliation Commission of Canada 2015b: 143; Ministry of Social Development 2018c: 7). Indigenous residents were denied cultural knowledge and skills and those who attempted to speak Indigenous languages might be subject to punishment.

> [T]hey used to tell us not to talk that [Indigenous] language, that it's devil's language. And they'd wash our mouths with soap. We sorta had to sit down with Bible language all the time. So it sorta wiped out all our language that we knew. (Anonymous, quoted in Wilson and Dodson 1997: unpaginated)

Carers would also hide efforts by birth families to contact care recipients. I met one New Zealander who spent her childhood believing that she had been abandoned, but learnt as an adult that social services had consistently blocked her birth mother's efforts to contact her (England 2014:

23). Family contact might depend upon good behaviour (Stanley 2016: 74). In other cases, parents and family were denied access (Senate Community Affairs References Committee 2004: 17–18; Ryan 2009a: Volume 1, p. 38). Many survivors were trafficked internationally (Child Migrants Trust 2018). Canada received the largest number of British migrant children, with approximately 100,000 arriving between 1869 and 1932 (Library and Archives Canada 2018). Others went to Australia, New Zealand, and elsewhere. Survivors often moved between different residences. In New Zealand, some experienced 'as many as 40 or more' placements (Henwood 2015: 13). Change might be sudden and disruptive. Residential instability was itself injurious as young survivors had existing relationships abruptly severed or were denied opportunities to form long-term caring relationships (Turner et al. 2019).

Disciplinary systems inflicted physical abuse. Physical abuse included slaps, punches and kicks, assaults with weapons, and forcing residents into painful positions, such as kneeling, for long periods. Disciplinary assaults could be inflicted by staff and peers.

> [I]nstitutions or religious orders allowed, even encouraged, sadistic and excessive punishment. Systemic beatings designed to break down the will and subjugate ... draw parallels to stratagems used in concentration camps. (Senate Community Affairs References Committee 2001: 80)

Punishment-as-psychological abuse included long periods of isolation. 'They used to lock us up in a little room like a cell and keep us on bread and water for a week if you played up too much' (Wilson and Dodson 1997: chapter 10). Every major report includes descriptions of extreme shame-based discipline techniques, including enforced public nudity. For example, a child who urinated in their bed might be beaten while nude, forced to wear nappies, or made to wear the soiled bedding (Senate Community Affairs References Committee 2001: 84). 'With few exceptions, the arrangements for handling bed-wetting were described as inducing fear and terror on a constant basis' (Ryan 2009c: 59).

Structural underfunding contributed to malnutrition, poor quality accommodation, and inappropriate clothing. In Ireland's industrial schools, 'malnourishment was a serious problem' (Ryan 2009a: 23). In Australia, '[n]umerous accounts were given of children always feeling hungry' (Senate Community Affairs References Committee 2001: 85). In some cases, the food was plain or unappetising. In others, hunger caused survivors to steal food or provide services to those who would feed them. Poor clothing and housing was normal. Survivors frequently describe

having to wear ragged, ill-fitting clothing that stigmatised them (Senate Community Affairs References Committee 2004: 90). And '[t]he physical infrastructure of missions, government institutions and children's homes was often very poor' (Wilson and Dodson 1997: chapter 10). Dormitories were cold, draughty, and unsanitary. 'Many survivors recalled not having enough blankets at night' (Royal Commission into Institutional Responses to Child Sexual Abuse 2017b: 65). In 1923, the Canadian Indian agent G. S. Pragnell noted:

> The gist of the Indians [sic] complaint is that the boys, that is, the smaller boys are far too heavily worked at such work as logging for the school supply of fuel in the winter and that the boys are quite insufficiently dressed as to be exposed to the cold weather in such work. The fact that so many boys died there this Spring of pneumonia has, of course aggravated and lent colour to their complaints. (Quoted in, The Truth and Reconciliation Commission of Canada 2015b: 341)

Poor nutrition, bad clothing, and unhealthy accommodation contributed to high levels of illness and injury. Medical treatment could be rudimentary, with undiagnosed illness and injuries left to heal (Ryan 2009c: 98). Poor dental care led to persistent oral health problems (Senate Community Affairs References Committee 2004: 111). In some cases, residents were subject to medicalised assaults, with staff inflicting unnecessary genital inspections, electroshock therapy, and involuntary sedation (Royal Commission into Institutional Responses to Child Sexual Abuse 2017b: 73; The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2020b: 73). Some survivors were subject to medical experimentation, including vaccine and hormone trials.

Structural underfunding encouraged the use of residents for labour, either within the institution or by hiring them out. Contemporaries believed that labour enabled young people to learn usable skills, defray the costs of their upkeep, and contribute to the community. Labour was often disguised as practical education (The Truth and Reconciliation Commission of Canada 2015c: 132ff). Male residents would be taught construction, agriculture, and light industry by working as builders, farmers, and fabricators. Females would launder, tailor, do beadwork, or care for younger residents. Young labourers experienced high rates of work-related injuries (Senate Community Affairs References Committee 2001: 88). Many survivors describe their experiences as slavery. In the words of one Australian, '"Foster care" meant being "farmed" out as [a]

temporary worker. I was sent to those who needed a slave & a slave I was' (Senate Community Affairs References Committee 2004: 121).

The failure of care systems to identify and investigate injurious practices was an underlying structural injury. To prevent exposure, carers might control residents' contact with outsiders. External inspections might be 'carefully stage-managed' (Senate Community Affairs References Committee 2004: 178) with institutions notified in advance so that they could manage the intrusion (Ryan 2009a). External visits might occasion better food and clothing, accompanied by warnings against 'informing'. When social workers visited the Parramatta Training School for Girls in New South Wales, the 'superintendent told girls to keep their mouths shut and say that everything was fine' or risk the consequences (Royal Commission into Institutional Responses to Child Sexual Abuse 2014b: 5). Institutions developed customs and habits that normalised abuse (Parkinson and Cashmore 2017: 89). While each jurisdiction received numerous reports describing the abuse and neglect of survivors, these rarely resulted in effective responses. For example, a 1956 investigation into charges of sexual abuse against the principal of Saskatchewan's Gordon's School was neither independent nor impartial; it was carried out by a subordinate teacher, who exonerated his superior (The Truth and Reconciliation Commission of Canada 2015a: 104). Medical staff might be similarly inclined. In Ireland, '[t]he area of neglect in healthcare most frequently reported by witnesses was the absence of investigation into the cause of non-accidental injury' (Ryan 2009c: 98). A lack of effective systems for identifying and investigating abusive behaviour permitted abusers to operate with impunity (Ministry of Social Development 2018c: 7).

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The consequences of care are as variable as the individuals who experienced it. Many care leavers live full and successful lives. For others, damage resulting from their care experiences includes illness and unemployment along with broken family and community relationships (Golding and Rupan 2011: 8–9, 25). Not only does consequential damage offer potential grounds for a redress claim, it affects how survivors interact with redress programmes and, as a result, how those programmes operate (Lundy and Mahoney 2018: 273). This final section surveys some of the more common injurious consequences experienced by care leavers as both individuals and groups.

Difficulties with personal relationships are among the most widespread injurious consequences of abuse in care. Denied secure loving relationships as children, many care leavers did not develop the ability to build mature relationships as adults (Cloitre, Cohen, and Koenen 2006: 6–8; Reimer et al. 2010: 1–2; Stanley 2016: 155). A recent study found that up to 90 per cent of maltreated children have 'insecure attachment patterns' (Van der Kolk 2017: 376). Problems with anger management, mistrust, and social skills hamper relationships with spouses and children. Many survivors are socially isolated, which can be psychologically injurious and a risk factor for other negative outcomes. Survivors who were depersonalised or trafficked lost contact with some or all members of their family. Some survivors became abusers, including abusers of other survivors, meaning that redress programmes cannot sharply distinguish survivors from offenders (The Truth and Reconciliation Commission of Canada 2015c: 414). Abuse can have criminogenic consequences. Criminal employment does not depend upon educational qualifications and strong prosocial skills, which is one reason gang membership is an attractive survival option for survivors who were ill-prepared for life after care (Henwood 2015: 25). Both within institutional care and then once released, criminal gangs provided survivors with identities and social groups (Stanley 2016: 140–43; The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2020b: 92). For many, lifetimes of alienation and rejection contribute to feelings of distrust towards any authority.

The injurious consequences of miseducation include high rates of illiteracy and innumeracy that operate alongside psychological difficulties to impair the survivors' remunerative prospects (Fernandez 2016: 232). As the Australian survivor Roger Matthew (a pseudonym) relates,

> I left there barely literate; I could read but not really comprehend the meaning. So I could not express myself in writing and anything that looked official filled me with such anxiety that I would avoid dealing with it. I feel enormously resentful today – they stole my future along with my childhood. What kind of work could I do after that educational deprivation? (Royal Commission into Institutional Responses to Child Sexual Abuse 2017b: 146)

Many survivors experience difficulties in holding down jobs or maintaining long-term employment. A survey of Queensland survivors found that 18 per cent 'regarded themselves as poor or very poor', which was six times the rate for other Queenslanders (Watson 2011: 3). Another 46 per

cent said they were 'just getting along', the comparative number in the general population was 26 per cent.

Compounding social and economic marginalisation, abusive care experiences are associated with collectively higher morbidity (Anda et al. 2006; Brennan 2008; Chartier, Walker, and Naimark 2010; Evaluation, Performance Measurement, and Review Branch: Audit and Evaluation Sector 2009; Felitti 2002; Ferguson 2007; Fuller-Thomson and Brennenstuhl 2009; Higgins 2010; Llewellyn 2002; McEwen and Gregerson 2019). Poor medical and dental care can cause or aggravate physical health problems later in life. Survivors are more likely to have long-term difficulties with addiction and substance abuse and more likely, than non-care leavers, to attempt suicide (The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2020b: 24). More generally, the socio-economic disadvantages experienced by many survivors contribute to mental and physical illness while simultaneously inhibiting effective treatment.

From a structural perspective, survivors' experiences of harmful consequences intersect with existing social injustices. For example, a lack of mental health services combines with discriminatory social norms regarding mental illness to compound the difficulties survivors have with psychological disorders. And care leavers often experience clusters of disadvantages, as health and personal issues combine with educational deficiencies and poverty to reinforce marginalisation (Watson 2011). Damage can be intergenerational if survivors did not learn how to be good parents. Often the children of survivors follow similar paths and families can comprise three or four generations of survivors (Evaluation, Performance Measurement, and Review Branch: Audit and Evaluation Sector, 2009: 45; Ministry of Social Development 2018c: 8). Some studies suggest that high stress experiences in systemically injurious care environments can alter the expression of genes that govern hormonal stress responses in ways that affect parenting behaviour (Van Wert et al. 2019). The research on epigenetics is contested (Carey 2018), but it is clear that the negative effects of care 'can be lifelong and profound' (Independent Inquiry into Child Sexual Abuse 2018: 73). Survivors experience pervasively injurious effects that provide grounds for compensation, while at the same time making it hard for many to engage with redress programmes.

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The major inquiry reports in the exemplar jurisdictions all tell remarkably similar care histories. Despite chronic historical uncertainty, they underline general patterns of structurally injurious care practices. These practices were a consequence of poor regulation and underfunding which, in turn, meant that survivors experience(d) systemic injurious acts and consequences with interactional and structural causes, and individual and collective effects. Although survivors are individually diverse, as populations they are severely marginalised. These disadvantages, as later chapters emphasise, shape how monetary redress programmes operate. They also provide a foundation for a common set of normative standards applicable to any redress programme. Those standards are the next chapter's subject.

3

What Makes Redress Better?

3.1 Introduction

Redress programmes exist because courts are inhospitable to survivors' non-recent claims. But if redress is to be better than litigation, it must be made so. Judging what makes better redress programmes requires evaluative criteria. The basic structure of redress involves, at minimum, four components: two agents (an offender and a survivor), and two forms of justice (substantive and procedural). Practically relevant evaluative criteria must engage all four. These criteria must reflect participants' interests and values, be realistic about their capabilities, and sensitive to the constraints they face.

It is easy to find works on what survivors want or need from redress (e.g. Lundy 2016; National Centre for Truth and Reconciliation 2020). As Chapter 2 describes, survivor populations are diverse, yet characterised by lower-than-average numeracy and literacy rates; high rates of morbidity and disability, including mental health; and high rates of poverty and homelessness. These disadvantages work together to impede access to both litigation and redress programmes. To help policymakers create accessible programmes, this chapter engages with the United Nations' survivor-focussed Van Boven/Bassiouni Basic Principles (the VBB Principles) to outline what a fair, impartial, and effective redress programme entails (General Assembly of the United Nations 2006).

Although essential, a survivor-focussed approach is not enough. The interests of all participants are relevant. Few works on redress attend to the offending states' distinctive interests or the constraints they confront. Unlike survivors, states are neither individuals nor groups: they are not even human. States are pluralistic institutional agents whose actions are carried out by officials. The state's distinctive nature affects applicable evaluative criteria. For example, redress programmes position the state as both offender and sovereign; discharging remedial obligations while, at the same time, exercising the state's ultimate responsibility for deciding

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what justice will be done – this is one way the agents who transact redress are not equals. More prosaically, unlike human offenders, redress programmes manage hundreds, if not thousands, of claims. Feasible criteria need to recognise that, for states, delivering redress is part of business as usual.

Conflicting interests further complicate the process of identifying acceptable evaluative criteria. For example, the survivors' interest in getting redress quickly confronts the state's need to take time to assess their claim. Participants' interests can also conflict with third parties – such as the natural justice claims of alleged perpetrators. Moreover, participants can confront internal conflicts – some procedures, such as evidentiary interviews, can be good for survivors in some ways and bad for them in others. The resulting problems are deep-seated. Good criteria can be endorsed by all stakeholders, they must be reciprocally justifiable. But human diversity means that people have different interests in how redress will operate. That deep-seated potential for disagreement provides a cornerstone for the argument that better programmes enable survivors to choose how they will pursue redress.

3.2 Survivors' Interests

Litigation is the default option for most survivors seeking justice, but the challenges it poses are so unpleasant that most survivors never file in court. A detailed discussion is not necessary for my purposes, a nine point outline will suffice.[1] First, protracted litigation for non-recent cases can take many years. Second, the costs of legal and other professionals make litigation too expensive for most survivors. Third, litigation risks harming survivors, both psychologically and with respect to their privacy, without supporting them to cope with either harm. Fourth, many survivors have claims for wrongdoings that were not tortious when they were performed, which no court can remedy. Fifth, litigation requires the plaintiff to demonstrate that the offender's wrongful acts are the proximate cause of their injuries, yet survivors suffer structural injuries and consequential damages with diffuse causal origins. Sixth, the evidence for non-recent injuries is often weak, with few documents and witnesses. Seventh, survivors seeking evidence held by states or third parties are

[1] For more comprehensive discussions: (Law Commission of Canada 2000; Royal Commission into Institutional Responses to Child Sexual Abuse 2015b; The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021).

hindered by the adversarial process of litigation. Eighth, limitation defences in statute, common law, and equity bar most non-recent claims. Ninth and last, offending institutions may no longer exist or are structured in ways that hide assets and evade liability.

These hurdles represent significant barriers for all but the most exceptional survivors. And the few survivors who succeed at litigation are not clear exemplars to follow. For example, Bruce Trevorrow was wrongfully taken into care by South Australia in 1957. In 2007, Trevorrow won the first case for wrongful removal (and sundry other claims) by a member of the Stolen Generations (*Trevorrow* v. *South Australia* 2007). Trevorrow's case was exceptionally strong, including documentary evidence that he was taken into care unlawfully. Most survivors will not have such evidence. Moreover, the litigation process inflicted 'enormous psychological and emotional trauma' on Trevorrow ('Official Committee Hansard' 2008: L&CA 16). Trevorrow died in 2008, two years before the Supreme Court of South Australia dismissed the state's final appeal.

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The VBB Principles respond to these difficulties by setting out the survivors' high priority justice interests and recommending how states should act to avoid or mitigate common problems. The VBB Principles derive from a decades-long global consultation process, are endorsed by the UN General Assembly, and are used by courts and advocates (Akashah and Marks 2006). In short, the VBB Principles are the best and most authoritative guide available. However, the Principles were not written for survivors of injurious care: spurred by the development of transitional justice, they address 'gross violations of international human rights law and serious violations of international humanitarian law' (General Assembly of the United Nations 2006: Section 3 (III)).[2] No redress programme for survivors of injurious care is confined to gross violations of human rights law. Moreover, the Principles are a somewhat disorganised collection of injunctions, guidelines, principles, definitions, and considerations: they require some interpretation. I divide the VBB Principles into procedural and substantive considerations. With regard to procedure, the Principles require 'fair and impartial access' to justice,

[2] Subsequent unattributed quotes in this chapter are taken from General Assembly of the United Nations (2006).

while their substantive remedies include 'full compensation'. The remainder of this section develops these criteria.

I address impartiality first. Impartiality requires insulating redress procedures from arbitrary considerations. Whereas courts institutionalise their independence from other organs of government, state-run redress programmes are always at risk of being partial when the offending state acts as an investigator, adjudicator, and defendant. Independence is key to securing impartiality and encouraging survivors to participate (Stanley 2015: 1155). Illustrating best practice, Ireland's RIRB lodged responsibility for the redress programme with an independent tribunal that was led by adjudicators with secure appointments and budgets. Moreover, it adjudicated claims using publicly available regulations and produced written judgements that were subject to review. It was, in effect, an independent quasi-judicial body.

Because fairness entails the like treatment of like claims, the VBB Principles prohibit 'discrimination of any kind or on any ground, without exception'. Non-discrimination bars arbitrary distinctions between eligible and ineligible claims. Similarly, non-discrimination favours procedural consistency: other things being equal, similar claims and claimants should not be treated differently. Redress programmes may prove less discriminatory than litigation, the outcomes of which depend upon luck in evidentiary quality and the claimant's resources. Moreover, transparent operations are needed for redress programmes to be seen as non-discriminatory.

Fairness includes the survivors' interest in having 'relevant information concerning violations and reparation mechanisms.' A fair measure of transparency requires survivors to know how to obtain redress, including how programmes will assess claims. That transparency enables survivors to know if a programme makes an error and seek a remedy through a review procedure. Moreover, fairness may require redress programmes to use more relaxed evidentiary standards and non-justiciable forms of evidence, such as hearsay and 'similar fact' evidence.[3] Fairness also requires redress procedures that are not biased on gender, cultural, or other grounds. The demands of fairness are comprehensive,

[3] Similar fact evidence uses information derived from injurious patterns, where similar injuries happened to different individuals. For example, if two or more survivors claim that they suffered similar abuse by the same perpetrator, that similarity might strengthen the claims of each (Ho 2006).

including how programmes are staffed and advertised, how evidence is collected and assessed, and how payments are made.

Fairness considerations also include how survivors are supported. A proceeding against the state places survivors in a profoundly unequal contest. The temporal, financial, and human resources of the immortal state are nearly unlimited. States use these advantages to exhaust survivors through protracted litigation – recall that his ten-year-long case had not finished before Bruce Trevorrow died. The VBB Principles stipulate that redress should be 'prompt' and unimpeded by unnecessary delays. Expertise and knowledge are other inequitably (unfairly) distributed resources. States have legal, archival, and other professional staff who enjoy the subtle advantages of repeat players (Reuben 1999: 1065). Whereas survivors usually participate in only one case (their own), the state employs experts who conduct hundreds of cases, enabling its officials to develop personal relationships, cultivate reputations for credibility, and learn from experience. The state's further advantages include control over, and access to, archived evidence. In response, the VBB Principles require 'proper assistance' for survivors, including expert archival, medical, and legal support. Access to counsel is particularly important in redress programmes that require survivors to present complex evidence or make important decisions quickly. The VBB Principles' demand for 'effective access' to justice vindicates simple low-cost programmes that require all stakeholders to volunteer pertinent information, such as relevant documents, records, or prior findings of criminal activity.

A fair proceeding protects the well-being of survivors. The VBB Principles stipulate that 'appropriate measures should be taken to ensure [the survivors'] safety, physical and psychological well-being and privacy. . .'. Under cross-examination, survivors risk serious psychological damage, including retraumatisation. Redress programmes must minimise these risks and support survivors who are harmed in the process; the Principles suggest that survivors should not bear the costs of the support they need. Turning to privacy, specific forms of abuse may be humiliating and many survivors understand their experience of out-of-home-care as shameful (Emond 2014; Sheedy 2005). Survivors should be treated with sympathy and respect throughout the process and their private data protected.

My survey of the survivors' interests in procedural criteria concludes with a value that the VBB Principles do not explicitly address: the survivors' interest in participation. Litigation disempowers survivors,

who have little control over, or involvement in, much of the judicial process. By contrast, redress programmes respect survivors as agents when they create opportunities for survivors to participate (Waterhouse 2009: 270; Lundy 2016: 31; Murray 2015: 178–79). Survivors should participate in several domains. In the first instance, survivors can co-design redress programmes, thus shaping policy at the formative stage. Second, they can be involved in delivering redress, as providers, consultants, in support services, and in the process of pursuing their own claims. Finally, survivors can be involved in redress outcomes, including their own payment negotiations or in helping others post-settlement. A flexible redress programme enables survivors to choose how they participate in redress. Because participation is not cost-free, effective survivor participation requires support. On this point, the VBB Principles suggest that redress programmes could engage with both individuals and collectives, allowing groups to present claims and receive redress.

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Turning from procedure to substance, Chapter 1 emphasises how offending states are using an array of remedial measures. The VBB Principles include a holistic range of measures for rehabilitation, restitution, satisfaction, and compensation.[4] To expand, the VBB Principles suggest that reparation can include rehabilitative claims for the treatment of medical or psychological damage incurred as a result of injury. In international law, restitution usually concerns restoring properties and liberties wrongfully taken or denied. However, the VBB Principles specify that restitution also includes the recovery of personal identity, family life, and, I would add, culture. As the previous chapter indicates, it was common for individuals in care to be assigned new identities and denied contact with, or information about, their birth families. In the most egregious cases, care systems perpetrated cultural genocide against Indigenous peoples. Therefore, better redress programmes will facilitate measures of identity recovery along with family and cultural reconnection. Satisfaction measures include researching and publishing accurate accounts of the injury, punishing offenders, and getting apologies.

[4] The Principles also include a fifth category, measures to prevent reoccurrence. Although survivors often say that a desire to prevent reoccurrence motivates them to talk to inquiries or submit redress claims (Independent Inquiry into Child Sexual Abuse 2019: 3), preventing reoccurrence is not a remedy for survivors who are no longer in care.

Survivors accord significant value to the acknowledgement that occurs when states take responsibility for offending (Lundy and Mahoney 2018: 271; Claes and Clifton 1998: 66,74). Although punishment is peripheral to the operation of monetary redress, the acknowledgement gained through report-writing, truth-telling, and apology is clearly salient.

The Principles' holistic approach positions monetary payments within a broader range of potential redress forms. That holism is important and I strongly endorse it. But its study could not be contained within this volume. My narrower focus reflects monetary redress's distinct values. The VBB Principles define compensation as a response to any 'economically assessable damage, as appropriate and proportional to the gravity of the violation'. That phrasing reflects the survivors' claim to financial compensation wherever possible and for the fullest possible extent – a criterial interest in full compensation. As the leading international judgment holds,

> reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained . . . or payment in place of it – such are the principles which should serve to determine the amount of compensation. . . (*The Factory At Chorzów (Claim for Indemnity) (The Merits)* 1928)

That counterfactual demand is easy to articulate, but hard to satisfy. There may be no way to recover lost childhoods or repair psychological and social damage. Nevertheless, Chapter 13 explores how full compensation offers a regulative ideal[5] governing the quantity of compensation.

The substantive content of the survivor's monetary claim depends on the nature of original wrongdoing and the harmful effects of that wrongdoing (consequential damage). The Principles embrace structural and interactional, and individual and collective, injuries. The ambit of compensable damage includes physical and mental harms, including the loss of opportunities, unemployment, and miseducation; loss of earnings and earning potential; and moral damage, which may include damage to family and cultural relationships and to the survivor's reputation or character. To that end, monetary redress can include the costs of other

[5] A regulative ideal is a principle or value that serves to shape action without presuming that the principle or value can be wholly realised. See (Emmet 1994).

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remedies, such as treatment for rehabilitation and restitution of family connections. Moreover, considered from a holistic perspective, monetary redress is a means of satisfaction because payment acknowledges the survivor's experience and validates the truth of their evidence.

To conclude this section, the VBB Principles articulate survivor-respecting programme criteria. Redress programmes should provide fair and impartial access to justice through non-arbitrary and non-discriminatory programmes delivered by an independent body. Fairness requires procedural rules that are public, prospective, and stable. Moreover, survivors need adequate assistance both to mitigate the disadvantages they face in making redress claims and support their well-being. Relevant well-being considerations include physical, psychological, and cultural aspects alongside privacy concerns. Survivors must have opportunities to participate in the development, delivery, and outcomes of redress. Regarding substance, survivors can have rehabilitative claims to remedy physical and psychological damage; restitutive claims for properties and liberties they have been denied, including information about family members; satisfaction claims for apologies and other forms of acknowledgement; and, finally and most centrally, compensation claims. The substance of compensation includes the interactional, individual, collective, and structural injuries discussed in the previous chapter, embracing any injurious acts and consequences that can be financially valued.

3.3 State Interests

The VBB Principles adopt 'a victim [survivor]-oriented perspective' (Zwanenburg 2007). Attending to survivor populations' distinctive characteristics is essential to developing and delivering accessible programmes. However, their survivor-orientation means that the Principles do not address the interests and capabilities of states. That is a manifest shortcoming. Evaluative criteria must address considerations relevant to both parties if they are not to engender unjust and unrealistic expectations.

Chapter 1 notes that, unlike survivors, states are not human. There, I observe that states do not feel remorse or guilt like people do. It is also true that the state's redress obligations impinge upon third parties in distinctive ways. Whereas wrongdoing can create stringent remedial obligations among individuals – obligations that take priority over most other demands – things are otherwise for states. States use taxation to

raise most of their revenue, meaning that the citizenry pays for the state's offences. And the citizenry's remedial obligation is not the same as the state's (Pasternak 2021). Citizens have a responsibility to contribute to developing and maintaining just institutions (Rawls 1999: 242ff). Because the remedial obligations the state has towards injured care leavers are part of that responsibility, the citizenry has reason to contribute resources towards redress. But that reason is quite different from those that govern interpersonal remedial frameworks. The citizens who provide the resources for redress are not usually guilty of any wrongdoing and, moreover, have countervailing claims upon the public revenue.

The basic policy goal of redress is to resolve the survivors' meritorious claims – success in that task defines an effective programme. Every state is marked by significant and persistent deficiencies of justice, which means that remedial obligations towards care leavers compete with other compelling policy demands. States must also provide a range of public goods, including transport, medical care, education, and defence. The observation that redress competes with other demands on the public purse means that survivors cannot reasonably ask that their claims receive absolute priority: *fiat iustitia, et pereat mundus*[6] is not a principle for good policymaking. But, obviously, survivors' claims are not without weight.

Because redress is a form of public policy, the basic tools of public policy analysis provide some criterial guidance. A foundational axiom of public policy analysis is that the optimal relation between a policy goal and policy tool is one-to-one (Knudson 2009: 308).[7] To have more than one policy tool for a policy goal invites inefficiency – efficiency is a key procedural interest of states. States maintain the ordinary courts as the primary policy tool for resolving remedial obligations. Therefore, one way to satisfy their criterial interests is to ensure that redress programmes are comparatively better than litigation would be. That means redress should not be worse than litigation with regard to the state's procedural values. Programmes need to respect rights, follow the law, nurture public support, and the benefits to the citizenry should outweigh the costs. Substantively, redress should be more effective in resolving the survivors' meritorious claims.

[6] Translation: Let justice be done, though the world perish.
[7] The ideal ratio is sometimes called the 'Tinbergen Rule' after the economist Jan Tinbergen.

To expand, effective redress policy should cohere with the state's other goals and practices. Redress programmes need to, for example, meet the demands of lawfulness, because an unlawful programme would risk survivors reverting to litigation. Litigation assures legality – claims are resolved in conformity with the law. But lawfulness has further procedural implications for third parties. Employment law offers an illustrative challenge. Redress programme staff are not (usually) offenders – they are third parties. They must be treated appropriately with respect to their legal entitlements and with regard to their physical and psychological well-being, including mitigating the risks of vicarious harm (discussed in Chapter 10) that arise when working with survivors' claims.

States have an interest in efficiency, meaning that redress programmes need the capacity to process claims economically. That entails an operative framework that is adequately resourced and rationally organised with well-run technical infrastructures. Since the procedural costs of claims tend to increase along with the time that officials devote to them, redress should be no slower than litigation and preferably much faster. Because increasing information quantity correlates with decreasing adjudication speed (and higher procedural costs), states have an interest in ensuring that a programme can access useable data efficiently. The need for efficiency underpins states' interest in the form and character of redress processes, including supporting applicants to provide information in easily managed forms. As Part II will demonstrate, redress programmes regularly confront difficulties with staffing, information, and regulation. Good programme design will not only minimise impediments, but will build in reflexive capacities to help identify and mitigate problems as they arise. Programmes need to be able to develop their capabilities as they mature.

Redress programmes should aim for internal consistency, but the interests of survivors, states, and other stakeholders are in perpetual tension. For example, no programme can deliver full compensation at a low cost without encouraging (inefficient) fraud. But there are measures programmes can take to promote consistency. I previously noted the survivor's interest in procedural transparency. States have an analogous interest in publicity. Because they are accountable for their expenditures – legally to their auditors and politically to their citizenry – states have an interest in being protected against fraudulent claims (Bay 2013: 2). Moreover, citizens should be confident that survivors are not abusing an opaque process, otherwise, 'if [citizens] don't understand the dynamics of it, it just looks like people are making up stories and they want

money and it is going to cost the taxpayer a fortune' (AU Interview 6). Publicity enables everyone to know what rules apply and whether participants are conforming to those rules. Litigation satisfies that demand with open courts that operate according to known rules and procedures using evidence available to, and contestable by, all parties. By testing claims to exclude non-meritorious applications, redress programmes can provide comparable forms of publicity. To do this, a redress programme needs to obtain relevant and reliable information, including potentially adverse evidence from offender-participants. It also needs to publish informative reports and statistical data.

Finally, a programme's goals and components should work together efficiently. This internal efficiency is a form of what policy scholars call congruence. Given that states have a policy tool for managing the claims of care leavers, redress will need to cost less than litigation. Litigation is a notoriously inefficient consumer of money and human capital that states might put to more productive uses. Redress programmes can be much cheaper to administer on a per capita basis. To illustrate, per capita administration costs for redress programmes in Queensland, Tasmania, and Redress WA ranged between AUD$1200 and AUD$3000 (Pearson and Portelli 2015: 55). These sums would not suffice to pay even one lawyer to attend a single day in court.[8] The potential procedural savings are significant. However, there are difficulties in ascertaining the right comparative baseline. Should it be what a state would spend on litigation in the absence of a redress programme? Or should it be what the state would spend if every redress applicant chose to litigate? The latter scenario would likely involve many more cases than would otherwise appear, as the abovementioned problems with litigation deter most survivors. And the cost of litigation depends in part on the state's litigation strategy. A state that adopts an aggressive approach that prolongs litigation will increase the associated procedural cost for a few cases, but may thereby deter others. By contrast, some states adopt model litigant strategies that eschew indecorous pettifogging but risk encouraging more claims.

Such contingencies make the answer to the question 'What would it cost to litigate?' indeterminate. But that does not make the counterfactual useless. Recall the fundamental assumption of reciprocity: good criteria are justifiable to all stakeholders. If being a model litigant is a common

[8] Australian lawyers charge between AUD$5000 and AUD$10,000 per day (Wells 2018).

law obligation for states (Chami 2010), states should not be able to rely on their failing to meet that obligation when setting redress budgets. Survivors could reasonably reject a parameter derived from hostile and unlawful procedures. Therefore, the expected cost of litigation to a state acting as a model litigant is a fairer parameter for an overall budget.

Returning to the policy goal, states aim to provide a procedure for resolving the survivors' meritorious claims. A claim is resolved when it no longer presents the state with a remedial reason to act. Therefore, the adjudication of redress should normally be final and not regularly displaced, or succeeded, by another process. Litigation serves this value by being a closed system, in which claims are adjudicated according to legal rules and issued by legal authorities. There is no appeal on points of law beyond the legal system.[9] However, most survivors never file claims, making litigation ineffective. To be effective, redress programmes need to attract (more) survivor-applicants and resolve their claims. A criterion then, for states, is that redress should attract and resolve more claims than litigation.

A further source of comparative effectiveness is the potential for redress programmes to address meritorious claims that litigation is incapable of resolving. An old legal saw holds that the state never loses in court. The truth of that nostrum approaches inevitability in the realm of non-recent claims. As one official said to me, the problem with litigating these claims is not that the state might lose, the problem was 'quite the reverse' – the state was nearly guaranteed to win (AU Interview 3). Moreover, some meritorious claims fall beyond the ambit of tort law, such as when injurious acts were legal at the time of commission. Afforded greater flexibility, redress programmes can target salient claims (and claimants) more effectively.

Previously, I discussed how states should expect redress to be more procedurally efficient than litigation. A similar point applies to the total cost of redress payments: states have an interest in resolving claims cost-effectively. In terms of monetary costs, litigation can be very expensive. To illustrate, the above-mentioned landmark non-recent abuse case, *Trevorrow*, resulted in a total award for the plaintiff of AUD$525,000. By comparison, the maximum payment available in Australia's NRS is AUD$150,000. Anticipating tens of thousands of deserving claimants in Australia, the McClellan Commission states that 'calculating monetary

[9] Of course, this is not technically true. But the number of litigation cases settled by non-legal officials is tiny in the relevant jurisdictions.

payments in the same way as common law damages would be … unaffordable' (Royal Commission into Institutional Responses to Child Sexual Abuse 2015b: 248).[10] South Australia's *Trevorrow* court rightly ignored the opportunity costs its award imposed upon the public purse, but no responsible policymaker could design a redress programme without addressing that point. The business case policymakers develop must include budget projections. Because money consumed by redress is not available for other public purposes, it is reasonable for states to require some budgetary certainty. That assurance might emerge using different techniques, as later chapters explain.

To summarise, a good redress programme should resolve more meritorious claims than litigation. To take a further step, redress programmes are better when they resolve more deserving claims. But that interest in resolution is balanced by a concern with costs: states have an interest in expending no more (ideally less) on redress (per claim) than they would on litigation, while good redress programmes resolve no fewer (ideally many more) meritorious claims than litigation. An effective redress programme might optimise those two criteria; if payment values decrease as the number of (expected) resolved claims increases, programmes become more cost-effective, increasing the ratio of the achieved policy target as compared to input costs.

To conclude this section, the criteria for evaluating a redress programme must recognise the distinctive character of state agency. States bear remedial obligations; however, these obligations are 'on all fours' with other policy goals – redress is a form of public policy. States have an interest in policy tools that are effective and efficient. Redress programmes should be superior to litigation. Programmes should operate lawfully; moreover, as states are accountable, both legally and politically, they have an interest in excluding ineligible claims. Substantively, redress should be cost-effective and offer a measure of budgetary certainty.

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In general, both states and survivors can expect a redress programme to improve on the prospect of litigation. To review some key procedural points relevant for survivors, the process must be impartial and fair. Impartiality requires redress delivered by an independent body using non-discriminatory procedures. Fairness requires stable rules and

[10] Chapter 13 returns to criticise the Commission's affordability argument.

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processes. Transparency enables survivors to find out when errors occur. Moreover, survivors may need support to mitigate the disadvantages they experience pursuing their claims. Relevant well-being concerns include privacy matters, alongside physical, psychological, and cultural considerations. Finally, survivors need robust opportunities to participate in programme development, delivery, and outcomes. Like survivors, states can expect the programme to verify claims lawfully and efficiently. Moreover, turning to substance, survivors have a right to full compensation while a state can expect a redress programme to be effective, optimising the number of meritorious claims resolved and the costs associated with those settlements. Later chapters develop these criteria using information about existing programmes, before coming to the recommendations of Part III. But a note of caution. As previously noted, the criteria are riven with internal tensions. Later discussions will expose and develop some of these conflicts. The resulting need for trade-offs underscores the benefits of flexible programme design, a flexibility that enables survivors to choose how they pursue redress.

PART II

4

Irish Redress

4.1 Introduction

This chapter describes three very different Irish redress programmes. The Industrial Schools programme operated by the Residential Institutions Redress Board (RIRB) emphasised interactional injuries, had many applicants, a large budget, and high public profile. The RIRB was followed by Caranua, an ancillary programme that redressed the consequences of injurious care. The third programme responded to survivors of Ireland's Magdalene laundries by addressing structural injuries. Its designers were told, in short, to avoid creating anything like the RIRB.

4.2 The Industrial Schools Programme

In 1999, the television series *States of Fear*[1] exposed systemic abuse in Ireland's residential industrial schools. Responding to the resulting public uproar, Taoiseach Bertie Ahern made a public apology on 11 May 1999 in which he announced his intention to set up the Commission to Inquire into Child Abuse (the Laffoy/Ryan Commission). The commission consisted of two bodies, the Confidential and Investigation Committees. The Confidential Committee heard testimony from survivors in private and without judgement, while the Investigation Committee held inquisitorial public hearings. Almost immediately, solicitors representing large numbers of survivors refused to participate in the Investigation Committee until they were guaranteed a monetary redress programme (Laffoy 2001: 13).

Acceding to that demand, the Irish government appointed the three-person Compensation Advisory Committee to design a redress programme. No survivor served on the committee. Its 2002 report (The Compensation Advisory Committee 2002) was adopted into statute

[1] The three-part documentary *States of Fear* (1999) is discussed in Smith (2001).

('Residential Institutions Redress Act' 2002). That Act established the Residential Institutions Redress Board (RIRB) to operate the programme, securing its independence. While the Advisory Committee proceeded, the government negotiated an agreement with the religious orders that operated most industrial schools. The orders paid €128 million in cash and property to the state in exchange for indemnities against survivors who obtained redress. That figure was expected to fund approximately half of the programme's cost (Committee of Public Accounts 2005: unpaginated). That estimate proved grossly erroneous and politically calamitous.

The RIRB received survivor applications, arranged support for applicants, and adjudicated settlements. Chaired by Justice Esmond Smyth, the RIRB's twelve board members came from different backgrounds, including law, academia, and social work. Board members were not public servants and membership varied over time. In addition, the RIRB had, at full complement, two full-time and four part-time lawyers and approximately thirty seconded civil servants as administrators. There was no effort to include survivors.

The RIRB's outreach strategy focussed on broadcast media. Irish news regularly reported on the redress programme and, in addition, the RIRB advertised on television (with an emphasis on sporting events), local radio and newspapers, and tabloid publications (IR Interview 3). The RIRB held early meetings with survivor groups, including émigrés in the United Kingdom. The RIRB developed a well-run website on which the RIRB irregularly published newsletters alongside its annual reports (Residential Institutions Redress Board Undated). To help participants, the RIRB published both short and long guides to the application process. The long guide provided a consistent and authoritative reference, while the shorter version was a more accessible web resource (Residential Institutions Redress Board 2005b, 2003).

The RIRB originally expected 6,500–7,000 applications (Committee of Public Accounts 2005). By September 2015 there were 16,649, of which 15,579 resulted in payment offers (McCarthy 2016: 27). An eligible application needed to meet five conditions: survivors must apply; be alive on 11 May 1999 (the date of the Taoiseach's apology); provide identification; evidence of institutional residence; and evidence of injury. Concerning residence, eligible applicants must have stayed at a scheduled institution. Originally 123 institutions were scheduled, the minister of education would add 16 more, bringing the total to 139. Survivors without formal identification could swear an affidavit confirming their

identity. Nine cases of apparent misrepresentation were referred to the police, resulting in one prosecution. Men submitted 9,981 applications and women submitted 6,668: a ratio of nearly 60:40 (Residential Institutions Redress Board 2017: 29). That difference might reflect the survivor population, there were more boys than girls in scheduled institutions (O'Sullivan 2009). Expatriates lodged nearly 40 per cent of applications.

The programme was open to applicants from January 2003 until December 2005 (thirty-five months). In 2003 and 2004, the RIRB received 2,573 and 2,539 applications, respectively (Residential Institutions Redress Board 2004: 8 and 2005a: 9). Then, in 2005, applications rose to 9,432, of which 3,700 arrived in the two weeks before the closing deadline of 15 December (Residential Institutions Redress Board 2006: 23). The enabling statute provided for late applications under 'exceptional circumstances' ('Residential Institutions Redress Act' 2002: paragraph 8.2). The courts compelled the RIRB to apply that provision broadly and the RIRB accepted 2,210 late applications. This included a 2009–2010 spike corresponding to the publication of the Commission of Inquiry's final report and increasing awareness of the lax provisions for late applications (Residential Institutions Redress Board 2010, 2011). The RIRB petitioned the government to legislate the programme's closure, which it did as of 17 September 2011.

Successful applicants must have experienced one or more of three types of interactional sexual, physical, and emotional abuse. Any act of sexual abuse constituted a basis for claim. Eligible physical abuse must have caused serious damage – explanatory examples include broken limbs, serious scarring, or long-term medical problems. Emotional abuse included sustained fear and verbal denigration and depersonalisation – damaging the survivor's family relations by, for example, lying to them about their birth names. The programme also redressed structural injuries of wrongful neglect, including impediments to the survivor's physical, mental, and emotional development such as malnutrition, inadequate education, and insufficient clothing and bedding. For claims of emotional abuse and wrongful neglect, applicants needed to show that abuse caused further physical or psychological harms. Survivors could also claim for 'loss of opportunity', which encompassed failing to provide the survivor with the legal minimum of education. Eligibility for loss of opportunity changed depending upon when the applicant was in residence. For example, a failure to receive secondary education became compensable only after free secondary education became available in 1967. Loss of

opportunity also encompassed how care experiences damaged the survivors' career.

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The RIRB assigned each application to a case officer. The officer assessed the application for completeness and checked to see if an interim payment was appropriate. Interim payments were available for applicants with dementia, a life-threatening disease or similar illness, and for elderly applicants who were born prior to 1 January 1931 (1 January 1933 after 2006). The maximum interim award was €10,000 and its value was deducted from any final award. Those applications were also prioritised for prompt resolution. The RIRB fast-tracked 3,284 applications; 2,886 due to age, 398 on medical or psychiatric grounds (Residential Institutions Redress Board 2017: 31).

The RIRB contacted any person or institution named in the application as an offender. Institutions (usually a religious order) were informed of the identity of the survivor, their claims, and the names of alleged offending persons associated with the institution. Respondent institutions were asked for the contact details of offending persons, who the RIRB would then notify. Named persons or institutions could request a copy of the redress application, excepting medical reports. Institutions would normally provide the RIRB with a written response, which became part of the case file. Alleged offenders and institutional representatives could request a hearing to contest or correct facts alleged in the application. Written responses were normal, but few attended interviews. The findings of the RIRB were confidential and inadmissible in court. Its processes had no legal consequences for offenders.

Most survivors needed care records to compile their application. The industrial schools were supposed to have kept a register of entry. Where those records were missing or inadequate, applicants needed other evidence of residence. Survivors could authorise their lawyers, the RIRB, or another party to search for relevant documents. In cases where no direct documentary evidence of residence was available, applicants could offer corroborating evidence, including memories of institutional personnel, the presence of other survivors, and/or swear an affidavit describing the period of residency.

Written testimony was the primary evidence of abuse, sometimes supplemented by oral testimony at an interview. The application form

provided tables for listing injurious incidences (where and why they occurred and who committed them) along with any consequent damage suffered. However, most survivors supplied written narratives. Whatever the format, applicants needed to provide detailed information because the programme assessed severity according to the frequency and duration of abuse and whether different forms of abuse were combined. Claims for damage required medical evidence; therefore, most applications included reports from one or more medical professionals. These reports cost the RIRB around €6 million (McCarthy 2016: 25). Reports needed to demonstrate that specific illnesses and sequelae were a consequence of experiences in an industrial school. The RIRB contracted medical advisors to review the survivor's medical evidence. If the advisor disagreed with the applicant's material, the RIRB would ask for a medical report from a different professional.

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This was a highly legalistic programme that reflects the influence of some survivors' lawyers in its development. As related above, the redress programme originated as a response to legal pressure on the Laffoy/Ryan Commission. Those lawyers made influential submissions to the Compensation Advisory Committee (The Compensation Advisory Committee 2002: 7). In effect, the redress programme's success depended upon its acceptance by lawyers. The scheme reflects their influence: the programme is a structured settlement process modelled on Irish civil law.

The complexity of the redress scheme led the RIRB to encourage applicants to retain legal counsel, which 98 per cent did (McCarthy 2016: 10). Lawyers mediated most communications between the survivor, record-holding bodies, medical consultants, and the RIRB. The remuneration obtained by lawyers reflects the centrality of their role: the mean average legal fee paid by the RIRB per claim was €12,193[2] per application, 20 per cent of the average award (Residential Institutions Redress Board 2017: 34). These costs reflect the lawyers' ability to bill the publicly funded RIRB for any expenses, unconstrained by the usual limits of a private client's willingness or ability to pay. Yet, the RIRB would only defray the survivor's legal costs if the survivor accepted a settlement. Survivors who rejected the RIRB's offer became responsible for their own legal costs – a noteworthy incentive.

[2] The figure includes costs incurred by lawyers in obtaining medical reports.

Confidential services helped survivors access their records and search for family members. In addition to developing a unit within the Department of Education, the state contracted with Barnardos Ireland to provide the Origins Tracing Services. Origins was built on capacities that Barnardos had developed delivering post-adoption services. As a Protestant organisation, Barnardos had not operated a scheduled institution – it was not an offender. Origins provided records for around 5,000 redress applicants. Some applicants obtained records directly from the religious orders that ran the schools. However, most received their residential records from the Department of Education's designated unit, via their lawyers. In the early 2000s, the department digitalised all its care records, creating a searchable database. To access their records, the survivor (or their agent) filed a Freedom of Information application asking for a 'Report by School Number and Pupil Number' with proof of identification, a privacy authorisation, and whatever information the applicant could provide about their family, their birth identity and date, and the dates of their institutional residence (IR Interview 11). If records were needed quickly, as was the case in the lead up to the programme's closure in late 2005, the applicant could obtain a provisional indication of residence. In the period 2005–2006, both Origins and the department developed lengthy waiting lists.

In September 2000, the Department of Health established the National Counselling Service for survivors, employing approximately sixty counsellors by November 2001 (The Compensation Advisory Committee 2002: 65). The Catholic Church also provided counselling through its Faoiseamh service, which became Towards Healing in 2011. These services combined direct counselling, by phone or in person, with funding for external therapy. Survivor-led organisations such as One in Four, Aislinn, and Right of Place also offered counselling. In 2001, the state set up a National Office for Victims of Abuse to act as an umbrella organisation to assist survivors, and co-ordinate the work of survivor groups (Department of Education and Skills 2010: 112). However, few groups joined and the office closed in 2006. Funding for survivor support groups continued and totalled around €42 million by the end of 2015 (McCarthy 2016: 36). The RIRB actively engaged with survivor groups, holding regular consultation meetings. When asked, workers from support agencies attended the board's interviews with survivors and provided advice and logistical support. For example, Right of Place operated a bed and breakfast facility for survivors who travelled to Cork to meet with lawyers or to attend an interview or settlement conference. The RIRB arranged

for Finglas Money Advice and Budgeting Service to provide financial advice to applicants. After 2008, applicants were also referred to Ireland's Money Advice and Budgeting Service.

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Applications were assessed by a panel of two board members. The composition of the panel for each application was chosen by lot to help ensure consistency. Panellists held evidentiary interviews with 3,325 applicants – 20 per cent. Interviews were required in any case requiring verbal testimony or to clarify conflicting evidence. An applicant might also request an interview to testify in person. In a small number of cases, and only with the permission of the board, alleged offenders cross-examined applicants. Interviews averaged around two hours in length. Most were held in the RIRB's offices in southern Dublin. These offices were well-served by public transport and pleasantly mundane in appearance. The RIRB tried to keep interviews informal, although lawyers for the RIRB and the survivor usually attended. The RIRB defrayed the attendance costs for the applicant, counsel, and any support person. Panellists travelled to hold interviews with ill or very elderly applicants. In some cases, the RIRB held interviews in prisons and in psychiatric hospitals; however, this was not the preferred option and the RIRB worked with prisons to enable applicants to attend the RIRB's more hospitable offices. RIRB held interviews in the United Kingdom for applicants who could not travel to Ireland.

The panel's first task was to establish the facts of the application. Here, the standard of evidence was a loose plausibility test: if the injuries described by the application were plausible, the RIRB did not interrogate them further (IR Interview 3). However, if the file contained disconfirming evidence, or parts of the application were disputed, the test became the balance of probability and the case would require an evidentiary interview. Panellists used the standards of the day – acts had to be illegal or against policy if they were to be redressable.

Settlement values depended upon both the experience of abuse and the damage caused by that abuse. Panellists assessed the evidence using a fourfold taxonomy of injuries, looking for evidence of abuse, medically verified physical/psychiatric illness, psycho-social damage, and loss of opportunity. Having assessed the evidence, the two-member panel would agree on a provisional numerical score for each component using the ranges indicated in Appendix 3.1. Having scored each component,

panellists then tallied the component scores to produce an overall total, using the matrix in Appendix 3.2 to convert the application's score into euros. The panellists would consider the result. If they thought it inappropriate, they might recalculate the provisional score or, in exceptional cases (fewer than ten), add extra monies up to the value of 20 per cent.

With a provisional value in hand, the RIRB would call a settlement meeting. Settlement meetings were conducted between counsel for the RIRB and the survivor. Although the survivor would usually be present at the office, they were rarely part of the actual negotiations, which were handled by their lawyer. As with evidentiary interviews, the RIRB was responsible for expenses. Originally, the meeting began with the board's lawyer explaining their provisional assessment. However, after consultation with survivor groups counsel for the applicant were permitted to open negotiations. Negotiations could, and often did, change the provisional assessment, leading to a changed payment offer (IR Interview 3). Most meetings ended with an agreed award value. Once that was complete, the RIRB formally notified the applicant of their settlement offer. Applicants had twenty-eight days to accept or decline the offer or appeal to the Redress Review Committee (appointed by the minister for education). By 2014, the committee had made 571 awards following a review, which increased the original award by an average of 39 per cent (McCarthy 2016: 26). Applicants could also appeal to the ordinary courts on procedural matters.

Funding for awards came from the Ministry of Education. That funding was not capped. The minister of education approved all awards, but that was a formality; the minister approved RIRB's every recommendation. Awards were not taxable as income, nor were they intended to affect the survivors' eligibility for any means-tested benefit. The Act empowered the RIRB to pay the settlement in instalments or place the funds in trust with the courts if they judged the applicant incapable of managing the money.

One interviewee estimated an average (mean) processing time as between eighteen to twenty-four months (Interview 3). However, this depended on the time of submission. In the months leading up to the end of 2005, the programme developed a backlog that took several years to clear. The time it took also depended upon how complicated the application was, the nature of the claims involved, and the evidence available. The programme settled 90 per cent of received applications by 2010. By September 2015, the few remaining cases were no longer in contact with

the RIRB. Unable to either pay a settlement or get the claimant to withdraw their application, the RIRB sought and obtained permission from the courts to close those files unilaterally. The last settlements were paid in 2016. Seventeen applicants rejected their awards. There were 1,069 applications withdrawn by applicants, refused by the RIRB, or that resulted in a zero-value award. The average payment was €62,250: 21 per cent of the €300,000 maximum.[3] The total value of all settlements was €970 million. Legal fees for applicants cost the programme €192.9 million and were paid to 991 legal firms (McCarthy 2016: 31). Administrative expenses were €69 million (€4,144 per applicant), including internal legal costs. The €1.52 billion total cost of the redress programme was over 600 per cent of the original budget estimate of €250 million.

As a last note, all of the RIRB's proceedings, including information about awards, were private. The 2002 Act prohibits the publication of 'any information concerning an application or an award' in a way that would permit the identification of a person or institution, including survivors ('Residential Institutions Redress Act' 2002: §28). This was understood by many survivors to prohibit them from speaking publicly about their experience with the redress programme (Ring 2017: 97). However, there have been no prosecutions relating to this provision and it is apparently a legal dead letter.

4.3 Caranua

The Laffoy/Ryan Commission published its final report in 2009. As Ireland suffered through the global financial crisis, the publicity surrounding the report cast light on the RIRB's burgeoning budgetary exorbitance. Those significant cost overruns triggered vociferous criticism of the 2003 indemnity agreement with religious organisations. Recall that religious organisations had paid €128 million towards the redress scheme, which was estimated at the time to be 50 per cent of the redress programme's costs. In 2009, the Irish government negotiated an additional €110 million[4] from religious orders to endow an ancillary programme. Caranua would supersede an existing fund of €12.7 million providing educational grants to survivors. Unlike the RIRB, Caranua's funding would be capped, and the programme would close when it exhausted its endowment.

[3] Values in this paragraph derive from year-end 2015 figures given in McCarthy (2016).
[4] By December 2019, €111,382,011 had been received (Caranua 2020b: 18).

Caranua opened in 2014. It was administratively independent, although the minister of education appointed the nine-member board, four of which were survivors. The board set administrative and staffing policy. In early 2017, Caranua had approximately twenty-three staff, of which eleven were advisors working directly with applicants. This proved inadequate, leading to 'appalling' backlogs (Committee of Public Accounts 2017). Most staff had social work and social care backgrounds and were hired directly: they were not public servant secondments (IR Interview 4). Understaffing and the use of temporary contractors led to high levels of turnover between 2014 and 2016.

There was a two-stage application process. First, the survivor applied to verify their eligibility. Eligible survivors must have received a settlement from the RIRB. Caranua had a list of successful claimants; therefore, the initial assessment merely cross-referenced the applicant with that list. The process was simple and quick. Caranua received 6,646 applications to verify eligibility, 6,158 would receive some funding (Caranua 2020a: 17, 3).

The second stage was much more complicated. Caranua sought to assess survivors' needs holistically and match them with appropriate services. Caranua provided direct funding in three different areas: health and well-being; housing support; and education, learning, and development. As examples, health and well-being services might include optometry or dental work; housing support could include disability modifications, repairs, and home improvements; and education included fees for tertiary education and training. The programme did not fund services available through the public system; therefore, Caranua's advisors often helped facilitate survivors' engagement with existing services. Successful applicants had to explain how their application related to injuries that they had experienced while in care. Then an advisor would assess if the service was appropriate to the survivor's needs and reasonable in terms of cost (Caranua 2016: 11). Where relevant (as in medical services) applications required a professional recommendation and/or a cost quote. Survivors could make multiple applications, repeating the comprehensive assessment each time. Most of Caranua's money was spent on housing support (e.g. repairs and home improvements), which consumed slightly less than 70 per cent of disbursed funds (Caranua c2019: 3). This created inequities between homeowning survivors and those who were tenants or homeless. Education was the least used category, with grants of around €1.4 million. In total, Caranua paid

€97,425,226 million in support for applicants (Caranua c2019: 3), €13,492,282 million was spent on administration (Caranua c2019: 3).

Caranua was a troubled organisation opposed by a vocal group of survivors, many of whom wished to receive the monies directly from the churches (and not pay administrators' salaries). Conflicts of interest emerged as board members, who were survivors, were also potential beneficiaries of the programme. Some board members became advocates for certain applicants (Interview 4). The programme was launched without any operative regulations and, consequently, the board developed its policy and procedures while in progress, which led to false starts and inconsistencies. Although the programme published guidelines on its website, programme staff were reported to use secret policy documents (Reclaiming Self 2017: Appendix 1). Significant policy changes included expanding the programme to include household goods, funeral costs, and family tracing. In 2016, applicants were given a lifetime limit of €15,000 to prevent a minority of survivors from consuming a disproportionate amount of funding. Continuing criticism led to a major review and in 2017 the government replaced several board members. In 2018, two of the new members left the board while publicly criticising its operations as inefficient and uncaring (Holland 2018). The programme closed to new applicants on 1 August 2018 and final payments were made in 2020.

4.4 Magdalene Laundries

The third Irish programme emerged as a reaction to adverse findings in a 2011 UN report (UN Committee Against Torture 2011). Operated by religious orders, Ireland's Magdalene laundries were workhouses for women. In some cases, the laundries were used as remand facilities (McCarthy 2010; Finnegan 2001). All residents were women, and most were young – the median age was twenty (McAleese 2012: xiii). Many residents experienced the laundry as a prison in which they were forced to labour in poor conditions (Smith et al. 2013: 9). Because the laundries did not admit children, single mothers had to relinquish their children, often to an industrial school.

Ireland responded to the UN's 2011 report by empanelling an Inter-Departmental Committee chaired by (former) Senator Martin McAleese. The committee reported that approximately 11,198 women resided in a laundry between 1922 and mid-1990s (McAleese 2012: 161). Taoiseach Edna Kenny responded to the committee's report with a public apology to all Magdalene survivors on 19 February 2013 (Kenny 2013). Kenny's speech announced that Justice John Quirke would head a commission to

design a monetary redress scheme. Quirke's remit reflected criticisms of the RIRB's capture by the legal profession. The terms of reference specified that redress funds must be 'directed only to the benefit of eligible applicants' and prohibited funding for 'legal fees and expenses' (Quirke 2013: 1). Quirke was to report within three months. During that period, survivors could lodge an expression of interest so that they would be informed when the programme opened.

The Magdalene redress programme opened in June 2013 and remains open at the time of writing. The Restorative Justice Implementation Team delivers the programme. Originally housed within the Department of Justice and Equality, the team moved to the Department of Children, Equality, Disability, Integration and Youth in 2020. Its budget is authorised by a vote of the Oireachtas that provides the programme some financial security against intra-ministerial reprioritisation. Operating from a Dublin office, the team was staffed by around nine seconded civil servants. It was initially entirely female, matching the gender profile of the applicants. The team advertised the programme through survivor groups, the departmental website, and Irish embassies. The programme received some media attention; however, the contrast with the high-profile RIRB is clear: before 2018, the Magdalene programme did not have a dedicated website, online information was housed on a subordinate page on a departmental website. Team members did not regularly meet with survivor groups. The programme did not produce annual reports or newsletters, and detailed procedural guidelines were only made public in 2018.

Quirke's report proposes two bases for monetary payment – residence and unpaid forced labour. Valid applications must satisfy four conditions. Applicants must apply; be alive on 19 February 2013 – the date of Kenny's apology; provide personal identification; and furnish evidence of residence at a scheduled institution. Posthumous claims are possible if the survivor lodged an application prior to their death. Originally, eligible applicants must have resided in one of ten Magdalene laundries or two 'training schools'; however, a supplementary process for fourteen further institutions was added after the Ombudsman published a critical programme review (Office of the Ombudsman 2017).

Opened in June 2013, the rate of applications slowed following the first year intake of 756 applications.[5] Thirty-one were received in the next year and a further twenty the year after. By December 2016, there had

[5] These numbers are derived from online records of the Oireachtas.

been 830 applications. After 2018, the scheme had two streams, the original and the supplementary processes, and fifty-two claims were reassigned to the supplemental process and a review of previously denied claims began. As of 13 December 2019, the original programme had 791 applications and the supplemental process had 115 claims (The Restorative Justice Implementation Team 2021).

Each application was assigned to a case worker, who conducted research and managed contact with the applicant (usually by phone). The application asked for copies of the survivor's birth certificate, photographic identification, a passport photograph, and their Personal Public Service Number. Survivors were also asked to contact religious orders for documentary evidence of residence. The laundry's register of entry should record the date, name, and age of the survivor at the time of entry and, sometimes, a release date. For around 50 per cent of applicants, institutional records were insufficient to establish the duration of residence (IR Interview 8). The team divided those applications into three categories (Office of the Ombudsman 2017: 39). Category 1 had a start date of residency, but insufficient information to determine the length of stay. In Category 2 there was evidence of residence, but neither a beginning nor end date. Category 3 had no documentary evidence of residence. Looking more broadly, the team would explore information from multiple sources, including voting, health, education, social insurance, and employment records (IR Interview 8). In cases where documents proved inadequate, the team accepted witness statements and some applicants were invited to informal interviews. Beginning in August 2014, two team members conducted these interviews and produced a report. As of mid-2017, there had been seventy-eight interviews, a little more than 10 per cent of the total.

Applications failed when there was no evidence of residence in a scheduled institution. But that requirement was only publicised in December 2013, after the team had processed several applications. This was one of several gaps between programme design and implementation. The Magdalene laundries were often part of large religious complexes that included several institutions, with people moving around the complex according to the practical demands of the moment. A survivor who, for example, resided in an industrial school and laboured in a laundry might be denied redress. The Ombudsman criticised the post hoc decision to make residence necessary for eligibility (Office of the Ombudsman 2017: 7). Compounding this unfairness, concerns with survivors' receiving redress twice – from both the RIRB and the

Magdalene programme – led policymakers to exclude laundries that had been scheduled in the RIRB (Office of the Ombudsman 2017: 8). However, the conditions of eligibility for the two programmes differ significantly. Unlike the RIRB, the Magdalene programme did not require evidence of abuse or neglect. Therefore, survivors who could not, or did not, tell the RIRB that they were abused were excluded if they had resided and/or worked in an RIRB scheduled laundry. As previously stated, the supplementary programme that started in 2018 added fourteen institutions. It also permitted applications by those who worked in a laundry without having resided in one.

Finally, there were serious concerns regarding the quality of the investigation into cases where there was no documentary evidence of residence. Despite provisions for interviews, in the judgment of the Ombudsman, the programme

> ... operated on the basis that only women who could demonstrate through available records that they had been officially recorded as admitted to one of the 12 named institutions were eligible. (Office of the Ombudsman 2017: 7)

Personal testimony was not given appropriate weight. While public statements indicated that the survivors' testimony would be accepted as true, in many cases, testimony that lacked documentary support was rejected by the programme (IR Interview 2; Office of the Ombudsman 2017: 40). Responding to this criticism, in 2018, a barrister, Mary O'Toole, was appointed to review all the cases. She opened a reinvestigation into 214 cases (Ó Fátharta 2016).

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To receive a redress payment the applicant must waive all claims against the state.[6] Applicants were eligible for €500 (plus VAT) for legal advice at the point of settlement. The modest provision reflects criticism of RIRB's legal costs. Indeed, the Quirke Commission had difficulties getting the government to agree to fund any legal advice (IR Interview 10). While applicants could self-fund legal representation earlier in the application process, for the most part, '[t]he only time a solicitor is involved, with the Magdalene[s], is when they're actually at the end of the process and they are signing the waiver' (IR Interview 9). The timing is important. Funded

[6] Applicants remained free to sue the religious orders responsible for running the laundries.

legal advice was only available after the applicant receives the final payment offer. By that point they would have already agreed to the provisional offer and the lawyer's task was to check that the survivor understood the consequences of that decision.

There was no specific provision for counselling associated with the scheme. Redress responded to the experience of labour in the laundries, and it was not assumed that participants were thereby traumatised (IR Interview 8). Some survivor groups offered counselling support (IR Interview 9) and any survivor could contact the National Counselling Service; however, there was no extra funding to counsel survivors participating in the scheme. Moreover, the advanced age of many survivors created problems. Unsupported survivors who did not have the capacity to sign legal documents were, in the words of the Ombudsman, 'forgotten' (Office of the Ombudsman 2017: 9). Several women died before they were made 'Wards of Court' and legally enabled to proceed.

The Quirke report advocates for a dedicated unit to assist Magdalene survivors in perpetuity (Quirke 2013: 45). That never eventuated. The Restorative Justice Team was the primary support, providing personal and logistical support, including records access. The team helped applicants complete their applications, usually by telephone. When survivors received written material from the programme, they could call the team for explanations or seek ad hoc support elsewhere. Some applicants obtained assistance from the Citizens Advice Bureau, either by phone or in person. However, the bureau did not offer a specific service for Magdalene laundry survivors. Although a network of survivor-support agencies volunteered support, none of these organisations received specific funding. Some interviewees observed that the support provided was inadequate (IR Interviews 2 & 9).

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Case workers with the team decided payment values. Their decisions were approved or revised by a senior officer within the team, and then a manager. The offer was then made to the applicant on a provisional basis. If the applicant agreed, the team issued a formal offer. There was no negotiation, although an applicant who disagreed with the offer could provide further information or appeal. The first level of appeal was inside the department, but outside the team. If the applicant remained unsatisfied, they could appeal to the Ombudsman and/or to the ordinary courts.

Appendix 3.3 describes how claims were assessed for both time in residence and the experience of coerced labour. The redress payments were separate, but not severable – all validated applicants received both payments and the values of both were set by the time they spent living in the institution. The lowest available payment was €11,500 and the highest €100,000. However, policymakers built in protection for survivors that they thought were vulnerable because of their gender, age, (mis)education, and illness (Quirke 2013: 7; IR Interview 5; IR Interview 8). To ensure continuing benefits from the programme, the team converted any lump sum monies in excess of €50,000 to a weekly pension payable for life. Further, because unpaid labour in the laundries did not accrue credit towards Ireland's contributory pension, the programme provided those who were fifty years or older a pension starting at €100 per week that increased in value each year until the age of sixty-five at which point they move to a value commensurate with the top standard state contributory pension, worth €243.30 per week in 2018. Once settlement was agreed, the pension was payable from 1 August 2013 until the applicant's death. Lump sum payments are tax exempt and not treated as income, but the contributory pension is reduced by the value of any primary benefits such as housing allowances or similar public support received by the survivor (Shatter 2013). And because the programme is designed to provide stable lifetime support, eligible survivors can access a range of medical and other services through special statutory provision. In another example of a gap between programme design and implementation, the provision of augmented medical services was delayed until 2015. Moreover, the augmented access is less than what Quirke recommended.

The programme aimed to operate as quickly as possible. An application submitted with sufficient documentary evidence of residence could result in a payment offer within weeks (IR Interview 8). By June 2014, the programme had made 369 payments – nearly half the eventual total.[7] The programme paid 164 claims the next year and 91 in the following. By December 2017 it had made 684 payments. As of November 2020, the original programme had received 791 applications and paid 719 claims, while the supplemental process had received 115 claims and paid 78 (Department of Children 2020). By 2020, €30.128 million had been paid to 788 survivors, a mean average of €38,234.

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[7] These numbers are derived from online records of the Oireachtas.

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The three Irish redress programmes are a study in contrasts. The RIRB's massive budgetary overrun constrained subsequent policymakers to design programmes that would avoid similar problems. Caruana's funding was capped and provided by religious orders. The Magdalene programme worked with a short (until 2017) schedule of twelve institutions and limited lump sum payments to a third of the RIRB's maximum figure, resulting in a mean average payment that was a little more than half the value of the RIRB's. The comparative difference in legal fees is even sharper, the €500 maximum in the Magdalene programme is 4 per cent of the RIRB's €12,193 average. Caranua did not pay for legal fees. Interestingly, one of the Australian programmes considered in the next chapter worked in a very similar manner to Caranua, but largely without criticism. However, the Australians would anticipate the Irish lesson in budgetary exorbitance by capping redress funding.

5

Australian Redress

5.1 Introduction

This chapter explores three Australian redress programmes. Queensland's Forde Foundation is a small in-kind programme similar to Ireland's Caranua and was established prior to the more compensatory Queensland Redress. The latter half of the chapter addresses Western Australia's complicated and troubled Redress WA.

5.2 The Forde Foundation

The 1997 publication of *Bringing Them Home* (Wilson and Dodson 1997) highlighted the roles played by of out-of-home care in the genocide of Australia's Indigenous Stolen Generations and spurred demands for monetary redress. In response, Queensland established the Commission of Inquiry into Abuse of Children in Queensland Institutions in 1998, known as the Forde Inquiry after its chair Leneen Forde. Finding systemic abuse in out-of-home care, the Forde Report recommended that Queensland establish 'principles of compensation in dialogue with victims of institutional abuse and strike a balance between individual monetary compensation and provision of services' (Forde 1999: xix).

The Forde Foundation was Queensland's first response to that recommendation. Set up in 2000 as a perpetual fund, Queensland supplied its capital funding of AUD$4.15 million. The foundation continues to be governed by a government-appointed board whose ten members serve three-year terms. The board attempted to recruit survivors as members, but confronted conflicts of interest (AU Interview 2). The foundation's three executive positions are supported by state funding. The Public Trustee administers the capital fund and between 2000 and 2019, the foundation distributed over 5,449 grants valued at around AUD$3.16 million (Forde Foundation 2019: 6).

All applicants must be registered with the foundation. Registrants must have been wards of the Queensland State, under its guardianship, or resided as a child in a Queensland institution. Registration is usually straightforward, supported by public records and facilitated by a community agency – Lotus Place (discussed later). There were 2,158 registered survivors in November 2021 (Private Communication from Eslynn Mauritz, Executive Officer of The Forde Foundation, 8 November 2021).

The foundation's executive officer manages the funding application process. On average, the board receives around 1,000 applications per year, although numbers are increasing. As survivors age, they are more likely to seek more expensive support and, since the foundation is open to anyone who was in care in Queensland, the number of registrants grows every year (Terry Sullivan in 'Official Committee Hansard' 2009a: CA6). The foundation gives informal priority to those who were in institutional care. There is no limit to the number of applications by any survivor, but they are now restricted to a maximum of AUD$5,000 in funding over five years.

There are three categories of application: dental, health and well-being, and 'personal development', which usually concerns education. The foundation will not fund publicly available goods or services, or those otherwise supported by private insurance. Monies are normally disbursed directly to providers. The foundation dispenses approximately AUD$50,000 each quarter, but this varies slightly from year to year to ensure the foundation's' perpetual sustainability. Funding decisions are made by a majority vote at the board's quarterly meetings. Assessment is supposed to be holistic – including information available about the applicant's life and previous choices, including the content and results of previous awards. However, as each meeting needs to consider around 250 substantial applications, the executive officer generates a short synopsis of each for the board to review (AU Interview 2). In general, dental services are simply approved: other applications receive greater scrutiny (AU Interview 2).

5.3 Queensland Redress

The Forde Foundation was (and is) a modest programme that spends around AUD$200,000 per year. Pressure for more substantive redress mounted throughout the 2000s (AU Interview 3). On 31 May 2007, Queensland announced a AUD$100 million programme for survivors of institutions investigated by the Forde Inquiry (Colvin 2007). A short

(June–August) consultation process preceded the programme's opening on 1 October 2007.

Queensland Redress began with a six-person team called Redress Services (AU Interview 2). The team originally expected 5,000–6,000 applications (Department of Communities 2009: 1). Applications came in quickly, eventually numbering 10,218 (Government of Queensland c2014: 2). Recruitment through secondments increased the staff to around fifty archivists, administrative officers, and project managers. The need to staff positions quickly, with a limited pool of available secondments, led to staffing compromises and high levels of turnover (AU Interview 2). The Department of Communities housed Redress Services, paying approximately AUD$12.3 million in administrative costs.[1] The department hosted a website (now defunct) with useful information, including the application form, some 'Frequently Asked Questions', and the Application Guidelines (Department of Communities 2008). The responsible minister published semi-regular media releases.

Redress Services served as the programme's back office. The front of shop was Brisbane's Lotus Place.[2] Lotus Place is a community centre offering counselling, support for records access and, during the programme, assistance in completing redress applications (AU Interview 1). The Forde Foundation was (and is) collocated at Lotus Place, as is the Aftercare Resource Centre[3] and, therefore, many Brisbane-based survivors were familiar with Lotus Place before Queensland Redress began, and the staff were equally experienced working with survivors. It is generally held that the work of Lotus Place as a one-stop 'portal providing consistent information and assisting people [was] outstandingly successful' (Robyn Eltherington in 'Official Committee Hansard' 2009a: CA75). However, the number of applicants stretched Lotus Place's

[1] I derived the AUD$12.3 million figure by multiplying the average administrative cost per participant of AUD$1200 by the number of applications (10,218). The AUD$1200 average is given in Pearson and Portelli (2015): 54.

[2] Lotus Place operated as part of Project Micah, founded by St Mary's Catholic Church in South Brisbane in 1995. Run by Karyn Walsh, Project Micah hosted five initiatives that were directly salient for survivors. Lotus Place served as the physical location for the Esther Centre, the Historic Abuse Network, Find and Connect, Relationships Australia, and the Forde Foundation. Technically, the Esther Centre supported redress applicants, but that detail is not relevant to this study.

[3] The Aftercare Resource Centre supports survivors of residential institutions and foster care.

resources. Lotus Place helped 'over' 2,000 applicants for redress, around 20 per cent of the total (Karyn Walsh in 'Official Committee Hansard' 2009a: CA14). The converse is that 80 per cent either had no assistance or used non-funded services such as the Aboriginal and Torres Strait Islander Legal Service. Rural and out-of-state applicants confronted significant accessibility challenges (Senate Community Affairs References Committee 2009: 89).

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The application deadline was originally 30 June 2008, this was extended to 30 September 2008. Around 3,000 applications were received in that three-month period (Mark Francis in 'Official Committee Hansard' 2009a: CA71). Received applications were assessed for completeness and survivors were contacted if material was clearly missing, but survivors could not amend their application after 28 February 2009. The programme accepted information in any format and the programme needed an upgraded information management system to manage the complexity of the material it received (AU Interview 2). The brevity of the twelve-month open period means that there are no records of the application rate, although one interviewee suggested that applications arrived steadily and almost immediately as survivor networks spread information about the scheme (AU Interview 2).

Eligibility for Queensland Redress required the applicant to have resided in one of the 159 institutions addressed by the Forde Report. This closed schedule of institutions created inequities, including racial discrimination. Legally, non-Indigenous children could only be placed in licensed institutions; however, some Indigenous children were placed in unlicensed institutions excluded from the Forde Inquiry and the resulting redress programme (AU Interview 3). Still, at the midpoint of the programme, June 2008, 53 per cent of the then 6,655 applicants identified as Indigenous (Lindy Nelson-Carr in 'Child Safety' 2008: 59).

Queensland Redress had two pathways, Level 1 and 2. Level 1 provided a uniform payment of AUD$7,000.[4] Survivors were eligible for a Level 1 payment if they had resided in a scheduled institution, were eighteen years or older on 31 December 1999, and had 'experienced institutional

[4] Level 1's AUD$7,000 value matched an existing programme compensating for Queensland's control over and underpayment of the wages of Indigenous persons during the early part of the twentieth century (Bligh 2010). For discussion of the wage repayment programme see (Banks 2008).

abuse or neglect' while in care (Department of Communities 2008: 3). The programme had five categories of abuse: psychological or emotional abuse, physical abuse, sexual abuse, neglect, and 'systems abuse', the last referring to structurally injurious practices (Forde 1999: iv–v, 12). These categories appeared on the application form as tick box options. To be eligible for a Level 1 payment, applicants needed only to tick a box that indicated they had suffered some form of abuse. Applicants were asked to name the institution(s) in which abuse occurred, then Redress Services would search for evidence of their residence. Residence could have been as short as a single day, but the programme excluded those who were in care during their first year of life only. Applicants needed to provide certified proof of identity (there were some multiple applications) and to authorise Redress Services to access relevant personal records. The information in the application form was confidential.

Care leavers could apply to Level 2 in their initial application or when notified of their Level 1 eligibility. Just under half of applicants (4,802) applied for a Level 1 settlement only. Level 2 responded to more serious injuries, including consequential harms, and required applicants to describe their injurious experiences in detail. The application form provided a short space to describe when injuries occurred and their duration, if the incident was reported, whether the applicant experience(d) consequential damages (the form suggests twenty-nine different harms), and whether medical treatment was sought or received (Department of Communities c2007: 5–6). Applicants were encouraged to submit any relevant documentation, such as police reports or medical statements. Redress Services did not provide funding for professional medical reports or other evidence of injury. This advantaged those who already had medical reports or could pay for them (AU Interview 1). However, most survivors simply described their experience in their own words. Applicants were not told how their information would be used: the assessment policy for Level 2 applications was not developed until after the programme opened to applications. A total of 5,416 survivors applied for a Level 2 payment (Royal Commission into Institutional Responses to Child Sexual Abuse 2015b: 118).

A total of 15 per cent of applications to Level 1 were prioritised due to age or illness (Mark Francis in 'Official Committee Hansard' 2009a: CA71). The programme did not accept posthumous applications, however, it provided AUD$5,000 towards the funeral expenses of those who would have been eligible. As many as 901 applications (9 per cent) were

received from out-of-state survivors, but less than 1 per cent of applicants were overseas (Mark Francis in 'Official Committee Hansard' 2009a: CA78–79). Incarcerated applicants offered a particular challenge. Because the programme accepted postal applications only, Redress Services set up an agreed confidential information system in which letters sent by inmates to the confidential postal address within the Department of Communities would not be read by prison staff. Payments for incarcerated applicants were held in a private trust until their release (AU Interview 3). Although prisoners are not permitted to have cash in prison, they might use the monies outside the prison for purposes within, such as bribery. This also helped imprisoned survivors avoid extortion.

All applications were assessed for a Level 1 payment. Because applicants who indicated an injury on the form were generally believed, Level 1 assessment primarily concerned institutional residence with records provided either by the applicant or sought by Redress Services. Only when no documentary evidence could be found did Redress Services revert to applicants for more information or a statutory declaration (AU Interview 2). Because Level 1 was administratively simple, on average, assessment took about one month (AU Interview 2).

Level 2 assessment began in August 2008, after Level 1 was complete and the programme knew how much remained from the AUD$100 million fund (Senate Community Affairs References Committee 2009: 39). The process required more information, administrative resources, and time. The secretariat compiled a summary of each case file. Applications were then assessed by two members of a six-person panel of contracted lawyers. Those panellists did not conduct interviews (Department of Communities 2009: 3). They matched testimony from the application with evidence available from the Forde Report about the institution. In general, if evidence of residence was available, the programme accepted testimony that matched patterns described in the report (AU Interview 3). The panel then scored the application using a matrix (Appendix 3.3) that divided assessment into seven discrete analyses, giving greater weight to in-care experiences. Once each component was scored, the panellists aggregated the points to assign the application to one of five categories of severity ranging from a null award to 'very extreme' (see Table 5.1). The panel chair read the final assessment and verified the outcome.

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Table 5.1. *Queensland Redress payments and values*

Level	Severity	Points	$AUD Value	Eligible	Received
1	N/A	0–14	$7,000	7,453	7,168
2	Very Serious	15–24	$6,000	1,455	1,447
	Severe	25–39	$14,000	1,254	1,252
	Extreme	40–59	$22,000	616	616
	Very Extreme	60–100	$33,000	167	166
Level 2 total				**3,492**	**3,481**

Source: (Adapted from Royal Commission into Institutional Responses to Child Sexual Abuse 2015b: 118 & 551)

Survivors accessed their records through a Freedom of Information process. Expert staff at Lotus Place provided applicants with support and guidance. Responding to the Forde Report, Queensland had digitised most relevant records. In 2001, Queensland also published *Missing Pieces*, a directory of the type and location of records held by public and religious bodies (Queensland Department of Families 2001). Those steps helped applicants compile their applications and facilitated cross-referencing. Around 80 per cent of applications were verified using departmental records (AU Interview 2). For the others, Redress Services searched for auxiliary records, such as school registers, and was flexible about the evidence it used (AU Interview 1). Moreover, during the Forde Inquiry, the state developed a ten-person 'Administrative Release Team' to respond to records requests (AU Interview 3). This team continued to help survivors access their personal records throughout the 2000s. This meant that a digitalised records-access infrastructure, with experienced staff, was available when the redress programme began.

Survivors confronted challenges in obtaining records nonetheless. Many records had been destroyed and what remained often lacked relevant information. Secrecy concerns surrounding adoption often meant that care staff tried to expunge the child's relationship with their birth parents from documents. Those concerns also inhibited carers from creating and developing personal records. When relevant information

was found, agencies redacted information that was not personal to the survivor. Rebecca Ketton of Aftercare observed 'that often significant amounts of information is blacked out or crossed out with thick black pen. This can be quite upsetting . . .' ('Official Committee Hansard' 2009a: CA39). Redacted information could affect a redress application, if, for example, an offender's name was withheld. Files often used language hurtful to survivors and many survivors needed counselling support when accessing records (AU Interview 4). Specialist counselling was provided by Aftercare, an initiative of Relationships Australia. Another result of the Forde Inquiry, Aftercare operated a two-person branch in Lotus Place with in-person and telephone counselling. Aftercare also brokered counselling, both privately and through Relationships Australia offices, of which there were forty in 2009. When Queensland Redress ended in 2009, Aftercare had 860 clients, a 200 per cent increase over the term of the programme (Rebecca Ketton in 'Official Committee Hansard' 2009a: CA42).

Queensland Redress did not pay for legal support during the application process. However, because the programme required survivors to waive all rights against the state for injuries suffered in care, survivors were instructed to obtain legal advice at the point of settlement. Applicants were provided with a list of solicitors willing to provide advice for a set fee (Bligh 2010). Redress Services paid those lawyers directly, at a total cost of AUD$3,468,750 (Royal Commission into Institutional Responses to Child Sexual Abuse 2015b: 118).[5] The waiver only affected the survivor's rights against Queensland. Financial advice was available to all applicants who accepted a payment. The programme would pay a set fee for an appointment with a financial advisor (Department of Communities 2008). This provision was not well utilised. One interviewee said, 'We were always really clear about the legal fees and financial advice, but no one took us up on financial advice . . .' (AU Interview 2). Kathy Daly reports that no applicant used the financial advice service (Daly 2014: 140).

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In December 2007, applicants began to be notified of their eligibility for Level 1 and sent the abovementioned waiver form. By 13 November 2008, over 3,270 Level 1 payments had been made and by April 2009 the

[5] This figure is probably inflation-adjusted to 2013 dollars.

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total was over 6,000 – respectively 46 and 84 percent of the 7,168 final total (Royal Commission into Institutional Responses to Child Sexual Abuse 2015b: 575). As many as 285 Level 1 payments went unclaimed, mostly by applicants with no known address. Survivors could appeal judgments to the Ombudsman or to the ordinary courts. That review only pertained to the question of institutional residence, never the actual assessment.

All successful Level 2 applicants were notified by letter in August 2009. This synchronised process was encouraged by the funding model in which eligible Level 2 applicants shared the AUD$45,349,000 remaining from the original AUD$100 million (Government of Queensland c2014). However, it also avoided the inequity of some applicants receiving settlements before others.

Every applicant in each of the Level 2's four categories of severity was paid the same amount. The mean average payment was AUD$12,987, added to the AUD$7,000 for Level 1. Assessment information and monetary values were private; however, survivors were free to discuss their settlements publicly. Redress monies were not treated as income when assessing benefits and taxation. Towards the end of the programme, an issue emerged with Medicare, Queensland's public health provider. Many survivors obtained redress for injuries for which they had previously received subsidised medical care, and Medicare began processes to recover its treatment costs from redress recipients. To protect survivors, Queensland paid Medicare a lump sum of AUD$500,000 to cover those repayments.

5.4 Redress WA

On 17 December 2007, two months after Queensland Redress opened to applications, Western Australia announced a programme providing a Level 1 payment of AUD$10,000 and Level 2 payments up to AUD$80,000. Redress WA's headline funding of AUD$114 million also looked larger than Queensland's but it would need to pay the programme's operational expenses, which would be around AUD$25 million. The programme opened on 1 May 2008 and closed to new applications on 30 April 2009. Then, on 26 June 2009, the government restructured the programme to create four tiers of payment with a maximum of AUD$45,000 (Royal Commission into Institutional Responses to Child Sexual Abuse 2014c: 64). Partly a response to the unfolding global financial crisis, the AUD$45,000 maximum better

communicated what survivors could reasonably expect, but the change undermined the programme's credibility and led to vociferous criticism (Green et al. 2013: 2; Pearson, Minty, and Portelli 2015: 7).

The post hoc change to the payment schedule reflected the fact that Redress WA was 'introduced in an awful hurry' and 'with no infrastructure in place'. 'It wasn't well planned. It wasn't planned at all' (AU Interview 6). In 2007, state policymakers held two consultation meetings, but the development process lacked meaningful stakeholder involvement (Kimberley Community Legal Services c2012: 5; AU Interview 6). Located in the (relatively new) Department of Communities, when it opened in May 2008, Redress WA had fewer than ten staff. By 2010, the complement was around 130, yet the programme was never fully staffed. Most were seconded civil servants, but the demand for staff led to staffing compromises and the use of short-term contractors, contributing to high levels of turnover (AU Interview 8). This, in turn, led to administrative delays and high workloads that further aggravated staffing problems. Work was also hindered by a 'clumsy and slow' data management system (Western Australian Department for Communities c2012: 13). Delays frustrated claimants, leading to more complaints and hostility from many survivors (Rock c2012: 8). Redress WA did not have a publicly accessible office and staff were anonymised to shield them from media criticism and security threats. In the opinion of one interviewee, that made them 'invisible', with detrimental consequences for survivors (AU Interview 6).

Redress WA's publicity strategy developed over time (Redress WA 2008b). Originally, the programme expected 9,689 eligible applications (Redress WA 2008b: 7). But the programme initially received much fewer than expected (only 328 applications by 31 August 2008) and the programme revised its publicity efforts, with more advertising (Rock 2008: 5; Redress WA 2008b: 11). Redress WA operated a website with useful information about the application process, available support, and updates on the programme. The programme produced a small number of newsletters, which it sent to registered applicants and published on its website.

Eligible applicants had to apply before 30 April 2009, with those who lodged an application having a further two months to complete it (Western Australian Department for Communities c2012: 17). Approximately 50 per cent of applications were submitted incomplete: some service providers simply submitted lists of names (AU Interview 9). Programme staff then had to contact applicants to complete missing

information. Some service providers in remote Indigenous communities requested permission to submit late applications for survivors involved with traditional lore or sorry business,[6] and for those adversely affected by widespread flooding (Rock c2012: 10). Redress WA received 171 late applications, 27 were accepted.

Compensable injuries included physical, sexual, emotional, and psychological abuse, and/or neglect (Western Australian Department for Communities 2011: 5). Applicants had to be eighteen on 30 April 2009, the original closing date of the programme. Applicants without identification documents could provide written statements from two referees. The programme did not have a schedule of specific institutions, but the state must have had formal responsibility for the survivor's residential care at the time of the injury, which must have been prior to 1 March 2006. This was a firm parameter. Redress WA rejected applicants who had been informally placed in out-of-home care, this disproportionately affected Indigenous applicants (AU Interviews 8 & 9).

Redress WA accepted 5,917 applications for assessment. The application flow was marked by a significant increase during April–July 2009, when the programme received nearly 50 per cent of the final total (Western Australian Department for Communities c2012: 16). Western Australian residents submitted almost 90 per cent of the programme's applications – half came from rural and/or remote areas: 42 per cent of applicants were under fifty years, and 49 per cent were male (Rock c2012: 3). Indigenous survivors submitted 3,024 (51 per cent) of applications. Former child migrants submitted 768 (13 per cent). Other groups were underrepresented, possibly because they lacked effective support organisations ('Official Committee Hansard' 2009b: 50). The eligibility requirement of having been 'in state care' may have dissuaded survivors of religious institutions who did not know they had been legally wards of the state (AU Interview 6).

Applications were prioritised if applicants had a terminal illness (Western Australian Department for Communities 2011: 26). Redress WA made 791 priority settlements of up to AUD$10,000 ('Extract from Hansard, Hon Robyn McSweeney' 2010). Overpayments were not recovered. In September 2009, after twenty-nine applicants had died, the programme began to pay AUD$5,000 to the estates of deceased

[6] 'Sorry business' includes a range of funeral and mourning practices.

claimants (Rock c2012: 7). As many as 167 applicants passed away during the programme.

The fourteen-page application form asked survivors to describe the injuries they suffered and the consequential harms they incurred, along with time and place of any residence. Officials believed that less structure would encourage applicants to provide more accurate information. To avoid priming applicants, the form did not list potential forms of abuse or neglect, it simply asked applicants to provide 'as much detail as possible' (Redress WA c2008: 4). Most evidence was narrative, often handwritten, although other relevant documentation might be appended.

Completed applications were placed on a waiting list before the research team began to verify care placements. Redress WA undertook to search institutional records. This preliminary research might uncover other relevant material; however, 'because of time pressures, the principal focus was verifying [residence in] state care' (Western Australian Department for Communities c2012: 20). Redress WA compiled dossiers on larger care institutions. These dossiers gave a brief overview of the institution's history; a summary of relevant policy and regulation; contemporary evidence of violations, including characteristic forms of abuse and neglect; and a list of alleged perpetrators. This was followed by summary information, for example, the institutional history of Bindoon Boys Town states '. . . sexual abuse was particularly rife in the late 1940s and through the 1950s' (Redress WA 2008/2009: 7). That short statement offered supporting evidence for survivors who claimed that they were sexually abused in that period. The summary also noted typical aggravating factors, such as the frequency of vicious public punishment. The dossier might conclude with some references and photos. Dossiers varied in quality. None were substantial and smaller placements would have less-developed dossiers – foster care was excluded. Where possible, assessors batched applications by institution and time. This facilitated the use of similar fact evidence, as specific perpetrators might be mentioned in multiple applications. However, this batching could only be partial, as most applicants had resided in more than one institution.

Contemporarily accepted abuse and legal injuries, such as caning, were not eligible. Applying the standards of the day, education was similarly assessed – for example, leaving school at the age of fourteen was not injurious (Government of Western Australia 2010: 19). Indigenous survivors of the Stolen Generations were not compensated for having been removed from their culture, but elements relevant to injurious cultural

removal might comprise consequential harm and/or be compounding and aggravating factors (Government of Western Australia 2010: 13–14). Initially, any award of more than AUD$10,000 required a psychological report, paid for by Redress WA ('Official Committee Hansard' 2009b: 54). This changed in 2010 and only applications assessed at Level 4 (AUD$45,000) needed medical evidence of injuries (AU Interview 8). If there was uncertainty whether the application was at Level 4, Redress WA might pay for a medical report, but the programme did not otherwise defray legal or medical costs. This after-the-fact change in policy meant that many applicants submitted unnecessary material, including psychological tests (Green et al. 2013: 4; AU Interview 6).

Having reviewed the application, institutional history, and any other relevant evidence, the case worker interviewed the applicant by telephone. During the interview, survivors could add information and interviewers might prompt applicants to provide relevant information, if, for example, research had uncovered a placement the applicant did not mention (AU Interview 9). In addition, the interviewer would seek clarification of, and evidence regarding, abuses or consequential harms described in the application. As some time had usually passed between the original application and the interview, new information was often available, including personal or medical records. These interviews helped moderate the variable quality of the initial applications, particularly for applicants with poor literacy (Western Australian Department for Communities c2012: 9).

Applicants were never interviewed in person. An internal document suggests that in-person hearings would be too stressful and 'a form of secondary abuse in some cases' (Government of Western Australia 2010: 12). Moreover, attendees at a hearing might seek legal representation, which would increase costs. Because telephone interviews could also retraumatise applicants, applicants could indicate that they did not want to receive a telephone call (Redress WA c2008: 2). These survivors were notified by letter when their application was assessed and invited to provide further information. Redress WA developed protocols to protect the privacy and quality of these interviews. But this preparatory work was not always successful.

> What I heard time and time again was people saying, 'Oh, I had my cousins over for lunch and I got a phone call, and it was the lady from Redress WA wanting to talk about my abuse and wanting more details about how I was sexually abused.' Often, survivors aren't assertive with authority, so they don't say, 'Well, can you ring back later' or 'Can we set up a time to do this later?' So, they would just feel obliged to talk about really intimate and painful memories on the spot. That wasn't fair . . . (AU Interview 6)

Having assembled the facts, the case worker scored the application using a matrix (Appendix 3.6). This matrix was not published until after the programme closed to new applications. Assessors used four components: the experience of abuse and/or neglect; compounding factors, such as how isolated the resident was when abused; consequential harms; and aggravating factors, such as degrading treatment. Each component was worth twenty points. Redress WA developed a table (Appendix 3.7) to gauge injurious experiences, using indicative descriptions to help assessors score applicants according to severity. By subdividing each application into several categories, each comprised of various factors, Redress WA tried to capture individual nuance while retaining consistency. Assessors were encouraged to holistically reflect on the outcomes (Government of Western Australia 2010: 8–10).

Although the general categories of abuse and neglect match information sought on the application form, applicants were not told how the programme would assess severity. Moreover, the application form is silent concerning the role of compounding and aggravating factors. The form asks for information about consequential harm, but it does not mention salient subcategories. Some of this information might have been sought during the telephone interview, but it remains true that assessors used information that was only partially related to evidence requested by the application form. This non-transparency responded to widespread worries that survivors might tailor their testimony so as to obtain higher settlements (AU Interview 9). Peter Bayman, the programme's senior legal officer, told a Senate Inquiry that '[w]e did not want to design a scale [for assessment] and then publish it so that it became essentially a cheat sheet' ('Official Committee Hansard' 2009b: 56). Moreover, the assessment guidelines were not compiled until October 2008 – nearly six months after the programme opened – with the fourth and final version confirmed in May 2011 (Western Australian Department for Communities 2011: 41).

The case worker's initial assessment was submitted to a team leader, who would reprise the assessment. If the totals varied, the judgement of the team leader was generally decisive (AU Interview 9). If an applicant was near the minimum score for a higher-level payment, they would often get moved up. Then, a senior research officer produced a 'Notice of Assessment Decision', that summarised the application and graded its severity. The programme notified applicants who were to be declined that they had twenty-eight days to provide further information. Applications categorised as severe or very severe were assessed a fourth time by an

'Internal Member' who was a lawyer. Internal members examined both the application and the assessment process, they might, for example, review the telephone interview transcript for evidence of leading questions (AU Interview 9). That fourth assessment could result in further requests for information or change the severity assessment. Once satisfied, the internal member submitted a report to the four-person Independent Review Panel that assessed the application again (Western Australian Department for Communities c2012: 20). The Review Panel did not need to use the matrices and could take a holistic view of the application. When it disagreed with the internal member, the panel tended to increase the settlement value (AU Interviews 8 & 9). Senior staff moderated the whole process to ensure that total costs would not exceed the capital funding. However, on 29 August 2011 the government provided a further AUD$30 million to cover any cost overruns.

With respect to evidentiary standards, Redress WA variously claimed to presumptively believe all claims by applicants (Western Australian Department for Communities c2012: 8); to have applied the standard of 'reasonable likelihood' (Western Australian Department for Communities 2011: 12); and to have tested evidence according to the 'balance of probabilities' (Government of Western Australia 2010: 11). In short, the standard applied depended on the payment value. Applicants pegged for lower level payments benefitted from a presumption of truth, (AU Interview 9), however, higher payments were assessed on the balance of probabilities (Government of Western Australia 2010: 31).

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Twenty-six agencies were initially contracted to support applicants, with more engaged over time (Government of Western Australia 2007; Western Australian Department for Communities; c2012; Department for Communities 2009: 42). Redress WA published a booklet titled 'Support Services for WA Care Leavers' in November 2009 (Redress WA 2009). Organisations were contracted to provide up to twelve hours of assistance for each survivor (Green et al. 2013: 4). The demands on key support services were significant. The Aboriginal Legal Service (ALS) submitted over 1,000 applications (Barter, Razi, and Williams 2012: 7–10). Indeed, overwhelmed by the demand, at one point the ALS stopped accepting new clients (AU Interview 6). At one step removed, Redress WA's helpdesk provided information to both applicants and service providers, receiving 500 calls, 100 emails, and about 20 text

messages each week (Western Australian Department for Communities c2012: 4).

Redress WA received variable reviews concerning the support provided (Royal Commission into Institutional Responses to Child Sexual Abuse 2014c: 66). For one survivor

> . . . with Redress, you had people on your side offering you information, support. And, sure, there was a financial thing at the end of it, which was wonderful, but it was the fact that we had qualified counsellors in proper settings, a myriad of people we could call if we had any questions – they were on tap sort of 24 hours a day, seven days a week – and that did help immensely. (Royal Commission into Institutional Responses to Child Sexual Abuse 2014e)

But another observer claimed that Redress WA initially failed to attract substantial numbers of applicants because it did not integrate well with support services (Senate Community Affairs References Committee 2009: 46). And support was needed. The ALS suggested that 'participation in the scheme was traumatic for all involved' (Barter, Razi, and Williams 2012: 7). Phillipa White, coordinator of the Christian Brothers Ex-Residents Society, was 'taken aback by the degree of distress and trauma' involved ('Official Committee Hansard' 2009b: CA2). Counselling was provided by a number of service providers. Some contracted counselling services also assisted in developing applications, this could turn the application process into a more holistic assessment (Green et al. 2013: 4). Redress WA applicants could access three hours of individual counselling (Australia 2009). Additional counselling could be arranged on request and Redress WA sponsored support groups across the state. By 2010, Redress WA had provided counselling services to 3,666 people ('Extract from Hansard, Hon Robyn McSweeney' 2010). By the 2012 financial year-end, around 75 per cent of claimants had received application support and/or counselling at a total cost of AUD$3,814,000.[7]

To help survivors access their personal records, Western Australia sponsored the 2004 publication of *Signposts* (Information Services 2004). *Signposts* is both a website and a 637-page print publication that lists over 200 relevant institutions, what records are available concerning each institution, where those records are located, and brief comments on

[7] The value derives from Department for Communities (2009, 2010, 2011, 2012); Rock (c2012: 4).

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their condition. But apart from *Signposts*, Western Australian undertook little preparatory work with records before Redress WA (AU Interview 7). The Department of Child Protection had primary responsibility for providing records and was rapidly overwhelmed by demand, with two-year delays from mid-2008 until 2011 (AU Interview 6). To manage, the department ceased providing full files, instead offering basic information about the place and duration of a survivor's residency. By 2010, Redress WA was requisitioning and searching complete records itself (AU Interview 9).

There were good immigration records for child migrants. Some 'Native Welfare' records were on microfiche in good condition and some religious orders had archived their records with the state (AU Interview 7). Nevertheless, 'the scant nature, fragmentation and destruction of departmental records often posed problems' (Rock c2012: 9). Records were often 'incomplete and paper-only' making verifying the survivors' residence in care 'one of the most complex, time-consuming parts of the Redress WA process' (Western Australian Department for Communities c2012: 18). Applicants needed to lodge a Freedom of Information Act request to receive their records, which approximately one-third did ('Extract from Hansard, Hon Robyn McSweeney' 2010). Third party information was redacted (Western Australian Department for Communities 2011: 23). Interestingly, complaints about redaction are not prominent among the primary sources.

Redress WA did not fund legal support because that would have reduced monies available for payments (Government of Western Australia 2010: 12). Originally, the programme was going to pay AUD$1,000 in legal fees to counsel applicants when signing waivers. However, when the programme decreased the maximum available payment, the programme abandoned the use of waivers. Nevertheless, as both Kimberley Legal Services and the ALS were contracted to support applicants, the 1,200 survivors they supported would have benefitted from legal advice (Kimberley Community Legal Services c2012; Barter, Razi, and Williams 2012). Some survivors claimed to have spent more on legal fees than they received in the settlement (Pearson, Minty, and Portelli 2015: 7).

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The settlement offer included the proposed payment value, along with information as to where the survivor could find relevant personal

records. For both reasons of privacy and welfare, the programme did not want to send sensitive and potentially distressing information to survivors without warning; therefore, explanations of the payment values were available only upon request (AU Interview 9). Approximately 1,300 applicants requested an explanation (Rock c2012: 5). Redress WA offered free financial counselling (Redress WA 2008a: 16). However, I could find no information indicating that survivors commonly sought financial advice. Kimberley Community Legal Services indicates that '... few of the successful claimants received assistance to ... [help them] ... use their Redress money' (Kimberley Community Legal Services c2012: 2).

Payments were generally by direct deposit. Monies could be placed in trust if the applicant was a prisoner or if the applicant was 'mentally incapable of managing their own affairs' (Western Australian Department for Communities 2011: 25). The ex gratia payments were not taxable nor charged against means-tested benefits. A very small number of people who had previously been compensated by the state had that money deducted from their settlements (Western Australian Department for Communities 2011: 15). No deductions were made for prior settlements with NGOs, such as churches. All successful applicants were offered a standard apology letter signed by the minister for communities and the premier of Western Australia. As many as 4,013 letters were issued (Department for Communities 2012: 57). Police referrals should have occurred when applications provided evidence of criminal offending, unless the survivor requested otherwise. The ALS advised that no Indigenous applicant would permit a police referral (AU Interview 9). However, if a child was presently in danger, a police referral was legally required. Redress WA made 2,233 police referrals (Royal Commission into Institutional Responses to Child Sexual Abuse 2014c: 65).

Originally, all payment offers were to be made before 30 April 2010 (Redress WA 2008a). That did not happen. The first payments were issued in February 2010 (McSweeney 2010). Afterwards, payments were made as assessments were completed: 1,300 were finalised by the end of 2010 and assessment continued until 30 June 2011 (Royal Commission into Institutional Responses to Child Sexual Abuse 2014c: 63). The last payments were made in 2012. The final values are set out in Table 5.2.

The programme paid the same amount to all survivors assessed at each level. The mean payment average was AUD$22,459. Survivors could request a review of errors of fact or process, but not the payment amount (Western Australian Department for Communities c2012: 21). Reviews were first conducted internally. If the applicant remained unsatisfied,

Table 5.2. *Redress WA levels and payment values*

	AUD Value	Payments	AUD Total
Level 1: Moderate	$5,000	859	$4,295,000
Level 2: Serious	$13,000	1,813	$23,569,000
Level 3: Severe	$28,000	1,477	$41,356,000
Level 4: Very Severe	$45,000	1,063	$47,835,000
Total		5,212	$117,055,000

Source: (Royal Commission into Institutional Responses to Child Sexual Abuse 2015b: 576)

they could complain to the Department of Communities. In both cases, the file could be referred to the Independent Review Panel, which had, in all cases of Level 3 and 4 assessments, already reviewed the assessment. Applicants could address a complaint to the State Ombudsman. Only nineteen appeals (0.3 per cent of applicants) affected the settlement outcome (Department for Communities 2012: 57).

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With an emphasis on supporting applicants through community services, Australian redress ensured that many survivors could get help from local agencies and from people they knew. However, budget caps led to relatively low payment values, and particularly in the case of Redress WA, rushed implementation created delays and procedural instability. Important for my argument supporting survivor choice, Queensland Redress and Redress WA developed somewhat flexible pathways to redress that differed according to their eligibility requirements and assessment processes. That approach resonates with the Canadian programmes discussed in the next chapter.

6

Canadian Redress

6.1 Background

Canada's residential school system developed during the nineteenth century. Religious orders operated most schools, which primarily housed 'status Indian'[1] children. These culturally genocidal institutions sought to eliminate Indigenous cultures by removing their children (The Truth and Reconciliation Commission of Canada 2015e: 1; MacDonald 2019). The schools were also systemically abusive. In 2006, the Indian Residential Schools Settlement Agreement (IRSSA) initiated three monetary redress programmes – the Common Experience Payment (CEP) and its ancillary Personal Credits programme, alongside the Independent Assessment Process (IAP). IRSSA also committed Canada to provide CDN$125 million for the Aboriginal Healing Foundation; CDN$60 million to research and preserve the experiences of the survivors; CDN$20 million for commemorative projects; and CDN$60 million for the Truth and Reconciliation Commission (2009–2015). These initiatives were complemented by the prime minister's 2008 parliamentary apology (Harper 2008).

Although they were independent processes, as composite parts of a single agreement, the three monetary redress programmes shared a common background, stakeholders, eligible populations, and some administrative and support provisions. The CEP redressed the collective experience of structural injuries, including the loss of language and culture. The Personal Credits programme provided in-kind redress, while the IAP redressed individually experienced, often interactional injuries,

[1] 'Indian' is a prejudicial term for Indigenous Canadians: it is also a legal status. Canada's Indian Act (1876) defines who is recognised as an 'Indian' and entitled to the rights and responsibilities associated with that status ('Indian Act' 1876 (1985)). Many Indigenous persons and peoples, such as the Métis and Inuit, were, for various reasons, not recognised as 'status Indians' and generally excluded from the Act's benefits and disabilities until 2016.

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including consequential damages. The programmes were very large. The CEP had more than double as many applicants (105,530) as the second largest exemplar – the IAP. Both the IAP's 38,276 applicants and the 30,042 initial Personal Credit applications greatly exceeded those in the largest non-Canadian exemplar, Ireland's RIRB (16,649). Canada's programmes were as expensive as they were big.[2] The CEP and Personal Credits cost over CDN$1.9 billion. IAP payments totalled CDN$3.2 billion (Independent Assessment Process Oversight Committee 2021: 88). This chapter will focus first on the CEP and its ancillary Personal Credits programme. I then address the IAP.

6.2 Common Experience Payments

Indigenous parties co-developed and implemented IRSSA, with the Assembly of First Nations (AFN) occupying a central position. Canada[3] assumed administrative responsibility for redress, but the courts had oversight responsibility, the administrative aspects of which were managed by an *amicus curiae*, Crawford Class Action Services. Developing and delivering such large and complex programmes required coordinating the work of several government departments and stakeholder groups along with hundreds of local agencies. This created problems (Dion Stout and Harp 2007: v). The National Administrative Committee (NAC) was the peak administrative body for all three programmes. It comprised seven representatives of the settling parties.[4] The NAC was responsible for regulatory interpretation. It could issue some decisions based on a majority of five, but it usually sought consensus, which meant it was slow-moving. For example, negotiations over the CEP application

[2] The churches bore some of IRSSA's costs, with a formula apportioning their financial contributions to their degree of involvement in the schools system. The monies involved for the United and Anglican churches were not significant and paid promptly. The Catholic Church was the largest church contributor and its CDN$79 million share was not paid in full. After sustained litigation, the Catholic Church was released from its obligation in 2015. At the time of writing, this remains a significant political issue.

[3] For simplicity, I use 'Canada' to refer to both the department-level state agency and the state generally.

[4] The seven parties were: Canada, churches, the AFN, the National Consortium (representing nineteen law firms), the Merchant Law Group, Inuit Representatives, and Independent Counsel (who represented law firms outside the National Consortium).

form continued until 6 September 2007, two weeks before the programme was launched (Strategic Policy and Research Branch 2013: 15).

Service Canada (a government agency) was one of the shopfronts working with survivors, receiving applications, ensuring their completeness, inputting information into the database, and confirming applicants' identity. Service Canada would also issue CEP payments. The *amicus curiae*, Crawford Class Action Services, operated a parallel client-facing email/telephone 'CEP Response Centre'. Crawford mediated between the programme and survivors, administered the CEP appeal process, and operated the IRSSA website. Donna Cona, an Indigenous service business, also ran a helpline.

Behind those outward-facing agencies, Canada's Department of Indian Affairs and Northern Development ran the primary administrative body – Indian Residential Schools Resolution Canada (IRSRC[5]). In 2007, Canada estimated that IRSSA would require around 600 full-time staff (Indian Residential Schools Resolution Canada 2007a: 5). At the time, IRSRC had 317 staff, mostly permanent civil servants supplemented by contractors (Audit and Assurance Services Branch 2015: 21). The programmes struggled to recruit and retain staff. IRSRC experienced significant turnover, with three deputy heads succeeding one another during 2006–2007. The 2008 global financial crisis led to a hiring freeze. Staffing challenges degraded capacity, decreased morale, and contributed to delays (Audit and Assurance Services Branch 2015: 37). IRSRC's host ministry was renamed and reorganised several times over the programmes' duration, aggravating morale problems.

Within IRSRC, the CEP had two key sub-units, the CEP Co-ordination Unit, responsible for administration, and the National Research and Analysis Unit (NARA), which researched and validated CEP applications. Operational and staffing costs for the CEP from 2006 to 2013 were CDN$101 million (Audit and Assurance Services Branch 2015: 9). Service Canada spent a CDN$36 million (Strategic Policy and Research Branch 2013: 36). Health Canada provided significant funding, of around CDN$55 million per year, in health and counselling support, but that figure includes funding for the IAP and the TRC (Office of Audit and Evaluation 2016: 1).

The visibility of redress benefitted from Canada's largest-ever advertising campaign, with information packages conveyed through and to

[5] IRSRC was known by several names but the changes are not important.

around 140 local and Indigenous organisations in English, French, and a variety of Indigenous languages (Audit and Assurance Services Branch 2015: 9). Advertising synchronised with IRSSA deadlines, with 98 per cent of survivors each seeing an average of 14 advertisements (Indian Residential Schools Adjudication Secretariat c2013). Because IRSSA extinguished the survivors' right to sue, a 150-day opt-out period enabled them to decide, both individually and collectively, if they wished to lose those rights. As many as 1,288 opted out before the 20 August 2007 deadline (Strategic Policy and Research Branch 2013: 5, fn 21). IRSSA would have been discontinued if that figure had exceeded 5,000.

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The CEP addressed collective and structural injuries experienced by those residing in the residential schools. Survivors received CDN$10,000 for the first year (or part thereof) of residence in a scheduled institution, then CDN$3000 for every subsequent year of residence (or part thereof) prior to 31 December 1997. Eligible applicants needed to be alive on 30 May 2005, not have opted-out, and to apply before 19 September 2011. That deadline was extended to 19 September 2012 for those who experienced hardship or exceptional circumstances. Posthumous applications were accepted for survivors who died after 30 May 2005.[6] Applicants who were sixty-five years or older on 31 May 2005 and applied by 31 December 2006 were eligible for advance payments of up to CDN$8,000. A total of 13,547 applications resulted in around 10,300 advance payments (Audit and Assurance Services Branch 2015: 5).

The short CEP application form asked applicants to provide identity documents and to state if they were status Indian, non-status, Métis, Inuit, or Inuvialuit. The survivor could select payment by direct deposit or cheque and needed to consent to Canada verifying their identity and duration of residence. The key evidence concerned which school(s) the survivors attended and the dates of attendance. A schedule of eligible institutions was appended to the form. A school was included if Canada was responsible for it and it provided overnight accommodation. The schedule should have included all such schools; however, exclusions

[6] The conditions of eligibility vary slightly for members of different claimant groups. For example, survivors who attended the Mohawk Institute and who died on or after 5 October 1996 were eligible.

occasioned widespread and bitter complaints (The Truth and Reconciliation Commission of Canada 2012: 9; Reimer et al. 2010: 34; Logan 2008: 84). IRSSA specified that institutions might be added if they fit the criteria for inclusion. Applications by 9,471 survivors requested the addition of 1,531 institutions (Indigenous and Northern Affairs Canada 2018). Most requests were denied. Canada accepted seven additions and the courts added three more – the last, when appeals ended in July 2018, brought the total number of scheduled institutions to 140.

Survivors could submit CEP applications by mail, however, 63 per cent of applications were submitted in person at a Service Canada Centre or at a local outreach session. Outreach visits by Service Canada staff leveraged local Indigenous agencies and support for applicants (Reimer et al. 2010: xiv). Because on-site support catered to reserve-based applicants, greater challenges were encountered with off-reserve, urban, and transient applicants. Service Canada created special communication conduits with federal (but not provincial) prisons (Strategic Policy and Research Branch 2013: 19 fn46).

In 2006, Canada estimated that there were 78,994 eligible survivors (Audit and Assurance Services Branch 2015: ii). This proved accurate: there were 79,309 CEP payments. However, Canada was prepared neither for the large number (over 25,000) of ineligible applications, nor the initial high volume. There were 38,475 applications in the first two weeks and around 80,000 after six weeks – a number that was originally expected would take a year to reach (Audit and Assurance Services Branch 2015: 48; Indian Residential Schools Resolution Canada 2007b: 34). There were 105,530 applications in total. Those high numbers reflected the programme's visibility and the good work of local support services, but they also exacerbated delays. IRSSA required most applications to be processed within thirty-five days and 80 per cent to be paid within twenty-eight days. Only 28 per cent met that standard (Strategic Policy and Research Branch 2013: 30). The ensuing scandal led the government to mandate the completion of 53,000 applications by 22 December 2007. Still, the overall throughput is noteworthy. The programme processed 78,186 applications between September 2007 and March 2008 (Strategic Policy and Research Branch 2013: 36).

When applications had missing information, Service Canada attempted to contact applicants informally. If that failed, Service Canada posted formal notices of incompleteness: the 13,477 such notices represent 13 per cent of the total applications. As this figure does not include informal efforts, it understates the extent of the challenge posed

(Strategic Policy and Research Branch 2013: 29). In the end, 2,294 applications were withdrawn or too incomplete to process.

The CEP sought to reduce the potential for retraumatising survivors by minimising contact with them. Documents provided the primary form of evidence. NARA would attempt to validate residential duration using a computer-assisted research system to search its database of over one million records (Audit and Assurance Services Branch 2015). Developed in-house, the automated software included common spelling errors and phonetic variations and covered records spanning ten years before and after the applicant's stated period of attendance. However, problems emerged during the critical September–October (2007) period (Audit and Assurance Services Branch 2015: 41). The automated validation rate of 44 per cent was significantly lower than the expected 65 per cent, contributing to delays (Indian Residential Schools Resolution Canada 2007b: 2).

The standard of evidence was the balance of probabilities. If the automated software did not validate the application, or validation was uncertain, there was a manual review. Minor uncertainties regarding residential duration were resolved in favour of the claimant. Gaps in the primary records would be interpreted as a period of residence when their duration was less than the number of years that could be verified (Indian Residential Schools Resolution Canada 2007b). Greater uncertainties required further documentary evidence. Verification could also depend on the quality of available records; if the records were generally good, they were given greater weight. Where there was doubt, the programme could ask applicants questions designed to elicit confirmation of residence. Applicants might provide affidavits, photographs, or other relevant documentary evidence; however, many applicants had incomplete or inaccurate memories of their school attendance (Fabian 2014: 255). The programme rejected 23,927 applications (23 per cent) (Aboriginal Affairs and Northern Development 2012: 5). Some applicants were duplicates, others intentionally provided inaccurate information; however, most rejections happened when the applicant did not reside at a scheduled institution or the records were inadequate. Strict validation protocols meant some claims were rejected in whole or in part despite researchers believing the applicant (Fabian 2014: 248).

Appeals by unsuccessful applicants created another backlog. There were 27,798 internal reconsideration requests managed within IRSRC, with 9,771 increased payments averaging CDN$8,363 (Indigenous and Northern Affairs Canada 2018: 5; Aboriginal Affairs and Northern

Development 2012: unpaginated). Should the applicant remain unsatisfied, they could appeal to NAC. There were 5,259 appeals to NAC, 1,164 of which resulted in increases averaging CDN$7,655 (Indigenous and Northern Affairs Canada 2018; Aboriginal Affairs and Northern Development 2012: 5). Unhappy with NAC's response, 741 applicants appealed to the courts, 7 were successful (Indigenous and Northern Affairs Canada 2018).

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Many survivors found the application process difficult, and most sought help (Reimer et al. 2010: 95; Dion Stout and Harp 2007: xii; Strategic Policy and Research Branch 2013: 23). As previously mentioned, three agencies, Donna Cona, Crawford Services, and Service Canada ran helplines providing advice. Large call volumes created long wait times: Service Canada received over 100,000 calls in November 2007 (Strategic Policy and Research Branch 2013: vi).

The Resolutions Health Support Program (RHSP) supported survivors and their families. Delivered by Health Canada, RHSP funded three specific roles: cultural support workers, health support workers, and professional counsellors. The largest cohort provided cultural support. Cultural support workers might be locally based Elders, healers, or others with cultural knowledge who helped survivors access ceremonies, workshops, prayer, or simply offered personal assistance. Local cultural support recognised that community healing is as important as individual processes (Castellano 2010: 26). Although locally provided services led to some privacy and confidentiality problems, 95 per cent of cultural support users reported that they felt their privacy was respected (Office of Audit and Evaluation Health Canada and the Public Health Agency of Canada 2016: 30).[7]

Health support workers provided professional mental health support during the application process. These workers had some tertiary education, experience with mental health assistance, and needed to be culturally competent – many were survivors. Because their work with survivors was short-term, often only the day of the IAP interview (discussed in Section 6.4), one of their key functions was to ensure that survivors had appropriate post-interview care (CA Interviews 1 & 6). In the third form

[7] Admittedly, the distrustful would be less likely to be users, and consequently excluded from a service-user survey.

of support, the RHSP funded professional counselling services – providing survivors and family members with an initial two-hour assessment. Normally, the counsellor would develop a treatment plan of up to twenty hours, with more available upon request. As part of its counselling services, Health Canada also maintained the 'Indian Residential Schools Crisis Line' – a telephone service. The programme's need for large numbers of counsellors created problems and their high turnover challenged survivors, who struggled to develop relations with a number of different counsellors (Reimer et al. 2010: 70).

In 2006, the RHSP had CDN$94 million funding over six years (Evaluation, Performance Measurement, and Review Branch: Audit and Evaluation Sector 2009: 44). High demand meant the programme was over-budget by 2011. Health Canada then spent another CDN$284.7 million between 2010 and 2015 on the RHSP (Office of Audit and Evaluation Health Canada and the Public Health Agency of Canada 2016: 6). Counselling and transportation services consumed roughly 23 per cent of Health Canada's budget, 4 per cent went to civil service salaries, leaving 73 per cent for emotional, cultural, and counselling services, much of which went to Indigenous organisations (CA Interview 6; Office of Audit and Evaluation 2016: 1). The bulk of this support capacity did not emerge until after the CEP, but by 2012 there were 286 health support workers and 403 cultural support workers (Green 2016: 190–91).

The IRSSA required Canada to settle all associated legal fees incurred prior to May 2005 and prohibited anyone charging further legal fees for CEP applications. This effectively detached CEP applicants from legal support and created a two-tier system. Survivors who had engaged lawyers prior to IRSSA not only had their fees paid by Canada, they often had a professionally compiled claim dossier and access to their personal care records. Survivors who entered the process afterwards received neither legal assistance nor help accessing their records. Instead, Canada undertook responsibility for record searches. By 2007, Canada had created a database that aspired to be a complete list of all status Indians who had resided in scheduled institutions. However, as intimated above, the lack of records and their inaccuracy hindered many applicants (Fabian 2014: 256). Many records had been destroyed (Reimer et al. 2010: 29). In 2007, an audit of NARA's database indicated significant gaps, particularly for non-status Indians, and significant inaccuracies due to input and scanning errors (Audit and Assurance Services

Branch 2015: 24, 33). These problems contributed to delays, frustrations, and public criticism.

The CEP increased pressure on general services for health, counselling, and policing (Evaluation, Performance Measurement, and Review Branch: Audit and Evaluation Sector 2009: 36). One survivor was reported as saying that

> a physician on my reserve indicates that he has never seen things so bad, that the stress resulting from the reliving of these past experiences has brought about suicides, attempted suicides, depression, alcoholism/drug abuse and violence within the community. (Stimson 2009: 72)

In response, the Aboriginal Healing Foundation funded healing circles, workshops, and other local services. Similarly, family members, volunteers, band councils, and First Nations helped survivors, and Canada funded additional Indigenous support programmes. In 2008–2009, that funding totalled CDN$4 million, with the three largest recipients being the AFN (CDN$535,000), the Indian Residential School Survivors Society (CDN$370,000), and the National Residential School Survivors Society (CDN$474,000) (Indian and Northern Affairs Canada 2009: 19). Some large Indigenous organisations were excluded, such as the Congress of Aboriginal Peoples, which represents Métis and off-reserve Indigenous persons. There were persistent and significant differences in the on- and off-reserve support available (Reimer et al. 2010: 32–33; CA Interview 5).

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Canada paid 79,309 CEP settlements (Crown-Indigenous Relations and Northern Affairs Canada 2019). These payments should not have affected survivors' tax assessments or eligibility for benefits. Direct deposit was preferred for security and privacy reasons, as there were concerns that physical cheques could be lost and many rural locations were served by (non-private) community mail bags (Strategic Policy and Research Branch 2013: 15). A computer system produced generic decision letters, which informed survivors of their right to appeal (Audit and Assurance Services Branch 2015: 42).

The 79,309 payments totalled CDN$1.622 billion, with a mean average of CDN$20,457 (Crown-Indigenous Relations and Northern Affairs Canada 2019). The average processing time during the first two years was 74.8 days (Strategic Policy and Research Branch 2013: 41). With the

majority of payments made in 2008, the CEP brought a 'massive and sudden influx of money into Aboriginal communities across Canada' (Dion Stout and Harp 2007: xi). Potential problems associated with that influx were anticipated and sources often attribute serious problems to the receipt of CEP payments (Reimer et al. 2010: 44; Jung 2009: 15 fn49; Fabian 2014: 258; Miller 2017: 168–69; Edelman 2012: 77; Audit and Assurance Services Branch 2015: 42). As the negative effects of the CEP are a prominent theme, it is interesting that a contemporary study of survivors does not provide strong evidence of the phenomenon (Reimer et al. 2010: 168–70). Indeed, a comprehensive reflexive study suggests that money from IRSSA was not widely misused (National Centre for Truth and Reconciliation 2020: 38–39).

6.3 Personal Credits

IRSSA committed Canada to spend CDN$1.9 billion on the CEP and stipulated that any underspend would be used to benefit survivors. When individual payments left nearly CDN$300 million unspent, CEP recipients became eligible for a non-cash 'personal credit' of up to CDN$3,000. Credits could be used for educational, personal development, or ceremonial services. Credits could be assigned to immediate family members and posthumous applications were welcome. Crawford Class Action Services began administering personal credits applications in January 2014. The administrative costs of the programme (around CDN$24 million) were paid out of the remaining funds – Crawford would receive CDN$15.7 million, Canada CDN$3.4 million, and Indigenous agencies would split most of the remaining administrative budget (Indigenous and Northern Affairs Canada 2016: 4).

Applicants had to specify how the credits would be used and monies would be transferred directly to the service provider. Indigenous organisations assisted applicants and provided services upon which the credits could be spent. The conflict of interest is obvious. Still, by working with Indigenous agencies the Personal Credits programme could benefit

> . . . not only individuals, but their families and, in some cases, their whole communities should they pool their credits for language programmes or cultural programmes that may be appropriate to re-building what they have lost through residential schools. (Charlene Belleau in Assembly of First Nations 2014)

The application process had two steps. First, the survivor needed to apply for a credit for a specific service, then, once approved, apply

through that service provider to redeem their credit(s). The original application deadline was 31 October 2014, but only a few applications were received initially (Indigenous and Northern Affairs Canada 2016: iv). As of 8 January 2015 only around 24,500 survivors had made an initial application (Assembly of First Nations 2015). The advertising emphasis on using credits to pay for college and university education was unattractive to older survivors (CA Interview 1). Later communications emphasised the use of credits for group and cultural activities, traditional knowledge and skills development, and cultural or healing ceremonies. In late 2014 and early 2015, there was a concerted effort that included CDN$2.3 million in outreach funding for the AFN and CDN$1.2 million for Inuit organisations, and the application deadline was extended to 9 March 2015.

Applications received only a cursory review. Nevertheless, around 11 per cent (3,240) were initially denied, usually for incompleteness (Indigenous and Northern Affairs Canada 2016: 13). As of 31 March 2016, survivors had submitted 30,042 initial applications and 23,774 redemption forms for a total value of CDN$57 million (Crown-Indigenous Relations and Northern Affairs Canada 2019). All credits had to be used by 31 August 2015, with extensions for survivors of institutions added to IRSSA's schedule of institutions after that date. The primary cause for redemption requests being refused was that they were submitted after the deadline (Indigenous and Northern Affairs Canada 2016: 14). After the personal credits were disbursed, IRSSA specified that remaining funds would go to the National Indian Brotherhood Trust Fund (NIBTF) and the Inuvialuit Education Foundation (IEF) according to the proportion of CEP applicants served by each.

6.4 Independent Assessment Process

When compared to the other two programmes, the IAP provided larger payments, redressed interactional and individual injuries, and was much more comprehensive. IRSSA established three key administrative bodies for the IAP: the Independent Assessment Process Oversight Committee (the Oversight Committee); the Indian Residential Schools Adjudication Secretariat (the Secretariat), which reported to the Oversight Committee, and served as the IAP's administrative manager; and the Settlement Agreement Operations Branch (SAO), representing Canada.

Responsible for policy development and interpretation, the Oversight Committee comprised representatives from IRSSA's parties, plus an independent Chair. The Oversight Committee reported to the NAC, but the NAC rarely involved itself in IAP operations (CA Interview 4). The SAO researched applications, provided background information on residential schools, and organised payments. The key SAO figure was the 'Resolution Manager', the lawyer who represented Canada at evidentiary interviews and when negotiating settlements. Resolution managers received four months of training. Some were seconded from the Department of Justice, and most were young and recently articled (CA Interview 4). SAO had 220 staff members by 2015.

The Secretariat was the central IAP agency and was responsible for outreach, receiving applications, liaising with counsel, organising interviews, coordinating medical and psychological assessments, hiring and training adjudicators, and communicating payment offers. Led by the chief adjudicator, the Secretariat required a large and well-trained staff with a variety of skills. Again, there were significant staffing problems. In 2006 Canada estimated that the IAP would require 445 staff to manage 2,500 applications per year (Estimates reported in *Charles Baxter Sr. & Elijah Baxter et al.* v. *Attorney General of Canada et al.* 2006). It had 241 employees at its peak in 2013, when it resolved 6,251 applications (Indian Residential Schools Adjudication Secretariat 2014: 10). In addition, the Oversight Committee contracted around 120 adjudicators. Adjudicators assessed claims and determined settlement values. Again, there were persistent staffing difficulties and IRSRC ran four hiring rounds for adjudicators, the last concluding in 2011.

The IAP originally expected 12,500 applications (Oversight Committee 2011: 3). It received 38,276. Application forms must have been postmarked before 19 September 2012 and late applications were only accepted in exceptional circumstances. Crawford Class Action Services received applications and conducted an initial eligibility review (Indian Residential Schools Adjudication Secretariat 2019: 6). Crawford admitted 33,867 applications. Most preliminary rejections concerned unscheduled institutions or claims that had already been settled. Between 2008 and 2011, there were approximately 430 applications per month. That rate doubled in 2012, with 7,670 in the final month of September 2012. Men submitted around 51, women 49 per cent of applications (Independent Assessment Process Oversight Committee 2021: 57). Most were Canadian residents, only 338 expatriates applied.

The IAP accepted posthumous applications for those who died after May 2005.

The Secretariat worked with Indigenous organisations to make outreach material comprehensible and culturally appropriate (CA Interview 7). Secretariat staff attended over 350 conferences, workshops, meetings, First Nations assemblies, TRC events, and powwows (Indian Residential Schools Adjudication Secretariat 2013a: 8). All CEP applicants were sent a letter inviting them to apply for an IAP. In 2009, the Secretariat conducted analysis to ensure that further outreach would target populations generating lower-than-expected numbers (Indian Residential Schools Adjudication Secretariat 2010: 6).

Eligible injurious experiences included any form of sexual abuse, serious physical abuse, abuse leading to serious harms and, in addition, consequential damage. Eligible injuries could be inflicted by school staff, peers, or other adults associated with a scheduled institution. The IAP shared the CEP's schedule of residential schools, although non-residents could claim for injuries experienced when participating in an authorised activity at a scheduled institution. Applicants were asked for identifying information and the schools they attended. The application form then asked for details about their injurious experiences, the names and positions of those involved and whether staff knew, or should have known, about the abuse. This information could be provided in tabular and narrative forms. The application asked for specific aggravating factors, such as racial abuse or the betrayal of trusting relationships, presented as tick boxes. The Secretariat's comprehensive guide helped survivors code their experiences (Indian Residential Schools Adjudication Secretariat 2018b).

To claim for consequential damage, applicants needed to describe, in free text, how injuries affected their lives and any treatment they had received. Applicants were prompted to assess their harms' severity using a five-step matrix. The form probed the survivor's education and work history, again asking the applicant to assess the severity of any impairment using a matrix. In addition, claimants could apply for actual income lost as a result of abuse-in-care, such as having lost a job. All claims for severe consequential damage required supporting evidence, such as a medical report, but claims for actual income loss were particularly difficult to sustain. Only eighteen applicants (0.04 percent) were successful (Galloway 2017). Looking forward, applicants were also asked to outline a post-settlement treatment plan and its costs. The last parts of the form concerned the applicant's preferences regarding the

forthcoming evidentiary interview, including the gender and ethnicity of adjudicators and the presence (or absence) of church parties; a declaration that the application is truthful; and consent for Canada to share information and access relevant records.

The IAP expedited claims from very elderly applicants and those with serious health problems. That expedited process allowed interviews to occur before documentary evidence was collected. Otherwise, applications went through one of three processes: standard, complex, or court. There were only three 'court track' applications (CA Interview 4).[8] The main work of the IAP was conducted in the standard and complex processes. These processes differed according to the types of injury and the corresponding standards of evidence. Most claims went through the standard process. These claims concerned redress for specified forms of abuse and consequential harms, and the standard of evidence was the balance of probabilities: abuse needed to be more likely to have happened than not and redressable harms needed to be plausibly linked to those acts of abuse. However, higher value settlements tended to require more and better evidence, including professional reports (Canada et al. 2006: Schedule D, Appendix VII).

A small proportion, 3 per cent, of claims (968) used the complex process, which included redress for serious psychological harms caused by 'other wrongful acts' and for the actual income losses mentioned above. 'Other wrongful acts' were injuries not enumerated on the IAP's list of compensable abuses and needed to have caused severe damage (Indian Residential Schools Adjudication Secretariat 2009b: 2). The redress of damage on the complex track used a higher evidentiary standard wherein survivors needed to prove causation.

Most applications were submitted incomplete and the Secretariat held the case files as parties progressively added documents (Independent Assessment Process Oversight Committee 2021: 43). Specific documents were mandatory for certain claims. For example, if the survivor sought redress for an ongoing medical disorder, they needed a report from a medical professional attesting to their illness. Excepting priority cases, interviews could not proceed until all mandatory documents were provided. The Secretariat prioritised applicants whose age or failing health would impair their ability to participate in the programme, alongside those going through the 'group process' (discussed below). Applications

[8] A claim would be moved to the court track only if its complexity meant that the IAP could not reasonably accommodate the claim.

could include thousands of pages, including medical, police, departmental, employment, welfare, and corrections files. As thousands of applicants sought their records, many agencies became overwhelmed by the demand, leading to further delays (Independent Assessment Process Oversight Committee 2021: 43; Indian Residential Schools Adjudication Secretariat 2011: 20). Professional reports could be challenging to obtain in rural communities, and the Secretariat experienced ongoing difficulties in retaining competent professionals. And when IAP assessment was treated as non-urgent, applicants could experience long waits for an appointment with busy medical professionals (Indian Residential Schools Adjudication Secretariat 2011: 22–23).

To help with consistency, the Secretariat developed a secure searchable online database of exemplar IAP decisions. Beginning in December 2013, the Secretariat also began to hold claims that would benefit from information gathered in other cases. The SAO compiled a list of around 2,200 affected claims and identified 647 that might provide beneficial evidence (Indian Residential Schools Adjudication Secretariat 2014: 21). This encouraged a batching of related applications and adjudicators developed expertise with specific geographical groupings of schools (CA Interview 7).

Adjudicators usually received the applicant's file in the weeks prior to the interview (Bay 2013: 3). The claim would then proceed through a negotiated settlement or interview. The negotiated process was faster, and dispensed with the evidentiary interview if the claimant and SAO agreed on a settlement value. The negotiated process developed over time, before 2010 the SAO would only negotiate with claimants who had previously sworn evidence (Indian Residential Schools Adjudication Secretariat 2011: 15). As the SAO became more accommodating, 4,415 claims were settled through negotiation (Independent Assessment Process Oversight Committee 2021: 50).

The majority of cases proceeded to interviews. Interviews were private and confidential and adjudicators, with assistance from the Secretariat, were responsible for ensuring they were located in safe, accessible, and convivial locations. Vancouver and Winnipeg had specially designed hearing rooms, but adjudicators travelled to communities across Canada to hold interviews in community halls, council offices, hotels, and friendship centres. Both their lawyer and an assigned health support worker met with the survivor prior to the interview. Translators were available if the survivor wished. If requested, a cultural support worker would attend and might perform a ceremony. The Secretariat would fund

the travel costs of two personal support people. Because interviews forced friends and family to confront details of the abuse experienced by their loved ones, most survivors proceeded with only their legal representative (Bay 2013: 3).

The adjudicator presided over the inquisitorial interview, which could last several hours. The adjudicator would explore the survivor's life in detail, working through their life before the residential school, their experiences at the school, and what happened to them afterwards. In general, survivors found the interviews very difficult (Morrissette and Goodwill 2013: 548; Bombay, Matheson, and Anisman 2014: 133; Miller 2017: 180). 'For some survivors, the act of sharing their testimony was one of the hardest things they have ever had to do in their lifetime' (Petoukhov 2018: 106). Some applicants read prepared statements, but they were warned that might affect their credibility. The interview was designed to be a place where the applicant related what had happened to them in 'their own words'.

> [D]o they have a ring of truth, right? That's what adjudicators are looking for. So, there are a lot of times where in the absence of documentation, they have the ring of truth and that ring of truth overtakes and overcomes any weakness and compensation is awarded by adjudicators. (CA Interview 4)

Protracted interviews were punctuated by regular breaks for the survivor's comfort. The SAO and church parties could use those breaks to suggest question topics to the adjudicator. Without the adjudicator's explicit permission, no one else could address the survivor directly. The interview process could be iterative. If survivors disclosed new injurious experiences, they might need to get new reports, or the Secretariat might need to contact newly alleged perpetrators. The adjudicator would then reconvene the interview.

Interviews were attended by right by the adjudicator, the claimant, their lawyer, the SAO, and a church representative. Most churches would only attend if invited by the survivors (Independent Assessment Process Oversight Committee 2021: 30 fn86). Although rare, some interviews involved witnesses. If called by the survivor, witnesses might testify at the survivor's interview, but if called by the SAO, church, or alleged perpetrator, they would have a separate hearing. Alleged individual perpetrators were notified and could make a submission, but they could not attend the survivor's interview without the survivor's consent. Canada provided alleged perpetrators with CDN$2,500 for legal advice, plus costs for their

attendance. Although alleged perpetrators rarely attended interviews, nevertheless, the fact that they were notified that they had been named as perpetrators created significant difficulties: many alleged perpetrators were family members or fellow survivors living in the same community (Bombay, Matheson, and Anisman 2014: 17; Independent Assessment Process Oversight Committee 2021: 76).

The large numbers of independent adjudicators with differing backgrounds and experiences raised quality and consistency concerns. Differences emerged as some adjudicators were more therapeutic and others more forensic. Each adjudicator received five days of initial training, supplemented by annual workshops. By 2009, there were eight deputy chief adjudicators working with groups of adjudicators to promote good practice and review decisions. Claimants could request an Indigenous adjudicator, which could make 'a big difference' to the survivor's experience (Hanson 2016: 12). But hiring Indigenous adjudicators proved difficult, contributing to delays (Miller 2017: 176). Not only are Indigenous lawyers underrepresented in Canada, many had potential conflicts of interest.

At the end of a (good) interview, the SAO representative would ask if they could thank the survivor, say that they believed the survivor's account, and offer an apology letter. Participants might discuss a future care plan: adjudicators could award up to CDN$10,000 for treatment, counselling, or traditional healing or CDN$15,000 for psychiatric treatment. After 2010, the parties could opt for a 'short form' decision if all parties agreed on a settlement value and wished to waive their rights to a written decision (Indian Residential Schools Adjudication Secretariat 2011: 11). Short-form decisions were not available to self-represented claimants who were thought vulnerable to pressure into accepting an unfavourable settlement at the end of a long and difficult interview. Around 38 per cent of all decisions were issued in short-form (Indian Residential Schools Adjudication Secretariat 2016: 17).

After the interview(s) concluded and all the evidence was collected, the adjudicator would take final submissions during a conference call between the adjudicator, the SAO, and the applicant's lawyer (CA Interview 4). At this point, the survivor and SAO could make recommendations. The adjudicator would then begin their assessment. Standard adjudicator decisions usually took around 160 days after the interview (Miller 2017: 175). However, they could 'easily' take up to a year (CA Interview 7).

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IAP applicants were eligible for support through the RHSP, the Secretariat, and from legal counsel. The RHSP provided applicants with the counselling and cultural support described above; however, the IAP accentuated the role of the health support worker. Health support workers helped with logistics for interviews, met with the applicant beforehand, and attended the interview if the survivor wished.[9] However, high caseload numbers and Canada's challenging geography often meant that health support workers only met survivors on the day of their interviews (Petoukhov 2018: 109; CA Interview 2). Cultural support was used by 28,918 survivors during the peak IAP period of 2010–2015 (Office of Audit and Evaluation Health Canada and the Public Health Agency of Canada 2016: 23).

The Secretariat managed interview arrangements, including the presence of Elders or translators. The Secretariat would also arrange ceremonies requested by survivors. Its website contained helpful information about IAP procedures, including a useful and straightforward video on the interview process. To provide additional support and outreach work, the Secretariat partnered with Indigenous organisations. For example, the Secretariat funded Indigenous organisations to provide financial planning workshops (CA Interview 7).

Legal representation was strongly recommended. To protect survivors from the associated costs, IRSSA capped contingency fees at 30 per cent of the survivor's settlement. Canada would pay half of that fee, plus any reasonable disbursements. Canada was also represented by lawyers, but they were not to defend their client. Instead, the SAO assumed several survivor-oriented responsibilities. This included compiling records about alleged perpetrators, including peer abusers, and conveying any known admissions from criminal trials or prior settlements. The SAO subsumed NARA and its database and provided dossiers on each residential school. These dossiers were a summary compendium that might include a chronology of infrastructure projects, administrative changes, and significant events such as disease outbreaks or temporary closures. The dossiers described school sports and outings and population figures (where known), along with known cases of assault and complaints, a list of staff members, and their periods of employment.[10]

[9] The worker would wait outside if the applicant did not want them in the interview room.
[10] The National Centre for Truth and Reconciliation archived some school narratives. As of 20 January 2022, they were available at: https://archives.nctr.ca/IAP-School-Narratives.

Legal representation emerged as one of the most significant problems in the IAP. The SAO's control over documentary evidence, including individual health, employment, and correction files; institutional staff lists; and the school narratives created conflicts of interest (Smith 2016). That conflict was apparent in the case of St. Anne's Residential School in Fort Albany, Ontario where a 1992 police investigation identified seventy-four suspects and charged seven people, leading to five convictions for assault and indecent assault (Barrera 2018). Despite repeated requests, the SAO did not provide the results of that investigation to the Secretariat (and through it, to survivors) until it was compelled by a 2014 court decision. This high-profile case reflected badly on the SAO's reputation for fairness.

Turning from the SAO to counsel for survivors, the IAP confronted the strategic challenge that many lawyers did not have IAP-specific expertise. In response, the Secretariat ran training seminars and circulated seven editions of the *Desk Guide for Legal Counsel*, first published in 2011 (Indian Residential Schools Adjudication Secretariat 2019). The *Desk Guide* introduced counsel to their role in the process and was supplemented in 2012 by the *Expectations of Legal Practice in the IAP*, amended in 2013 (Indian Residential Schools Adjudication Secretariat 2013b).

Many lawyers worked hard with claimants, with some renouncing all fees from survivors and contenting themselves with the government's contribution. Still, the actions of some tarnished the good work of many. Delays occurred when lawyers took on too many clients, while others, with their fees guaranteed, de-prioritised IAP claims (Indian Residential Schools Adjudication Secretariat 2012: 8). Lawyers arrived at interviews unprepared, without meeting survivors beforehand, and obstructed survivors' access to support services. Venal lawyers exploited vulnerable clients. Some overcharged their clients by not discounting Canada's contribution. Between 2007 and 2009, adjudicators reviewed 50 per cent of cases, and reduced legal fees in around 80 per cent of those reviewed (Indian Residential Schools Adjudication Secretariat 2010: 17). Worse lawyers provided survivors with usurious loans, secured against forthcoming settlements. Others encouraged their clients to use 'form filler' agencies to complete their applications with generic information. Those agencies charged survivors for the service, then with much of the paperwork done for them, the lawyer would charge their full fee nevertheless. Unconscionable lawyers recruited survivors, then pushed them into using form-filler agencies in which the lawyers themselves had an

interest. Although only a minority of lawyers engaged in malpractice, their adept harvesting of clients affected large numbers (Miller 2017: 179). One firm headed by David Blott represented more than 5,600 survivors, all of whom had to get new representation after Blott was disbarred in 2012.

A better result emerged from the 'group process' wherein survivors were funded to collaborate with and support each other. Groups needed to share a salient attribute, which might be attendance at the same school or residence in a shared community. Interviews remained individuated but the funding supported traditional ceremonies, such as sweats or powwows, community workshops with therapists or Elders, and personal development such as financial literacy or parenting training. The Secretariat received applications and awarded funding to groups. The number of group IAPs steadily increased throughout the programme. By 2017–2018 twenty groups comprised of 285 claimants had been approved for CDN$997,500 in funding to help navigate the challenging IAP process in a more culturally appropriate mode (Indian Residential Schools Adjudication Secretariat 2018a: 26).

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Reflecting on the database of prior decisions, adjudicators assessed claims using four matrices prescribed by IRSSA. Each calculation was independent and the results were then aggregated. The first step scored acts of abuse according to severity (Appendix 3.8). Here, importantly, the scoring of injurious acts was not cumulative, instead the scores reflected the most severe injury described. Next, the adjudicator assessed harmful consequences (Appendix 3.9). The third step assessed aggravating factors, including, for example, the use of racist insults or violence in the course of abuse (Appendix 3.10). The total aggravating factors would then inflate the point total derived from abuse and consequential harms as follows: *(Act Points + Harm Points) x (Aggravating percent x 100)*. The final step concerned 'loss of opportunity', defined as an inability to obtain and retain employment and to undertake or complete education (Appendix 3.12). The final settlement value (plus any funding for future care) was derived from the sum of the four assessments (Appendix 3.13). The maximum total available points was 123 and the maximum settlement value was CDN$275,000 (excepting actual income claims). Both applicants and the SAO could appeal to the chief adjudicator on

procedural questions. Survivors could appeal on errors of fact for review by a second adjudicator. Any party could appeal to the courts; however, the courts heard these cases with caution (Coughlan and Thompson 2018). Their hesitancy was strategic, IRSSA was to replace, not stimulate, litigation.

After thirteen years of operation, the IAP closed on 31 March 2021. IRSSA committed Canada to process 2,500 IAP claims per year. But although higher-than-expected numbers contributed to initial delays, the IAP met that target between 2007 and 2016, with a 2012 high of 4,677 decisions and negotiated settlements. The average claim took twenty-one months (Miller 2017: 175). Originally budgeted for CDN$960 million, the IAP paid CDN$3.23 billion to 27,846 survivors, issued by cheque to

Table 6.1. *Number of adjudicator settlements* by CDN dollar value*

Compensation Points	Compensation ($CDN)	Number of IAP Claims
1–10	$5,000–$10,000	76
11–20	$11,000–$20,000	565
21–30	$21,000–$35,000	1308
31–40	$36,000–$50,000	1836
41–50	$51,000–$65,000	2543
51–60	$66,000–$85,000	3325
61–70	$86,000–$105,000	3623
71–80	$106,000–$125,000	3682
81–90	$126,000–$150,000	2319
91–100	$151,000–$180,000	1368
101–110	$181,000–$210,000	581
111–120	$211,000–$245,000	166
121 or more	Over $245,000	36
Total		21,428*

* This data excludes all negotiated settlements and court process claims. It also excludes the few claims settled after 25 October 2018.

Source: (Private Communication, Michael Tansey of the Secretariat, 31 January 2021).

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the survivor's counsel (Independent Assessment Process Oversight Committee 2021: 8, 88). The success rate of received applications was 82 per cent. The mean average payment was CDN$91,478.

In total, the IAP cost Canada around CDN$4 billion (Independent Assessment Process Oversight Committee 2021: 60). That figure excludes monies spent by state bodies other than IRSRC.

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Canada's IRSSA created a flexible set of three very different programmes that engaged the same survivor population through an overlapping set of institutions. These programmes were large, expensive, and high profile. A common implementation theme is the importance of local support and services. That local focus, and its Indigenous character, stands in sharp contrast to the New Zealand's Historic Claims Process, addressed in the next chapter.

7

Redress in Aotearoa New Zealand

7.1 Introduction

This chapter focuses on the monetary redress programme operated by the Ministry of Social Development (MSD) between 2006 and 2017. With 2,643 claims and 1,315 settlements, the Historic Claims Process (HCP) was the largest state redress programme in New Zealand (Ministry of Social Development 2018b).[1] While MSD continues to provide redress, this chapter concerns the HCP as it was prior to the 1 February 2018 announcement of a Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care. That inquiry prompted transformative changes to the state's redress strategy.

In 2003 the government learnt that people were approaching the Salvation Army for redress of abuse in care. A number of those survivors had been state wards (NZ Interview 6). Looking for a cost-effective and survivor-focussed alternative to litigation, in 2007, MSD consulted with nine survivors to find out what they might want in a redress process (The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021: 157). That feedback shaped an initial framework offering three key redress outcomes: an understanding of the survivor's experience in care, a formal acknowledgement and/or apology, and monetary payments. That framework coalesced in 2008 into a two-pronged response, the Confidential Listening and Assistance Service (CLAS) and the Crown Litigation Strategy.

CLAS heard survivor testimony with a therapeutic purpose. Its purposes were to listen to survivors, acknowledge their experiences, identify issues with which CLAS could assist, and develop a forward-looking plan that might include access to personal records, counselling, or assistance with housing and employment training (NZ Interview 6). CLAS did not

[1] The Ministries of Education and Health operated analogous but much smaller programmes.

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accept new registrations after 2013 and closed in 2015 having heard testimony from 1,103 survivors (Henwood 2015: 49). The second component to New Zealand's response concerned monetary redress. The Crown Litigation Strategy of 2008 had three points:

(1) [State] agencies will seek to resolve grievances early and directly with an individual to the extent practicable
(2) the Crown will endeavour to settle meritorious claims
(3) claims that do proceed to a court hearing because they cannot be resolved will be defended (Ministry of Social Development 2014: 4).

Point (3) expressed the Crown's commitment to a strong legal defence, which meant that out-of-court resolution was the only effective option for survivors (Cooper 2017). Whereas other exemplars were established to remove the survivors' claims from the courts, MSD's programme developed in dialogue with ongoing litigation, and until the 2014–2015 Fast Track Process (see Section 7.2), did not assume clear remedial responsibility for a defined set of claims. Instead, MSD developed a mutable set of conventional procedures for semi-structured negotiation as an adjunct to litigation. As the number of cases grew, these procedures coalesced into a programme with a quasi-independent remit, which became the responsibility of the MSD's Historic Claims Team (the Team).[2]

7.2 The Historic Claims Process

Founded in 2004, staff numbers in the Team grew slowly in response to the increasing number of claims. Staff turnover was relatively low. In 2017, the Team had slightly fewer than thirty members. These included a programme manager (a lawyer), one senior analyst, eleven senior advisors who managed claims, four administrators, and ten staff working with records (NZ Interview 6). All were permanent civil servants. The Team's location within MSD created significant concerns regarding its impartiality. The former chair of CLAS, Judge Henwood, observes,

> The department [MSD] is the perpetrator and also the person trying to put it right. Some people are very, very anti the department [the Ministry] because of all the harm and the way they've been dealt with over the years. So, I don't think it's satisfactory and it's still not satisfactory. (Quoted in, Smale 2016)

[2] The Team bore many different names throughout the period.

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Advisors were often long-serving employees of MSD and lawyers in the programme were employed by MSD to provide it with legal services – the ministry was their client. Meritorious claims appear to have failed due to that lack of impartiality (NZ Interviews 2 and 8) and important evidence was withheld from survivors (Young 2020: 424–25). Moreover, the programme discriminated against survivors when that served political interests. For example, the claims of survivors convicted of serious crimes were delayed for several years because officials were worried the government would be criticised if they were found to be giving money to criminals (Cooper and Hill 2020: 133). There was no effective independent oversight of the process. A review by the New Zealand Human Rights Commission was blocked by the government and its critical 2011 report was never published (Human Rights Commission 2011).[3]

The redress programme had limited public exposure. There was no public advertising and no regular contact with survivor groups (NZ Interviews 1, 6 & 8). A government website was the primary public information source. Most applicants heard about the claims process through survivor networks, from a service agency, or from CLAS (Allen and Clarke Policy and Regulatory Specialists Limited 2018: 2; Ministry of Social Development 2018c: 11). The programme's limited visibility was, in part, a technique to mitigate the ever-growing backlog of claims: the programme did not have the capacity or budget to manage more applicants (NZ Interview 6).

There was no application form. Survivors without legal representation lodged their claims by telephoning the Team and speaking with an advisor. The advisor noted when and where the survivor was in care, what injuries they experienced, and if the claim should be prioritised because the survivor was very ill or suicidal. Alternatively, the survivor's lawyer could engage with MSD directly or file a civil claim in court. A small Wellington firm, Cooper Legal, represented nearly all survivors who retained counsel, representing slightly more than half of all successful claimants. Cooper Legal would first interview the survivor, then notify MSD of the claim and request relevant records pertaining to the survivor – a filed claim would go through a formal process of legal disclosure. After receiving the records, counsel would prepare a 'Letter of Offer' describing the survivor's claim, the supporting evidence, and a desired

[3] Letters between the attorney general and the Commission are on file with the author.

settlement value. Cooper Legal used litigation strategically to help their clients obtain redress. It was not a direct avenue to compensation.

In 2013, MSD was told that incoming claims had peaked and that it could expect a further 482 claims before 2030 – an average of seventeen per year (Webber 2013: 15). This proved inaccurate. The flow of applications has progressively increased. The year 2008 was the first year the programme received more than 100 claims; 200 claims-per year was exceeded in 2011; 300 per year in 2015; and 2017 saw 431 applications (Ministry of Social Development 2018b). During that period, the balance of filed and unfiled claims shifted. Until 2009, claims tended to be filed in court, after that the majority were unfiled: as of 31 December 2017, there were 2,008 unfiled and 635 filed claims (Ministry of Social Development 2018b). I could not find 2017 data on gender; however, 2020 data states that 71 per cent of claimants were male and 22 per cent were female (The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2020b: 175). Between 50 to 60 per cent of claimants were Māori (Young 2017: 8).

Without formal eligibility criteria, the programme's conventions developed and changed over time and the Team used different procedures for different claims. Speaking very generally, survivors must have been alive to lodge a claim, but if they died subsequently, their estates could receive payment. Eligible claims were not limited to specific time periods. While New Zealand originally described pre-1993 injuries as historic, the Team used the same procedure for later injuries. Many claimants were placed in residential institutions. However, the HCP also managed claims from survivors of foster care and other situations, potentially covering anyone who had been legally taken into the care, custody, or guardianship of MSD (or its predecessors), or when the person or family had been under state supervision. In short, the ambit of eligibility was determined by a sense of whom MSD was responsible for in social work practice.

The wide ambit of potentially eligible claimants was matched by a relatively narrow ambit of redressable injuries. Only injurious acts were eligible. These tended to be interactional acts of, for example, sexual abuse, or the inappropriate use of isolation. In more recent years, survivors began to claim for violations of New Zealand's Bill of Rights (1990), including, for example, the right not to be subject to torture or to unreasonable search and seizure and those claims are not subject to statutory limits. Most consequential harms were not redressable, which meant that the programme excluded the effects of injurious cultural

removal, loss of personal identity, and the severance of family relationships.[4] Recall that Māori constitute the majority of survivors, and out-of-home care systemically disconnected them from their cultural and family groups (Ministry of Social Development 2018c: 7). This is an extraordinarily significant omission: it is impossible to overstate the importance of family connections (whakapapa) in Māori culture (Collins 2011).

MSD must have been responsible for the injurious act(s) in some way. For example, abuse by MSD staff would be a relevant injury. But injuries inflicted by others, such as another child, were only redressable if they resulted from a practice failure on the part of MSD. The weaker the causal connection between the injury and actions of MSD staff, the harder it was for claimants to obtain redress. Staff actions were judged according to contemporary standards. However, one interviewee stressed that contemporary standards could be what was permitted, even when permitted practice violated contemporary regulations (NZ Interview 2). That form of normalisation could also reduce settlement values.

The programme sought to be highly personalised, holistically assessing claims through a survivor-oriented process that was modelled on social work. The investigation assessed what abuses occurred and whether the state had legal responsibility for the survivor's welfare at the time. The advisor began by compiling the survivor's records. The next phase of the process, for unrepresented claimants, was an evidentiary interview with two advisors.[5] These interviews were central to MSD's understanding of the process as survivor-oriented (Young 2017: 3). Survivors could have a support person and choose where the meeting occurred. Common venues included marae, community meeting halls, prisons, and government offices. Interviews could take several hours, they were audio-recorded and survivors were encouraged to describe their injurious experiences in detail. Ideally, advisors would listen, ask probing questions, and give survivors advice on how to access personal records and where they could get counselling or other support. After the interview, advisors would pursue any further relevant documents and, potentially, interview alleged perpetrators and other informants. If MSD staff were

[4] The exclusion of consequential harms reflected, in part, the role of New Zealand's Accident Compensation Commission (ACC). ACC's public insurance programme provides medical treatment and some money payments that replace the right to sue available in other jurisdictions. All compensatory claims for personal injury occurring after March 1974 are non-justiciable. Many survivors were eligible to access ACC benefits.

[5] Prior to 2012, advisors met represented survivors and their lawyers, but this became less common (NZ Interview 2).

involved as alleged perpetrators, they received NZD$2,000 for legal advice. Survivors were welcome to supply advisors with further information after the meeting.

Advisors needed to identify social work practice that did not meet contemporary legislative and policy standards. To determine what laws and policies applied contemporaneously, MSD contracted Wendy Parker to report on legal and practice standards between 1950 and 1994. Her report was supplemented by dossiers on fifteen institutions. As Parker stresses, she relied on institutional records only and did not use survivor testimony (Parker 2006: 8–9). However, as new claims were received and investigated, the Team progressively developed a database on institutions, survivors, and alleged perpetrators.

The advisor would develop a provisional assessment, including a proposed payment value. That assessment then underwent a secondary review by the programme manager, tertiary review by the chief legal advisor, and, finally, approval by the ministry's deputy chief executive. In filed cases, MSD or Crown lawyers would also be involved. Because assessment was personalised and detailed, and involved multiple reviews, it was also slow: most cases took four to eight weeks to investigate (2020: 533). Staffing limitations led to backlogs (Winter 2018a: 15). By early 2018, claims were taking around four years to process (Allen and Clarke Policy and Regulatory Specialists Limited 2018: 1). Some of these delays also resulted from underfunding. The HCP did not have the budget it needed to resolve claims.

To address the growing backlog, in 2013 MSD developed a supplementary 'Fast Track Process'. The Fast Track Process was optional and only available for claims lodged as of 31 December 2014. The Fast Track Process would accept claims on face value, if advisors could establish that the state was responsible for the survivor at the time of the relevant injuries; that the survivor was where the abuse occurred at the time alleged; and, that any named perpetrator could have been where the injury occurred (Hrstich-Meyer 2020: 22). The Fast Track Process also narrowed the ambit of redress by excluding Bill of Rights claims. The Fast Track Process made 600 payments, 46 per cent of all claims settled before 31 December 2018.

New Zealand's redress programme confronted persistent complaints of non-transparency. Because procedures constantly changed, it was difficult to know how assessment would be conducted (NZ Interview 2). '[T]he rules were always changing and ... there was inconsistency when interpreting the rules' (Ministry of Social Development 2018c: 17).

While represented applicants could get advice from their lawyers, unrepresented survivors were much worse off. In early 2018, Allen and Clarke found

> Most of the claimants had relatively limited understanding or visibility of the claims review process, including how claims were assessed, where claimants fit into the process, and how the claim would be resolved. (Allen and Clarke Policy and Regulatory Specialists Limited 2018: 4)

Evidentiary standards are an example. The investigation sought to verify claims. In general, its evidentiary standard was that 'the Ministry needed to have a reasonable belief' that the survivor was injured and that it was reasonable to hold MSD responsible (Hrstich-Meyer 2020: 8). But the HCP applied evidentiary standards inconsistently (NZ Interview 2). Moreover, it appears that MSD did not always follow the procedure outlined above. For example, some survivors were told that they did not need to describe their injurious experiences during the interview, only to have that lack of detail detract from their payment values (Cooper and Hill 2020: 79).

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Support for survivors was underdeveloped. Until it closed in 2015, CLAS was, apart from Cooper Legal, the primary source of support. CLAS brokered counselling, helped survivors obtain personal records, and supported survivors in reading those files. Survivors could submit recordings of their CLAS interview to the HCP and CLAS referred 514 survivors to the programme (Hrstich-Meyer 2017: 8). MSD did not engage with survivors' organisations as part of its implementation strategy (NZ Interview 6). Indeed, the programme's failure to engage with Māori organisations prompted a 2017 Waitangi Tribunal complaint (Te Mata Law 2017). That complaint criticised the cultural appropriateness of the programme. During the 2006–2017 period, there was only one Māori advisor in the Team and they left prior to 2017 (NZ Interview 6). As a result, Māori survivors did not 'feel their cultural needs were recognised or catered for' (Ministry of Social Development 2018c: 9). That failure 'reinforced [the survivors'] sense of isolation, helplessness, loss of identity and loss of connection that occurred as a result of being in care' (Ministry of Social Development 2018c: 9).

CLAS might refer survivors to Cooper Legal. Better off survivors paid their legal fees, shouldering the risk that the cost of the process would

exceed their settlement (which it sometimes did). However, most survivors relied on legal aid. Each survivor needed to establish their legal aid eligibility independently and funding was not guaranteed. Indeed, after the Crown Litigation Strategy was announced in 2008, New Zealand began to withdraw legal aid from all non-recent claims (Cooper and Hill 2020: 41–52). Cooper Legal fought that decision in the courts until 2013, when it was agreed that MSD would pay around 66 per cent of the reasonable costs of any legal aid debt with the remainder being written-off by Legal Aid (NZ Interview 2). As of 2017, the cost to MSD of this arrangement was slightly more than NZD$3.8 million, a mean average of NZD$10,445 across 365 claims (Ministry of Social Development 2018b).

MSD funded psychological counselling, usually offering six initial sessions, with a total cost (for all survivors) of around NZD$106,000 by 2019 (Hrstich-Meyer 2020: 23). Additional counselling could be obtained through ACC (see footnote 4 in this chapter). However, the offer of counselling might emerge late in the process, and a dearth of suitable counsellors created waiting lists (NZ Interviews 1 and 2). Very few survivors used professional medical or psychological assessments as evidence in their applications (NZ Interview 2). As there was no funding for such components, and redress excluded consequential harms, professional assessment was not cost-effective. There was no dedicated financial advice service for survivors, although advisors might direct survivors to public advice services (NZ Interview 6).

There was no legislative or policy initiative to facilitate records access for survivors (NZ Interview 5). After CLAS closed, Cooper Legal became the only independent service with specialist records expertise. For unrepresented claimants, MSD's Team managed documentary research. A 2017 survey of 422 survivors indicated that 90 per cent of respondents believed that they would benefit from improved support in accessing records (Stanley et al. 2018: unpaginated). Record searches were complex, usually involving multiple organisations and delays were normal and considerable. Although Archives New Zealand held older files, other government records are decentralised and held by each ministry, often at the regional level. Unrepresented survivors might not know what records exist and what they could expect to obtain (NZ Interview 2). And those records were often in poor condition. '[F]iles were often incomplete, irretrievable and in some cases, missing' (Ministry of Social Development 2018c: 13). To illustrate, when MSD sought twenty-eight staff files for a non-recent abuse case in 2006, only six could be found (Young 2020: 294). MSD would destroy more employee records in 2009

(Young 2020: 293). Moreover, there were problems with the records provided, including cases wherein MSD did not provide all relevant records (Cooper 2017; NZ Interview 8). Concerns regarding the redaction of third-party information, including the identities of family members, were prominent and widespread (Ministry of Social Development 2018c: 13). At times, the Team redacted according to the rule 'if in doubt, leave it out' (Young 2020: 441–42). Redaction could make it harder to settle a case or obtain higher settlement figures. Moreover, it prevented the survivor from getting information about their cultural and family background, a point of particular difficulty for Māori survivors seeking cultural reconnections (Ministry of Social Development 2018c: 9).

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The flexible and holistic character of the process meant that outcomes differed. Building on the programme's social work ethos, some survivors received ad hoc assistance with housing and education. In nine cases, when the Team could not substantiate a redress claim, MSD offered a small wellness payment in lieu of a zero award. However, the programme's holistic character diminished as the volume of claims increased (Young 2020: 342). By December 2017, 1,315 survivors had received NZD$25,147,184 in payments, a mean average of NZD$19,123 (Ministry of Social Development 2018a). While a few (152) payments exceeded NZD$30,000, most (89 per cent) were below NZD$20,000 (Personal communication, from Anonymous, 26 July 2017). As the value of the settlement increased, more approvals were needed. Civil servants could make ex gratia payments up to NZD$30,000, but higher figures required ministerial authority – a procedural hurdle that may have depressed some payment values. Administering the programme cost NZD$41,103,134 between 2007 and 2019 (MacPherson 2020: 23).[6]

MSD suggests that settlement values were 'broadly in line with what a court might award' (Hrstich-Meyer 2017: 2). Other observers disagree (Cooper Legal 2013: 2; The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021: 153). Before 2018, the programme did not publish information on how it determined settlement

[6] I could not find administrative costs for the period ending 31 December 2017. For those interested in comparisons, by 31 December 2019, the HCP had paid NZD$30,220,698 in redress to survivors, which is slightly more than 73 per cent of the administrative costs incurred by that date.

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values. It is now known that once the ministry had paid an initial set of claims, subsequent values were derived by comparing new cases with three to five previous offers (Hrstich-Meyer 2020: 10). That practice crystallised in the Fast Track Process's six-row severity matrix (Appendix 3.14), which the Team created by analysing its settlement practice. The Fast Track Process was subject to a forced distribution to cap its expenditure to NZD$26 million ('Linda Ljubica Hrstich-Meyer Transcript' 2020: 585–86). It appears that, on average, payments made through the Fast Track Process were around NZD$5,000 less than those available through the standard process ('Linda Ljubica Hrstich-Meyer Transcript' 2020: 588–89).

Whereas counsel received settlement offers for represented survivors, offers for unrepresented applicants often came through a second face-to-face interview. In the second interview the advisor provided information to help the survivor understand their care experience (NZ Interview 6). The advisor might offer a verbal apology along with the monetary offer. Given the power disparities involved, many survivors experienced this as 'take it or leave it' proposal (NZ Interview 2). If a represented claimant rejected the proposal and subsequent negotiation failed, then the claim might proceed to a judicial settlement conference. In 2015, an Intractable Claims Process, using third party mediation, was to begin, but no claims were heard before the process was cancelled by MSD (Cooper and Hill 2020: 84). In the end, should a survivor disagree with MSD's proposed payment, they might have recourse to the courts, where they were likely to fail. Procedural review was similarly impuissant. A 2016 court ruling concluded that the programme sat within the Crown's prerogative and its processes were non-justiciable (*XY And Others* v. *The Attorney General* 2016).

Unrepresented survivors would receive some money for legal advice at the point of settlement. The total cost of that advice was NZD$311,321 as of 31 December 2017 for 950 survivors, giving a mean average of NZD$889 (Ministry of Social Development 2018b). As intimated above, payments with a value of under NZD$30,000 were ex gratia and sometimes (but not always) were a full and final settlement waiving the survivors' rights. The settlement included an apology letter describing the survivor's care history and the injurious experiences that MSD accepted. Survivors could ask for specific material to be included or excluded from the letter. The apology was usually signed by the chief executive, although the minister of social development would sign the letter if the survivor asked (Price 2016).

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New Zealand's HCP was the least formalised and, consequentially, the least independent of the ten exemplar programmes. And while it avoided some of the budgetary exorbitances associated with larger, more legalistic programmes, it shared common problems with backlogs, partiality, and difficult records access. It was also significantly less efficient than most other programmes. The HCP was the only exemplar that cost more to administer than it paid to survivors.

PART III

8

Redress Policy Design and Delivery

8.1 Introduction

Nemo judex in causa sua – no one should judge their own case – is a fundamental principle of natural justice. Yet, state redress programmes involve the state judging if, and how, it will redress its own offences. A history of systemically injurious practice involving the legislature, executive, and judiciary often means that there is no authority uncompromised by complicity. That makes it difficult for states to be credible redress providers. With reference to the criteria that Chapter 3 describes, this chapter explores how flexible and survivor-focussed strategies address the resulting challenges in programme design and delivery.

8.2 Designing Redress

Programme design always involves difficult trade-offs and public officials can lack the credibility needed to make the necessary decisions. To illustrate, recall how Redress WA's payment values were reduced through unilateral cuts, which, made without survivor participation, damaged the programme's credibility and became a focal point for public criticism (Green et al. 2013: 2). That is a high-profile example of a common problem. When difficult decisions are made by civil servants or politicians, it can be hard for them to demonstrate the independence and impartiality necessary for credibility.

The exemplars demonstrate two potential design techniques to promote credibility – the use of independent policymaking bodies and the participation of survivors in the process. Ireland used independent ad hoc committees – the Compensation Advisory Committee and the Quirke Committee – to design, respectively, the RIRB and Magdalene programmes. That strategy removed some obvious sources of bias, but independence is always partial and relational. All policymakers are subject to influences and constraints. The Compensation Advisory

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Committee was strongly influenced by lawyers representing survivors, and the RIRB's legalistic character reflected their involvement. Responding to the legal capture of the RIRB, the government gave the Quirke Committee terms of reference that prohibited funding legal support for Magdalene laundry survivors. That stricture avoided one problem while creating another – it detached those survivors from robust legal support. Moreover, all design bodies are constrained by what they think the implementing agency (the government) will accept. Not all design recommendations can, or will, be accepted. Policy design bodies must work within what budget, staffing, and other resources the state will provide.

The fact that independence is always partial and constrained underscores the importance of survivor participation. Most exemplars limited survivors' involvement in programme design: only the Canadian programmes included survivor representatives in the process. Even there, it was lawyers who negotiated and oversaw IRSSA, not survivors, and most lawyers represented interests other than their survivor-clients (CA Interview 3). Future programmes should enable much more robust procedures for co-design. Jane Wangmann argues that survivor involvement in design leads to more adequate eligibility requirements, helps programmes move beyond legalistic approaches, and promotes 'creative forms of redress ... that directly respond to survivors['] needs' (Wangmann c2016: 2). In support of Wangmann's point, survivor feedback led to ameliorative changes in some exemplar cases, one example is the negotiated settlement process in Canada's IAP. But the potential for practical benefit is not the only reason for inclusion. Including survivors in programme design respects the principle, popularised by disability advocates, that there should be 'nothing about us, without us' (Charlton 1998). To exclude survivors is to treat them as objects of state action (AU Interview 15). Conversely, including survivors could help build credibility among survivor populations, with one interviewee stressing the importance of participation as 'Vital for trust. Vital for credibility' (AU Interview 13).[1] Participating survivors can serve both as programme champions and as feedback channels when problems arise.

Survivor participation in programme design involves trade-offs. Participation requires specific skills and resources and survivors who become representatives are, by virtue of those capacities and status,

[1] The comment concerned the role of Senator Andrew Murray, a survivor and member of the McClellan Commission.

unrepresentative of most survivors. And the point is not only analytic. Some survivor representatives have distinctive non-representative viewpoints. One, an Irish interviewee told me,

> . . . you will find as you go around, there are a lot of loud voices about, on behalf of survivors, who don't represent survivors really, but have been very influential in the sense that government has listened to them. So, a lot of what is in our legislation reflects what those loud voices have said. (IR Interview 4)

There was conflict between survivor representatives in Ireland, Canada, and Australia. Bearing these difficulties in mind, it seems plausible to think that survivors participating in design would tend to improve redress programmes. There are many ways for survivors to participate, but some of the best practices I know happened in Scotland. There, the InterAction Action Plan Review Group, which included survivor representatives, brought stakeholders together in an inclusive developmental process resulting in a 2018 report on redress recommendations that would frame Scottish Redress.[2]

I have stressed the importance of design independence. Equally important is the need for redress programmes to operate through independent agencies. Redress programmes perform different tasks: they support applicants; accept, research, and assess applications; issue payments; review complaints; and interpret regulations. Programmes can enjoy varying degrees of independence across these different tasks. Most exemplars were not independent from the executive with respect to most tasks because they were located within government ministries. The most independent exemplar, the RIRB, was a statutory tribunal with control of its own staff, budget, and administration. Nevertheless, most staff were seconded civil servants and its annual budget needed legislative approval. The situation in Canada was more nuanced. Originally a standalone government agency, IRSRC was subsumed by Canada's Department of Indian Affairs and Northern Development in 2008, aggravating concerns with its independence and impartiality (National Centre for Truth and Reconciliation 2020: 33) (CDN Interview 7). However, the courts and NAC provided regulatory oversight. Other ministries (Health Canada and Service Canada) contributed significantly to the programme, working alongside First Nations in providing

[2] The Scottish process is too complicated to summarise. Interested readers should refer to (Kendrick and Shaw 2015; Kendrick, McGregor, and Carmichael 2018a, 2018b, 2018c).

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programme outreach, applicant assistance, health care, and cultural support. The programme's independence benefitted from the number of agencies it involved. Governance by the representative and composite NAC (and the Oversight Committee) reinforced the checks and balances inherent to systems with multiple veto players. And the Canadian state's involvement was highly pluralistic, involving different ministries while the courts maintained a supervisory role. IRSSA's programmes did not depend upon the benevolence of a single state agency.

Both the RIRB and IRSSA were created by law. A legal basis helps ensure that the programme's operating criteria are public and accountable because survivors can appeal to the ordinary courts when they confront a problem. Several exemplars with an executive basis, including Redress WA, Ireland's Magdalene programme, and New Zealand's HCP were marked by non-transparency and unfairness. In those programmes, the lack of an independent review process diminished their credibility. A legal basis also provides a public commitment to redress and helps ensure funding sufficient to discharge those obligations. New Zealand's HCP offers a cautionary example of a programme that lacked the funds it needed to pay survivors' claims. Moreover, legislating redress provides important opportunities for legislators and executives to publicly acknowledge the state's history of offending and its obligations to survivors.

However, using law to create a programme can generate inflexibility. Redress programmes need to adapt as they develop. However, adapting the law is usually slow and costly. For example, both Canada's IAP and Irish RIRB accumulated applications from claimants who could not be contacted. These programmes could neither process those claims nor terminate them. To resolve the problem, the Irish Dáil had to legislate an amendment to the original 2002 Act that terminated those 'cold claims'. Canada's IAP needed the responsible courts, the Oversight Committee, and the responsible state agency to authorise its 'Lost Claimant Protocol'. By contrast, programmes with an executive basis can adapt more quickly, with changes authorised by ministers or public servants.

Moreover, if the principle of comity[3] obstructs judicial oversight, an executive basis can help protect survivors, the programme, and taxpayers from overly onerous judicial review (Western Australian Department for Communities c2012: 4). For the law's superiority in terms of

[3] The principle of comity requires the various branches of government to avoid interfering in the competence of each other.

accountability comes with costs. Litigating procedural reviews slows delivery and requires programmes to divert resources to judicial proceedings. Moreover, when each decision needs to be vetted for legal acceptability, programmes adopt legal habits of justification and procedure. Courts will be similarly tempted to impose judicial norms of process, evidence, and settlement. There is a resulting danger that redress becomes identified with satisfying legal obligations, a tendency apparent in Canada's IAP (National Centre for Truth and Reconciliation 2020: 31; CA Interview 4). As for survivors, some of their legal representatives will be interested in cost-building through tangential or vexatious legal challenges. Both programmes and the courts must guard against the abuse of review by those with the wrong incentives. The Canadian IAP and Irish RIRB guaranteed legal fees. And in both programmes, the courts reviewed hundreds of cases. One wonders if all those applications were for the benefit of survivors: lawyers are, after all, paid by the hour.

Courts will be asked to review individual claims and more general procedures. Procedurally, judicial review should ensure that a redress programme is generally fair and efficient and offers real benefits for survivors. But, as far as possible, courts should apply the redress programme's internal regulations and avoid imposing specifically juridical criteria or procedures. Otherwise, judicial review risks reinscribing the problems with litigation – including its retraumatising, inefficient, and protracted character – that redress programmes are created to avoid. As a 2006 Ontario decision by Justice Warren Winkler makes clear, sensible judges will avoid treading too far into the redress process (*Charles Baxter Sr. & Elijah Baxter et al.* v. *Attorney General of Canada et al.* 2006). Because redress programmes are not ersatz courts, judicial review should furnish them with a wide margin of appreciation.

Because the job of programme design does not end after a programme begins, redress programmes should schedule periodic comprehensive reviews. Design is an ongoing process shaped by practical experience. To give an example, Canada's IAP constantly amended its procedures, publishing over twenty new and supplemental directive and guidance papers between 2008 and 2016. The need to adapt is universal, every programme confronts unforeseen challenges. With that prospect in mind, programmes should be designed to be adaptive, with built-in mechanisms for reflexive development. A good example is the Irish Ombudsman's report on the Magdalene laundries programme (Office of the Ombudsman 2017). Responding to survivor complaints, the Ombudsman found that the programme did not adhere to its own

standards and enjoined the government to make necessary changes, which it did. And while the Magdalene review was an ad hoc response to complaints, it is equally possible for reviews to be scheduled as part of the programme's development. Programmes need robust yet efficient strategic review processes that are comprehensive, independent, and include survivors.

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Programme design depends upon funding. What can be done with a budget of $20,000 per eligible survivor is very different from a budget of $100,000. Chapter 3 discusses (briefly) budgetary quantum, here I want to focus on how programmes are funded. The exemplars used a range of different funding models. I will address two points, the differences between capped and uncapped programme budgets and the use of funds provided by non-governmental religious orders.

Five exemplar programmes were publicly capped. Canada's Personal Credits, Ireland's Caranua, and Redress WA's capped budgets included administrative costs, while the Forde Foundation and Queensland Redress capped settlement funds only. In addition, during 2014–2015, New Zealand's Fast Track Process operated under a settlement cap that was not public knowledge at the time. From a public policy perspective, a capped programme has the advantage of budgetary certainty. A budget cap ensures predictability, the benefits of which are demonstrated by the profligacy in which two uncapped programmes, Ireland's RIRB and Canada's IAP, overspent their original estimates by billions of euros and dollars, respectively.

A capped programme offers some advantage to survivors in regard to assessment. Because it distributes a fixed monetary allocation, a capped programme needs only to apportion its fund among applicants. A budget cap can, therefore, help lighten the survivors' evidentiary burden. If assessors need only the information necessary to allocate each survivor a portion of the capital sum, good design can permit them to effect that allocation while minimising costs, by, for example, not asking for details about the survivors' injurious experiences. Such a capped programme may provide the same monetary payments to all eligible applicants, as in Queensland's Level 1 payments and Tasmania's redress for the Stolen Generations.[4] However, a capped programme that attempts to match

[4] Tasmania's Stolen Generations of Aboriginal Children Act (2006) created a AUD$5 million fund for the redress of wrongfully removed Indigenous persons. The money was

payment values to the severity of injury puts survivors in competition with one another and hampers the programme's ability to provide just compensation. Recall that the estimated numbers of valid applicants are usually very wrong. Uncertainty over the eligible application numbers necessarily limits any policymaker's *ex ante* confidence in a capped budget's ability to provide adequate payment values. A comparison illustrates the unfairness. Like the RIRB and IAP, Queensland Redress's Level 2 provided comprehensive redress for both injurious acts and consequential damage, yet its average payment of AUD$19,987 was much lower than the average in either comparator (€62,250 and CDN$91,478). Similarly, the NZD$25 million cap on the Fast Track Process meant the resulting payments were, on average, NZD$5,000 less.

Capped programmes ease potential pressure on the public revenue. Another design tactic with a similar outcome is to raise funds from offending NGOs, such as churches. Many religious orders are well-resourced and have an incentive to contribute when that will relieve them of potential liabilities. From a resourcing perspective, having NGOs contribute is an advantage, so long as the costs of obtaining and processing those monies do not exceed the value received. And the costs can be significant. Both Canada's IRSSA and Ireland RIRB had significant problems obtaining monies from the Catholic Church. In Canada, the Catholic Church failed to pay and then used its not-yet-delivered monetary promises as leverage in negotiations over access to its files and its participation in other aspects of Canadian reconciliation (Galloway and Fine 2016). After some legal missteps, Canada accepted only part of what was expected. In both Canada and Ireland, the Catholic Churches' failure to pay a fair share of redress created a public scandal, for the church and for the state officials who facilitated their sub-optimal contributions (The Irish Times Editorial 2003; McGarry 2020; Warick 2021). Because both IRSSA and the RIRB indemnified the religious organisations, there was good reason to complain that their release from liability was cheaply purchased. Future programmes should secure adequate contributory funding before providing NGOs with associated benefits, such as indemnity.

In sum, credible programmes are better designed by independent bodies that enable survivor participation. Moreover, a flexible programme might have a capped budget for common experience base payments, such as Queensland Level 1. But where the aim is to

divided equally among all successful applicants, with the family members of survivors eligible for lower payments. For discussion: (Winter 2009).

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compensate survivors according to severity, then budgets should be uncapped or, as Chapter 3 suggests, set by the counterfactual costs of settling the claims through litigation. As a programme's budgetary demands increase, the rationale for obtaining funding from NGOs becomes stronger. However, states should ensure that adequate funds are secured before providing religious orders and other funding organisations with associated benefits, such as indemnities.

8.3 Delivering Redress

Moving to programme delivery, tensions between the state's status as an offender and as redress provider remain a standing challenge.

> The fact that victims have to deal with the very department that is the successor to the institutions that abused them in the first place is like asking a victim of rape to seek justice from their rapist. (Smale 2019)

The analogy could be expanded. Smale is talking about New Zealand's HCP, in which MSD operated as the offender, the investigating police, the defence attorney, and judge. The resulting conflicts of interest became a focal point for criticism, with one survivor observing that the HCP was 'not looking after my best interests but rather the interests of [MSD]' (Mahy c2016: 7). Without independence from the offending agency, survivors may reasonably believe that their applications are not impartially administered. Moreover, potential applicants may fear reabuse or retraumatisation by unsympathetic officials.

But there are countervailing considerations. Because start-up organisations struggle to deliver large and complex redress programmes quickly, there are obvious benefits to leveraging the existing capacities of a government ministry (Audit and Assurance Services Branch 2015: 44). State ministries have dedicated administrative, financial, and infrastructural capacities that can support hiring and managing staff along with other administrative necessities. But those advantages come with their own difficulties, including cumbersome public service procedures (CA Interview 7). To illustrate, when application numbers for the IAP tripled the original estimate of 12,500 claimants, the Secretariat increased its staffing complement to a point that exceeded the ministry's funding allocation, leading to a protracted restructuring of the Secretariat's employment contracts through a different agency, Public Service Canada.

Because smaller, independent organisations can be more nimble, outsourcing at least some components provides some clear benefits. In Western Australia, an interviewee noted,

> we wanted to minimise the amount of government involvement because there was this, I guess, general distrust of government on the part of most applicants, that we tried to outsource as much of the contact with applicants to support groups outside government. (AU Interview 8)

Australia's approach deserves attention. Both Queensland Redress and Redress WA outsourced the taking of testimony to community agencies. There, survivors could assemble their applications in a familiar and comfortable environment. These community agencies had on-site counselling support and the capacity to address the survivors' holistic well-being needs. Outsourcing leverages the skills of NGOs without incurring the associated management and administrative costs. It can be easier for a state to contract for a service than to develop and provide it, although the exemplar cases also involve states funding NGOs to build their capacity.

When survivors worked with community NGOs to develop their applications and submitted them to a redress programme housed within a government ministry, it was clear that the state occupied the role of both offender and adjudicator. That structure patently infringes the *nemo judex in causa sua* principle. Alternatively, Canada's approach to the IAP attempted to distinguish between its representative, the SAO, and the independent Secretariat, which was responsible for contracting the independent adjudicators responsible for assessing each claim. How the state is impersonated is a policymaking question with implications throughout the redress process. If, for example, the redress programme negotiates, as the RIRB did, with survivors over the substance and value of their claim, those officials will necessarily represent an agency that opposes that of the survivor – the state. If the state is not assigned specific representation in the redress process, it may tend to subsume the whole. There may be an advantage to appointing a specific state representative that remains distinct from the redress programme.

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Shifting attention slightly, physical infrastructure is critical to delivery. If survivors are going to give oral testimony in person, whenever possible they should be able to choose the location. Hearing rooms should be

easily accessible by public transportation and designed to make survivors feel calm and safe (Fallot and Harris 2009: 6–7). Furniture should be comfortable and the environment quiet. The facility should have private rooms where survivors can talk to a counsellor or support person. Rooms need clearly accessible exits. Survivors must 'know that the door can open and close very easily for them' so they do not feel trapped (IR Interview 9). Several interviewees stressed the need to balance comfort and formality.

> We decided that we would do it as the most dignified process that we could conjure up. Because we didn't want to be oppressive and over the top, it had to be friendly. Always had flowers . . . and had sandwiches and tea. The idea was for these people to feel that it was all about them; that was their day to come and tell us what they had on their mind. (NZ Interview 7)

Canada's Winnipeg office was designed to put Indigenous survivors at ease.

> Aboriginal themes are incorporated into the wall coverings, hardwood flooring, and numerous pieces of art placed throughout the hearing centre. Low glycaemic refreshments, including fresh baked bannock and fresh cheese and fruit, are provided from an Aboriginal supplier. (Indian Residential Schools Adjudication Secretariat 2011: 9)

Because not all survivors can access custom facilities, oral testimony must be heard where it can be given. Hotels are a common choice, as they usually have good transport infrastructure, are formal without being intimidating, and are available for short-term use. Little things matter. Michael Bay, a Canadian adjudicator, would ensure that he wore professional but colourful clothing to avoid reminding survivors of the residential schools' presiding black cassocks (Bay 2013: 3). Concern for the survivor's well-being means that programmes should avoid hearing testimony in high-stress carceral environments such as prisons or psychiatric hospitals. But the setting should not be too casual, the setting needs to reflect the importance of the event to survivors. As one survivor told me,

> I wouldn't want them [programme officials] to come in their thongs and tee shirts and their miniskirts. I want them to look official. This is serious business we're dealing with here in this country. (AU Interview 13)

Advisors should avoid taking testimony in the survivor's home. Hearing the person somewhere else means that after they testify, survivors can

leave their testimony behind and return to a (hopefully) safe home environment (NZ Interview 6).

Caranua, the Magdalene programme, the Forde Foundation, Redress WA, the CEP, and the Personal Credit process all operated without (much) face-to-face engagement, mediating their work with survivors in writing or by telephone. A remote interface can limit the psychological, logistical, and monetary costs of participation and can work well if the priority is speed and not engagement. In addition, working with survivors remotely promotes both security and equity. The security concerns are real: a google search will quickly reveal hostile language on some survivor-oriented websites – Redress WA received a number of threats (AU Interview 9).[5] In addition, mediating survivor interaction by phone helps ensure that clients cannot simply appear in an office and demand inequitable and resource-intensive attention.

Remote engagement is likely to become more common as technology develops. However, survivors may not wish to discuss their traumatic injuries with a distant and faceless operator (Reimer et al. 2010: 63–64). A Western Australian interviewee criticised the remote character of Redress WA, saying that survivors would have preferred to work in person (AU Interview 6). Moreover, it can be difficult for remote interviewers to ensure that the survivor is well-situated. A remote process makes it harder to monitor the survivor's emotional well-being. In New Zealand,

> one survivor, Loretta Ryder, said she was asked deeply personal questions by the Ministry of Social Development's claims contact centre over the phone. 'I started crying because I was on the phone while at the garage getting my car fixed and I was shamed.' (The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021: 155)

Interviewers need to be able to ensure that the interview is taking place at an appropriate time and place. They also need to identify people who are under stress, and have an effective response strategy for people who are not coping. Redress WA created a 'risk register' for survivors with identified safety concerns, they would receive a follow-up call the next day (AU Interview 9). Many survivors will need immediate support, which is more difficult over the phone.

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[5] That said, no staff were physically assaulted by a survivor in any exemplar programme.

Because Chapter 10 discusses the process of giving testimony, here I turn to the intake, storage, and retention of evidence, including testimony. The information needed varies according to eligibility criteria and assessment procedure. These operative demands must inform the programme's data infrastructure. Information may arrive as video and audio files, professional reports, public records, and personal handwritten narratives. It may also come in different languages. Survivors should be able to choose the language in which they testify, or have a competent translator assist them. The data management system needs to be capable of managing these variables efficiently, which will require testing the system using real-world information. Off-the-shelf data systems may be inadequate and exemplar programmes often required bespoke software – Canada's SADRE (Single Access to Dispute Resolution Enterprise) cost around CDN$8.4 million (Treasury Board of Canada Secretariat 2007). When programmes open to applications without systems appropriate to their data needs, technical problems will create delays and make it harder to assess applications accurately.

Because many applications will arrive incomplete and contain poor quality information, good data entry is critical.

> Rubbish in, rubbish out. And you need people, at the time you are putting the data in, to be capable of realising what is wrong with the application and to start chasing down the issues. Because people put in rubbish applications. (AU Interview 9)

Applications should be pre-screened when they are received to assess their completeness and (prima facie) eligibility. This should happen as quickly as possible. If survivors wait months or years before having an incomplete file returned to them, the quality of information may suffer along with the programme's reputation. Programmes should confirm receipt of completed applications, using that opportunity to provide further information on the steps remaining to completion. The letter should provide information about available support services and remind applicants that completing the application does not guarantee payment. The final report for Redress WA remarks that because many applications will arrive with errors, the data management system should record the original application as a photograph or scan (Western Australian Department for Communities c2012: 12). Both the original submission and the corrected data should be preserved.

Data management must be secure and private. Programmes need to access secure government records, which can be easier if the work is done

by civil servants, but programmes will also need access to the private archives of NGOs, such as churches. Any information the programme holds about survivors must be secure, but, at the same time, programmes may need to share data. Canada's IAP used an online file management system that both counsel for survivors and programme staff could access, which held client files and could be used to coordinate hearings. Information management systems will need to restrict access to those who need it. Redress WA created a special database for more sensitive claimants (including celebrities), accessible by a limited number of senior staff (AU Interview 9). Programmes should audit staff access patterns to ensure that information is not accessed inappropriately.

Because programme data can be valuable for exogenous purposes, privacy's demands do not stop when the programme closes. Historians and other researchers may hope for access, as might others: in Ireland I heard about an estranged spouse trying to uncover what a former partner had received, hoping to use their redress payment to augment their alimony. In a less personal example, Canada's TRC sought access to the IAP's rich database to support its own research. The TRC heard testimony from around 6,750 people, not all of whom were survivors (The Truth and Reconciliation Commission of Canada 2015f: 1). By comparison, the IAP validated 27,846 claims and heard testimony from many more people. Desiring access to the IAP's larger dataset, the TRC confronted the IAP's legal commitments to the survivors' privacy and the ethical challenge that survivors had a right to control how their information would be used – no survivor had authorised anyone to give their information to the TRC (Independent Assessment Process Oversight Committee 2021: 54–55; McMahon 2017: 33ff). The case went to the Supreme Court with the result that IAP records on survivors will be destroyed on 19 September 2027 unless the survivors ask to have their information archived at the National Centre for Truth and Reconciliation, hosted by the University of Manitoba. IAP applicants have now been sent letters advising them of their options.

The principle of enabling survivor's agency supports the Canadian court's decision – survivors should be able to decide whether and how their data can be used. As far as is feasible, programmes should give survivors choice over how their information will be used, who will be able to access it, who will be responsible for storing it, and if and when information will be destroyed. Survivors must know if their information might be given to third parties, such as named offenders or the police. Some will consent to having their information being put to use outside

the redress programme. Others will not. Ideally, survivors should be able to select their preferred options, for example, some might consent to having de-identified information retained, but not to having their names included in a permanent archive. Others will wish the opposite. Survivors should be informed about choices they do not have, such as when the law mandates a police referral. The demands of informed consent require a flexible range of options and it would be best if programmes have the relevant procedures in place when they begin.

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Staff are the medium through which survivors engage with redress and the state discharges its obligations. But the fact that the state needs staff to discharge its redress obligations points to another problem with credibility. As previously mentioned, impersonality inhibits the state's accountability. Survivors never encounter the state, they only deal with its representatives. When survivors contact a redress programme, the people who answer the phone calls, emails, and letters are not offenders confronting their crimes, they are employees. The fact that state accountability is always vicarious means that state redress lacks the authenticity that comes when real people take responsibility for wrongdoing and work at a remedy.

Using government staff to deliver a redress programme blends the roles between offender and employee. Experienced staff from health, police, corrections, welfare and child protection come from fields responsible for systemically injurious care. The complicity of these professions adds to the tensions this chapter explores. I previously noted how the use of civil servants can compound concerns about impartiality and conflicts of interest. Similar points can apply to NGOs. For many survivors, the participation of religious orders is important because they committed, or were responsible for, significant injuries. But no survivor should be forced to use services, or work with staff, that they see as compromised. A survivor-focussed approach must enable a flexible range of access options. Chapter 12 returns to this discussion.

Redress programmes require staff to work with often marginalised survivors through complex and highly stressful processes. A consistent theme across the exemplar programmes was the need to get and retain high quality client-facing personnel. But even experienced staff will need training to guide vulnerable clients through new and often complicated redress programmes. This is highly demanding work. One Irish interviewee stressed the importance of employing:

> people who could talk to applicants on their own level . . . front line people really drove the process on a continuous basis . . . [T]he applicants felt they could ring . . . they could talk to somebody, you know, somebody that they felt comfortable with, they could ask the questions that maybe they thought were stupid, that they mightn't ask if they were going to get a barrister/solicitor at the end of the phone . . .
>
> [W]e would find it a regular feature that the day the applicants would of have got their settlement, they'd say, 'Will you be sure to say thank you to whoever it was they would have dealt with on the phone.' (IR Interview 3)

There are benefits of having caseworkers administer claims because that enables survivors to develop a relationship with a few staff members (IR Interview 3; NZ Interview 6). But a casework approach makes each survivor depend on an individual staff member, creating obvious human resource concerns in organisations with high levels of staff turnover.

Smaller programmes that use few relatively senior staff to investigate and assess applications tend to experience less turnover. With a small and tightly knit team, programme managers can select resilient staff and provide them with robust support. Larger programmes are forced to hire from a broader pool and, in the exemplars, tended to have more staff turnover. A redress programme's temporary character encourages staff to look for new (more secure) employment. Using contract workers aggravates the problem, but using civil servants will not solve it, if those staff fear redundancy or suboptimal redeployment when the redress programme closes (Indian and Northern Affairs Canada 2009: 11). To retain good staff, programmes need to work with them in their career development. That might include identifying future opportunities in the civil service or helping transition staff into the private sector.

A second point on staff turnover concerns the potential for psychological damage. The stress of working with survivors' testimony can be a significant contributor to staff turnover (Fabian 2014: 246; Rock c2012: 10; AU Interview 12). 'Vicarious traumatisation', 'secondary traumatic stress', or 'burnout' happens when someone suffers a stress disorder caused by engaging with the experiences of traumatised people (Chouliara, Hutchison, and Karatzias 2009: 47). Persistent exposure to distressing testimony can cause staff to exhibit symptoms that include doubting survivors' testimony, avoiding traumatising material, or becoming personally involved with survivors (Swain 2015b: 185). One study examining potential causal factors identified a personal history of trauma, high caseloads, inexperience, and a lack of effective coping mechanisms (such as supervision) as potential contributors to developing

vicarious trauma (Dunkley and Whelan 2006: 110). But anyone can be affected. 'There are only so many rapes and other real-life horror stories that you can hear about in a day or a week or a month or a year before it starts to eat at your soul' (Bay 2013: 5).

When vicarious trauma makes staff doubt survivor testimony, actively avoid difficult material, or look for other work, it poses a strategic risk. There is a growing literature on preventive techniques (Bober and Regehr 2006; Wilson 2016). Those techniques include limiting staff contact with traumatising material. This can be done in different ways. Insofar as hearing survivors' testimony is more challenging than written reports, programmes might encourage written testimony. Information management systems can reduce staff contact with traumatising material by enabling them to scan rather than retype material. Managers can limit caseload numbers or limit the number of cases each member of staff engages with per day. Other techniques offer positive support to staff well-being through yoga, fruit bowls, and therapy, alongside regular supervision and unburdening sessions. Managers should monitor staff for stress indicators and encourage psychological assessments or counselling. However, these techniques have countervailing disadvantages. If testimony is mechanically scanned unread, it will not be reviewed for errors. Survivors who are kept at arm's-length through pre-recorded testimony will forego some of the participatory value involved in telling their stories. As always, there are trade-offs. But, redress programmes have a responsibility for the well-being of their employees and meeting that responsibility is both a legal requirement and necessary for efficient programme operations.

A third and last point on staffing concerns descriptive representation. Turning first to gender, Ireland's Magdalene programme matched the gender of staff to that of the applicants. Others, like Canada's IAP, enabled survivors to select adjudicators according to their gender, with around half the applicants expressing a preference (CA Interview 7). In addition, residential school survivors could choose the gender of their counsellors and other support workers informally. Having this option is important because some applicants are put off by the prospect of working with one gender or another. George Grant testified that 'I couldn't tell them [Redress WA] everything because the staff there were mainly females and it was unpleasant stuff for them to have to read or to listen to' (Royal Commission into Institutional Responses to Child Sexual Abuse 2014d). Although Grant would have preferred to speak to a man, an Australian interviewee noted:

> . . . non-Indigenous survivors of abuse who are male generally want a female counsellor; and want a female to record their abuse account because they have had bad experiences with men. There are, of course, exceptions . . . But the Aboriginal men and women don't want to talk to the opposite sex about their abuse. To have the option of having male and female Indigenous support services available is important. (AU Interview 6)

Programmes should enable survivors to choose the gender of key programme staff.

The ethnicity of programme staff – specifically, their indigeneity – was significant in Canada, New Zealand, and Western Australia. Recall that 51 per cent of Redress WA applicants were Indigenous – in New Zealand it was over 50 per cent, while in Canada it was nearly 100 per cent. These proportions reflect the roles played by out-of-home care in the systemic repression of Indigenous peoples. Moreover, the genocidal character of Canada's residential schools made indigenising the redress process a step towards post-colonial relations (Henderson 2013: 66). Stakeholders emphasised the need for Indigenous redress staff because connecting, or reconnecting, with Indigenous cultural practices was an important (potential) element of redress (CDN Interviews 5 & 6). In Western Australia, the Indigenous Kimberley Legal Services and the ALS helped applicants overcome the 'inherent mistrust' Indigenous Australians have towards state institutions (Western Australian Department for Communities c2012: 13). Because some survivors 'don't trust white people' (Dion Stout and Harp 2007: 43), Canadian exemplars strongly encouraged Indigenous staffing. The ISCRC prioritised hiring Indigenous staff and, in addition, health and cultural support work was outsourced to Indigenous agencies (Indian Residential Schools Adjudication Secretariat 2011: 5). Survivors preferred hearings with Indigenous adjudicators (Hanson 2016: 12) while programme management recognised the need for local support to reach into marginalised communities. As one (non-Indigenous) interviewee said,

> Who are we here in Ottawa . . . to know who would be respected in the community, especially using the example of cultural support providers, you know, the cultural support people? We don't know. (CA Interview 6)

Canada's Personal Credits programme stands out as a process in which Indigenous First Nations worked with their survivor-members to identify and provide services that they would find beneficial, often in ways that helped both individuals and communities develop. However, not all

survivors felt that cultural affinity was given the same priority in the IAP and CEP (National Centre for Truth and Reconciliation 2020: 28).

Indigenous populations tend to be relatively small, meaning that there are fewer Indigenous persons available for staff positions. That relative scarcity aggravated hiring delays that created, in turn, inefficiencies and increased staff turnover (Ish and Trueman 2009; AU Interview 6). During Redress WA, the ALS reached capacity and began to turn survivors away (AU Interview 6). Second, the use of local Indigenous providers for cultural and health support in small communities can create conflicts of interest and privacy problems, with some applicants deterred by the prospect of locals learning the intimate details of their experiences (Reimer et al. 2010: 71). By providing multiple support options, programmes can alleviate that concern, enabling survivors to choose where they get help. A flexible programme should ensure that privacy concerns do not block culturally appropriate local support.

As a last point, the popularity of Indigenous staff in IRSSA may reflect a more broadly held view that programmes benefit from having staff who share experiences with survivors (Allen and Clarke Policy and Regulatory Specialists Limited 2018: 3; Feldthusen, Hankivsky, and Greaves 2000: 107). The experience of injury

> can actually provide a lot of insight into [for] someone who is providing counselling and support to someone in that situation [of applying for redress] or when training . . .; people can draw from their own lived experience . . . and that can actually add richness to what they are doing. (AU Interview 10)

I return to the importance of managing the challenges posed by survivors working in redress programmes in Chapter 12. Here, I simply note that redress programmes should publicly present an adequate number of staff members whose background and position make them credible to survivors.

8.4 Administrative Recommendations

- Redress programmes need design techniques that bridge the credibility gap. Credibility-building techniques include independent design bodies and having survivors participate in co-designing redress programmes.
- A capped budget can be effective in funding the redress of collective or structural injuries. But it is difficult to ensure that capped programmes

are adequately funded to apportion payments according to the severity of individual injuries.

- Policymakers must assess whether the advantages of external funding from religious orders (and other NGO offenders) outweigh the associated difficulties. States should secure contributory funding before providing NGOs with associated benefits, such as indemnity.
- Programmes need robust and efficient strategic review mechanisms that operate independently of both programme staff and the judiciary.
- Survivor representatives should be part of any review process.
- Programme delivery should remain, to an appreciable degree, independent of the state. To prevent the personality of the state from subsuming the redress administration, there may be an advantage to appointing a specific state representative that is distinct from the redress programme.
- The information needed by the redress programme must inform systems for data intake and database infrastructure.
- The data infrastructure needs to be ready when the programme opens to applications. The system needs to be tested with real-world information.
- Applications will be submitted with errors. The intake processes needs to identify errors promptly and correct them. However, the system should retain the originally submitted material for reference.
- Whenever possible, survivors should be able to choose where they testify. Designated hearing rooms must be easily accessible by public transportation and designed to support the survivors' well-being.
- Survivors need to give informed consent as to how the information they provide will be used. Flexible options should be made available.
- Programmes need to hire and train good staff in sufficient time to meet the administrative demands of the programme.
- Redress programmes are responsible for their employee's well-being. Meeting those responsibilities can be necessary to enable the efficient operation of the programme. Limiting the effects of vicarious stress must be a key strategic focus.
- To retain good staff, programmes need to manage the risks that job insecurity poses.
- Survivors need ongoing support throughout the programme. It is preferable for them to develop positive working relationships with staff. There are benefits to a caseworker structure.

- Programmes should consider enabling survivors to choose the gender of the staff they work with.
- Programmes should consider enabling survivors to choose the ethnicity of the staff they work with.
- Programmes should publicly present an adequate number of staff members whose background and position give them credibility with survivors.

9

Who and What Should Be Eligible for Redress?

9.1 Introduction

Should convicts be eligible for redress? If so, then taxpayers may fund large monetary payments for rapists, murderers, and other violent offenders. The resulting potential for negative publicity is a concern for policymakers (Western Australian Department for Communities c2012: 25; Lane 2017). To illustrate, in 2010, New Zealand's Crown Law wrote to Cooper Legal stating:

> when considering the making of potential settlement payments to people who have been convicted of murder, the Crown needs to consider the feelings of the victims' families. Indeed, the wider community may regard it as morally unconscionable that individuals convicted of murder are paid money by the State . . . (Quoted in, Cooper and Hill 2020: 133)

Persistent concerns with public opinion meant that those imprisoned for more than ten years were excluded from the HCP's Fast Track Process, their exclusion then became general HCP policy until 2018. Looking elsewhere, Australia's NRS excludes those imprisoned for five years or more, unless officials determine they would not 'bring the scheme into disrepute; or adversely affect public confidence in, or support for, the scheme' (Commonwealth of Australia 2018: §63). In other words, eligibility depends upon what programme officials think observers (the media) will say about the survivor.

Excluding prisoners is unfair because their right to redress is independent of their offences. As Dinah Shelton argues, 'the character of the victim . . . is irrelevant to the wrong and to the remedy' (Shelton 2015: 72). Moreover, prisoners report much higher than normal rates of non-recent abuse (Dalsklev et al. 2019). Not only is the experience of abuse criminogenic, higher rates of incarceration stem from survivors' social and economic marginalisation – the more marginalised a person is, the more likely they are to be imprisoned and, when sentenced, marginalised

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persons tend to receive longer prison terms (Western 2006: 35ff). Excluding prisoners will, therefore, discriminate against the most marginalised. The ineligibility of criminal survivors is unfair and discriminatory because it makes a potential consequence of abuse in care – part of their injurious experience – into a reason preventing them from obtaining redress.

This chapter explores what a flexible approach to eligibility entails. Setting the parameters for eligible claims involves a series of trade-offs. A programme that arbitrarily excludes certain people and injuries is discriminatory. But, as a programme includes more people, and more injuries, it becomes larger and more expensive. The parameters of eligibility have significant operative implications. These parameters help determine the evidence a survivor needs to provide, which, in turn, is an important factor in determining the quantity, and character, of the information a programme needs to manage. The trade-offs that arise support the argument for flexible redress programmes that enable survivors to choose how they will pursue redress.

9.2 Who Is Eligible?

Some exemplar programmes limit eligibility to survivors associated with certain institutions or placement types, while others require applicants to bear a specific status, such as being a ward of the state or having been legally removed from parental care. Although approaches can differ in subtle ways, for illustrative purposes I begin with a simple contrast between 'defined-list' and 'open' programmes.

'Defined-list' programmes limit eligibility using a schedule of institutions – only survivors associated with a scheduled institution are eligible for redress. Survivors might be associated with an institution in different ways, including both attendance and residence and it is common for schedules to change. Recall how Ireland's Magdalene programme was originally restricted to former residents of twelve scheduled institutions, before legal and political pressure pushed the government to admit fourteen more facilities. Some programmes offer standing processes for adding institutions. Ireland's RIRB and Canada's IRSSA permitted survivors to petition (or sue) to add institutions that met the general description for eligibility but were omitted from the original schedule. Nevertheless, although schedules changed, they were always definitive.

The advantages of a defined-list programme lie in its transparency, efficiency, and expressive value. A programme is more transparent if the rules defining eligibility require little interpretation. A defined list of scheduled institutions helps survivors know if they are eligible – they can simply look at the schedule to see if 'their' institution is listed. In terms of efficiency, programme staff can proactively research scheduled institutions, obtaining relevant records and compiling dossiers. Better-informed officials will process applications more quickly, potentially using automated systems. If restricted to large institutions with good records, defined-list programmes may generate firmer population estimates and better budget projections. Moreover, there is an expressive value to using a schedule of institutions to tailor a redress programme to a distinctive form of wrongdoing. Canada's Indian residential schools are a compelling example of injurious institutions that demanded distinctive acknowledgement. That expressive aspect of redress is part of what makes these programmes valuable. Similarly, some (usually large) institutions like St. Joseph's Industrial School in Artane, Dublin, and Parramatta Girls Home in Sydney are important to the identity of many former residents. Providing a schedule recognising these places as inherently injurious is another way of acknowledging survivors' experiences.

Defined-list programmes work well when survivors have good information about their care experience and adequate records exist to validate their claims. But that describes only a minority of survivors. Many care leavers do not know where they resided. Some will have been too young to remember and survivors often went through many residences, recall (from Chapter 2) that New Zealanders could experience 'as many as 40 or more' placements (Henwood 2015: 13). Another New Zealand interviewee related that

> My husband can't remember the names of the homes he was in. He knows vaguely the street they were in. He said as a child he was never told what the name of the home was; he was just there. (NZ Interview 8)

The extent of the problem is highlighted by a Swedish study comparing survivor testimony with care records that found 33 per cent of survivors did not recall one or more placements recorded in their files (Sköld and Jensen 2015: 163). If survivors do not remember a placement, they may not know whom to ask for their records – a Catch-22. Adding to their difficulties, care institutions are not static – they change their names, locations, and identities over time. And the poor quality of existing records exacerbates the problem. Survivors who hope their personal

records will help place them at certain times and locations are often disappointed.

Defined-list programmes need to distinguish between survivors who are eligible because they associated with the institution in the right manner and those who did not. But lived experience may not conform to that binary distinction. For example, Canada's CEP programme excluded survivors who did not legally reside at residential schools. However, these schools were attended by thousands of 'day students' who experienced poor schooling and food, along with abuse and neglect, while residing somewhere else, such as a hostel, mission, or private residence. The interstitial public/private nature of care enabled movement between and within different care placements, making non-arbitrary line drawing difficult. The need for non-discriminatory criteria suggests that, contrary to its widespread use, the concept of residence is not well-suited to defining the relevant form of association. Future policymakers might consider using a more appropriate concept.

Invariably, a programme that restricts eligibility to a specific list of institutions will face pressure to include similar institutions. Adding institutions is psychologically and logistically difficult. Because expenditures will increase when more institutions are included, usually only senior officials (judges or ministers) can add institutions and the process tends to be onerous, expensive, and uncertain. Recall how Canadian survivors succeeded with only 7 of the 1,531 institutions they sought to add to IRSSA's schedule. The last addition required six years of litigation. Kivalliq Hall was scheduled in 2019, thirteen years after IRRSA began (APTN National News 2019).

Whereas defined-list programmes have a definitive schedule of institutions, an 'open' approach defines eligibility according to care status or type of injurious experience. For example, Redress WA and New Zealand's HCP extended eligibility to any survivor legally in the care of the state prior to a specified date. Open programmes are more inclusive and flexible, mitigating concerns with the unfair distinctions created by defined lists. An open approach reflects the fluid histories of out-of-home care across a range of placements and differing legal and administrative designations. In open programmes, assessors can respond to that diversity by deciding eligibility on a case-by-case basis.

However, that flexibility makes the ambit of eligibility less transparent. Redress WA was open to anyone in state care, but survivors placed by state officials in religious institutions or private care homes might not know that they were legally in state care (AU Interview 6). Existing

records may not help. 'Redress WA encountered many instances where applicants' circumstances and care arrangements were legally complex, ambiguous, or not explicitly defined' (Western Australian Department for Communities c2012: 5). That programme rejected 600 applications after deciding that the state did not have legal responsibility for the survivors' placement. Many of those rejected were Indigenous survivors who had been placed with family members with the knowledge and financial support of state officials, but the state never assumed legal responsibility for their care. Those applicants reasonably claimed that they had been in a form of state care, but the programme applied a more restrictive interpretation.

Inchoate evidence requires programme staff to make judgements about eligibility. Wherever judgements occur, there is non-transparency because the survivor cannot know what programme staff will decide. Moreover, when eligibility is uncertain, programmes will tend to require more information, increasing the costs of participation for all parties. The varying quality of available records aggravates the resulting difficulties, creating unfair inconsistencies between applicants. Open programmes also raise budgeting concerns for states. As previously noted, poor record-keeping and the informality of many care arrangements make robust population estimates generally difficult. Open programmes aggravate that difficulty due to the diverse range of care placements and the potential for staff to arrive at differing interpretations of eligibility in each case. And because each applicant needs to establish their eligibility independently, open programmes will tend to have higher costs per case than more transparent and efficient defined-list programmes.

Turning from operational matters to an expressive concern, redress programmes are public statements that care has been injurious. As such, they risk stigmatising all those involved. Not only is that unfair to carers who discharged their responsibilities appropriately, there are potential strategic risks to existing care systems. If care is stigmatised as injurious, the public odium will discourage potential care workers. Many care systems already struggle to find high quality placements for young people. Any decrease in availability may lead to the increased use of inappropriate and harmful placements, including serial temporary placements. Many survivors argue that one of their motivations for speaking about their injuries is to help protect others from being injured (The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021: 220). It would be an ironic injustice if, by adding to the opprobrium surrounding care, redress contributed to the mistreatment

of those presently in care. Because they embrace a broader range of care placements, the reputational risk of open programmes appears higher than that of defined-list programmes focussed on institutions that no longer exist such as religious orphanages and ethnically segregated residential schools. To minimise the risk of overly broad stigmatisation, programmes should link payments to discrete abusive events or institutional forms by clearly articulating the purpose of redress and the types of injurious experiences to which it responds.

To summarise the discussion, a defined-list programme works best with a schedule of distinctive institutions with good archives. Defined-list programmes will be less effective when encompassing a diverse range of care placements. As the definition of eligible institutions becomes less specific, the greater the incentives for applicants seeking to add related institutions and the harder it will be to estimate programme costs *ex ante*. By contrast, open programmes are more flexible. However, they will tend to increase the demands on applicants, who may be less certain about their eligibility – leading to an unfortunate combination of higher rejection rates and lower application numbers from the eligible population. Note that open programmes usually require applicants to evidence interactional injurious experiences – simply being 'in care' is not itself an adequate basis for a redress claim. By contrast, a defined-list programme can redress survivors who experienced structurally injurious institutions.

The trade-offs between open and defined-list programmes suggest that a survivor-focussed programme might enable flexibility by developing pathways incorporating both techniques. A defined list's transparency is a significant advantage: every programme should have a pathway in which association with one or more institutions on a scheduled list enables eligibility. That list should be supplemented by reasonable and low-cost procedures for adding institutions to the schedule. However, given the interstitial nature of care, an effective programme should also have pathways that enable survivors who were not associated with a scheduled institution to apply if they meet appropriate criteria. When investigating the survivor's care status, programmes might be encouraged to use discretion in the survivor's favour – the semi-private nature of care encouraged non-standard arrangements that should not now disadvantage claimants.

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Most redress programmes specify a closing date, making prior submission a condition of eligibility. There is considerable variation in duration: Table 1.1 gives the exemplars' open periods. With an open period of twelve months, Queensland Redress was the shortest, while the longest, Canada's IAP, was open for five years. More recent programmes tend to be longer, both Scottish Redress and Northern Ireland's Historical Institutional Abuse programmes will be open for five years, and Australia's NRS will be open for ten.

Neither New Zealand's HCP nor Ireland's Magdalene laundry programme specify a date when they will stop accepting new applications. These schemes manage a small number of applications using the resources of an existing ministry. But most other exemplars had deadlines. Canada's IRSSA was unique (among the exemplars) in having two. Survivors had to notify the programme before 20 August 2007 if they wished to opt out of IRSSA, then there were application deadlines for each of IRSSA's three component programmes. Programmes with a budget cap, like Queensland Redress and Redress WA, need to have an application deadline. In these Australian programmes, all validated applicants divided a finite capital sum and officials needed a deadline to know how many survivors would lodge a claim. For larger programmes, run by independent bodies with programme-specific funding and large staff complements, deadlines help manage expenditures. If the programme ends on a certain date, policymakers can know when its resource demands will end. A time limit can concentrate programme resources. For example, Canada's CEP process assembled hundreds of people who devoted a year to the programme. That focus of investment may create efficiencies. The data offered by exemplar programmes suggests a potential (weak) evidence for a deadline effect on processing time. The average processing time in the two large and comprehensive programmes, the IAP and RIRB, was around twenty-one months. That compares favourably with the twenty-seven-month average in New Zealand's comprehensive and open-ended programme. Moreover, a deadline might offer some psychological benefits. Because applications are difficult for survivors, one interviewee suggested there was a psychological advantage to making survivors meet a specific time frame or lose their chance at redress (AU Interview 9).

But most other commentators disagree and point to the difficulties that deadlines create. Survivors may take a long time to learn about and decide to apply for redress. Some recoil from the difficulties involved and trauma prevents others from submitting their applications promptly.

Because the redress process is of 'major emotional and psychological significance' for most survivors, it can take time before they can apply (Murray 2015: 106). Eileen Patricia O'Reilly, a senior redress officer with Redress WA, observes:

> It is not till they [survivors] get to a certain stage in their life where they are actually ready to look at this and make a difference in their lives. I have had a number of people that have looked at me and have thrown the application back at me, people in their 20s and 30s, and said, 'Do you think I'm going to fill this in, tell you my story, and you slap me in the face yet again?' It is a staged process. People have to be ready to actually put in their applications. ('Official Committee Hansard' 2009b: CA57)

Similarly, Karyn Walsh, of Lotus Place, has said:

> . . . lessons of the redress schemes everywhere are showing that timeframes and the ability to just get your life into some sort of order to be able to fill out an application process by the due date and get the necessary documentation is an unrealistic request given the lives that people are living (Quoted in, Senate Community Affairs References Committee 2009: 56)

Deadlines can be harmful if the financial inducement of the wished-for settlement compels survivors to apply before they are psychologically ready (Green 2016: 103).

For the programme, using deadlines to limit eligibility tends to compress the receipt of claims. Although Ireland's RIRB was open for twenty-seven months, it received 9,432 of its 16,662 applications (57 per cent) in its final year; 3,700 (22 per cent) arrived in the two weeks prior to the deadline. Redress WA and Queensland Redress also experienced late surges that over-loaded their processing capacities, leading to delays and consequential procedural changes to expedite the administrative process. Deadlines also encourage incomplete applications, Canada's Personal Credits, Redress WA, and Ireland's RIRB all received large numbers of unfinished applications in the last few months. Managing those incomplete applications added to delays and processing expenses, which, in turn, damaged the programmes' reputation, while spikes in application numbers overwhelmed records searching and survivor support services, leading to further delays. These delays damaged survivors' well-being and caused higher burn-out rates among staff, aggravating staffing problems.

Because a too-short window for applications can be unfair and ineffective in settling meritorious claims, programmes come under pressure to admit late applications. That pressure often succeeds. But the difficulties involved in getting extensions granted, and the fact that many

survivors will be dissuaded when they find that they have missed the closing date, means that longer open periods encourage more applications. That should, hopefully, make the programme more effective at settling meritorious claims. A longer application period also permits survivors greater choice over to when to apply, enabling them to do it when they are psychologically better prepared. If survivors have a longer time to collect necessary evidence, they can spread the logistical demands out over a longer period, making the programme more accessible. Given the difficulties that survivors experience during the application process, if the programme operates for several years, survivors might suspend their application if psychological or other difficulties impede their progress. Finally, a longer open period can accommodate survivors who become eligible after the programme opens, for example, if new institutions are added to a defined list. Although a programme will tend to cost more as it attracts more applications while incurring ongoing operational expenses, a longer open period may have the virtue of 'flattening the intake curve', helping prevent the programme from being overwhelmed by application numbers during critical phases. A longer open period might enable a more sedate pace, allowing the programme to develop the capacity to manage larger numbers of applications.

There is an alternative to making programmes longer. Between 2003 and 2008, Tasmania reopened a programme for people abused in state care several times to accommodate late applicants (Children and Youth Services 2014: 3). Then, in 2011, Tasmania created a successor programme with a small staff to manage a slender stream of applications. The successor programme used the same procedures as the original; however, the maximum payment decreased from AUD$60,000 to AUD$35,000. Although that programme would close in 2013 to be, eventually, superseded by the NRS, Tasmania might serve as an inspiration for a forward-looking flexible approach. A redress programme might be designed with two phases. An initial phase paying higher amounts might motivate a large proportion of the eligible population to apply promptly, making the programme more effective. Applications received after the initial deadline would enter a successor programme, with smaller staff numbers, simpler eligibility criteria, and lower settlement values. If this two-phase structure was built into the original programme, there would be no need for continual extensions, decreasing the survivor's psychological costs and the state's administrative expenses.

Flexible, survivor-focussed practice enables survivors to apply at the time and over a period that best suits them. Longer open periods enable

greater survivor choice and may help flatten intake curves. Still, given the significant resourcing required to operate a comprehensive redress programme, states can reasonably impose closing dates. However, to avoid pressure to reopen programmes and disappointing survivors who miss out, policymakers should consider operating successor programmes for applicants who do not apply before the initial closing date. A successor programme might provide a base level payment through a relatively low-cost process administered by a permanent independent office.

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Although most programmes prioritise applications submitted by the elderly or very ill, some survivors will die during the process. Fairness suggests that the estates of survivors who die while waiting should receive redress. Making posthumous claimants eligible will blunt criticisms of slow-running programmes that will otherwise be accused of waiting for claimants to pass away. The eligibility of posthumous claims also lends the redress programme a more collective character. Because a substantial redress settlement provides survivors with opportunities to perform as a family or community provider, insofar as families and communities become beneficiaries, enabling posthumous claims reflects the importance of these opportunities.

Programmes manage posthumous claims in different ways. The most restrictive require a living survivor to accept the settlement offer but will pay if the survivor dies prior to receipt. In others, a survivor must be alive to lodge an eligible claim (the Magdalene laundries programme is an example), but the claim can continue if they die before receiving a settlement. Less restrictive programmes permit posthumous claims to be submitted by the survivors' estate or next of kin. In Canada's CEP, survivors who were alive on 30 May 2005 were eligible, even if they died before submitting a CEP.

When survivor testimony is necessary for success, posthumous claims confront considerable challenges. Canada's IAP permitted posthumous claims only if a living survivor had submitted testimony regarding their injurious experiences. As with most aspects of the IAP, the rules surrounding posthumous claims were complicated and subject to various court rulings, which were summarised in a 2015 policy brief (Indian Residential Schools Adjudication Secretariat 2015 (2018)). The larger point is that if programmes depend upon survivor testimony, the necessary evidence may disappear when the survivor dies. Therefore, if a

programme needs testimonial evidence, it should be collected quickly. Applicants might be encouraged to record, as soon as possible, testimonial evidence relevant to their case. A flexible programme could use recordings of oral interviews, signed affidavits, witness statements, and hearsay evidence to process posthumous claims.

Posthumous claims are more easily managed when the primary validating evidence is documentary – the CEP is an example. Other programmes manage posthumous claims by allowing next of kin to obtain redress. This can be done in different ways. Tasmania's Stolen Generations programme had a separate process for children of primary applicants. Whereas primary survivors received AUD$58,333 each, their children were eligible for payments of AUD$5,000, up to a maximum of AUD$20,000 per family group (Office of the Stolen Generations Assessor 2008: 8). Scottish Redress offers a different approach. Scottish claimants can nominate a beneficiary to take over their redress claim at any time prior to settlement. Some infirm or elderly applicants may choose to reassign their claim to a beneficiary to permit the claim to continue posthumously. But should the claimant die without assigning a beneficiary, either the surviving spouse or partner will receive the whole settlement, or it will be apportioned equally among surviving children. In cases where a deceased survivor had not applied, their next of kin can apply on behalf of a survivor who died after 31 November 2004 for a payment of £10,000.

Given the age and morbidity profiles of survivor populations, it is reasonable to give priority to elderly and gravely ill applicants. Enabling claims to be reassigned to beneficiaries or letting family members assume posthumous claims enables further flexibility. The leniency of such provisions may depend upon the programme's purpose. If it is primarily about settling the survivor's claims, then when death ends those claims, the programme will have little reason to permit them to continue. But if the programme has broader community and social aims, then enabling posthumous claims can help fulfil those larger purposes.

9.3 What Injuries Are Eligible?

Recall (from Chapter 2) that survivors experience(d) injurious acts and consequences, with both interactional and structural causes, that afflict survivors as both individuals and groups. The eligibility of different categories of injuries shapes programme operations. One way a

programme can create a flexible framework for survivors is to enable them to choose pathways that redress different forms of injury.

Public discussions of redress often concentrate on interactional injurious acts: reports of sexual assault and physical cruelty have become the expected currency of survivor testimony. Individual injurious incidents include abusive events, such as physical blows, sexual touching, or medical malpractice along with emotional (mental) abuse, including insults and other degrading treatment. Some programmes are narrowly tailored. New Zealand HCP only admits injurious acts. The other exemplars tend to be less narrow, however, they often treat interactional (and individual) injurious acts as more severe than structural or collective injuries.

Pushing back against that trend are those who argue for the importance of structural injuries, such as neglect. Neglect is not a single event, it involves a pattern of mistreatment in which someone's physical, emotional, and developmental needs are systemically unmet. Structural neglect was common in systemically injurious care. Frank Golding observes that neglect was more frequently reported than either physical or sexual abuse in Australia (Golding 2018: 197), while Shurlee Swain argues that structurally neglectful conditions predispose institutions to more frequent sexual and physical abuse (Swain 2015a: 301). Equally, care leavers testify that fear of abusive incidents coloured their communal life in care – survivors lived in an 'atmosphere of fear' (Ryan 2009c: 101). Other critics note that redress programmes that emphasise discrete interactional acts focus blame on individual offenders in ways that decentre structural faults attributable to institutions and organisations (Green 2016: 129; McEvoy and McConnachie 2013b: 503).

Redressing interactional injurious acts is important to many survivors. Not only might they demand just compensation for their injuries; they may want the redress process to acknowledge those experiences. But those claims should not displace the redress of structural injuries. Evidencing interactional injuries can impose serious psychological costs – a point I return to in Chapter 10. By contrast, information about structurally injurious practices is more likely to be held in institutional records, to illustrate, Queensland's Forde Report cites numerous contemporary reports evidencing poor-quality care (Forde 1999: 35–36). Moreover, because the redress of structural injuries focusses on general environments and not specific acts, redress programmes can limit logistical costs for participating survivors, offenders, and their respective lawyers. Redress programmes that have access to institutional records

or reports compiled by public inquiries may be able to redress structural injuries more quickly and at lower costs than those redressing individual injuries. An example is the Magdalene programme, which settled most claims within a few weeks or months (IR Interview 7). A similar point applies to collective injuries, including the family separation, cultural disconnection, and genocide inflicted upon Indigenous peoples in Canada and Australia. In many cases, a programme would not have to collect evidence unique to an individual's case before acknowledging that they experienced some collective injuries.

Previously, I noted the concern that redressing individual injuries inflicted by individual offenders serves to individuate blame and so decentre institutional and systemic responsibilities. In comparison, a structural approach to redress responds to systemic and common experiences. In that way, such programmes acknowledge the policy wrongs committed by institutions. Moreover, the redress of collective incidences of injury can help the programme to be more inclusive, enabling more survivors to participate. A good example appears in the Canadian IRSSA, where the CEP offered redress for the collectively injurious residential schools and the IAP focussed on individuated abuses. That flexibility enabled 79,309 survivors to obtain redress for (some) collective injuries, while the IAP settled 27,846 individual claims.

Redress programmes can potentially include a wide range of structurally and interactively caused injuries and their collective and individual results. Turning to the overarching argument for flexible design, offering a pathway to redress structural and/or collective injuries alongside opportunities to pursue individuated redress enables survivors to choose which claims they pursue. Although I distinguish between structural and interactional and between collective and individual forms of injury, policymakers should look beyond these simplistic labels to analyse what will work in the relevant context. As the discussion of posthumous claims suggests, it may be easier to get evidence for some injuries than others. Or perhaps survivors will strongly prefer to include or exclude certain injuries. Or, equally, financial constraints may encourage excluding more grievous injuries, leaving the remedy of those to the courts.

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I now turn to the question as to whether injuries that were permitted at the time when they were committed should be eligible for redress. Present standards of behaviour may condemn previously permitted

practices and some survivors experienced injuries that were celebrated by the communities in which they lived. Examples include the legal misuse of forced labour – the sadistic Francis Keaney, principal of Bindoon Boys Town from 1942 to 1954, was proud of his sobriquet 'Keaney the Builder' – which he obtained by forcing resident children to construct the institution's stone edifices (Senate Community Affairs References Committee 2001: 116). 'Keaney the Builder' received an MBE in 1953, Bindoon Boys Town was renamed Keaney College in 1966, and his life-size bronze statue stood on the grounds from his death in 1954 until 2016. Other injurious practices might have been less celebrated, or even formally illegal, but nevertheless normal. An example is corporal punishment. Despite its prevalence, the practice of corporal punishment often violated regulations limiting its use. Elizabeth Stanley similarly details how New Zealand's restrictions on secure confinement (isolation) were regularly ignored by care staff (Stanley 2016: 128). In these cases, the standards of the day were impermissible *de jure*, yet New Zealand's HCP relied on them when deciding what injuries to redress (NZ Interview 2).

Because the purpose of state redress programmes is not to extinguish legal liability, there is no general reason to exclude injuries for which no one can be held legally liable. Nevertheless, some contemporary standards are clearly relevant. In the early twentieth century, education was compulsory in the Canadian Province of Manitoba for children aged seven to fourteen; however, in 1962, the minimum school-leaving age increased to sixteen (Oreopoulos 2005: 10). The IAP adjusted its eligibility categories accordingly, but it would not redress a failure to provide education beyond what was legally required. A similar point was made by interviewees in Ireland, who pointed out that when survivors complained of receiving a bland and largely meatless diet, their experience reflected what the post-war Irish normally ate (IR Interview 3). The RIRB did not accept that survivors were injured by eating common Irish fare.

I think the question as to whether injuries permitted by contemporary standards should be eligible for redress is easy to answer. Education standards and the bland Irish diet of the mid-twentieth century are examples of contemporary practice that are not wrong in themselves – they are not *malum in se*. However, when programmes confront legal, or otherwise permitted, injuries of forced labour and isolation, and other permitted *wrongdoings*, the defence of contemporary standards should not limit eligible injuries. Redress programmes do not determine culpability or extinguish legal liability. They redress injuries. And abuse does not become less injurious because it was socially or legally permitted.

Indeed, the fact that care providers were permitted to injure young people is a salient feature of systemically injurious care practices. The permissibility of injurious regimes is one of the things that ought to be redressed.

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Offending agents included both institutional and natural persons. Where an institution's regulations or practices were structurally injurious, the offender is the institution itself. Institutional offenders include both state and non-state agents, such as religious organisations. Natural offenders occupy three distinct relationships with survivors. Some offenders were staff members: exemplars that redressed interactional injuries invariably addressed staff offending. However, eligibility varied regarding the treatment of injuries inflicted by offenders in two other categories, non-staff adults and peer offenders.

Many care leavers were injured by non-staff adults while in care. For example, one Australian survivor was sexually assaulted by her father when he visited her in a residential institution (Senate Community Affairs References Committee 2004: 81). Her injuries include both those assaults and the fact that the care institution did not protect her from them. Other survivors might be injured when they left a care residence to spend time elsewhere, this might include being forced to labour at a farm, building site, or holiday camp. Some programmes excluded these offences. New Zealand required injuries to have been associated with a failure attributable to the state, either a government institution or an employee (NZ Interview 6).

The survivors' peers constitute a third category of offending natural persons. Peer offending was common in many care placements (Mazzone, Nocentini, and Menesini 2018; Barter et al. 2004: 21; Stanley 2016: 81–86; Ryan 2009c: 109–10; Bombay, Matheson, and Anisman 2014: 52ff). To illustrate, Canada's TRC reports Louise Large's account of her bullying, she was 'the leader of the pack' at the Blue Quills residential school.

> Nobody could bother the Crees, or . . . they would have to deal with me. And so I ended up, I beat anybody . . . even the boys would come fight with us, and I would always beat them all up. (Quoted in, The Truth and Reconciliation Commission of Canada 2015f: 167)

As Chapter 2 remarks, some placements had hierarchies of bullies, who could be endowed with a semi-official status and were permitted, or encouraged, by care staff to engage in peer offending.

Peer offenders create distinct challenges for redress programmes. Many peer offenders were children at the time of their offences and not liable for their actions. There may be liability for an institution's failures to regulate the behaviour of young people, but not for the specific injurious incidents. Moreover, some peer offending is normal. Acts that would be criminal between adults, or between adults and children, can be part of the normal developmental process. Children are not expected to act like adults. Large's account goes further. She suggests that bullying was a survival strategy for negotiating the terrible conditions of the residential school. She is what Luke Moffett calls a 'complex victim', whose offending was an adaptive response to a hostile environment (Moffett 2016: 150). Care institutions encouraged bullying by developing practices in which weaker residents needed protection. Some would argue that Large was injured by being compelled to become an offender. But one does not need to accept that claim to recognise the fact that because systemic injurious care is criminogenic, many survivors are offenders (Marshall and Marshall 2000: 253).

Contacting peer offenders as part of an investigation risks exposing them unfairly. Offenders who were children at the time might reasonably expect not to be asked to account for their actions now. Moreover, peer offenders may themselves be (potential) redress claimants and if the programme treats them as an offender that will colour their own applications. Finally, when peer offenders and (other) survivors live together in families and small communities or continue to share religious fellowship, involving them in redress claims raises serious privacy and well-being concerns (Bombay, Matheson, and Anisman 2014: 78–83).

At minimum, if a programme is going to ask for offenders' names, it should inform survivors how that information will be used and someone without an interest in their settlement (which may not be their lawyer) should talk with the survivor about the potential ramifications. In Australia, some survivors who provided an offender's name to the NRS were then contacted, unexpectedly, to participate in a criminal or workplace investigation (Kruk 2021: 68). The previous chapter argues that survivors must know what will happen to information that they give to the programme. Some survivors will want to use the redress process to create accountability – they will want prosecutions (AU Interview 13). Others, worried about putting themselves and others at risk, will wish to proceed without giving names. And every survivor should be able to choose whether or not alleged offenders (both institutional and individuals) participate in their interview.

Non-staff and peer offending both raise difficult issues. In both cases, programmes will confront injuries for which the respondent is not legally liable. But I have already said that redress programmes do not exist to extinguish legal liability. They emerge as a response to meritorious claims that the courts are unable to address. Therefore, legal liability should not circumscribe eligibility for redress. What then should set a limit? I think redress programmes should extend a broad latitude for injuries inflicted by non-staff and peer offenders, acknowledging the criminogenic conditions of structurally injurious care. But the problems that arise underline the importance of survivors participating in policymaking. Different programmes, confronting differing legal, logistical, political, and financial constraints, could reasonably differ in their inclusiveness. In some cases, it may be better to treat at least some peer offending as a collective injury, when, for example, institutional structures encouraged peer offending. In addition, programmes that redress individual offences may wish to adopt special investigative provisions that recognise the distinctive privacy and well-being concerns associated with offenders who are members of the survivor's family and community.

In accord with the argument for flexibility, different pathways to redress might distinguish between injuries inflicted by different offenders. A pathway redressing collective injuries might respond to structurally injurious care environments. Additional pathways could then address individual injuries occurring in a broader range of placements, including offences committed by individual staff, non-staff adults, and peers. These pathways might employ different investigation techniques for adult and peer offences and permit survivors to opt-in, or out, of pathways as they prefer. Survivors should not need to accuse members of their family or community to be eligible for redress.

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Most programmes use cut-off dates to delimit eligible injuries. To illustrate, claims for residence arising after 31 December 1997 were ineligible in Canada's CEP, while Queensland Redress and Redress WA were limited to injuries occurring prior to 31 December 1999 and 1 March 2006, respectively. Those cut-off limits reflect the programme's purpose. Redress programmes are (in part) justified by the evidential problems associated with non-recent claims. Without a cut-off date for eligible injuries, programmes will receive more recent claims. Given changes in record-keeping, staff training, and accountability practices, more recent

claims are likely to have more relevant information (evidence) available. Moreover, more recent care experiences may not involve the injurious extremes of deprivation, punishment, medical malpractice, and child labour characteristic of the worst placements of the early and middle of the twentieth century. Reflecting significant changes to the epistemic and regulatory environments, ordinary legal processes may be better able to manage more recent claims.

While there are good reasons to have special redress programmes for non-recent injuries, choosing a specific date to exclude more recent offences may appear arbitrary. Arbitrary line-drawing invites charges of unfair discrimination when it is unclear why an injury occurring on one day is eligible, but the same injury occurring the next is not. This line-drawing problem is unavoidable and familiar to many policy fields. I suggest that terminal dates will be less arbitrary insofar as policymakers can point to significant regulatory change. In the case of Queensland, the terminal date of 31 December 1999 matched the beginning of the Forde Inquiry and the advent of a new Child Protection Act. That new statutory regime, alongside the increased accountability created by the Forde Inquiry, represented a salient point differentiating injuries occurring on different dates. Redress WA's cut-off date corresponded to the full implementation of Children and Community Services Act 2004. In Canada's case, the 31 December 1997 limit matched the year in which the last Indian residential school closed, ending the possibility of injuries occurring in these institutions. These examples illustrate the advantage of selecting dates that can be justified by reference to substantial change. However, to return to the participatory theme, survivors should share in selecting cut-off dates.

9.4 Consequential Damage

The damage caused by injuries suffered in care marks the lives of many survivors. As Chapter 2 outlined, consequential harms can have structural or interactional causes and be individually or collectively experienced. Individual damage includes physical health problems, including frequent illness and risky health behaviours, including self-harm; mental health problems and psychosocial maladjustment, including depression, anxiety, personality disorders, and post-traumatic stress disorder (PTSD); alcohol and substance abuse; financial management problems; and educational and occupational difficulties (Fitzpatrick et al. 2010: 388). The large range of harmful outcomes can include

potentially opposite phenomena, for example, childhood sexual abuse can lead to both sexual inhibition and/or exhibition. Collectively experienced damage includes exposure to higher probabilities of physical and psychological illnesses – a higher chance of getting ill afflicts survivors in general. Injurious care can have intergenerational effects and other collective harms may include care leavers' marginalised social status and their experience of cultural and family disconnection. In communities where survivors comprise large portions of the population, the negative effects of care may be statistically discernible.

> [T]he child poverty rate for Aboriginal children is very high – 40%, compared to 17% for all children in Canada. These statistics cannot be explained away simply on the basis that many Aboriginal people live in rural communities. These children are living with the economic and educational legacy of the residential schools. (The Truth and Reconciliation Commission of Canada 2015d: 71)

Few programmes clearly specify monetary redress as a response to collectively experienced damage. They tend to engage with collective consequential damage through measures that supplement or support monetary redress, such as counselling or family tracing assistance. However, the Canadian Personal Credit programme provided monies to help survivors engage with their First Nations communities – helping redress the communal harms of the Indian residential schools' assimilative effects. And previously mentioned programmes that include family members as beneficiaries respond to the negative effects of injurious care they experience.

The redress of some collectively experienced damage will be efficient if relevant evidence derives from population-level data, such as demographics. By contrast, the redress of individual damage poses significant challenges. Chapter 12 addresses problems associated with assessing consequential damage, here I examine the treatment of survivors. To be eligible for consequential damage, survivors need to show that they are damaged, and that they are not responsible for that damage – demonstrating that the course of their lives was set by what others did to them (Pearson, Minty, and Portelli 2015: 30). This requires assessing the survivors' responsibility for their choices, decisions, and life plans. In effect, the programme must judge how well people have lived (Diller 2003: 741). Any investigation of consequential damage will focus on the survivor – subjecting their life to privacy invasions that entail alienating and undignified representations.

In previous work, I observe how representing oneself as a damaged person involves alienation (Winter 2018b). Alienation occurs when people see something that is (or should be) integral to themselves as a separate and hostile force. Eligibility for consequential damage encourages survivors to represent themselves as damaged persons. To claim redress, survivors need to represent consequential damage as both something they endure and as part of their person (something they are). The survivor is harmed, and the damage lies within. For example, Cheryl Kelly's submission to the Australian Senate's Inquiry into Children in Institutional Care attributes her parental failings to her experience of child abuse:

> . . . I have immense problems today with parenting. Not only am I utterly bereft of experience from which to guide my parenting, I find it difficult to give my children affection, nurturing and positive reinforcement of the people they are becoming. (Kelly 2004)

Kelly represents the way she parents, something that she thinks should be central to herself as a person,[1] as something imposed upon her. That is alienation. And that alienation develops in a context of indignity. Over 50 per cent of respondents to a 2010 postal survey of Australian care leavers indicated that they confront 'shame or fear' regarding their injurious experiences (Golding and Rupan 2011: 36–37). Of course, survivors might be embarrassed by aspects of their injurious experience that are not consequential damage. But in the context of this discussion, it is worth observing how the personal history and characteristics eligible for consequential damage – unemployment, innumeracy, illiteracy, and disorderly tendencies such as alcoholism and violence – are often viewed as shameful. Survivors know that other people will judge them (Senate Community Affairs References Committee 2004: chapter 6). And the redress of consequential damage encourages survivors to display attributes of their person – their personal decisions, behavioural patterns, and character attributes – in alienating and shameful ways. The process is aggravated by its public and bureaucratic character. The redress judgement creates an impersonal depiction of the survivor as a defective person.

A second problem with the eligibility of consequential damage concerns the invasive character of the process. To investigate the harms that occurred and assess their severity, a comprehensive redress programme could examine a survivor's entire life. Moreover, a programme that

[1] Kelly made three written submissions to the Inquiry. The last two are nearly entirely concerned with parenting.

attempts to redress only those harms caused by injurious care experiences must exclude damages attributable to other injurious experiences. In that effort, the programme needs information about potentially harmful events that occurred prior to, or after, the survivor's experience of care. The redress of consequential damage fosters wide-ranging invasions of privacy. As an Irish informant observes,

> So, we did look at the totality of people's lives . . . we looked at, I suppose, all of the things that happened to people in their life. Pre-care and post-care, you look at other contributing factors in their lives as well, and that sort of provided us with a framework to assess how their time in care impacted on them. (IR Interview 3)

A comprehensive investigation can include hundreds of medical, financial, employment, and educational records, and probe the survivor's relationships with their community, family, and friends. This investigation gathers deeply private information, exposing it to public assessment. Redress WA's assessment matrix (Appendix 3.6) offers a good example. In that programme, eligibility for consequential harm included 'sexual dysfunction, negative body image, anxiety about sex etc'. Reflect for a moment on how a survivor would evidence those harms. It is hard to imagine anything more invasive.

Chapter 12 returns to the difficulties of assessing consequential damage. Those difficulties underline the obvious solution of making the redress of consequential damage optional. Some survivors may prefer to avoid it altogether. Others may benefit from the redress of collectively experienced damage, through processes that eschew invasive personal assessments and alienating personal representations. Still others will want all possible injurious damage redressed.

9.5 Eligibility Recommendations

- A defined-list programme works best with a schedule of distinctive institutions with good records, while open programmes are more flexible and responsive. The trade-offs between open and defined-list programmes suggest that a survivor-focussed programme might develop pathways incorporating both techniques.
- Programmes require transparent criteria to define how survivors need to be associated with institutions on a defined list to be eligible. Programmes might use discretion in the survivor's favour – non-standard historical practices should not now disadvantage claimants.

- Developing and communicating the ambit of eligibility should aim to mitigate the reputational risk to existing care services.
- Programmes should be open to applications for a period sufficient to make them accessible to all eligible survivors.
- Policymakers should consider operating successor programmes to manage applications submitted after an initial closing date.
- Facilitating posthumous claims is fair and enables familial and collective benefits.
- Survivors should be encouraged to record, as soon as possible, testimonial evidence relevant to their case.
- Programmes should give priority to elderly and/or gravely ill applicants.
- All programmes should include a relatively low-cost pathway to redress structural injuries; that pathway might be supplemented by one or more pathways in which survivors pursue the redress of individual injuries.
- Legal liability should not define eligible injuries.
- Subject to other considerations, redress programmes should extend a broad latitude for injuries inflicted by non-staff and peer offenders.
- Generally, contemporary standards of what was permissible should not be used to exclude meritorious claims; however, there are certain claims where non-invidious contemporary standards are relevant, such as the legal requirements for education.
- Because redress programmes respond to unique concerns associated with non-recent claims, programmes can reasonably impose cut-off dates. Injuries that were incurred after that cut-off date can be pursued through ordinary processes.
- Programmes should seek to align cut-off dates with relevant regulatory change or another distinctive event.
- The redress of consequential harm should be an option but not required for a successful claim.
- Policymakers should consider designing flexible programmes that distinguish the redress of collective and individual consequential damages, enabling survivors to choose to pursue the redress of structural and/or collective harms alongside one or more pathways redressing individual damages.

10

The Evidentiary Process

10.1 Introduction

Through phone calls, letters, emails, interviews, and application forms, redress programmes get evidence from survivors. Programmes also get evidence from other sources, including religious organisations, care institutions, governmental departments, and professionals, such as counsellors, psychologists, and medical practitioners. Often complex and working through successive phases, the evidentiary process constitutes a critical element of programme operations and the survivors' redress experience.

Information is the primary instrumental purpose of the evidentiary process. Because information is costly for survivors to provide, and for programmes to manage, an efficient programme would only acquire what it needs to distinguish eligible from ineligible claims and, where relevant, assign them to the correct severity standard. But because a redress programme provides a way for survivors to tell their story, there are also participatory values inherent to the process (Hanson 2016: 12). For Lana Syed-Waasdorp, Queensland Redress was 'a great thing to have' because '[i]t gives us a chance to write to the government and let them know how we did all suffer and it lets us be heard, lets our stories go and be heard'. ('Official Committee Hansard' 2009a: CA25). If the application process is viewed primarily through an instrumental lens, policymakers might try to limit survivors' engagement. But participatory values can provide reasons to amplify survivor engagement and increase the costs of their involvement. Tensions between participatory values and instrumental optimality reinforce the need for flexible programmes that negotiate the resulting trade-offs.

10.2 Advertising Redress to Survivors

Survivors need to know about a redress programme before they provide it with evidence. Effective advertising must reach survivor populations

that are 'information disadvantaged through low income, poor education, an inadequate knowledge of English, disability, geographical isolation or other reasons' (Redress WA 2008b: 10). Moreover, survivors who are suspicious of governmental institutions may mistrust or ignore outreach attempts. Success depends on informing survivors in ways that motivate them.

To cast a wide net, exemplars used radio advertising to target high-profile sporting and cultural events, and ran print adverts in popular and/or freely available newspapers, while state agencies, such as prisons, displayed posters, distributed pamphlets, and hosted information sessions. Confronting challenges of both geography and Indigenous cultural difference, both Redress WA and IAP staff held community-level sessions in remote communities. Redress programmes are popular news items and programmes can use newsletters and periodic reports to provide content for the media. Making information available to journalists and other observers can also be a way of ensuring accountability and transparency.

Redress programmes should leverage survivor networks and community agencies. These bodies can advertise the programme on their websites, mailing lists, newsletters, and social media pages, and host in-person events. If survivors already trust these local networks and agencies, redress programmes can piggyback upon their reach and credibility – Chapter 5 notes the Child Migrants Trust's effective organising of Redress WA applications. To motivate survivors, advertising must clearly and accurately represent the programme. It should also be iterated. An iterative strategy increases not only the numbers reached but also the probability of repeated engagement. People are more likely to act when they are repeatedly exposed to information (Keller and Campbell 2003). As Chapter 6 observes, Canada's advertising strategy for IRSSA sought to reach each survivor an average of fourteen times. As a result, the CEP and IAP received applications from over 100 per cent of their eligible population estimates. Moreover, as different survivor communities (rural, disabilities, Indigenous, and those incarcerated) may belong to different networks, the programme may need different forms of advertising to reach all those eligible effectively. This may include advertising in minority languages.

First-contact advertising merely tells survivors that the programme exists and where to find the pamphlets, guidebooks, and websites that provide more detailed information. Websites are cost-effective and easy to update, but some survivors may find accessing text-based websites

challenging. Because phones are now more common than computers, programmes should present information in a manner optimal for mobile viewing. In general, survivors need to know whether they could be eligible, what they could be eligible for, what they need to do to apply, and, perhaps most importantly, where they can obtain assistance – most survivors will not complete and submit effective applications on their own. Immediately connecting survivors with support groups allows programmes to outsource some of the work involved in getting usable evidence to lawyers and other support workers.

10.3 Testimonial Evidence

Evidential testimony comes from different sources and can be either pre-recorded or provided in person. With one exception (New Zealand), all the exemplars used application forms. These forms shape what, and how, testimony is given. As Robyn Green argues,

> the bureaucratic *form* [emphasis supplied] requires consideration in the study of reparations because it is by way of the application documents that specific categories are created to represent residential school experiences and the possibilities for compensating its problematic outcomes [emerge]. (Green 2016: 124)

Green rightly emphasises that application forms shape how survivors describe their claims. To illustrate, many female survivors were subject to unnecessary internal examinations to check for venereal disease when in care. Survivors applying to the Australia's NRS now claim that those injuries constitute sexual abuse (Kruk 2021: 72–73). Some of those claims may be products of the NRS's eligibility requirement. Sexual abuse is necessary to get redress from the NRS: applicants must provide evidence of a sexual event, and the application form requires survivors to 'describe . . . your experience of child sexual abuse . . .' (National Redress Scheme c2019: 10). If the programme was otherwise structured, then some survivors might describe their injury differently, perhaps as physical assaults or medical malpractice. The categories a programme uses will shape the evidence it receives.

An evidentiary process requires survivors to learn what injuries the programme can redress, what information is relevant, and how to craft their evidence accordingly. Well-designed forms help applicants give officials the information they need (Howlett 2017). While application forms can vary, universally beneficial techniques include using simple

language and separating complex information into manageable portions. Because survivors are culturally diverse, the programme may need different application forms to convey and acquire information effectively, changing not only the language, but also the style and approach to suit cultural norms. If the programme has more than one pathway, then the application form should be divided so that applicants need only provide information relevant to the pathway(s) they want to apply for, thus avoiding inefficiencies. Forms can be both web-based and on paper, enabling survivors to use technology that works for them. Programmes should vet their forms using accessibility software and run pilot tests with users.

The application form should clearly explain why it is collecting information and indicate what evidence is necessary and what is optional. As noted in Chapter 8, it should, of course, also tell the applicants what will be done with the information. The form should capture necessary identification and contact details, including any previous names or other identifiers (such as numbers or nicknames) by which the applicant was known in care. Because redress can take a long time, and some survivors are itinerant, the application should ask for alternative contact persons or organisations. Where institutional residence is relevant, the form should prompt applicants with a list of named institutions, such as orphanages or schools. Because some placements (like foster care) will not have proper names, or applicants may not recall where they resided, the form should include free text space so applicants can describe what they do know. It is good practice to ask for information in more than one way. For example, the IAP's application form asked for information about abuse using both a table and free text space. The table summarised the relevant experiences and encouraged survivors to define those experiences using concepts and categories used by the programme. The free text space then allowed applicants to describe their experiences in their own words.

Chapter 9 recommends that programmes accept pre-recorded testimony to offset the risk of a survivor dying during the application process. Pre-recording also enables survivors to develop their evidence over time. Survivors can revise for clarity, accuracy, and effectiveness, making reference to programme guidelines and receiving assistance from support workers. Some programmes accept testimony initially recorded for other purposes. For example, New Zealand's HCP accepted transcripts of testimony given to CLAS. The overarching point is to enable survivors to use processes and formats that suit them, while at the same time

providing the programme with the necessary information. One could imagine a programme operating a web portal through which survivors (or their lawyers) could log on to progressively develop their application. Survivors could upload written, audio, photographic, or video-taped testimony, alongside written accounts and electronic records. This would allow programme staff to review that material as the application develops, helping survivors provide clarifying or missing information.

I advocate flexible programmes that provide survivors with different pathways through to redress. To choose how they will participate, survivors need to be well-informed about the available options. If the application needs to provide a lot of information about a complicated set of options, they will become very large and complex in themselves. That is a worrisome result. Large application forms are more difficult, even intimidating, to complete. To mitigate the problem, programmes can offer more simplified information as a first resource, putting more complex information into guidebooks with explanatory sections that match the structure of the application form. Greater complexity is an inevitable and necessary trade-off to flexibility and is an unfortunate consequence of ensuring that survivors have the information they need to understand the programme. This is another reason to ensure that survivors have competent support during the process.

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When pre-recorded testimony is insufficient, oral testimony can help add or develop pertinent information. Oral testimony is usually provided through interviews. Interviewers who know what evidence a successful claim needs can help identify evidence helpful to the survivor's claim and ask clarifying questions. Centred on the survivor, the interview is, perhaps, the most survivor-focussed aspect of redress. '[W]e need to have an opportunity to say what we need to say' (CA Interview 2). An interview offers important participatory values, enabling survivors to speak directly to the programme. When an interview goes well, it can help survivors feel validated, empowered, and, potentially, to heal.

> The hearing is not just a step in a compensation process: it is an opportunity for the parties to achieve, together, a degree of the healing and reconciliation intended ... (Indian Residential Schools Adjudication Secretariat 2009a: 11)

Transitional justice practice promotes the benefits of testimony. In the 1990s, the South African Truth and Reconciliation Commission

embraced the idea that testifying about injurious experiences can be good for people psychologically (Hamber 2003). Building upon popular understandings of the 'talking cure' in psychotherapy, the commission's posters told the world that 'Revealing Is Healing' (The Truth and Reconciliation Commission c1995). The message was received enthusiastically, spurring an evolving and dynamic range of testimonial-based remedial initiatives (Skaar 2018: 415).

Some survivors say that testifying has therapeutic or other benefits (Independent Assessment Process Oversight Committee 2021: 24). But that therapeutic potential is matched by serious concerns for the survivors' well-being (Senate Community Affairs References Committee 2009: 55–56; Dion Stout and Harp 2007: 19) (IR Interview 6). Imagine a survivor preparing to tell the worst parts of their life story in an unfamiliar room to someone they just met. Interviews ask survivors to relive detailed memories of their past abuse and submit that testimony for judgement. Their words will be judged for veracity and weighed as evidence. The survivor is effectively 'on trial' and the stakes are high. Not only is money involved, survivors also risk having their accounts discredited. Being disbelieved or understood differently than intended can undermine the participatory value of testimony (Turner 2016: 37).

Whereas trained psychologists conduct therapy under controlled low-stress conditions, a high-stress inquisitorial interview is, almost inherently, conducive to retraumatisation. It is, therefore, unsurprising that every exemplar that used oral testimony received complaints that it harmed survivors. Sinead Pembroke's findings concerning the Irish RIRB are symptomatic. In her study of twenty-five Irish survivors, several respondents described their interview as 'cathartic', but the majority 'emphasi[sed] that it caused further trauma and opened up psychological wounds' (Pembroke 2019: 56). Illustrating those different experiences, Canada's National Centre for Truth and Reconciliation's Report is balanced. At one point, it states that

> [some] Survivors commented that the IAP and CEP processes brought their memories back to the experiences they had in residential schools, which sometimes lead [sic] to healing and reconciliation for themselves as individuals as well as for their families as a whole. (National Centre for Truth and Reconciliation 2020: 8)

But the report also highlights Eugene Arcand's more difficult experiences:

> For me, the invasiveness, persistence and depth of the questioning we were subjected to inside of our compensation hearings was obscene and did not need to occur to verify whether sexual or physical abuse it occur. That day of my hearing, and the days that followed, were some of the worst days in my life second only to when my abuse actually occurred. (Quoted in, National Centre for Truth and Reconciliation 2020: Foreword)

From the perspective of the programme, interviews need to produce evidence. That purpose need not require lengthy discussions about traumatic events, and interviewers may naturally avoid spending more time talking about injuries than is necessary for evidential purposes. But a too-short exposure to the traumatic experience during testimony may aggravate the interview's harmful character. Karen Brounéus suggests that short-term engagement with traumatic memories can intensify trauma as the body's bio-psychological responses are triggered without the survivors having enough time to work through the traumatising memory (Brounéus 2008: 62). A short interview that leaves traumatising memories unprocessed may aggravate retraumatisation. To protect the well-being of survivors, interviews must work in a trauma-informed manner. No seriously injured survivor should tell their story for the first time in an evidential interview. If survivors are not comfortable engaging with those memories, the highly stressful evidentiary interview can lead to further and serious psychological harm.

Testimony may have real value for some survivors, however, because those benefits are neither universal nor unmitigated, interviews should be optional for survivors, which, in turn entails pathways that do not require oral testimony (Lundy and Mahoney 2018: 281). Given the difficulties associated with testimony, survivors who choose to participate in an interview need the option of having support persons attend. Reflecting the psycho-emotional difficulties involved, one interviewee (a therapist who worked with the Irish RIRB) observed that people could lack memory of the interview in the same way that people can lack memories of traumatising injuries.

> There's a little fog that various people get. They can't remember what their lawyer said, they didn't remember what happened [during the interview]. They want you in the room because you need to remind them two days later what actually happened. Because people completely forget the experiences, have no idea what actually happened. (IR Interview 6)

While not all survivors will want family or friends with them – they may have privacy concerns, and participation risks vicariously harming

everyone involved – having support in the room can be crucial to making the process safer and more effective.

Survivors should also have some choice over who hears their testimony. It is easier to have a single interviewer hear testimony, while a multi-person panel communicates formality. Moreover, an interview panel may be better at obtaining information, with members from different professions – social workers, psychologists, legal and medical professionals – attuned to different kinds of data. The use of panels can also help with consistency. Ireland's RIRB panellists were regularly shuffled by lot so that panellists did not develop idiosyncratic and inconsistent procedures. However, survivors may find the presence of multiple interviewers intimidating. Wherever possible, programmes might permit survivors to choose the number of interviewers at their hearing. Recall the recommendations made in Chapter 8: where possible, survivors should be able to choose the ethnicity, gender, and language of their interviewer.

Considering the well-being difficulties involved, survivors need to be provided with pathways to redress that do not involve interviews. And where it is likely that an interview risks harming survivors, the survivor should have the support of long-term counsellors (or other support people), not merely their lawyers. Programmes have a responsibility for the well-being of applicants, and staff need training in trauma-informed engagement to help them identify problems and respond appropriately. Survivors should be monitored by trauma-informed supporters during the days immediately following testimony, for they may be at a high risk of psychological deterioration, including suicide. Moreover, a programme needs to manage the public relations (business) risk that retraumatisation poses. A programme will be less effective if it develops a retraumatising reputation that deters potential applicants. On that point, Redress WA is candid.

> While the retraumatisation of individuals can be managed, what is less manageable is general public criticism of the 'traumatising nature' of the scheme and allegations that the scheme 're-abuses' applicants. (Western Australian Department for Communities c2012: 10)

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Some programmes include representatives of 'offending institutions' at interviews. Canada's IAP required legal representation of Canada (the SAO) at hearings and Ireland's RIRB could include church entities and

other institutional representatives. The RIRB even permitted alleged individual offenders to cross-examine survivors, although that rarely happened. The value of including offenders in an evidentiary interview is uncertain. Some might provide useful information, but equally they might provide that information at some other time. Sometimes their inclusion is justified by a potential restorative justice benefit. Restorative justice involves processes that bring offenders and survivors together as a way to help repair damaged relationships (Strickland 2004).[1] When representative offenders listen to the survivor's testimony and offer condolences:

> [the interview] helped them to start healing because they were able to tell someone in authority – and have the defendants there – about what happened. (CA Interview 7)

A Canadian report quotes an unnamed SAO representative as saying,

> It's a very important step in the hearing process . . . to have someone who is there on behalf of the government to tell them, 'I believe you're credible. I believe these things happened to you.' Just those words, you could hear and see the emotion on their face. (Independent Assessment Process Oversight Committee 2021: 70)

I think involving offenders is expensive and risky, it also makes logistics more challenging. Staffing shortfalls in Canada's SAO contributed to delays in the IAP. And some SAO representatives did what a lawyer is supposed to do – look out for the interests of their client – helping some interviews become more adversarial (National Centre for Truth and Reconciliation 2020: 31). Regardless of how offenders (or their representatives) act, the survivor may be uncomfortable testifying in front of people they see as opponents (CA Interview 8; IR Interview 9). Moreover, should the survivor wish to pursue a civil claim against the offending institution, the offender's participation may provide them with information prejudicial to the survivor's claim.

When programmes confront countervailing considerations, the best option is to enable choice. But choice is always constrained, a point that is clear in the issues involved in asking survivors to name offenders. Survivors will have to give the names of offending institutions so that programmes can get evidence of their time in care. However, survivors

[1] I express reservations with restorative accounts of state redress in: (Winter 2014: 211–13; 2009: 53–56).

may not need to give the names of alleged individual offenders. Most programmes are legally obliged to refer potential criminal prosecutions to the police and take steps to safeguard young people from potential offenders. But, as Chapter 9 observes, these (otherwise reasonable) steps create privacy and safety concerns for survivors.

Since testimony is psychologically difficult, a programme might try to minimise the number of times that survivors testify. As previously mentioned, that is one reason to accept testimony produced for other bodies, such as public inquiries. Limiting testimony also reduces the amount of information flowing into the programme, which will tend to lower operating costs and, hopefully, increase processing speeds. But these measures confront trade-offs. Most interviews last only a couple of hours. In such a short period, survivors may fail to say all that they wish. They may fail to recall certain facts. Or they may fail to mention them at the right time. Human memory is not a well-sorted catalogue; testimony is active, creative, and, importantly, partial. Survivors often progressively recall more information about abusive events each time they testify (Tener and Murphy 2015). In New Zealand,

> Many [survivors] also later recalled details that they had forgotten or not felt comfortable sharing during the interview and were reluctant to follow up with MSD staff for fear of being a 'hassle' or the emotional impact of repeatedly discussing their experiences. Additionally, some felt that the session was too short to comprehensively and safely share their story. (Allen and Clarke Policy and Regulatory Specialists Limited 2018: 3)

In Canada, progressive disclosure during an interview could result in significant delays as applications were recalibrated, new potential offenders notified, and new professional reports obtained. While new disclosures will, usually, increase processing time and costs, there are mitigating steps that programmes can take, such as not contacting named offenders and dispensing with the need for professional reports to evidence familiar forms of consequential damage. It is important that survivors know that progressive disclosure is normal and acceptable, and that they can add to their testimony at minimal cost.

Generally, survivors benefit if they can present their evidence in a well-ordered narrative, with all the details in the right places. But memories of abuse may not fit that model. Perfect recollection is improbable, not least because trauma can disorder and fragment memory (Samuelson 2011). Oral testimony is likely to differ from that recorded in written applications. Inconsistencies should be expected and are not necessarily evidence of

dishonesty. Programmes that emphasise the potential legal consequences of making errors risk deterring survivors, especially those used to being disbelieved by hostile officials. For many survivors, testifying will involve emotional and challenging behaviours, others may be reticent, not wishing to tell a stranger the most intimate details of their lives.

That said, a programme's integrity is in tension with the oft-heard injunction to 'Believe Survivors'. The fact that a survivor says something does not guarantee its truth, and 'acknowledging and respecting the pain suffered by victims does not entail a suspension of critical faculties' (McEvoy and McConnachie 2013a: 130). The practice of simply believing survivors can create problems. In the 1980s and 1990s, many people believed in the widespread satanic ritual abuse of children. As lurid stories of demonic rituals spread through the media, more and more people came forward claiming to be survivors. The desire to believe what complainants said led to hundreds of false allegations and wrongful convictions, demonstrating how well-intentioned practice can lead to injustice (Smith 2008a, 2010). When the act of questioning survivor testimony is seen as disrespectful, or even abusive, people will fail to check basic facts, and errors will occur (Smith 2008a: 32).

Inaccurate testimony need not result from fraudulent intent. A well-known experiment colourfully demonstrates how people can be encouraged to remember things that never happened. The experimenters showed people a childhood photograph of them taking a hot air balloon ride and asked what they could remember about the experience. The trick was that the subjects had never ridden in a balloon. The childhood photograph had been doctored to include a photo of the subject in a stock balloon ride photo. After seeing the doctored photograph, nearly half the subjects invented some memory of an experience that never happened. Some of those memories were very detailed. One subject said,

> [the balloon ride] occurred when I was in form one (6th grade) at um the local school there . . . Um basically for $10 or something you could go up in a hot air balloon and go up about 20 odd meters . . . it would have been a Saturday and I think we went with, yeah, parents and, no it wasn't, not my grandmother . . . not certain who any of the other people are there. Um, and I'm pretty certain that mum is down on the ground taking a photo. (Wade et al. 2002: 600)

Human memories are not stored data recalled from the past, they are contemporary constructions that respond to what is happening in the present. Research has found that media reports, peer discussions,

therapy, even what people think they ought to have experienced, will influence what they remember (Kebbell and Westera 2016: 125). Human memory is so suggestable that it would be surprising if the publicity given to injurious care histories did not affect survivors' testimony.

These qualities of human memory are a serious problem. People want to believe survivors, yet it is normal for survivors to construct memories, that is what everyone does all the time (Wilson, Lonsway, and Archambault 2020: 27–28). In non-recent abuse cases, it can be difficult to cross-reference survivors' memory with other evidence. However, when cross-referencing can happen, errors are uncovered. In 2009, Debra Rosser, an archivist who helps survivors find records, told an Australian Senate inquiry that she was presently working with twenty-one cases. Of these, Rosser thought that around half had told her stories that 'do not make sense in terms of the practices of child care institutions of the time' ('Official Committee Hansard' 2009b: CA4). However, these errors concerned who was legally responsible for the survivor at the time, which is information that might not have been relevant to the young person at the time. Things are different when survivors are asked about their injuries. One widely cited review into the adult recall of childhood abuse indicates that positive claims of abuse tend to be accurate (Hardt and Rutter 2004: 270). That review compared testimony with recent records of abuse. It observed a significant rate of under-reporting, survivors did not testify to around one-third of documented abusive events. Under-reporting may be common. Kimberley Community Legal Services told the McClellan Commission that their 'clients frequently received less than they were entitled to [from Redress WA] because they were reluctant to fully divulge past abuse' (Royal Commission into Institutional Responses to Child Sexual Abuse 2015b: 251).

When thousands of survivors apply for redress, many will make honest mistakes, both in their own favour and against it. Others will try to cheat the programme – survivor populations include a share of rogues. Although redress programmes rarely identify out-and-out fraud, they tend not to look for it and, when they do discover potential cases, they may dismiss the claim instead of reporting it. I am familiar with only one review that explicitly looked for fraud, and it found numerous cases, including a claimant who had his mother lie about his claim (Kaufman 2002: 298). The prospect of fraud involves two concerns. First, survivors who get redress illegitimately reduce the programme's efficiency. Second, if suspicion of fraud becomes widespread, payments may lose some of their value. If the general public begins to see those who receive payments

as potential cheats, that will undermine public acknowledgement of the survivors' injurious experiences.

Deciding how much credibility programmes should give testimony is difficult. Programmes can expect some false claims. Programmes should take particular care with evidence arising from group processes, where one individual is asked to support claims made in another's application. A natural wish to help one another might not be an incentive to be truthful, especially when collaborators live in the same families and communities. But disbelief is harmful to survivors who may believe what they are saying, even when it is inaccurate. Although a lenient approach risks inviting false claims, it may be more efficient to quietly pay some non-meritorious claims, than to attempt to invalidate them.

10.4 Institutional Records

Apart from testimony, institutional records are most important sources for evidence. I have frequently noted that the records of young people in care are very poor. Institutions did not invest adequate resources in creating and archiving records. Many records were never created, many more are now missing and those that remain are hard to locate and access. Some records contain false information. *Forgotten Australians* quotes an anonymous survivor,

> . . . mistakes were common, the files are something to behold, they are inaccurate & sloppy, they make me think of the saying: 'Never let the truth get in the way of a good story' as some of the stuff that is in my file are just 'nice' stories, it never happened. (Senate Community Affairs References Committee 2004: 270)

And institutional records seldom provide evidence of specific injuries:

> [T]he number of files that would actually confirm that the person has been abused by the person they're saying, would be, you know, you could almost count them on the hand, on the fingers of a short-sighted butcher, as the old saying goes. (IR Interview 6)

It is unfair to survivors when deficiencies in record-keeping and records-access harms their claims, especially when the offender was (and is) responsible for developing and maintaining those records (Ministry of Social Development 2018c: 22). For that reason, making access to available records as easy as possible is critical to the evidential process. Records can provide survivors with relevant information about where

they were in care, what happened to them, and who they were in care with. Programmes should develop, as quickly as possible, high-quality accessible databases and begin to compile and analyse relevant documents. Moreover, programmes should move to secure access to records held by relevant private organisations, potentially funding the necessary archival work. Transparency requires that all records used as evidence should be available to both survivors and programmes.

The records needed by a programme will reflect the demands created by its ambit of eligibility. Programmes that assess consequential damage engender the greatest demands because, as Chapter 9 argues, assessors must develop a comprehensive picture of the survivor. Such claims can involve thousands of documents, each taking time to obtain, compile, distribute, and analyse. In general, increasing informational demands will increase costs for both states and survivors. Conversely, programmes can reduce the costs of records-management by reducing the programme's epistemic demands. As an example, using only placement-duration as a metric, Canada's CEP focussed on a relatively narrow set of records, with the state assuming primary responsibility for accessing and analysing those documents, reducing the costs associated with distribution. But no option is costless, as the challenges faced by the CEP demonstrate. Poor-quality records meant the CEP proceeded slower than expected and survivors often disagreed with the outcome, leading to large numbers of reconsideration requests. Again, transparency is important, had survivors been able to view the relevant records when the CEP was assessing their claims, they might have been able to understand how their claim was adjudicated and point out errors of fact present in the files.

10.5 Professional Evidence

Survivors in Ireland's RIRB who claimed for consequential damage needed to submit one or more reports from a medical professional. These reports had to say what damage the survivors suffered and how their care experiences caused that damage. Similar provisions applied in Canada's IAP and Queensland Redress Level 2. Professional reports hold out the prospect of objective evidence. That objectivity enables programmes to outsource judgements about survivors, using independent professionals for a more impartial process. Moreover, if professionals prescribe effective treatment, or catch undiagnosed illnesses, the process can support survivors' health and well-being.

However, getting professional reports can create significant delays, stress, and expense. Canada's IAP experienced long delays as survivors

waited for appointments with the few professionals willing to work in rural locations. Medical specialists often have lengthy waiting lists and they may not prioritise report-writing over the acute needs of their other patients. The expense of professional reports makes them inaccessible to self-funding survivors, yet, if the state defrays the costs, the taxpayer will shoulder the resulting burden.

The added costs in time and money mean that programmes should only require professional reports when those are necessary. Programmes that contract external professionals to provide these reports confront the usual problems associated with outsourcing. Training external contractors is harder than training employees and inconsistencies may increase as different contractors apply differing standards. Because consequential damage is only ever stochastically linked to injuries in care, and the range of potentially linked harm is very large, almost any syndrome might be said to be caused by injurious care. The difficulties involved in causal diagnosis mean that a judgement formed during a single consult is not guaranteed to be accurate. In some cases, these difficulties will be aggravated by cultural barriers, for example, standard psychological tests may not appropriately assess Indigenous applicants (Dingwall and Cairney 2010: 26–27; AU Interview 5; CA Interview 2). In other cases, programmes will confront bias. Professionals might be predisposed to link syndromes to care experiences out of a natural wish to help claimants. But if the survivor's lawyer arranges the professional reports, those professionals will also have a financial incentive to encourage repeat business. Quality concerns led Ireland's RIRB to engage relevant professionals to analyse reports submitted by their peers. Similarly, Canada's IAP sought to stop lawyers from leveraging biased expertise by having the Oversight Committee approve a schedule of acceptable professionals. These measures added further delays. A flexible redress process should have at least one pathway to redress that does not require third-party reports. In those pathways for which they are required, reports should be available free of charge for survivors; however, programmes should take steps to ensure robust quality control and to minimise the number and depth of such reports.

10.6 Evidentiary Recommendations

- The evidentiary process should aim to be optimally efficient, engendering adequate information while minimising burdens borne by applicants and costs to the state.

- Programmes need to use a range of techniques to engage hard-to-reach survivor populations. Repeat contact is likely to be necessary. Programmes should leverage existing survivor networks and agencies.
- Programme information must be accessible. It should be tested on a representative sample of users, including members of hard-to-reach communities.
- Application forms should help survivors present information that is easy for staff to use. But survivors should have options to use a range of technologies to provide testimony in ways that suit them.
- The difficulties that survivors experience with testimony means that they should have options as regard to what they testify about and the processes involved. If interviews are to be optional, a programme needs a pathway to redress that does not require in-person testimony. Programmes should have at least one pathway to redress, wherein survivors can quickly and efficiently obtain a settlement by providing a limited amount of evidence.
- Interviews must be conducted in a trauma-informed manner. Given the difficulties associated with testimony, survivors need the option of having the presence of support persons. As far as possible, survivors should not be testifying for the first time in an evidentiary interview.
- Programmes should consider having multi-person panels hear testimony. Survivors might want to choose the number of interviewers at their hearing.
- Survivors need to be able to progressively develop their applications over time. Survivors may not provide all salient information during a single interview.
- Survivors should be able to choose whether alleged offenders (both institutional and individual) participate in the survivor's interview.
- Survivors should be able to choose not to name individual alleged offenders, or, if they do name them, that those names are kept confidential. If that is impossible, then survivors need to be clearly informed of the consequences of naming offenders.
- If programmes are going to believe survivors, they must accept that they will receive some inaccurate testimony. Particular care should be taken with group processes.
- Programmes need to develop secure, high-quality databases that include all relevant records. Survivors should be able to progressively augment their claim.

- Survivors should be given access to all the records (and other evidence) used to process their claim.
- Programmes should minimise the use of third-party reports. Where reports are necessary, programmes need to monitor their quality and work with professionals to overcome delays and avoid excessive costs.

11

Assessing Redress Claims

11.1 Introduction

Programme assessors decide what injuries to redress and how much money to pay. Both judgements can be difficult. Some observers insist that it is impossible to set a monetary value on injurious care experiences. '[N]othing could repair the impact of institutional child sexual abuse on their [survivors'] lives, . . . no amount of money could compensate them adequately for the abuse' (Royal Commission into Institutional Responses to Child Sexual Abuse 2015b: 93). However, those arguments rarely proceed to the conclusion that if quantification is impossible, then survivors deserve nothing. Chapter 13 addresses how policymakers can set values on injuries. This chapter looks at the tools and procedures used to assess claims once those tariffs are specified. Since people will reasonably disagree about how much to pay, good procedure is essential. To restate values introduced in Chapter 3, a good redress programme will be transparent, impartial, and fair while protecting survivors' privacy and well-being. In addition, assessment should be lawful, public, effective, and efficient.

11.2 Assessment Tools

Assessors use various tools to decide what information will count as evidence, how that evidence will be interpreted, and how much to pay survivors. The tools they use shape programme operations and the survivors' redress experience. This section focuses on the primary tools of rules and factors, the secondary use of categories and guidelines, and the tertiary functions of matrices. Assessors can use these tools to build pathways to redress that include or avoid certain benefits and barriers.

Rules specify how information will be used in advance. When using rules, an assessor functions like a Turing machine, putting evidence through a sequence of tests. When rules prescribe how claims will be

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assessed, survivors can know in advance what they can expect to obtain. As a result, rules-based assessment has significant advantages in both transparency and accountability. To illustrate, in the Magdalene programme, every month of residence at a scheduled institution was valued at a specific sum (Appendix 3.3). In the ideal situation, once an assessor decided how long a survivor had resided at a scheduled institution, simple rules of addition determined how much they received. The process was mechanical. Moreover, the programme used a single and simple metric of residence duration: if a survivor knew how long they had been in a laundry, they knew how much they were due.

Transparency enables efficient applications. If survivors know what evidence is relevant, they can focus their applications accordingly. Using rules reduces the amount of information that programmes need, helping assessors avoid superfluous and intrusive investigations, which, in turn, speeds up the process and limits its financial and psychological costs. Turning to fairness, rule-based transparency allows survivors to understand how claims are assessed. Assessors can easily explain how they apply rules to the evidence. Similarly, applicants can discover errors when rules have been misapplied, decreasing assessors' discretionary power and promoting fairness. If the same rules apply to all similar claims, then rules help programmes avoid discrimination.

Rules are predictable, quick, fair, and cost-effective. But they are not flexible. Rules determine how programmes will use information prior to (and abstracted from) actual cases. That means what the rules require may not accord with what is relevant to survivors or what justice requires. Rule-based assessment cannot weigh all the components of a complex injurious experience. And the capacity of rules to eliminate discretion and create fairness can be overstated. For example, recall how the CEP's strict assessment rules led to some claims being rejected in whole or in part despite the staff believing the applicant's claim (Fabian 2014: 248). At other times, assessors will need to judge what facts a certain piece of evidence supports, if testimony is reliable, or what its content, which might be circumstantial, entails for residence duration. These judgements create opportunities for discretion. And they are often made using factors.

A factor of assessment is a relevant consideration for which no *ex ante* rule stipulates an outcome. To illustrate, Redress WA graded applications according to severity (Appendix 3.7). There were four categories: moderate, serious, severe, and very severe. When assigning a claim to a category, assessors considered a diverse set of factors including: the

number of abusive incidents, their duration, the degree of harm sustained, the length of recovery, and the age of the survivor when the abuse occurred. Such factors weigh in favour or against certain decisions; they require assessors to make judgements. Although Redress WA specified some potentially relevant factors *ex ante*, assessors ultimately had to decide how each would bear upon their decisions. Moreover, assessors can have discretion to address novel considerations. The result is greater flexibility and comprehension. Factor-based analysis enables programmes to engage with what survivors say is most important to them.

The disadvantages of factor-based assessment mirror the advantages of using rules. As the range of potentially relevant information widens, factors make programmes more complicated and harder to understand. The volume of data rises as claimants are induced to submit more potentially relevant information. Assessors need to work with more information and decide what weight to give it. They also tend to collect more evidence. Because factors require assessors to make subjective judgements, the need for justified (defensible) decisions may encourage extensive, costly, and potential harmful investigations. That, in turn, means that survivors need more support. Factor-based assessment will, therefore, tend to be slower, more intrusive, and cost more.

Some of these challenges are ineliminable. But some, like inconsistency, can be mitigated. The weighting of factors may differ from case to case and from assessor to assessor, making the process more inconsistent and less transparent. Inconsistencies create risks of invidious discrimination (Pearson, Minty, and Portelli 2015: 30). But programmes can take consistency-improving steps. Canada's IAP ran training programmes for assessors, both at the outset of the programme and periodically afterwards. Programmes can also use panels instead of individuals. As Chapter 10 notes, having assessors work as panels of two or more means that decisions have to be mutually justified, thus reducing discretion and helping to develop common practices. Moreover, policymakers should consider developing accessible databases that include (de-identified) exemplar judgements that demonstrate how representative factors are valued so that assessors and survivors can understand the process and apply those weightings and considerations to novel claims.

As other consistency-promoting devices, programmes use secondary tools to organise the use of factors and rules. Categories and guidelines can be composed of either factors or rules or both. A category is rule-like in that its satisfaction specifies a particular outcome. In practice, some categories are, in fact, fulfilled by rules. For example, Redress WA did not

accept psychological reports as evidence – that prohibition was a rule prescribing how a category was defined and used. Other categories contain one or more factors that require assessors to exercise judgement – recall how Redress WA categorised applications into four standards of severity. Categories are retrospective, they classify existing data and judgements. By contrast, guidelines indicate how assessors should proceed. Some guidelines use rules to limit discretion. An example appears in Ireland's RIRB, which divided the survivors' injurious experience into four categories, each corresponding to a limited points range (Appendix 3.1). Once assessors pegged a set of facts into a category, they used factors to assign a specific points value within the corresponding range. That guideline used the rule 'stay inside the range' to restrict discretion. Guidelines can also be presumptive rules operating in the absence of certain considerations. So, for example, the maximum payment in the RIRB was €300,000, but in exceptional cases (a category) assessors could add up to 20 per cent to the payment. That discretion turned what would otherwise be a rule (no claimant will receive more than €300,000) into a guideline, with assessors deciding what factors constituted an exceptional claim.

By structuring how assessors use rules and factors, categories and guidelines help decompose complex procedures into discrete components, making assessment easier to perform and understand. These secondary techniques make assessment fairer and more accurate, while reducing costs for survivors and states. However, just as categories and guidelines produce certain advantages, they bear the trade-offs involved in applying the rules and factors from which they are constituted.

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As processes become more complex, assessors need tertiary structuring techniques. A common example of a tertiary tool is the matrix. To return to the Magdalene programme, its two-step matrix (Appendix 3.3) converted residence duration directly into payment values. More complex programmes use a three-step (or more) process. Canada's IAP disaggregated four grounds of eligibility: the experience of abuse, aggravating factors, psychosocial harms, and consequential loss of opportunity. For each ground, assessors used a matrix comprised of guidelines and categories that applied rules and proposed relevant factors. To illustrate, using the consequential harms matrix (Appendix 3.9), the IAP provided more points to survivors who experienced a 'severe post-traumatic stress

disorder' than those assessed with a 'mild traumatic stress disorder'. These two standards (severe and mild) were part of a rule: claims for severe post-traumatic stress disorder were assigned to a higher category. And IAP assessors used factors to distinguish between the categories of severe and mild stress disorder.

A good matrix clearly displays what information is relevant to the various parts of a complex process. That transparency helps reduce the costs borne by survivors and promotes speedier assessment. Insofar as matrices enable applicants to understand how the process should operate, they can help identify errors and reduce discretion. Matrices promote fairness by fostering consistency, prompting assessors to treat similar cases in the same way. A step-by-step process ensures that survivors are all similarly prompted for information and assessors use consistent procedures.

Matrices help programmes to be more comprehensive when they require assessors to look at different aspects of each application. For example, Queensland Redress divided its Level 2 assessment into seven different categories (Appendix 3.4). Having seven categories encouraged assessors to look at each claim from multiple standpoints, making the programme more comprehensive. Assessors examined claims for evidence in each category and then assigned a point-value to each. They then added up the total score. That score was then put into another five-row payment matrix (Appendix 3.5). Fourteen points or less resulted in no payment (or, rather, the claimant simply received the Level 1 payment), while higher scores were slotted into progressively higher-paying categories. The matrix makes the process simple to understand but its rule-based aggregation is inflexible, which reduces the programme's ability to respond to the distinctive experience of the survivor (Sunga 2002: 52). To illustrate, Queensland Redress gave in-care injuries more weight than post-care damage. I suspect that did not correspond to the experience of many survivors living with the debilitating consequences of injurious care.

Because redress programmes offer survivors acknowledgement, the procedures they use are communicative. To take a simple example, recall how Redress WA's matrix assigned claims to one of four categories of severity, each associated with a payment value (Appendix 3.7). Learning how their claim was assessed told the survivors both how the programme labelled their experience and how it was valued. Programmes should consider the labels they use carefully, for the wrong terms can be insulting. The lowest tier on Redress WA's matrix was labelled

'moderate'. This category included a loss of family contact, multiple physical assaults, and diminished educational opportunities – it is clearly unacceptable to describe these injuries as moderate (AU Interview 8). More generally, matrices reduce human suffering into discrete figures and cells abstracted from survivors' lives. Survivors often disapprove of how matrices construct/present hierarchies of victimhood (Pembroke 2019: 53; Feldthusen, Hankivsky, and Greaves 2000: 109; Daly 2014: 179–80). These critics object to the comparative grading of injuries like 'meat' (Miller 2017: 127) and argue that assigning points to different experiences turns redress into 'some kind of diabolical board game' (Cherrington 2007: unpaginated). The result, Robyn Green argues, is that quantifying injury through rigid processes undermines a programme's capacity to reconcile or heal (Green 2016: 130).

Cindy Hanson offers a related concern regarding gender. She observes that assessing injuries according to severity involves judging which injuries are worse than others. Her analysis of Canada's IAP found that it used a masculinist and hetero-normative framework when defining severity. As evidence, she points out that more severe forms of sexual abuse were defined by penetrative assaults with a penis or object. She argues that served to minimise the severity of assaults by female perpetrators because the programme was less likely to assess their offences as among the most severe (Hanson 2016: 8). Hanson further notes that the word 'breast' does not appear in the IAP's matrices (Appendices 3.8–3.12). Although assaults involving the survivors' breasts were included in the categories of fondling and touching, the larger point is that there should be a gender, and one might hastily add, a cultural analysis, of the assessment categories to ensure that they are fair and non-discriminatory.

In summary, different ways of organising the use of rules and factors through categories, guidelines, and matrices have different benefits and drawbacks. Carrying forward the argument for flexibility, programmes should have at least one pathway to redress in which a simple rule-based process works quickly and transparently to redress the maximum number of survivors. As models, the Magdalene programme, Canada's CEP, and Queensland Redress Level 1 used simple residence-based rules for eligibility and processed most claims quickly. Queensland Redress Level 1 was the simplest. With every validated claim receiving the same amount, the pathway did not need a matrix. Although they were more sensitive to residence duration, the CEP and Magdalene programmes' matrices made no effort to quantify the survivors' injuries, instead, they

set out simple rules for converting residential duration into payment values. However, their inflexible and narrow character made it impossible to acknowledge the severity of injury comprehensively. To do that, a programme needs one or more pathways that assess applications using factors, making the programme more complicated, more demanding of information, slower, and less transparent. Greater use of categories and guidelines creates complexity that, in turn, demands tertiary structuring techniques. And while observers criticise those techniques, it is noteworthy that programmes using matrices attract applications from large numbers of survivors. The factor-dominated RIRB, Queensland Level 2, IAP, and New Zealand Redress all received much larger than expected application numbers – indicating that a large percentage of survivors chose to participate in these programmes. To respect and enable their decisions, better programmes support survivors to choose whether they will pursue redress through rule-based processes, or through factor-dominated procedures, or both.

11.3 Fast and Slow Tracks

Just as the tools that assessors use are important, so are the processes in which they use them. Because survivors in poor and declining health need to have their claims processed quickly, Chapter 9 argues that programmes should assess all claims for prioritisation when they are submitted. Not only is it in the survivor's best interest, assessing survivors while they are alive helps programmes avoid the administrative challenges entailed by posthumous claims. Interim payments are a similar technique to get money to survivors as quickly as possible. For example, Scottish Redress paid £10,000 to all applicants with a terminal illness or aged sixty-eight or older. It may be tempting to treat interim payments as conditional (and repayable) if a full assessment later finds an overpayment. But attempting to recover money from survivors is unlikely to be effective (many will not have any money to repay), will detract from their well-being, and harm the programme's public reputation. Potential overpayments could be minimised if the interim payment derives from a simple rule-based pathway.

Politicians, survivors, and the media will demand that programmes assess claims quickly. That pressure creates dilemmas. Waiting imposes costs upon survivors. Uncertainty over the outcome of their claim while waiting for a settlement may aggravate financial stress. Survivors who borrow against their future settlement will then watch interest charges

consume ever-greater portions of as-yet-unknown sums (Assembly of First Nations c2017). Turning to the interests of the state, a speedy programme is likely to generate fewer criticisms and cost less to administer. These reasons in favour of speedy assessment may explain some of the unrealistic commitments among the exemplars. For example, Canada committed to processing 80 per cent of CEP claims within thirty-five days, a standard initially met for only 28 per cent. Delays happen for good reasons. Getting the staff, the information management systems, and procedures in place to launch a programme takes time. As previously noted, complex factor-based processes will induce programmes to accumulate information, with each byte adding time to the process.

This trade-off between time and information can be viewed from a different perspective. As programmes progressively accumulate data, the evidence they have improves. The Canadian IAP held back claims identified as likely to fail without supporting evidence from other claims. Such a case might have involved an alleged offender against whom the claimant's testimony was the only available evidence. But if another claimant later accused the same offender (independently), then that second claim would benefit from the prior allegation. Because it can be unfair if early claims are assessed using less developed data, programmes may wish to give survivors the option of a 'slow track' process wherein their claims are held back to permit the programme to amass relevant data on care experiences and similar fact claims. Equally, the programme might assess claims provisionally, and then reassess them should further evidence emerge. To avoid over-payment, the programme might pay a percentage of the provisional assessment, with the complete payment deferred until the process concluded. That would be another way to make interim payments. Provisional payments would ensure that survivors receive some monies promptly without being put at a comparative disadvantage. It would also enable survivors to add evidence progressively. Moreover, a holistic reassessment might stand in place of a case review process, at least in the first instance.

Obviously, a slow track process and similar techniques favour better-off survivors who are willing to wait. For others, the need for a quick settlement may outweigh the desire for greater accuracy. I have already stressed the relative speed advantage of simpler rules-based pathways. But factor-dominated pathways can also use techniques to speed up assessors. Regular procedural reviews can look for inefficiencies and bottlenecks. In some cases, programmes learn from experience. For example, over time, the Canadian IAP began to accept that experiencing

abuse was likely to lead to related psychological disorders. That meant that abused survivors did not have to procure further professional reports confirming that psychological damage was caused by injurious care experiences, and the programme did not have to pay for and assess those documents. Programmes confronting growing backlogs of cases can hire or redeploy staff or they might use processing quotas or bonuses for speedy work. These latter techniques encourage assessors to reduce the time spent on each case, which, in turn, limits the amount of information they can work with. The trade-off is a less accurate and less personal process for survivors.

Another technique promises both faster outcomes and more survivor participation. Both Ireland's RIRB and Canada's IAP made greater use of negotiation as these programmes developed. If the parties agreed on a monetary outcome, then their agreement was evidence of its appropriateness, saving assessors from producing time-consuming adjudicative judgements. Post-hearing judgements can take a long time, the IAP, for example, took between six months and a year. If survivors have an opportunity to say how they would assess their own claim, that is an important way to participate in the process (IR Interview 3). However, no programme can, or should, rely on case-by-case negotiation to resolve claims. That would be non-transparent and unfair, the resulting power imbalances would disadvantage most survivors. Where redress monies have significant, even life-changing potential, the incentive to settle quickly is powerful. One interviewee told me that '[survivors] come to us and say, "I got offered NZD$5000. I took it because I was sick, I was dying"' (NZ Interview 2). Another related,

> I remember a lady in [place] who accepted a fast track payment. She had a young son, a pre-schooler, who had very severe medical problems . . . She was a single mum. She'd had terrible abuse as a child in state homes. She was absolutely on the bones of her backside, and she accepted the fast track payment because it would pay for one year of her son's treatment. (NZ Interview 8)

While clearly respectful of the survivor's agency, negotiation creates a conflictual dynamic between the survivor and whoever is representing the state at the point of settlement. As Chapter 8 notes, it is important to reflect on how the state is represented in the process – is the state represented by the redress programme or by another party, such as the SAO in Canada's IAP? A programme that negotiates with survivors will no longer be a disinterested adjudicator. The logistical costs involved are

also significant, and survivors will need legal representation to mitigate inequalities. It is very likely that such a process would increase the risks of retraumatisation significantly. Still, survivors should not be prevented from choosing a quicker option, if they know that it might have some disadvantages for them. A programme could offer an optional negotiation pathway, overseen by an impartial professional mediator. That professional would be charged with preventing exploitation. Successful negotiation would conclude the procedure. However, if the parties fail to reach an agreement, adjudication might be a secondary option.

11.4 Publicity

No programme can operate without some publicity. Survivors need to know that the programme exists and, at least roughly, what injuries are eligible for redress. But how much information about assessment should be available? At least three reasons militate against publishing procedural details: privacy, truth, and perversity.

New Zealand officials cited privacy concerns to explain why they refused to publish details of MSD's assessment process, arguing that it would be possible to infer what happened to a survivor if one knows how much they were paid and how that was assessed. In 2017, I received a response to an Official Information Act request explaining that MSD had redacted the descriptions of injuries[1] the HCP used to categorise claims because:

> Release of [that information] would enable people to identify the nature of the abuse and/or harm that a claimant suffered whilst in care, leading to identification of very personal and private information which may negatively affect people who are already vulnerable. (Private Communication, from MSD, 20 September 2017)

The concern is not unfounded. In Chapter 2, I used what survivors said about their Redress WA payments to make such an inference when observing that the survivors who testified at a public hearing in Perth were unrepresentative. If transparency can reveal the nature of a survivor's injuries, that could be a privacy concern.

A further consideration concerns transparency's potential to create untruthfulness. Chapter 10 introduces the problem of inaccurate testimony. Procedural transparency can aggravate that problem. If applicants

[1] The full descriptions are in Appendix 3.14.

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know what forms of injury will attract the greatest monetary settlements, that may affect the evidence they provide. One concern is the potential for fraudulent applications. Recall that Redress WA did not advertise its assessment criteria because it did not want to publish a 'cheat sheet' ('Official Committee Hansard' 2009b: 56). But apart from fraud, insofar as the redress process is supposed to provide survivors with an opportunity to have the state acknowledge their experiences, knowing what will get more money may cause survivors to focus on aspects of their experience that are less personally important, or to testify about experiences about which they would prefer to remain quiet. To illustrate the concern, redress programmes often provide more money for sexual abuse than other injuries. Chapter 10 intimates that if it is known that sexual abuse attracts higher payments than physical abuse, survivors may feel – and their lawyers and others with an interest in the financial outcome of the application may put – pressure to accentuate sexualised aspects of their experience. Not only do incentives mould testimony, but they may also encourage survivors to talk about things that they are not ready to discuss, aggravating retraumatisation.

And finally, if survivors know what garners higher payments, that might pervert the potential participatory benefit inherent to the redress process. The participatory value of testimony requires survivors to tell the programme about their injurious experiences and have that experience officially acknowledged and validated. Policymakers might hope to create a process in which survivors come to the redress programme to state on record what happened to them in care and what that has meant for their lives. But knowing what experiences will get more money might encourage survivors to engage with redress instrumentally, with the goal of extracting the maximum monetary value, to the detriment of intrinsic goods inherent to the process.

These concerns confront the general benefits of transparency in making redress fairer and more efficient. When weighed against these values, the concern with privacy appears speculative. I have never heard a survivor complain that publishing assessment criteria interfered with their privacy. In part, this is because those survivors who speak publicly about their redress experiences tend to be activists who also speak about their injurious experiences. Policymakers could mitigate the potential threat to privacy by notifying redress recipients of the potential problem, allowing survivors to make an informed choice about revealing their payment values. Similarly, while the problem of fraud cannot be dismissed, it is balanced by concerns over underreporting, as Chapter 10

notes. And the problem of perverse incentives confronts a powerful counterargument: if survivors wish to engage with redress instrumentally – aiming to maximise their payments – that is their prerogative.

On balance, I think the arguments for transparency outweigh those against, which can, moreover, be mitigated by informing survivors about the potential consequences of disclosing payment values. When survivors have a greater understanding of how the programme works, they can know what to expect. Knowing the rules of the game will enable survivors to be better players. I have already reviewed how transparency enables survivors to focus their testimony on relevant rules and factors. More streamlined applications will make programmes more efficient, benefitting both states and applicants by being faster and cheaper to administer. And knowledge facilitates agency. Greater transparency enables survivors to see themselves as part of the redress process, not merely an object of it. Indeed, knowing how assessment will proceed can help survivors make an informed choice about whether and how they wish to participate. Transparency also makes programmes fairer by reducing the assessors' discretion and enabling survivors to know how redress values are derived.

> When they [survivors] are shown how their settlement offer was arrived at, it is a whole lot easier for them to accept something that they are disappointed with than if they are just not given any information at all – [if] it appears like it has been plucked out of thin air and it is just because they 'don't like me'... (AU Interview 6)

As a last point, transparency enables survivors to make an informed decision as to whether to have their offer reviewed. Survivor-instigated review reduces assessor's discretion while promoting accuracy, fairness, and transparency. External review may be carried out by redress-specific bodies, such as Canada's NAC, or more versatile institutions, such as an Ombudsman/person or the courts.

11.5 Standards of Evidence

An evidentiary standard determines how certain an assessor must be to accept something as a fact. A standard is a type of category, when something meets a standard it can be judged as belonging to a category – such as being a fact. Relevant considerations for evidentiary standards include the quantity and reliability of information and the presence or absence of contradictory evidence. Lower standards accept facts

supported by poorer quality and/or less evidence; higher standards require better quality and/or more information.

I have frequently observed that non-recent claims tend to lack robust evidence. That is an important reason why redress programmes replace litigation. In civil litigation, the 'balance of probabilities' standard assesses which out of a limited set of factual scenarios is the most likely to have occurred. If plaintiffs need to show that their account is the most probable, then the preponderance of evidence must favour their claim. Few redress programmes require all claims to meet that high standard. Programmes usually advertise lower standards, indicating that claims need only be plausible or that there is a reasonable likelihood of survivors' testimony being true.

Assessors often use multiple standards of evidence. The RIRB applied higher standards to evidence of residence when they could access robust institutional records, but used lower standards when archives were missing or damaged. Some programmes, Queensland Redress is an example, imposed higher standards of evidence upon claims for more serious abuses. However, that may be unfair to those with more serious injuries. Many programmes treat sexual abuse as the most severe form of injury. Yet non-recent claims for sexual abuse are among the least likely to enjoy strong confirming evidence. Therefore, using higher evidentiary standards for more grievous injuries can be unfair to survivors of sexual abuse.

Unfairness also arises from inequalities between survivors. Educated and well-resourced applicants are likely to provide better evidence than applicants who lack those advantages. Redress WA found that application quality was 'strongly linked to the literacy level of the applicant ... This had the potential to significantly disadvantage applicants with poor literacy skills' (Western Australian Department for Communities c2012: 9). The advantages that better-resourced survivors enjoy can be reinforcing and comprehensive. Better-resourced applicants may be more likely to get expert assistance, obtain their personal records, and receive treatment for physical and psychological complaints. The resulting differences in available evidence could be aggravated if more serious injuries are associated with greater disadvantages, and therefore, lower quality applications. Fairness may, therefore, justify the use of lower standards that all survivors have an equitable chance of satisfying. As evidentiary standards decrease, per-case assessment should speed-up and procedural costs decrease because, if applicants need to provide lesser quality, and lower quantities of, evidence, that data will be less costly to manage and produce.

But lower evidentiary standards entail trade-offs. In programmes that calibrate payments to the severity of injury, lower evidentiary standards would not only validate more claims, but they would also pay more per claim, making the programme more expensive. Lower standards can also damage a programme's integrity, as Chapter 10 observes. Some claimants will provide inaccurate information by mistake. Others will commit fraud. A redress programme needs to test claims so that political authorities and other observers, including the citizenry, can be confident it is not being abused.

Lower evidentiary standards favour fairness at the cost of integrity. But programmes can use their rich databases to alleviate that trade-off. Conventional litigation uses higher evidentiary standards because, in most cases, courts have evidence about a single case only. By contrast, redress programmes can receive hundreds, or thousands, of applications. Moreover, they often follow or accompany public inquiries that investigate injurious care systems. As a result, assessors need not address each claim in isolation, but can look at how claims fit into emerging patterns. Redress WA used information provided by applicants to compile historical dossiers on institutional practices and staffing.

A common evidential pool can strengthen weaker applications while mitigating some integrity concerns, if false claims are discovered by reference to contradictory common evidence. And the fact that many potentially eligible survivors will not claim for all their injuries (or not apply) offers a further counterweight to concerns with fraud. But there is no way to eliminate unfairness. Databases will tend to have more information about some periods and some residences than others. Placements with larger populations, such as large orphanages, are likely to engender more applications, each contributing to a more comprehensive historical picture. Moreover, larger institutions may have more accessible records. By contrast, other survivors will benefit less. A survivor of foster care may be the only applicant with any information about their personal history. Still, if increasing evidentiary standards excludes more meritorious claims than fraudulent ones, programmes may balance the state's interest in protecting the public revenue with its interest in resolving meritorious claims. Better programmes match the appropriate standard to the evidence available.

11.6 Consequential Damage

I will finish this chapter by looking at some further difficulties involved in assessing consequential damage and broach an alternative approach

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using collective data and/or collective harms. Recall that relevant harms include a broad range of physical and psychological disorders, illiteracy, family separation, and cultural estrangement, *inter alia*. Exemplar programmes adopt different approaches to assessing consequential damage. The Magdalene laundries programme assessed a single form of harm – damage to the survivors' pension entitlements. Others, like Ireland's RIRB, Canada's IAP, and Redress WA were more comprehensive. More comprehensive programmes tend to make higher payments, enabling greater recognition of the survivors' post-care injurious experiences. Chapter 9 discusses how this approach is both intrusive and costly. Here, I explain why the individuated assessment of consequential damage punishes resilient survivors and confronts serious epistemic uncertainty. The difficulties involved are such that Redress WA's *Key Learnings* report recommends excluding consequential damage from future programmes (Western Australian Department for Communities c2012: 27). I think that recommendation is unwarranted. But before I say why, I will explain the difficulties.

Redressing consequential harm punishes resilient survivors who find it harder to provide evidence of damage than others (Green et al. 2013: 4). For example, resilient survivors may not have evidence of the psychological harm they experience(d). One interviewee said,

> Because I'm a very resilient individual, I went out and got a degree in philosophy, European history, an honours degree. . . Because of that there were points taken off of me. . .and in some ways that is an injustice in itself. Because having been successful in one particular area of your life doesn't necessarily mean that your life is [better] overall from the guy drinking a bottle of wine on the street. Physically you see the difference, mentally you can't and that's the point. (IR Interview 1).

The interviewee's resilience helped him succeed in higher education and prevented him from displaying behaviours typically associated with psychological harms, which he encapsulates as 'drinking a bottle of wine on the street'. That meant that he was unfairly disadvantaged in his capacity to produce evidence of consequential damage.

A second concern comes from the difficulties with counterfactual causal judgements. Because this discussion is a little abstract, I will start with a simple example. Suppose you are walking down the street. Distracted by an oddly shaped cloud in the sky, you trip, fall, and cut your knee. It seems right to say that tripping caused the cut to your knee. That judgement depends on a counterfactual assessment in which you

imagine a plausible counterfactual world in which you walk without tripping. When you replay the same sequence of events, but omit the trip, you would not have cut your knee because no other knee-cutting cause appears in the imagined counterfactual. Causal assessment compares a counterfactual series of events with what actually happened to see what harms exist now that would not have otherwise occurred. Note how the counterfactual is bounded by what might have plausibly happened. When you counterfactually imagined walking without tripping you did not imagine aliens using space lasers to cut your knee. That would not be a plausible alternative sequence of events. In the same way, if a survivor is to claim consequential damage in a redress programme, assessors need to imagine a plausible counterfactual world in which the survivor would not have experienced the relevant harm – they need to suffer damage that they could have reasonably expected to avoid if the injury did not occur.

Using what they know of the survivor and the world in which they live, assessors use a variety of causal factors to construct plausible counterfactuals. Unfairness occurs when cumulatively disadvantaged survivors have a harder time establishing the plausibility of better counterfactuals. A good example appears in the Canadian IAP wherein applicants could claim for actual income losses resulting from abuse experienced in a residential school. Valid claims needed to show how abuse deprived survivors of income that they could have otherwise reasonably expected. That required assessors to imagine counterfactual worlds in which survivors received the income that they claimed to have lost. Very few (eighteen) survivors were successful.[2] These claimants tended to have experienced a psychological event that caused them to lose a job or work fewer hours – their actual career constitutes part of the relevant counterfactual. But the programme did not redress the income lost by those who did not have a well-paid career. Survivors who were persistently unemployed could not point to plausible counterfactual income. That glaring unfairness meant some better-off survivors obtained redress denied to those whose were worse off, whose injuries might have contributed to their economic marginalisation.

The injurious consequences of residential school were comprehensive. One interviewee illustrated the problem as follows:

[2] Beyond the unfairness, it is irrational for a programme to have a pathway for redress using evidentiary standards that only 0.04 per cent of applicants satisfied.

> [The redress programme] considered I did not lose any opportunity of employment or education. I said, 'Yes I did, I should – according to everybody I know, they think I should have been a doctor'. I know I had the ability or I had the capacity and whatever else. I said, 'Why don't they put the measure to what I could have done and should have achieved?' . . . My potential was never measured to a standard of what an average, or whatever non-native [non-Indigenous] person in an average home [would achieve] . . . 'Why don't you measure me against that instead of measuring me against my peers?' We've all been traumatised, we've all been victimised. (CA Interview 2)

In this case, the interviewee, an Indigenous Canadian, argues that the counterfactual for determining what is harmful was unfair. She suggests that the programme should have considered the multi-generational collective damage inflicted by the residential schools. Instead of assessing her educational or employment experiences against the minimum standards of graduating high school and not being unemployed, it should be assessed against what her innate talent could have achieved in a counterfactually less-racist society. For extremely marginalised populations, what is normal may be a consequence of systemic injustice. Programmes that attempt to redress the damaging consequences of injurious care can only partially grasp how pervasively unjust social structures affect how, and what, harms arise (Green 2016: 136).

The interviewee's argument points towards epistemic concerns with assessing counterfactuals over longer histories. Recall the simple example of your knee-cutting trip. Your trip is what lawyers call the proximate (closest in time) cause of the cut to your knee. The trip and the cut were separated by seconds. Counterfactual causal assessment becomes progressively harder over longer periods. Causation is not lineal; it is a network that grows ever more complex the further one goes back in time. Non-recent claims ask assessors to consider the causes of harms decades after survivors have left care. What should those counterfactual worlds exclude? It can be challenging, or impossible, to distinguish damage experienced as a result of injuries in care, from the consequences of other events experienced prior to, or after, care.

> And the Board [Irish RIRB] then would say, 'Well, hang on a second. You're saying that you were abused in the institutions, but your father abused you for four years before you got into the institution'. So, if you're assessing a damage, then you look at the damage that was already there and the Board, or the institution, can't be responsible for all of it. (IR Interview 6)

Post-care experiences differ as well. Many survivors will have spent time in the military or prison, had an abusive spouse, or other psychopathological experiences. Now middle-aged, they might have an attachment disorder, which is a common consequence of abuse in care. But to what extent is that disorder caused by pre- or post-care experiences? The question may be unanswerable: there may be no way to discover, even approximately, the true consequences of eligible injurious acts.

One common technique to mitigate this problem is to identify certain forms of consequential damage and redress all survivors who experience them. Recognising the harmful potential of structural injury, Queensland Redress accepted any psychological disorder as consequential damage. In a similar approach, the Magdalene programme redressed a specific form of damage (diminished income) by applying a simple rule: all valid applicants received a full pension. While both approaches risk redressing non-meritorious claims, at the aggregate level the experience of structural injuries means that survivor populations exhibit high frequencies of certain harms; therefore, a programme can use a structurally oriented causal analysis to assess some consequential damage.

To summarise, survivors have claims for the redress of consequential damage. But assessing those claims poses serious problems. Programmes that try to assess the exact consequence of injuries experienced in care may create unfairness or impose significant costs in trying to overcome the epistemic challenges involved. As alternatives, programmes may use aggregate population data to redress frequently experienced harms, such as psychological disorders. Or programmes could redress collectively experienced damage, such as the intergenerational harm residential schooling inflicted upon Canada's Indigenous peoples.

11.7 Assessment Recommendations

- Survivors should be able to choose whether they wish to pursue redress through a rule-dominated pathway or through a factor-based process, or both.
- At least one pathway to redress should use rules and simple eligibility metrics. That will make it quick, transparent, and accessible.
- More comprehensive pathways may employ more complex procedures making greater use of factors.
- Categories, guidelines, and matrices can help organise assessment, making it fairer and more transparent. However, programmes should recognise the harmful potential of pejorative labels.

- Applications should be assessed for prioritisation. Alternatively, programmes might provide interim payments, deferring complete payment until after a final assessment. A programme could minimise the potential for overpayments if the interim payment derives from a simple rule-based pathway.
- Because it can be unfair if early claims are assessed using less developed data, programmes may wish to give survivors the option of a 'slow track' wherein their claims are held back to permit the programme to amass relevant data on care experiences and similar fact claims.
- Programmes should undertake regular procedural reviews to look for inefficiencies and bottlenecks.
- Programmes should conduct gender and cultural analyses of assessment processes to ensure that they are fair and non-discriminatory.
- Programmes could offer survivors the option of using a negotiated settlement process mediated by an impartial professional. If mediation is unsuccessful, the claim would be adjudicated.
- Programmes should publish the assessment criteria they use.
- Survivors should be able to have their assessments reviewed by an appropriate body.
- A good evidential database might include exemplar judgements of more common claims explaining (and demonstrating) how representative factors are valued so that assessors and survivors can understand the process and apply those weightings and considerations to novel claims.
- While publicising the programme's assessment criteria risks the survivors' privacy, on balance, programmes should maximise the transparency of their assessment criteria and procedures.
- Programmes should match the appropriate evidentiary standard to available evidence.
- Fairness may justify the use of easier-to-satisfy standards. While lower standards risk validating non-meritorious claims, some of that risk can be offset by using a common pool of evidence.
- It is difficult to assess claims for consequential damage. One common technique to mitigate this problem is to identify certain forms of consequential damage and redress all survivors who experience them.
- Survivors should not be required to apply for individuated consequential damage.

12

Local and Holistic Support for Survivors

12.1 Introduction

Survivors need support when preparing and submitting redress applications; they need help through (often protracted) assessment processes, assistance when they receive payments, and afterwards. Large numbers of survivors will have 'low levels of education and varying literacy skills, high levels of mental health issues and a reduced capacity to cope with delays and frustrations' (Western Australian Department for Communities (c2012): 3). The resulting difficulties make good support necessary to survivors and to the effectiveness of any redress programme. Support work is not ancillary, it is part of redress.

The chapter moves through two phases. I first explore how local, often long-standing, community agencies support survivors. This discussion encompasses the roles of survivors and offenders in providing support. I then look at four key professional services: legal advice, records access, psychological counselling, and financial advice. This chapter stresses the advantages of providing holistic support through, or alongside, community agencies. While survivors should have real choices where they get support, comprehensive services that embed professional support in local agencies reduce access barriers and help ensure that support does not stop after the payment is accepted or the redress programme ends.

12.2 Community Agencies

I begin by looking at what community agencies do well and some of the difficulties they confront. Community agencies are a diverse bunch, as are the roles they undertake in redress. Some provide specific services, such as counselling, while others are more comprehensive. Many agencies are small and informal; others are large professional organisations, and there are those that blend informal and formal components. All are constantly evolving.

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The distrust that many survivors have for government accentuates the need for trusted community agencies to participate in delivering redress effectively. Chapter 5 described Lotus Place's work as the shop front for Queensland Redress. Lotus Place is a characteristically informal community centre located in Brisbane. Like many such agencies, it offers survivors a place where they can be at home. Many survivors need regular assistance. Agency staff develop long-standing relationships with survivors who come in to have (or make) a meal or read a book (AU Interview 17). Personal relationships are an important aspect of community agencies. Survivors get to know agency staff, forming supportive friendships.

Because they are trusted presences in the community, local agencies can help survivors surmount the barriers they confront in getting redress (Audit and Assurance Services Branch 2015: 14; Reimer et al. 2010: 65; National Centre for Truth and Reconciliation 2020: 15). During Queensland Redress, Lotus Place provided

> practical assistance in completing applications for the Redress Scheme and preparing declarations of harm, advocacy with past residential care providers, individual counselling for people adversely affected by trauma and childhood abuse, therapeutic group activities, opportunities for reconnection with family and friends, drop-in activities, literacy and numeracy courses and access to those, advocacy and referral for people at risk of homelessness in crisis or with mental health issues, advocacy with government and peer support activities . . . (Mark Francis in 'Official Committee Hansard' 2009a: CA72)

At Lotus Place, survivors would get help accessing their personal records and be guided through the application process. They could also be put in touch with counsellors. And, most importantly, that process happened within a holistic focus on the survivor's well-being. The survivor would have a case worker help them through the redress process, but that was only part of the agency's work with survivors, together with helping survivors to get a job, housing, or medical treatment. This model, in which redress is part of a larger relationship enables services to continue after the redress programme ends. The capacity to offer holistic and long-term services, as opposed to short-term support that is narrowly focussed on redress, is a critical point of advantage for community agencies. For those reasons, policymakers should consider offering redress applicants the opportunity to register with a community agency, enabling support to continue long term.

Eris Harrison, speaking for the advocacy group Alliance for Forgotten Australians, argues that Queensland Redress's high application numbers resulted from the effective work of community agencies (Senate Community Affairs References Committee 2009: 39). Queensland's approach stands out: for many survivors, Lotus Place was a 'lifesaver' (RPR Consulting c2011: 7). But redress programmes also create challenges for these agencies because they increase the number of survivors they work with, while changing the work that they do (Evaluation, Performance Measurement, and Review Branch: Audit and Evaluation Sector 2009: 36). In Perth, Tuart Place's client numbers grew from 500 to 1,400 during the two years of Redress WA (AU Interview 6), while, at the same time, agency staff had to learn how best to support applicants in a new (to everyone) redress programme. Queensland Redress similarly increased the numbers of survivors using Lotus Place. Robyn Eltherington notes that the resulting changes were

> a challenge for former residents who have been engaged in our service system for a long time; Lotus Place had become home, in a sense, and had been predictable, and they felt it was their place. I think that for them – I do not mean to speak for everyone, but this is just my perception – [Queensland Redress] has been a significant change . . . we need to work with them to talk about what we can learn from that and what we need now that there so many more people who have connected. ('Official Committee Hansard' 2009a: CA75)

Because they are flexible and responsive, community agencies can quickly reorient themselves to support survivors' needs. But there are other forces at work. Tendering service contracts selects organisations that can compete for funding successfully, a process that has clear disciplinary effects (Green 2016: 164). Where existing organisations are robust, programmes can use them as assets. Other agencies will evolve to become more successful in getting funding. Across all the exemplar cases, redress programmes encouraged the rapid growth and professionalisation of service agencies. States can aid that process by investing in community agencies. For example, prior to the 2018 advent of the Shaw Commission, support services in New Zealand were inferior to those in other jurisdictions. New Zealand has since begun funding certain agencies to develop, including Male Survivors Aotearoa, which received more than NZD$12 million to upgrade its national capacity (Male Survivors Aotearoa 2020). That is a considerable sum for an organisation that was once a coffee-and-muffin peer support group meeting in a Christchurch community hall (NZ Interview 1).

The personal service provided by community agencies is critical to their effectiveness. But it also creates privacy challenges. Many survivors will not want their family, friends, or associates knowing about their redress application. But the intimate environment of a community agency can make confidentiality difficult. In small communities, 'even the location of office space might compromise a Survivor's privacy' (Reimer et al. 2010: 71). In response, Canadian agencies developed privacy-preserving techniques, including home visits. The demands of privacy also underscore the survivors' need to have multiple points of access to the redress programme. One-stop local services are an important asset, but they need to be augmented by accessible centralised assistance. Local support favours those who live in the right area. Most survivors will not be so fortunate. The widely praised Lotus Place helped 20 per cent of Queensland Redress applicants – a modest minority. Technology is making remote support ever-more accessible; however, it remains impersonal. Programmes should consider using itinerant in-person services to reach survivors in more remote locations. In short, the answer is to provide options and enable survivors to select those services best suited to them.

Redress programmes benefit from better quality applications that cost less to administer and are quicker to assess. To help survivors submit better applications, support workers need to 'understand exactly what information is required from the applicant and how that information should be formatted' (Western Australian Department for Communities c2012: 14). That knowledge can develop through experience and training. Canada's IAP offers a good practice model. There, programme staff visited small communities to engage and train support workers, who could then champion the programme to survivors and help them through the application process. These workers were salaried contractors. By contrast, Redress WA contracted community agencies to provide a specified number of hours of assistance for each applicant (no training was provided) (Green et al. 2013: 4). Alternatively, if service providers are block-funded *ex ante* to assist people with applications, they will be able to train staff appropriately and use their more secure funding to provide holistic support.

By raising the political profile of survivors' claims, redress programmes can help community services get needed funding. Conversely, survivors who come to local agencies for help with a redress application will be introduced to the agency's broader services and community, potentially beginning long-term beneficial relationships. Redress programmes can

thereby play important roles in connecting survivors with services and in developing the quality and reach of these services. Good support services are critical to survivors' well-being. Many ageing care leavers are concerned about the prospect of being reinstitutionalised in residential care homes and hospitals (Browne-Yung et al. 2021). As nodes in overlapping networks of survivors, community agencies can provide critical support for survivors and advocacy on their behalf.

I will close by addressing a general worry. I support block-funding agencies that deliver holistic and comprehensive services. That advocacy appears at odds with the fashionable thinking in policy circles known as new public management (Lane 2002). Many analysts believe that because block funding lacks incentives linked to individual clients, it leads to lower-quality services. They believe it is better to have market competition that enables users to select providers who best meet their needs (Lapuente and Van de Walle 2020: 464). As competition develops better services, it drives specialisation, with providers filling ever-more refined niches in a market serving ever-more sophisticated consumers. That may work in some fields. But that argument depends on a problematic set of assumptions. Most survivors only make one application for redress. That means that they do not benefit from opportunities to try out different service providers. As the Canadian experience with legal professionals (discussed below) demonstrates, one-off service fees can have perverse effects when there is no chance of the user becoming a repeat customer. While survivors need to be able to choose services that are accessible to them, the time-limited character of most redress programmes reduces the opportunities for markets to develop among the (often very few) existing service providers. Service agencies need to be monitored for quality and to prevent corruption. They need to be accountable to survivors and to the broader public. But in a field where survivors face steep access barriers, I think the evidence supports stable and robust funding for holistic, comprehensive, and ethically driven agencies.

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Every time I visited a support agency or group, I heard about the importance of survivors working with other survivors. For example, in Australia, a support worker told me,

> There is nothing like a survivor coming into a drop-in centre for the first time and the first person who comes up to meet him and welcome him in, kind of in an official way, is also a survivor. There is an immediate

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> connection, often of that shared experience, that a professional person who isn't a survivor of abuse can't have with that person and that is empowering. It is an overused word – 'empowering' – but there is something important about that. (AU Interview 6)

An Irish interviewee said,

> You see it yourself, the difference [when a survivor is] speaking to [another survivor] that they divulge so much so quickly. Right? Whereas if it's somebody different it takes a while because it's a trust thing. It's all on trust. (IR Interview 9)

Similar points were made at each of the eleven local agencies in which I conducted interviews. Survivors occupy leading roles in many of these agencies. As credible representatives, their leadership brings the authority of lived experience. Moreover, their presence can help overcome mistrust. Working to support one another through redress helps survivors build and maintain communities in which they feel at home. As the New Zealand survivor Jim Goodwin notes, 'Abuse happens in isolation, healing happens in communities' (Quoted in, The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021: 302). Survivors can grow into effective support workers by volunteering at an agency where they have personal contacts and feel comfortable. Survivors describe their work supporting other survivors as important to their personal development, gaining experience and self-respect from their accomplishments, while providing local agencies with dedicated staff who are connected to the work they do and the people they work with (IR Interview 9; NZ Interview 1; AU Interview 1; AU Interview 15).

Being involved in supporting one another is an important way survivors can participate in redress. But interviewees emphasised the challenges it creates, including privacy concerns. Some people, of course, make their identity as survivors publicly known. But no one should need to publicise their injurious experiences to get a job – most organisations would confront serious legal and ethical challenges should they make victimhood a condition of employment. And survivors have different capacities. While observers emphasise the contributions made by those who are 'more articulate and resilient' (Ministry of Social Development 2018c: 21), interviewees often highlighted problems. The psychological difficulties that many survivors experience can make it hard for them to work in an organisation (AU Interview 17). And more concretely, many survivors have problems with literacy and other technical skills that make it difficult for them to serve on a board or make administrative decisions

(AU Interview 6). While that interviewee argued survivor-leadership was, on balance, an undoubted and crucial asset,

> it can feel a bit sometimes like it is the professional [non-survivor] board members at a board meeting who are grappling with the 'real' decisions ... there can be a sense at times of [that] it's the professional board members who make nuts and bolts decisions about money and that kind of thing. (AU Interview 6)

As previously mentioned, conflict of interest problems occurred in Ireland, where survivors on the Board of Caranua helped decide the criteria for disbursing benefits and then made applications for those benefits themselves (IR Interview 4). Similar problems occurred at a programme in Melbourne (Frederico and Long 2013: 90). Another agency said that when they

> employed one person because they were a Forgotten Australian [a survivor]. She applied for a job, she had the skills and had been in an orphanage. But it was a disaster because the more she got into the work, the more she over-identified, and then she thought she had more life experience to make decisions about who should get money and should not, and all of that. (AU Interview 1)

Other problems concern evidence. Survivors risk contaminating each other's testimony, creating potential problems when one survivor helps another compile a redress application. And where past trauma has led to psychological damage, survivors may not be able to help others. Two Australian interviewees reported issues with sex-offending survivors creating risks for others at their agencies (AU Interviews 6; AU Interview 10). Having learned from past difficulties, one Canadian agency requires survivors to be actively pursuing psychological well-being as a condition of employment (CA Interview 2). More generally, survivor participation can risk aggravating injuries. Psychological support needs to secure well-being, but some formats, such as group sessions, can be harmful if not well-managed (AU Interview 10; AU Interview 17). I have participated in several group sessions that exploded emotionally, with survivors threatening and insulting each other.

As a last comment, redress programmes and associated support agencies must beware that some people become professional victim advocates, while others operate as professional victims (AU Interview 7). 'Activities and groups that serve to strengthen victim identities and communities can sometimes lock people into the past' (Huyse 2003: 63) when survivors would be better helped to move beyond their injury. Numerous

interviewees spoke off the record about difficulties with survivor advocates. Some advocates use survivors as stepping stones for a career. Others exploit them. And, as I have noted previously, the views expressed by survivor representatives may not be very representative at all. There was conflict between survivor's representatives (and potential support agencies run by survivors) over service contracts in Australia, while survivors jostled for remunerative positions with Ireland's Caranua. These concerns reflect the usual effects of inducement and bias. Still, while survivors supporting survivors poses challenges, most interviewees stressed that these difficulties were manageable through good hiring processes and managerial support.

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When offending agencies take leading roles in providing redress, some survivors will see the difficulties they experience during the process as further institutional offending. I have observed that because the state is an offender, a state redress programme can confront survivors as an offending institution. Equally, redress programmes can need offending NGOs, such as churches, to participate by providing funding, documentary evidence, or witness testimony. Having discussed these roles previously, here, I want to look at the support roles that offending NGOs can undertake.

Offending NGOs often want to support survivors to make amends and rehabilitate themselves as organisations. Massimo Faggioli, a historian of the Catholic Church, argues that continuing revelations of systemic sex abuse comprise 'the most serious crisis in the Catholic Church since the Protestant Reformation' (Faggioli 2018). Embracing several Christian denominations, the crisis targets the churches' moral authority and their financial health (Boorstein and Bailey 2019), which means their institutional well-being may depend on being seen to repent. And offending NGOs offer more than motivation. As long-standing service providers, many offending NGOs have useful experience, skills, infrastructure, and client networks. Having offending NGOs involved can be valuable to survivors. After all, these organisations ran the institutions, and it was their priests and employees who inflicted injuries and abuse. Survivors who want to hold them accountable may welcome their participation in redress.

Offender participation can happen in different ways. In a holistic manner, many churches have offered general apologies, sought to reform

their organisations, and invited survivors to (re)join them in fellowship. More immediately, offending NGOs can take up roles in redress. In Ireland's RIRB and Canada's IRSSA, the churches part-funded redress payments. Canadian survivors could also ask church officials to attend IAP hearings to offer a personal acknowledgement or apology. Although only a minority did, their contributions could be a 'really powerful thing in terms of individual reconciliation' (CA Interview 4). The IAP's final report emphasises the value that churches brought to the process (Independent Assessment Process Oversight Committee 2021: 70). Equally, in Western Australia, I was told that

> [The Salvation Army] do it really well, they send along their Territorial Commander and he sits there, and he listens for as long as necessary and he says, 'I'm really, really sorry' and he is the top guy and for people who have been through a Salvation Army home who know the hierarchy, that is impressive. They feel validated. They feel like they have been taken seriously. (AU Interview 6)

For survivors who are ready and when the NGOs do it well, having offending institutions participate can be advantageous (White 2014: 3). But it is critical that they participate only when invited. Some survivors feel 'so much anger and rage' that they cannot bear to work with past providers (AU Interview 13). The Magdalene laundries programme required survivors to approach the religious orders that ran the laundries to get their records. That provision likely deterred survivors who feared conflicts of interest and retraumatisation or who simply did not want to contact an offending religious order. A survivor-centred approach might adopt a two-pronged strategy. The first prong involves offending organisations funding independent agencies to work at arm's-length. Support agencies must be clearly autonomous – that means funding needs to be long term and unconditional and staffing appointments must be made independently. The exemplar programmes include good examples. Lotus Place is an independent branch of Micah Projects, a Catholic initiative, while in Western Australia, Christian Brothers Ex-Residents Services was an early and important advocate for Redress WA. Christian Brothers Ex-Residents Services was succeeded by Tuart Place, which continues as an independent community agency.[1] In the second prong, organisations can

[1] Tuart Place is operationally independent. Although it receives some funding from Catholic institutions and operates out of Catholic-owned premises, it has other funding sources and clear governmental independence. The relationship of Lotus Place to the Catholic Church is best summarised as complicated (see Micah Projects Inc. 2020).

engage with those survivors who want direct contact, for example, the Irish Catholic Church runs a survivor counselling service, Towards Healing, that has worked with nearly 7,000 survivors and family members since 1997 (Towards Healing Counselling and Support Services 2020: 5). Best practice involves developing trauma-informed specialist agencies that adopt a survivor-focussed ethos.

12.3 Professional Services

This section focuses on the supportive work of lawyers, archivists, counsellors, and financial advice services. The quality of that support, and how it is organised and funded, shapes the survivor's experience of redress. It also affects programme operations. Embedding these services within local community organisations makes them easier to access and more effective.

In litigation, plaintiffs pay their own lawyers. New Zealand's HCP largely continued that model, as did Redress WA and Queensland Redress. When survivors need to pay for their own lawyers, most go through redress without legal support. This can be fine for some applicants in relatively simple programmes. But more complex programmes demand significant legal assistance, creating opportunities for problems. The most complex exemplar programmes, Canada's IAP and Ireland's RIRB, confronted widespread difficulties with legal professionals. Public scandal over legal costs damaged the RIRB's reputation (Kelly 2006) while frustration with the legal malpractice led the IAP's Dan Ish to complain,

> When I accepted the appointment as Chief Adjudicator in 2007, I never anticipated that my duties would include regulating the lawyers who appear for claimants. I have, however, come to the conclusion that such a role is necessary in order to preserve the integrity of the IAP – a process that is meant to be claimant-centered and ought never to do further harm to those who suffered abuse at residential schools. (Indian Residential Schools Adjudication Secretariat 2012: 4)

Ish's frustration was precipitated by an epidemic of malpractice affecting thousands of claimants (Coughlan and Thompson 2018: 24). The RIRB and IAP attracted lawyers who were previously uninvolved in historic abuse claims. Some joined to help vulnerable clients navigate a difficult process. Others saw opportunities to exploit those vulnerabilities. Putting gross malpractice aside (for a moment), a programme's structure can

create perverse incentives. Ireland's RIRB would only defray the survivor's legal costs if the survivor accepted a settlement. A survivor who rejected the RIRB's offer would become responsible for their legal costs – a noteworthy incentive. However, if the deep-pocketed state guarantees their fees, lawyers can increase their billable hours by increasing the amount of information they process for each case, creating delays. Similarly, increasing fees in tandem with the survivor's redress payment can encourage lawyers to extract retraumatising information from unprepared survivors (Pembroke 2019: 52; National Centre for Truth and Reconciliation 2020: 40; CA Interview 7). Other lawyers can maximise returns by doing very little for large numbers of claimants. One Irish survivor named 'Robert' said, 'I felt like I was just a number to my solicitor, and I was! I was one of hundreds of other survivors they were representing at the same time!' (Quoted in, Pembroke 2019: 52). In Canada, 'form fillers' completed thousands of applications while offering minimal support to each applicant, with lawyers secure in the knowledge that high success rates would guarantee large numbers of fee-paying claims (Petoukhov 2018: 87). Gross malpractice occurred when lawyers cheated and exploited thousands of vulnerable care leavers.

Even when lawyers behave ethically, legal representation risks aggravating a redress programme's adversarial potential (White 2014: 4). Lawyers who focus on getting the largest possible monetary settlement can obstruct other benefits, perhaps, most importantly, the survivors' sense that they have been heard and had their experiences validated. A ministerial report in New Zealand (the potential bias of which should be strongly underlined) observes that

> [legally] represented Claimants were more critical, frustrated and dissatisfied with the process. We believe this is in part attributable to the arm's length approach inevitable in a represented claim scenario ... The Claimants felt uninformed and isolated from the process and were left with a fait accompli – accept the offer or wait a few more years. (Ministry of Social Development 2018c: 9)

While there is some evidence that legally supported applicants receive higher payments (Kruk 2021: 42; NZ Interview 2), legal representatives increase the risk of instrumentalisation, wherein redress becomes valuable to the survivor only in terms of its monetary outcome. Lawyers come with their own skills and perspectives. Used to the adversarial dynamic of litigation, they may not appreciate the different needs and purposes of redress. Danielle De Paoli, a solicitor who works with Australian survivors, argues that lawyers should subordinate their role as advocate to

that of membership in the survivors 'network of supporters' (De Paoli 2017: 57). The role of lawyer-in-support means attending to the entirety of the survivor's well-being (De Paoli 2017: 54).

A community law initiative in Australia offers a promising model for holistic practice. Originally developed to help survivors work with the McClellan Commission (2013–2017), knowmore was well-positioned to support applicants when the NRS began in 2018. Services are free to survivors because knowmore receives block funding from Australian governments. Block funding limits cost-building incentives: because knowmore staff are salaried (and not fee-for-service), they do not profit from individual claims. More importantly, knowmore trains legal professionals to work with survivors. That includes training in Indigenous cultures and workshops on trauma-informed practices (AU Interview 5). As a result, knowmore's lawyers are redress experts with a personal and professional ethos that prioritises the survivors' well-being. And, of course, knowmore's funding structure and ethos limits the prospect of gross malpractice.

Knowmore's holistic practice offers counselling and financial advice alongside legal services. It can be difficult to talk about injurious experiences with a lawyer. Some survivors will be difficult clients – they will miss meetings, fail to provide evidence, or have problems managing their emotions. Trauma-informed training can help lawyers learn how to get information from clients effectively in ways that make survivors feel safe and supported (AU Interview 10). At knowmore, lawyers and counsellors collaborate to promote survivor-focussed practice. And while knowmore's distinctive approach might not be replicable everywhere, it highlights the value of embedding lawyers in comprehensive community agencies. Still, the usual problems emerge. A review praising knowmore's work observed that resource limits were creating delays, with some survivors waiting up to twelve months for an initial consult, and there were difficulties with access outside metropolitan areas (Kruk 2021: 211). As I have previously said, to ensure fair access, local services need to be accompanied by initiatives that reach smaller and rural communities. Survivors should be able to choose and retain the legal counsel of their choice. However, because better legal representation is a key to better redress programmes, knowmore's holistic service is a model for how programmes can support survivors to access records, get psychological counselling, and receive financial advice.

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Turning to survivors' personal records, I have consistently noted how institutional records are often incomplete or missing. Moreover, survivors experience severe difficulties with accessing records, difficulties that archival professionals can help navigate. Getting access to records can be cumbersome, slow, and expensive and care leavers may be deterred by the need to contact offending organisations. (The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021: 252–53; AU Interview 4). Survivors may not trust offending organisations to release all the relevant information, they (the survivors) may have experienced their initial, or even repeated, requests for records being wrongfully denied (NZ Interview 8). Once they get their records, survivors may have difficulty understanding what they received. Problems with literacy combine with technical jargon. For example, one expert told me that Irish care records sometimes describe survivors as having been 'found receiving alms' as children (IR Interview 11). When they read their files, many survivors thought that meant that they were found begging on the streets. But that was not true – the phrase meant that children were with foster parents. Terminological difficulties are aggravated by derogatory or insulting language that increases the need for emotional support (Allen and Clarke Policy and Regulatory Specialists Limited 2018: 2). The result is that survivors need specialist assistance to acquire, understand, and use their records.

Exemplar programmes were frequently delayed when they could not access records or when records management systems were inadequate. Even comparatively simple schemes, like Ireland's Magdalene programme, found primary care records deficient, requiring innovative and broader archival searches or evidentiary interviews. To anticipate problems with delays in records-access, programmes need to enable survivors to submit applications with only minimal records, permitting them to augment their files as records become progressively available. In some cases these problems could have been mitigated by investing in, and testing, a records system prior to opening the redress programmes or by having the programme open to applications over a longer period. Archivists need time to discover what information is held where and to identify gaps or problems in that tapestry of information. But public officials confront a trade-off, any delay in the opening of the redress programme will attract public criticism and imposes further costs upon survivors.

To move forward, there are lessons to be drawn from Irish and Australian practice. Ireland did two things well. First, Ireland digitalised

relevant records before the redress programme began. This was a bit lucky – the initiative emerged in response to pressure from adoptees and care leavers for information about their birth families. However serendipitous, digitalisation helped the RIRB. Future redress programmes would similarly benefit, and, as Chapter 10 urges, any jurisdiction contemplating a redress programme should compile and digitise all care records as soon as possible. States should also review their file retention and destruction policies to ensure they do not dispose of relevant material and similarly encourage NGOs to follow best practice (for best practice guidance, see Department of Social Services 2015). The second thing the Irish did well was to use a competent service provider to assist survivors. As Chapter 4 describes, Origins staff were embedded in Barnardos community agencies across Ireland. With access to the state's digitised database, Origins staff became experts at locating relevant records for the RIRB and experienced in supporting survivors. Similar points might be made about the Find and Connect service in Australia ('Find & Connect' 2021). Initially launched in 2011, Find and Connect is a website that describes where records relevant to survivors are, what those records contain, and how people can access them. Find and Connect builds upon previous publications, including Queensland's *Missing Pieces* and Western Australia's *Signposts* (Queensland Department of Families 2001; Information Services 2004). The database is open access. At present, support workers around Australia are using Find and Connect to help NRS applicants. This includes state funding for Find and Connect staff in community agencies, such as Lotus Place. Note how, in both Ireland and Australia, archival staff operated out of community agencies that help survivors through the difficult process of accessing records.

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I have emphasised that redress processes harm applicants who must recall, relive, or even learn about their injurious experiences. To manage these difficulties, survivors need access to counselling throughout the programme, and after. Most programmes refer survivors to professional counselling services that they block fund or pay fees-for-services, authorising a pre-set amount of support. That counselling is often focussed on high-stress activities, such as evidentiary interviews. But that approach might not match the requirements of survivors whose needs are not episodic. Nor it is best practice for survivors to meet counselling staff

just before highly stressful events (IR Interview 6). It is better for survivors to develop a stable relationship with one or more counsellors throughout the redress process (AU Interview 17). Counselling must be accessible and provided for as long as it is needed. Appropriately responding to the survivors' complex and acute needs can involve community, family, and individual measures (Aboriginal Healing Foundation 2006: 12).

This study is not an account of good counselling practice (see instead Sanderson 2006; Cloitre, Cohen, and Koenen 2006). But among the exemplar programmes, Canada's comprehensive local support stands out. Leveraging the AFN's on-reserve infrastructure was part of a post-colonial drive to devolve delivery to Indigenous-run services (CA Interview 6). Canada funded cultural, emotional, and psychological support, combining mental health services with culturally appropriate and often local support for survivors that was integrated with existing public health services to avoid inefficient duplication. Involving the local community in providing emotional and psychological support is likely to help build survivors' trust in the programme (Dion Stout and Harp 2007: 53–55). When getting help is normalised, it loses its stigma. Moreover, a community-level strategy helps alleviate persistent problems associated with finding and retaining appropriate psychologists. As redress programmes increase the demands upon counselling professionals, alternative means of support can help reduce (often substantial) waiting times. In Canada, local cultural support and, to a lesser extent, health support workers offered accessible non-professional alternatives to psychologists. In all the exemplar jurisdictions, local community workers supported survivors going through redress. This could include getting them accommodation near the evidentiary interview, accompanying them to professional consultations and/or interviews, helping answer questions, and just being there for survivors going through a difficult time. When the experience of abuse is widespread in the community, it is important to have community-level responses (Degagné 2007: S53). In that respect, Canada's group-based redress practices enabled mutual support. Similarly, Australia's Lotus, Tuart, and Open Place, along with knowmore, combine counselling support with other survivor services.

I have been talking about counselling support for survivors through redress. Counselling can also be a redress outcome. Canada's IAP allowed survivors to apply for psychological care provisions as part of redress. Similarly, counselling is part of the NRS's redress package. These programmes give survivors the option of choosing counselling-as-redress,

creating flexibility. Survivors regularly report that counselling is one of the most important and regularly accessed services (Reimer et al. 2010: 67–73; Watson 2011: 4; Golding and Rupan 2011: 34). Block-funding specialised counselling services can be cheaper than paying survivors to find counselling on a case-by-case basis (Boyce and Wood 2010: 511–12). It can also be more accessible for survivors. Redress programmes can fund services embedded in local agencies, alongside more private telephone and video-calling services to make a flexible and holistic range of options available and provide services that are accessible to survivors in rural areas.

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My last topic in this chapter concerns managing money. Legally incapable survivors will need to have their money managed by third parties, as will those currently incarcerated. But financial management will be optional for most survivors. To help survivors manage their redress monies, redress programmes offer financial advice services. Similarly, most major redress reports endorse the value of financial advice, including, for example, the McClellan Commission (Royal Commission into Institutional Responses to Child Sexual Abuse 2015b: 379). Those recommendations reflect submissions made by agencies with significant experience working with survivors. The benefits of professional advice are clear. Many survivors combine poor literacy and numeracy with little experience in managing larger sums of money (Petoukhov 2018: 96; Reimer et al. 2010: 43). Marginalised survivors may not be able to find good advice within their communities, while their vulnerabilities to those who would exploit them create fears that survivors will misspend their redress monies (Dion Stout and Harp 2007: 33–34; Miller 2017: 169).[2] At the same time, redress payments can affect the survivor's eligibility for means-tested benefits. While most states mandate that redress does not count as ordinary income, the attendant complexities of law and regulation may not be easy to understand. Moreover, these complexities may not be known to officials in the government agencies that administer benefits. Officials who mistake redress payments for ordinary income may deprive survivors of entitlements. Survivors need to have someone to whom they can come to help resolve problems.

Unfortunately, these excellent reasons to offer financial advice do not reflect any evidence that most survivors benefit from it. In no exemplar

[2] Chapter 13 offers some reservations regarding these concerns.

case was financial planning widely used. For example, an Australian survey reports that only 10 per cent of 136 respondent survivors had financial counselling concerning their redress payment (Care Leavers Australia Network 2016: 21). Low uptake may stem from ignorance regarding financial counselling's benefits, fatigue resulting from protracted redress processes, and/or anxiety in relation to visiting an upscale office to meet a wealth professional. Simply offering financially counselling is not an effective way to make it accessible.

Dion Stout argues that accessible financial counselling needs to engage the survivor in determining what goals they have and then provide them with what they need to realise those goals (Dion Stout and Harp 2007: 71). Advice needs to be delivered by people who are used to working with survivors and provided in places where survivors feel comfortable. For Indigenous survivors, financial advice should reflect distinctive cultural values. Programmes can provide a helpline for survivors to call with questions or get general guidance. But a holistic agency like knowmore can link personalised financial advice with legal and counselling services. Survivors who come to talk to counsellors or their lawyers could be encouraged towards financial advice. Because most survivors will talk to their counsellors and lawyers on multiple occasions, that encouragement can be repeated. Moreover, being embedded in a community agency allows financial advisors to benefit from trauma-informed training and experience with survivors. Making financial advice part of everyday community services could be more helpful to more survivors. More generally, as I previously observed, future redress programmes could offer survivors the opportunity to register with a community agency for ongoing help with accessing services.

12.4 Support Recommendations

- Holistic support for survivors should be understood as a core component of redress.
- Comprehensive community agencies should be at the centre of the programme's survivor-support strategy. The best community agencies are local, personable, and comprehensive. They take a holistic approach centred on the survivor's well-being.
- Funding for support, or its provision, should supplement and augment existing public services. It should not duplicate.
- The support provided by comprehensive local agencies must be accompanied by services accessible to all survivors, including those in rural

areas. This may include itinerant services alongside remote telephone, email, and video call options.

- Community agencies may need help adapting to the workload and skills challenges created by redress programmes.
- Having survivors work with survivors through redress can be widely beneficial, despite the challenges involved.
- Offending NGOs (such as churches) can provide effective support services. However, survivors should never be compelled to engage with offending organisations.
- All redress programmes should consider funding legal assistance. It is necessary in more complex programmes.
- Programmes must take proactive steps to reduce the potential for legal professionals to harm and exploit survivors. This can include trauma-informed training and ensuring that funding structures promote survivors' well-being.
- Professional support services are best delivered as part of a comprehensive and holistic service.
- Survivors should be able to choose and retain the legal counsel of their choice, however, Australia's knowmore service offers a good practice model that combines legal and financial advice along with professional counselling.
- Programmes should provide survivors with specialist records access support. This can include developing efficient and comprehensive data management systems and by training and funding local service providers.
- Those who provide counselling support should do so in line with best practice. The design of counselling support and its funding should enable an adequate standard of care.
- Programmes should consider offering counselling as a redress outcome.
- Effective financial advice needs to be attractive, responsive, and accessible.

13

What to Pay in Redress and How to Pay It

> Child sex abuse redress scheme to cap payments at $150,000 and exclude some criminals (ABC News 2017)
>
> Child sex abuse proposed redress scheme to cap payments at $150,000 and exclude criminals (Cunningham 2017)

13.1 Introduction

The headlines announcing Australia's NRS highlight maximum payment values. The accompanying articles tell readers that Australian governments had negotiated with religious organisations in response to the McClellan Commission's call for a redress programme paying up to AUD$200,000 (Royal Commission into Institutional Responses to Child Sexual Abuse 2015b: 22). Those negotiations would reduce that figure. As the then Minister for Social Services, Christian Porter, told a press conference,

> To maximise the ability of the Commonwealth to have the greatest amount of opting-in from states, territories, churches and charities, we consulted over the last year ... about what was the amount to set the maximum redress payment at that would maximise the amount of opt-in ... (ABC News 2017)[1]

In other words, states and NGOs would not agree to fund redress at the rates recommended by the McClellan Commission. The NRS's maximum of AUD$150,000 was what the offending institutions were willing to give, not what survivors were due.

Payment values are among the most widely publicised facts concerning any redress programme. But despite the public attention those figures

[1] Most survivors are only eligible through the NRS if the institution in which they experienced abuse joins the programme and undertakes to pay a substantial portion of the survivor's redress payments. For more information (Commonwealth of Australia 2018).

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receive, there is little commentary on *how* redress should value injuries. Chapter 3 argues that survivors have strong claims for full compensation. Justice requires that each receive what they are due. That requires a credible redress programme to try to fully compensate survivors, at least for some injuries. Within the scope of redress, survivors are entitled to full compensation. Programmes should not, as the NRS did, impose general discounts.

13.2 Setting Values

A fair redress programme would give survivors what they are due – full and just compensation. Full compensation requires programmes to offer payments that reflect credible estimates of the injuries' (dis)value. No exemplar redress programme offered full compensation, most paid much less. To illustrate the gap, recent Australian research on historic abuse claims found that civil litigation paid an average of AUD$138,775 (Daly and Davis 2021: 450). Supposing those court judgments are at least closer to full compensation, redress is remarkably low – average payments in Queensland Redress and Redress WA were AUD$13,500 and AUD$22,458, respectively.[2]

Apologists offer three arguments justifying the disparities between what survivors are due and what redress typically provides. For some, the relative ease of redress justifies less than full compensation. Since litigation is protracted, costly, and uncertain, if redress is relatively quick, cheap, and sure, it will offer a good bargain for survivors, even when it pays less than what they deserve (Pearson, Minty, and Portelli 2015: 41; Royal Commission into Institutional Responses to Child Sexual Abuse 2015b: 374). The idea is that survivors are compensated for getting less than what they deserve because the state makes it easier for them to get it. But that is a perverse argument. Many of the difficulties survivors experience with litigation were/are created by offending states that failed to prevent, uncover, record, and investigate abuse. To pay survivors less because the offending state did not fulfil its responsibilities risks compounding injustice.

A second argument holds that full compensation is unaffordable (Royal Commission into Institutional Responses to Child Sexual Abuse

[2] The average payment in the NRS is around AUD$85,000 (Byrne and Travers 2021).

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2015b: 248). Redress programmes are expensive and because states must allocate scarce resources, it would be unfair for survivors to insist that they receive full compensation. This argument looks good in the abstract. But in reality, it is unclear whether paying full(er) compensation to survivors would in fact be unfair to others. Survivors can rightly ask why *their* claims are judged too costly. Why they should get short shrift while states spend billions on a myriad of other things? Some of the decisions made in the exemplar cases appear questionable. Recall, from Chapter 5, how the government cut Redress WA's maximum payment from AUD$80,000 to AUD$45,000 to keep the programme within its AUD$114 million budget cap. That cut was announced in 2009, just after the government announced funding for an AUD$1.8 billion athletics stadium in Perth. Survivors nicknamed the new sports ground 'Redress Stadium' as a wry comment on how the government spent 'their' money (Moodie 2019). As another example, in 2006, the same year Canada announced IRSSA's redress programmes, it cut 1 per cent from the federal goods and services tax, which decreased the state's annual revenue by CDN$4.5 billion (Government of Canada 2006). IRSSA paid survivors around CDN$5 billion, meaning that a one-year delay in the tax cuts could have funded an almost twofold increase. It would be easy to find further examples. The larger point is that while redress programmes are expensive, the monies involved are well within the states' budgetary capacities. Of course, policymakers must exercise some budgetary control, but they cannot argue that fuller compensation is unaffordable.

A more subtle argument for partial payment concerns the purpose of redress. This argument usually begins, correctly, with the point that it is impossible to calculate a precise (dis)value for injuries like sexual abuse, wrongful removal from one's family, and loss of cultural attachment. The argument then takes a further step into what Kathy Daly calls the 'antinomy of denial and support' (Daly 2014: 176). Denying the possibility of full compensation, supporters argue that redress payments are instead measures that acknowledge and assuage the survivors' injuries (e.g. Palaszczuk, Trad, and Farmer 2018; The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021: 304). Referring to the NRS, Robyn Kruk argues that redress serves 'to recognise and alleviate the impact of past institutional child sexual abuse and related abuse, not to determine and compensate for the severity of the impact of that abuse' (Kruk 2021: 92–93).

Kruk's antinomious passage continues,

> to assess the severity of the impact of the abuse, survivors would need to provide more detailed and specific information in their applications as well as potential medical or psychological assessments. This would not be consistent with a trauma informed approach to redress. (Kruk 2021: 93)

Kruk implies that fully compensating survivors would be bad for them. But it is unclear how the paternalistic argument is supposed to work. How would a programme 'recognise' the survivors' injuries without 'detailed and specific information' about their experiences? One might think that recognising those experiences requires information about them. Moreover, the NRS's thirty-page application form asks for detailed and specific information – Kruk's argument does not justify the practice that she is defending.

Kruk is right to suggest that participating in redress can be difficult for survivors. Defective redress processes can harm survivors. But redress can be better designed. Moreover, I think survivors should get to decide what information they wish to share. Survivors may wish to incur some difficulties and risks. Therefore, if they are appropriately supported, providing survivors with the options to choose less difficult pathways to redress need not preclude providing them with options for pursuing more fulsome (and difficult) pathways.

When asked, survivors argue that fair redress payments should match their injuries (Lundy and Mahoney 2018: 273). That is, after all, normal corrective justice practice and what full compensation requires. Seetal Sunga argues that survivors tend to understand redress money as communicating an exchange value – the monetary award indicates what the injury is worth (Sunga 2002: 54). That understanding is powerful, even for those who agree that it is impossible to put a monetary value on their injuries. In 2016, the Care Leavers Australasia Network surveyed 259 Australian survivors asking: 'In regards to Redress / Compensation, what do you believe is a fair amount that Care Leavers should receive?' The resulting report offers a selection of survivors' answers, nearly all[3] of which represent a 'fair amount' as an exchange of like value – fair redress would pay back the costs imposed by injury (Care Leavers Australia Network 2016: 19). The quoted survivors all agree with the first step in the antimony – compensation is impossible. But they still argue that

[3] One answer does not address the subject of fairness, but instead speaks about the profound effects of injury.

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fairness entails full compensation. Anyone who hopes to convince survivors otherwise is paddling against a roaring current of interpretation. As one survivor, Paul Zentveld, puts it: 'we want to get paid money, big money, because we deserve it' (Quoted in, Ellingham 2021). Because survivors understand themselves as deserving full compensation for their injuries, they complain when redress undervalues their suffering (Daly 2014: 179–80). 'One of the most common grievances voiced by people who were unhappy with the outcome of a [redress] process is that the level of payment they were offered was unfair' (White 2014: 4). Reframing redress as a non-compensatory measure of acknowledgement, alleviation, healing, and reconciliation might sound like a good idea, but it will not satisfy what fairness demands.

I think policymakers can refuse the antinomy by recognising that full compensation can be a just aim even when it is impossible. Impossible things are often worth attempting. To use a mundane example, if I were to grab a pencil and ruler right now and draw a straight line, I would fail. Straight lines are a conceptual ideal beyond the capabilities of the human hand. But millions of people draw lines every day that are straight enough for their purposes. And by analogy, that is what redress programmes should aim to do. A redress programme may not discover what perfect compensation requires, but it is likely to come closer to that discovery if it at least tries. In other words, full compensation is a regulative ideal governing the value of compensation.

Because survivors are due full compensation, a programme needs to demonstrate that it has made a credible effort to appraise the disvalue of their injuries. The remainder of this section sketches how a programme might set redress values. But I will not propose any specific figures here. Appropriate values will vary from time to time and place to place and will be more credible when co-developed with survivors. Policymakers need to use effective methods to develop credible values – drawing upon data and techniques from markets, litigation, insurance, and public health. No method is perfect, but there are several techniques that can help policymakers set values for different components of injury.

In the easiest cases, there may be injuries (usually interactive and individual) that have a market value. If a survivor had something stolen from them while in care, the programme can price a replacement using existing markets. Similarly, if consequential harms require medical or dental treatment, programmes can price the market cost of necessary procedures. Analogous techniques might be used for survivors with reduced employment capacity. Using existing markets to set values, a

programme could compensate those who earned below an average or living wage, or some other appropriate baseline. Shifting focus slightly, to value the experience of living with physical or psychological disease and/or disability, programmes might use the public health tools of Quality-Adjusted Life Years (QALYs) and the related metric of Disability-Adjusted Life Years (DALYs). These metrics combine the expected shortfall in individual life expectancy relative to the quality of each expected life year to provide an objective measure of how to value living with disease or disability (Maldonado and Moreira 2019). The literature on both DALYs and QALYs is well developed, and policymakers can refer to broadly accepted tables to calculate payment values. Finally, court precedent and insurance settlements offer aggregated statistics on average awards for many different types of injuries. These statistics reflect thousands of accumulated judgements. The use of average judicial award values would be apposite for two reasons. Not only does litigation present a public valuation of injuries, it also offers a ready procedural alternative. If redress values fall too far below what litigation can provide, survivors with potentially good tort cases will opt out of redress.[4]

Market data, life tables, and average judicial and insurance awards provide relevant information. Still, this data has limits. The cost of repairing damage is not the same as the disvalue of experiencing harm. Large-scale award databases or payment schedules can lump different injuries into homogenous categories. Jurisdictionally specific legal frameworks, contractual conventions, and award norms affect payment values exogenously. The available information is only partial and approximate. But a programme might start with that data and then innovate when necessary.

Redress programmes will confront some injuries for which no adequate data exists. When programmes need to innovate, there are three prominent approaches to assessing the disvalue of injuries (Chalfin 2015: 4). The 'contingent valuation' method surveys what people say that they would pay to reduce the probability of injury by a certain percent. For illustrative purposes, if the average respondent would pay N to reduce the chance of being lied to about the death of a parent by 10 per cent, then the disvalue of that injury could be $= N \times 10$, adding frequency multipliers to capture recurring injuries. A second option, 'hedonic pricing', infers the disvalue of non-market goods using market

[4] In Australia, statutory changes have made it easier to pursue non-recent cases and many survivors are now choosing litigation over redress (Kruk 2021: 172).

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observations. This method decomposes the value of a market good, such as a house, into its component parts. To illustrate, a programme might try to capture the disvalue of living in a threatening environment by looking at the relationship between house price and crime rates to estimate how much people actually pay to reduce security threats.

Both contingent and hedonic pricing assess what people would pay, or have paid, to avoid injury *ex ante*. A third method decomposes injuries into sub-components that are priced using analogous market goods and services. An example is child neglect. Some American courts approach neglect as a failure to provide information and services. Those courts define thirteen core domains of non-neglectful childcare: psychological/emotional development; education; diet; medical care; dental care; fitness; access to athletic experiences; culinary skills; faith/morality; personal finances; household services; career counselling; and learning to drive (Laurila 2013: 64). By estimating the amount of time an average parent spends on each of these activities for a child of the appropriate age, assessors can work out the cost of replacing those services with professionals. The aggregate value would then be multiplied by the number of days the child was denied different aspects of care. Although the initial calculations are complex, it would be relatively easy to create a formula or table to estimate the disvalue of neglect.

None of the techniques canvassed above provide perfect information. Contingent valuation is subject to significant epistemic concerns – not least of which is that values are set by people with no experience of the injury, a problem that merely headlines all the other problems of subjective survey responses (Tourangeau 2003: 5). Hedonic pricing requires good data on what motivates people to pay different prices and it may turn out that prices are not very sensitive to the relevant concerns. Turning to the service-replacement approach, the price of services is not the same as the cost of experiencing the injury. And the approach confronts difficult questions, including which services to include in the calculation; how to value partial provision; and how to value goods for which there are no market equivalents, such as parental love. Thinking more generally, many of the techniques estimate average disvalues, which means they offer mere proxies for the disvalue experienced by specific individuals. Moreover, my survey of different ways of estimating the disvalue of injury depends upon the possibility of aggregating the costs of component injuries. But simple aggregation will not reflect the compounding disvalue of a complex injurious experience, for example, a physical assault is made worse when no one provides medical treatment.

Because it is impossible to estimate the disvalue of many survivor's injuries accurately, people are right to say that full compensation is impossible. Nevertheless, survivors deserve a credible explanation of the values that redress offers: hand waving and platitudes are all too common and need to stop. To that end, these techniques offer survivors (and others) methods for critiquing existing or proposed payment values. For example, using the service-replacement method Andrew Laurila suggests that a single parent's nurture between the ages of four and eighteen is worth around USD$269,501.37 (Laurila 2013: 70). That figure comfortably exceeds the highest average value paid by an exemplar programme – the IAP's CDN$91,000. And, of course, most survivors have claims for injuries other than neglect. A moment's reflection suggests that robustly priced payments would likely exceed most payments offered by the exemplar programmes.

***

Having supported a robust approach to evaluating injuries, I want to consider why participants might, in fact, prefer less precise approaches. The sensitivity of an individual's injurious experience to the payment received is a matter of degree. The least sensitive approach would pay all validated applicants the same amount. For example, a Swedish programme paid all successful redress claimants SEK 250,000 (Sköld, Sandin, and Schiratzki 2020: 179). Refusing to distinguish between injurious experiences, insensitive programmes might work well when redressing collectively experienced injuries or when survivors all experienced similar structural injuries. But when survivors have complex and varied experiences, then undifferentiated payments create false equivalences. By contrast, highly responsive programmes vary monetary values in step with every injurious nuance. For example, Ireland's RIRB gave each application a score out of 100 points. That score fixed the application into one of five standards of severity, with each category corresponding to a range of €50,000 – that is, an applicant scoring between 40–54 points would be pegged in the €100,000–€150,000 range (Appendix 3.2).[5] Because each €50,000 band was defined by fewer than fifty points and the RIRB rounded payments to the nearest thousand euros, every point made a difference to the monetary outcome. That is an example of a

[5] The band for the most severe claims was larger and spanned €200,000–€300,000, however, less than 1 per cent of claims were pegged in the highest category.

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highly responsive approach. And if payments depend on every nuance of the survivor's experience, programmes will need to acquire and assess all relevant evidence. I have repeatedly noted that as programmes demand more information, they tend to be slower, less consistent, and impose higher costs upon participants.

The offsetting disadvantages posed by the extremes of very sensitive and insensitive programmes suggest that a better strategy may lie somewhere in between. A programme can distinguish between some, but not all, injurious experiences by using categories that group roughly similar injuries together. Exemplars include Queensland Redress and Redress WA (Tables 5.1 and 5.2).[6] These programmes reduced informational demands and made assessment easier by sorting claims into bands according to their severity and making identical payments to all claims in each band. This technique makes assessing the most grievous claims easier – once assessed as meeting the minimal criteria for the highest standard, they require no further work by assessors (AU Interview 9). Further, a less sensitive process may increase everyone's confidence that the claim has been correctly valued – it may be clearer how a claim fits within a broader, rather than narrower range.

> The monetary difference between these levels of payment was quite large and acted as a strong differentiator in the severity of abuse and/or neglect. Redress WA is of the view that this differentiation reduced the number of legal challenges (that is, review requests lodged by legal practitioners) to Redress WA offers. (Western Australian Department for Communities c2012: 15)

The point is practical. If payment values are only moderately sensitive to different injurious experiences, then an applicant will have less incentive to seek a review (rescoring) if they score at the bottom or in the middle of a range. That means broader ranges, with less sensitive conversion ratios, can create cost savings. Similarly, from the survivor's perspective, knowing the minimum requirements for a category could let them limit their evidence to only what is necessary to meet the relevant standard. For example, if categories are defined by the experience of different forms of abuse, but insensitive to frequency, a survivor could limit their evidence to a single event.

Similarly, programmes could redress collectively experienced injuries or structural injuries through less sensitive approaches by providing

[6] Scottish Redress has adopted a similar approach (Scottish Government 2021).

base-level payments. The values should reflect a specific injurious experience and, importantly, be set high enough to avoid insulting survivors. Because monetary values are communicative, very low payments can be offensive (The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021: 223; Death 2017: 148; Allen and Clarke Policy and Regulatory Specialists Limited 2018: 6). As one Queensland survivor said, 'The [AUD$7000] compensation offered by [Level 1] was an insult that was not worth applying for' (Quoted in, Porcino 2011: 6). Although people will differ on what they think insulting, it should be possible to select a reasonably respectful base figure.

One approach suggests that a respectable figure is one that is 'meaningful, in the sense that it would provide a means to make a tangible difference in their [survivors'] lives' (Royal Commission into Institutional Responses to Child Sexual Abuse 2015a: 151). There are different ways to understand what a 'tangible difference' might entail. From a material perspective, redress could, 'help survivors rebuild their lives' by making a noticeable difference in how they live (The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021: 304–5). As a good effort, the £10,000 base payment in Scottish Redress is 36 per cent of that nation's £27,716 median average household income (Congreve and Mitchell 2021) and 6 per cent of the 2021 average Glaswegian house price of £159,0000 – just enough for a down payment (HomeCo 2021). By contrast, AUD$7,000 was 11 per cent of the Queensland's 2011 median income of AUD$63,804 (Queensland Treasury 2017) and 1.5 per cent of the 2010 median house price (AUD$460,919) in Brisbane (Clegg 2019). The reference to housing is merely illustrative. While a route to a secure home is one way redress could make a tangible difference, policymakers should co-develop adequate base values with survivors. Ideally, all eligible survivors would get a base payment. Pre-screening should eliminate clearly fraudulent or duplicate applications, but otherwise any survivor injured in care should be eligible for a base payment. No one should receive a zero award.

To conclude, programmes must explain how they appraise injuries. The processes through which policymakers derive values should be accessible, transparent, publicly justified, and include survivors. While setting values upon injurious experiences will be contentious and difficult, programmes should make credible efforts to explain and justify the values they offer. That said, there are advantages to both survivors and states if programmes are somewhat rough when calibrating payments. There are obvious trade-offs as programmes approach the regulative

ideal of full compensation. However, good participatory programme design could work towards acceptable outcomes. Policymakers should consider providing multiple avenues for redress wherein lower payments come from roughly assessed and lower cost processes. In addition, survivors can choose more nuanced pathways to fuller compensation.

13.3 Paternalist Reservations

There are reasons to fear that survivors made vulnerable because of their care experiences will misspend their money or be exploited by the dishonest. Fear for survivors' well-being can tempt programme designers with paternalism. One advocate illustrated his concern by telling me about a survivor who had received NZD$80,000 in redress. The survivor was

> [n]ot long out of prison. Spent most of his life in prison. Institutionalised. Through all the boys' homes. Institutionalised. Got out of prison, NZD$80,000. All the guys that he knew, knew he was getting this $80,000 . . .
>
> When I finally caught up with this guy a few weeks down the track, I sat down with him, 'How's it going?'
>
> 'Yeah, no good', . . . He said, 'I haven't got any money. . .'
>
> I said, 'How much have you got left?' I think he said eight thou[sand]. I said, 'What have you got?' He had a fifty-inch television set and a pair of green Doc Martins. [I said] 'Right, what happened?'
>
> 'Oh, so and so called round and wanted to borrow $500. [Then] So and so called round [and borrowed more]. . .' He lent one guy, who was in a church that he was working with, $10,000. This fella was never ever, ever going to pay him back $10,000. He gave his brother $10,000. Now, that money's all gone, where does he go to get support? . . .
>
> Now, where is he now? He's had $80,000. He's not only back to where he was in the beginning, he's in a worse place than he was because he sees [that] 'I'm a fucking hopeless useless bastard. I got an opportunity to set up for the rest of my life and I fucked it up, so I am useless'.
>
> Fortunately, we work with him every day of the week and support him. We've kept him out of prison for eight years. He wants to go back to prison because that's all he knows.
>
> Now, that's what happens when you give these people money. (NZ Interview 1)

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The interviewee argued that lump sum payments could be harmful. Not only will survivors misuse their money, but once the misspent money is gone, they are left to regret that they have squandered an important opportunity.

As an alternative, the interviewee emphasised the importance of working with survivors to identify and meet their needs. He argued that redress should not pay survivors directly, instead, their money should be held in trust. A social worker would manage their redress money in the survivor's best interest. That professional would holistically review the survivor's circumstances – examining their health, housing, employment, and education – then allocate money according to the survivor's needs. Should any redress monies remain, the survivor would receive a nominal pension, no more than 'fifty dollars a week' (NZ Interview 1).

I generally oppose this kind of blanket paternalism. I appreciate that community workers, like the interviewee, with experience working with many disadvantaged survivors, may have a different perspective. Moreover, my opposition is coloured by my support for holistic community-level support for survivors. Chapter 12 argues that redress programmes should offer survivors the opportunity to register with agencies whose staff can help facilitate access to services. Survivors need high quality, accessible, and holistic support. This can work in different ways, illustrating one option, Magdalene survivors have cards providing augmented access to health care services. In addition, local agencies should receive ongoing funding to support survivors. To a certain extent, my opposition to paternalistic restrictions depends on the complementary provision of high-quality services. Moreover, I accept that redress programmes will need to make provisions for legally incapable survivors, like prisoners, to have their money managed by third parties. But having made those concessions, because paternalistic imposition takes away the rights of survivors to do what they want with their money, it needs robust justification. Paternalism must be the exception, not the rule.

Redress programmes 'must always respect the ultimate right of Survivors to make their own decisions' (Dion Stout and Harp 2007: 53). Because it is extremely fungible, money empowers survivors. As Chapter 3 underlines, money gives people control over the course of their life. By contrast, having a social worker or other government official control the survivors' money risks recreating the injurious structures that governed them as young people. The just treatment of survivors demands respect for them as persons:

> Those hoping to support Survivors must then respect and protect their autonomy and independence, however and wherever they may decide to spend their [lump sum redress payments]. (Dion Stout and Harp 2007: 53).

Restricting access to monies for paternalistic reasons presumes that survivors will act against their own interests (Alliance for Forgotten Australians 2015: 12). Furthermore, it presumes that programme officials know better than survivors what those interests are. I doubt that is normally true. And making paternalism into policy entails sweeping judgements concerning the incapacity of all survivors. Survivors are diverse, with differing needs and capacities. Too often, concerns around the misuse of monies are born from anecdote, fed on prejudice, and are better addressed through robust and holistic support.

Paternalism is appropriate when people will otherwise make bad choices that lead to serious and irreversible self-imposed harms. I have never seen evidence of that resulting from a redress programme. Some survivors will make bad decisions, but others will make good ones (Graycar and Wangmann 2007: 17). In Canada, for example, there were widespread concerns that Indigenous redress recipients would not manage their redress monies well. However, the

> . . . money was generally put to very good use, with many claimants setting up educational funds, making donations to local causes and generally treating the money as special or even sacred funds that needed to be spent thoughtfully. (National Centre for Truth and Reconciliation 2020: 39)

Policymakers should make pension and/or trust facilities available as an option, but they should only be forced upon survivors when that is demonstrably necessary for that specific individual.

***

Similar points apply to in-kind redress programmes. In-kind redress is a paternalistic technique that controls how survivors spend their money. Exemplars included Ireland's Caranua, Queensland's Forde Foundation, and Canada's Personal Credits. These programmes were/are paternalistic in two ways. First, they decide and limit what kinds of goods and services survivors will be able to claim, within the parameters of eligible claims set by policymakers. Second, they make judgements about what will be good for individual survivors on the basis of their applications. The latter

process involves empowering professionals to make judgements about what is in the care leavers' best interest.

In response, survivors rightly object that they should control how their money is spent. Discussing Canada's Personal Credits programme, Robyn Green notes the frustrations expressed by survivors concerning the limits imposed by the programme (Green 2016: 104). Similarly, Tom Cronin argues that Caranua's paternalist basis made survivors 'beg for our own money – money that we are entitled to' (Quoted in, Ó Fátharta 2016). Cronin's point was echoed by one survivor who told me that she was presently 'begging' Caranua for services (IR Interview 10). Because applications for in-kind services take time and resources, they are much more cumbersome than simply letting survivors spend their money as they see fit. Inequities arise when more motivated and capable survivors apply for more money and do so more often (IR Interview 4). For that reason, Caranua imposed a €15,000 lifetime limit on each survivor. Canada's Personal Credit programme limited each survivor to CDN$3,000 and the Forde Foundation imposed a maximum of AUD$5,000 in funding over five years. Finally, the rules constraining eligible applicants are often inflexible, excluding reasonable claims that do not fit into preconceived categories. To illustrate, the Forde Foundation will pay fees for vocational or Technical and Further Education (TAFE) courses, but not for university degrees (Forde Foundation 2018). Why not? Recall, from Chapter 2, how survivors were denied education as young people because those charged with their care thought them unfit for academic pursuits. One might think that the Forde Foundation is making the same judgement.

13.4 Communicating Values

I previously noted that payment values are widely publicised, with media often highlighting maximum available sums. But because most programmes make maximum payments to very few survivors, a popular focus on those figures can encourage false assumptions (Daly 2014: 180). Redress WA observes the

> . . . propensity for applicants to assume their eligibility and make assumptions about their expected level of payment. In some instances, applicants made financial decisions on the incorrect assumption they would receive the maximum level of payment. (Western Australian Department for Communities c2012: 11)

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If few survivors receive maximum payments, publicity that focuses upon those values can be misleading. Recognising the problem, the McClellan Commission suggests emphasising the average values a programme expects to pay (Community Affairs References Committee 2018: 30). Programmes should advertise and report median payment values and encourage the media to do likewise.

Turning to individuals, communicating payment offers to survivors is an integral part of redress. Institutional representatives may need training to communicate well, and survivors may need support during the offer process (Kruk 2021: 147; IR Interview 6; NZ Interview 1). Although survivors usually benefit from good and transparent information about how their claims were assessed, many will not want to receive a letter full of confronting information for psychological and privacy reasons (AU Interview 9). For the same reasons, survivors may prefer to have their redress money discretely deposited in a bank account. Survivors should be able to choose whether or not they will receive an explanation. Either way they may need support. Some survivors will be retraumatised by confronting their injurious experiences. Other will be angry or insulted if they do not get what they expect. Lower than expected sums may suggest that staff did not like them, or thought they lied, or indeed that programme staff have cheated them (Reimer et al. 2010: 29; AU Interview 6). These concerns underpin the need for clarity regarding monetary payments. Clearly stating how programmes derived payment values can help avoid misunderstandings and accusations. When part of a claim is not redressed, survivors should be told why and what recourse they have through review processes or litigation.

Exemplar programmes adopted different strategies in communicating payment offers, with many offering apologies. The literature on apologies is large and I will touch on a couple of key points only (for an introduction see, Smith 2008b). An apology is an obvious complement to an explanation of redress that accepts responsibility for injuries. Some survivors never open apology letters and others discard them in the rubbish, but many survivors welcome them. I have met survivors who frame their apologies for display in their living rooms or who carry them folded in their wallets. In New Zealand,

> Some [survivors] thought the apology was just a standard letter sent to everyone. They felt it did not acknowledge their own personal experience and therefore did not feel genuine. For others, having an official apology vindicated them and validated their experiences while in care. They felt the apology letter was proof of what happened to them. (Ministry of Social Development 2018c: 15–16)

Some programmes despatched generic apology letters lacking any information about the individual's claim.[7] A better approach would acknowledge the survivor's unique experience (IR Interview 1). Letters must be clearly and accessibly written. An excerpt drawn from an apology letter that I have on file offers a cautionary lesson in obfuscation. The letter was sent to a New Zealand survivor and it reads (in part):

> I am extremely sorry to hear of the physical abuse you were subjected to while placed with caregivers during your time in care. I have been advised that in two placements, failures existed in how these particular caregivers were assessed, which in one case arguably contributed to you being abused over a prolonged period of time by one of the caregivers' children.

The second sentence addresses what redress is for. And it opens by distancing the writer from the injurious acts. The offending, if there is any, pertains to failures in how MSD assessed caregivers. Even there, the author (Brendan Boyle, chief executive of MSD) does not acknowledge wrongdoing, instead he reports what someone else has told him – Boyle has 'been advised' of failures. Those abstract failures are never described and are not attributed to an agent. Moreover, Boyle is not certain of their injurious character. When he suggests that one failure 'arguably contributed' to abuse, he implies the possibility that it did not. It is not even clear which of two failures (no more is said about them) is the potential contributor.

Evasive ambiguity is 'inappropriate, insulting, and counter to the purpose of [redress]' (Allen and Clarke Policy and Regulatory Specialists Limited 2018: 7). Better statements clearly explain what redress is for. Looking for best practice, Reg Graycar and Jane Wangmann examined a small Canadian programme redressing survivors of the Grandview Training School for Girls (Graycar and Wangmann 2007). Payment decisions issued by that programme carefully explained how redress payments were calculated and who was responsible for what. Around ten pages long, those statements reproduced core elements of the survivor's testimony, so that survivors could know that they had been heard. Accessibly written and reflecting the care leavers' personal experiences, 87 per cent of survivors said these statements were 'very important' to them (Graycar and Wangmann 2007: 28).

Observers emphasise the importance of having a representative of an offending institution apologise to survivors as individuals (Philippa

[7] An exemplar copy of a generic apology issued by Redress WA is on file with the author.

White in "Official Committee Hansard" 2009b: CA16; CDN Interview 4). Personal apologies are more expensive and time consuming than generic statements. But more personalised accounts can match the seriousness of the experience addressed (Royal Commission into Institutional Responses to Child Sexual Abuse 2015b: 10). To lend the apology weight, observers suggest that they should come from high-ranking officials, preferably leading politicians (The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021: 223; Lightfoot 2015: 23).

Survivors should have the option of receiving a letter that explains what is being redressed and how the programme adjudicated their payment values. Good in itself, that clarity also enables the fair use of waivers. Waivers require survivors to release the state from future claims and agree to a final settlement of their claim(s). It is unfair to ask survivors to waive claims for which they have not been offered credible payments. Waivers should only settle claims that are redressed. The advantages of settling claims with waivers are obvious to states, but they can be good for survivors too. By legally resolving the claim, a waiver might help survivors move forward with their lives.

As an aside, the point of payment is an opportunity for the survivor to get information about the use of data held by the programme about the survivor. Chapter 8 argues that survivors should control how their information is used and archived and when (or if) it will be destroyed. Survivors would benefit if they could learn, at the end of the process, whether information from their claim aided other applicants, was used in prosecutions, or informed policy research. Survivors should also be given an opportunity to (re-)instruct the programme as to future use of that data, where and how their information should be archived, or whether it should be destroyed. Redress programmes will hold highly sensitive and private information about survivors. Survivors need to be able to control what happens to that data.

Survivors also need time to consider payment offers. For example, Canada's IAP required survivors to request a review within thirty days. Australia's NRS provides six months. Longer periods are better for survivors, allowing them time to seek advice, make a decision, request a review, or, potentially, augment their claim with further evidence. Survivors should be able to extend the offer period by notifying the programme. But should the survivor fail to respond within a reasonable period, the offer should lapse and the claim should close. Ireland's RIRB experienced difficulties with claims that they could not close because

survivors did not respond to settlement offers. Those claims continued in limbo until the Dáil legislated to terminate them. After a reasonable period, the survivor's failure to respond should be treated as a refusal. That refusal would leave survivors able to reanimate their claim either through litigation or in a successor programme.

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Tensions between the public and private are a theme in this study. I have previously remarked that individual monetary payments can individualise and privatise experiences that are better understood as collective and systemic injuries affecting families, communities, peoples, and polities. Pushing back against those individualising tendencies, Madelaine Dion Stout and Rick Harp advocate giving Indigenous survivors the option of linking payments to a communal sweat (Dion Stout and Harp 2007: 63). Non-Indigenous survivors might also appreciate payment ceremonies. While apology letters are worthwhile, '[A] lot of applicants wanted a face-to-face apology. A standard letter, even though it came from the Premier, didn't really cut it with them' (AU Interview 8).

Policymakers should consider having ceremonies for awarding monetary payments. Participation would need to be strictly voluntary, but having community events could be valuable for those who choose to participate. Ceremonies might be tailored to the survivors' context. Some survivors might prefer an intimate approach involving only a small number of people. Others would benefit from larger events. Still others might want a response to a specific institution, such as a large orphanage or residential school. Where survivors have gone through redress as a group, that collective might host the ceremony. Again, there is value to taking a flexible approach.

However devised, formal processes communicate respect for survivors and provide opportunities to develop and affirm the meaning of payments. One could imagine survivors participating in a ceremony with politicians or senior civil servants. Some survivors might testify, but this would be voluntary and no one other than the survivor need know their payment values (which would have already been agreed). If survivors wish, the ceremony could include institutional representatives, such as church officials, offering personal apologies or statements. A formal event could link individual payments to larger practices of communal reconciliation in ways that militate against individualising tendencies. Community award ceremonies would enable senior officials to state

publicly how monetary redress connects with the survivors' membership in their communities and in the larger polity. That is one reason the survivor advocate Sir Roger Martin argues that redress programmes should include a ceremonial recognition of the survivors as citizens (Neilson 2019). Martin argues that care leavers need to be publicly recognised both as survivors and as equal citizens.

If community events acknowledge survivors publicly, they could also help shape survivors' understanding of their redress monies in positive ways. Some survivors report that they feel their redress money, or things purchased with it, are tainted by their association with abuse or neglect (Feldthusen, Hankivsky, and Greaves 2000: 98; Dion Stout and Harp 2007: 33; The Royal Commission of Inquiry into Historical Abuse in State and Faith-Based Care 2021: 94). A communal celebration could help mitigate the sense that redress money is soiled. Adding to their intrinsic value, high-profile events could encourage the development of survivor networks. Moreover, by publicly highlighting survivors' needs, such events could provide opportunities for advocacy that helps secure funding for necessary support services. Of course, payment ceremonies create additional costs and delays. And privacy concerns will deter some. But if the ceremony was optional, and attendance was cheap, it is an option worth exploring with survivors.

The potential benefits are evidenced by the value survivors find in the grand public apologies offered by senior politicians. It has become normal for premiers, prime ministers, and presidents to apologise to survivors. It has also become normal for survivor representatives to participate in those apologies. In 2008, Phil Fontaine, a survivor, and national chief of the AFN, spoke in Parliament in response to the Canadian prime minister's national apology for the residential schools. Accepting the apology, Fontaine described it as 'signif[ying] a new dawn in the relationship between us and the rest of Canada' (Fontaine 2008). Twelve years later, a survivor-focussed report confirms that apology 'had a profound effect on the Survivors in terms of feeling believed and having their personal experiences validated' (National Centre for Truth and Reconciliation 2020: 16). Larger communal ceremonies can recognise the collective and political character of the survivors' experiences of structurally injurious policy. When survivors see those apologies as components of a substantial and holistic remedial process (and not merely a self-serving publicity stunt), public apologies and monetary redress can each gain strength from one another, improving the quality of both.

13.5 Payment Recommendations

- Survivors are due full compensation; therefore, a programme needs to demonstrate that it has made a credible effort to appraise the disvalue of injuries.
- Programmes need to use the best available methods to develop credible payment values, drawing upon data and techniques from markets, litigation, insurance, and public health. Appropriate values will vary from time to time and place to place and will be more credible when co-developed with survivors.
- If a redress programme offers a base payment, it might be set at a value sufficient to make a tangible difference in survivors' lives.
- Although survivors have a right to full compensation, programmes might consider using categories that group roughly similar injuries together and pay the same amount of money to all those assessed at a specific standard.
- Better programme design would provide multiple avenues for redress wherein lower payments are associated with roughly assessed and lower cost processes, while also enabling survivors to choose more nuanced pathways to fuller compensation.
- Programmes will need to make provisions for legally incapable survivors to apply for and obtain redress.
- Programmes should offer survivors the option of putting their redress payments into pension and/or trust facilities.
- Programmes should not use concerns for survivors' well-being to impose paternalistic restrictions on their use of redress payments.
- Holistic redress programmes should provide a range of direct support services, rather than make survivors apply for in-kind redress.
- Programmes should advertise and report median average payment values, and encourage the media to do likewise.
- Programmes should offer survivors clear explanations of what their redress is for, and how values were derived. Survivors should be able to choose whether they will receive an explanation, or not.
- Redress should be accompanied by both collective and personal apologies. These might be provided orally and/or in writing.
- Personal apologies should not be limited to generic statements. Better apologies clearly indicate who is taking responsibility for what.
- Payments should be accompanied by statements regarding what has and will happen with the survivor's information and enable survivors to direct what will happen with their information.

- Programmes should only ask survivors to sign waivers when they have been offered credible redress payments. It is unfair to ask survivors to waive claims for which they have not been offered credible payments.
- Survivors need enough time to consider payment offers, however, their claim should lapse once that period concludes.
- Policymakers should consider developing redress ceremonies that recognise the collective and political character of injuries experienced in care.

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.

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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).

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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.

APPENDICES

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Appendix 1

Historic Currency Prices

This table of conversion factors provides readers with a guide to the historic value of currencies. The table displays factors the reader can use to convert monetary values given in the text to 2021 USD.

I derived the factors in the table as follows. First, I deflated the historic value of the currency by the GDP implicit price deflation factor for each year. That figure was converted into a percentage representing the historic value as a percent of the currency's value in 2021. That inflated value was then multiplied by a conversion factor for 2021 USD. The 2021 USD conversion factors are:[1]

AUD = 0.76382	GBP = 1.40152
CDN = 0.81780	NZD = 0.70997
EURO = 1.20393	SEK = 0.11901

Historic GDP implicit prices were obtained from the Federal Reserve Bank of St. Louis, a component of the United States' Federal Reserve System.[2] The prices for Euros is relative to Irish inflation as distinct from that of other European jurisdictions.

[1] 30 June 2021 USD conversions from https://www.ofx.com/

[2] The price date for each currency is 1 July of the respective year for Australia, Canada, New Zealand, and the USA. British, Swedish, and Irish prices are taken at 1 January.

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YEAR	AUD	CDN	IRISH €	GBP	NZD	SEK	USD
1995	1.22248	1.21160	*No Data*	2.14912	1.04204	0.16285	1.47120
1996	1.21206	1.20211	*No Data*	2.10923	1.03063	0.16196	1.45885
1997	1.20793	1.19645	1.76654	2.11264	1.03050	0.16060	1.44583
1998	1.20334	1.19921	1.71603	2.09712	1.02465	0.15987	1.43729
1999	1.19632	1.18255	1.68008	2.08386	1.02065	0.15905	1.42722
2000	1.17127	1.15736	1.62119	2.06693	1.01026	0.15767	1.40852
2001	1.15769	1.15364	1.55841	2.04808	0.99231	0.15536	1.39119
2002	1.14324	1.14090	1.50766	2.02669	0.98323	0.15388	1.37943
2003	1.12776	1.12128	1.46739	1.99772	0.97642	0.15223	1.36319
2004	1.10843	1.09897	1.46185	1.96977	0.95550	0.15191	1.34003
2005	1.08014	1.07755	1.42880	1.93480	0.94264	0.15123	1.31241
2006	1.05050	1.06005	1.39085	1.90204	0.93684	0.14948	1.28487
2007	1.02671	1.04144	1.37707	1.86895	0.90266	0.14661	1.26182
2008	0.97483	1.00039	1.38289	1.82969	0.88884	0.14324	1.24275

2009	0.98875	1.02805	1.43617	1.80815	0.87750	0.14071	1.24161
2010	0.93999	1.00972	1.46890	1.79058	0.85830	0.13966	1.22833
2011	0.90595	0.98228	1.45292	1.76382	0.83883	0.13845	1.20520
2012	0.91580	0.97300	1.42818	1.74252	0.84603	0.13733	1.18885
2013	0.90498	0.95788	1.41774	1.71246	0.81709	0.13627	1.17209
2014	0.90703	0.94072	1.41837	1.69063	0.80820	0.13428	1.15138
2015	0.90858	0.94784	1.33229	1.86350	0.80359	0.13180	1.14126
2016	0.90057	0.94325	1.32381	1.65686	0.79142	0.12999	1.13186
2017	0.87478	0.92646	1.31258	1.63088	0.76603	0.12741	1.11212
2018	0.85318	0.90538	1.30387	1.60182	0.75595	0.12445	1.08519
2019	0.82379	0.89769	1.25180	1.57193	0.73798	0.12123	1.06598
2020	0.82406	0.88660	1.26737	1.48321	0.72281	0.11901	1.05227
2021	0.76382	0.81780	1.20393	1.40152	0.70997	0.11901	1.00000

To illustrate the table's use, Chapter 7 gives the maximum payment value for New Zealand's HCP's Fast Track process as NZD$50,000. Most fast track payments were made in 2015, therefore, to understand the relative 2021 USD value, the reader would multiply 50,000 by the 2015 NZD conversion factor (0.80359):

0.80359 X 50,000 = 2021 USD$40,179.50.

If the reader wishes to know 2021 values in the original currency, they can revert to online calculators offered by national institutions:

Australia: www.rba.gov.au/calculator/

Canada: www.bankofcanada.ca/rates/related/inflation-calculator/

Ireland: www.cso.ie/en/interactivezone/visualisationtools/cpiinflationcalculator/

Britain (England): www.bankofengland.co.uk/monetary-policy/inflation/inflation-calculator

New Zealand: www.rbnz.govt.nz/monetary-policy/inflation-calculator

Sweden does not offer an English language calculator and the USD figures are given in the table.

Appendix 2

Interviews

Interview Number	Interviewee	Start Time	Date	Number of Interviewees
Ireland				
IR Interview 1	Advocate	1030	6-Nov-14	1
IR Interview 2	Advocate	1500	6-Nov-14	2
IR Interview 3	State	1430	10-Nov-14	2
IR Interview 4	State/Service	1300	11-Nov-14	1
IR Interview 5	State	1000	12-Nov-14	1
IR Interview 6	Advocate/ Service	1030	13-Nov-14	2
IR Interview 7	State	1100	18-Nov-14	2
IR Interview 8	State	1430	19-Nov-14	2
IR Interview 9	Advocate	1030	20-Nov-14	2
IR Interview 10	State	1430	20-Nov-14	1
IR Interview 11	Service	0930	28-Nov-14	1
Ireland Total Interviewees				**17**

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(*cont.*)

Interview Number	Interviewee	Start Time	Date	Number of Interviewees
Australia				
AU Interview 1	Advocate/ Service	1300	2-Feb-16	1
AU Interview 2	State	1030	3-Feb-16	1
AU Interview 3	State	1030	4-Feb-16	3
AU Interview 4	Service	1430	6-Feb-16	2
AU Interview 5	Service	1000	5-Feb-16	1
AU Interview 6	Advocate/ Service	1330	8-Feb-16	1
AU Interview 7	Service	1000	9-Feb-16	1
AU Interview 8	State	1000	10-Feb-16	1
AU Interview 9	State	1330	11-Feb-16	1
AU Interview 10	Advocate/ Service	1000	15-Feb-16	1
AU Interview 11	Advocate/ Service	1300	17-Feb-16	1
AU Interview 12	State	1100	18-Feb-16	1
AU Interview 13	Advocate	0930	19-Feb-16	1
AU Interview 14	Advocate	1000	23-Feb-16	1
AU Interview 15	Advocate	1430	23-Feb-16	1
AU Interview 16	Service	1000	25-Feb-16	2
AU Interview 17	Advocate/ Service	1200	25-Feb-16	2
Australia Total Interviewees				**22**

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(*cont.*)

Interview Number	Interviewee	Start Time	Date	Number of Interviewees
Canada				
CA Interview 1	Advocate/ Service	1000	31-Oct-16	1
CA Interview 2	Advocate/ Service	1300	31-Oct-16	1
CA Interview 3	State	1130	16-Nov-16	1
CA Interview 4	State	1400	16-Nov-16	2
CA Interview 5	Advocate	1130	17-Nov-16	3
CA Interview 6	State	1000	18-Nov-16	3
CA Interview 7	State	0930	21-Nov-16	1
Canada Total Interviewees				**12**
Aotearoa New Zealand				
NZ Interview 1	Advocate/ Service	1500	24-May-17	1
NZ Interview 2	Advocate	1100	13-Jun-17	2
NZ Interview 3	State	1400	13-Jun-17	1
NZ Interview 4	State	1100	14-Jun-17	3
NZ Interview 5	State	1400	14-Jun-17	1
NZ Interview 6	State	1000	17 & 25-Jul-17	1
NZ Interview 7	State	1000	18-Jul-17	1
NZ Interview 8	Advocate	1100	29-Jul-17	2
Aotearoa New Zealand Total Interviewees				**12**
Combined Total Interviewees				**63**

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Appendix 3

Payment and Assessment Matrices

3.1. RIRB's Matrix for Assessing Severity

Available Points	Abuse in Care	Consequential Damage		
		Medically verified physical/psychiatric illness	Psycho-social damage*	Loss of Opportunity
	1–25	1–30	1–30	1–15

* Examples of injurious psycho-social damage included problems with family attachment, cognitive impairment, and substance abuse.
Source: Adapted from (The Compensation Advisory Committee 2002)

3.2. The RIRB's Payment Matrix and Outcomes

Redress Bands	Points	Award Payable	Number of Payments	Percent of Total
V	>70	€200–300 000	48	0.30%
IV	55 to 69	€150–200 000	280	1.8%
III	40 to 54	€100–150 000	2073	13.31%
II	25 to 39	€50–100 000	7523	48.28%
I	< 25	Up to €50 000	5655	36.30%
Total			**15,579**	

Source: (McCarthy 2016: 26)

3.3. Magdalene Redress Payment Matrix

Years spent in residence	Residence	Labour	Total
(up to 3 months)	€ 10,000	€ 1,500	€ 11,500
1	€ 14,500	€ 6,000	€ 20,500
2	€ 20,500	€ 12,000	€ 32,500
3	€ 26,500	€ 18,000	€ 44,500
4	€ 32,500	€ 24,000	€ 56,500
5	€ 38,500	€ 30,000	€ 68,500
6	€ 40,000	€ 36,000	€ 76,000
7	€ 40,000	€ 42,000	€ 82,000
8	€ 40,000	€ 48,000	€ 88,000
9	€ 40,000	€ 54,000	€ 94,000
10	€ 40,000	€ 60,000	€ 100,000
10+ years	€ 40,000	€ 60,000	€ 100,000

Source: Adapted from (Quirke 2013: 43) (Payments calculated per month of residence).

3.4. Queensland Redress Assessment Matrix

Type of harm	Weighting	% Range
Physical injury (including harm from Sexual Abuse and/or Neglect) – During Placement	0–20	Low 0–6%
		Medium 7–15%
		High 16–20%
Physical injury (including harm from Sexual Abuse and/or Neglect) – Post Placement	0–5	Low 0–1%
		Medium 2–3%
		High 4–5%
Physical illness – During Placement	0–5	Low 0–1%
		Medium 2–3%
		High 4–5%
Physical illness – Post Placement	0–5	Low 0–1%
		Medium 2–3%
		High 4–5%
Psychological injury/ Psychiatric illness (including harm from Sexual Abuse, Systems Abuse and/or Neglect) – During Placement	0–34	Low 0–10%
		Medium 11–28%
		High 29–34%
Psychological injury/ Psychiatric illness (including harm from Sexual Abuse, Systems Abuse and/or Neglect) – Post Placement	0–16	Low 0–4%
		Medium 5–12%
		High 13–16%
Loss of opportunity	0–15	Low 0–4%
		Medium 5–12%
		High 13–15%
Total		0–100%

Source: (Royal Commission into Institutional Responses to Child Sexual Abuse 2015: 550-51)

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3.5. Queensland Redress Payment Matrix

Level	Severity	Points	$AUD Value*
1	N/A	0–14	$7000
2	No payment	0–14	$0
	Very Serious	15–24	$6000
	Severe	25–39	$14,000
	Extreme	40–59	$22,000
	Very Extreme	60–100	$33,000

Source: (Adapted from Royal Commission into Institutional Responses to Child Sexual Abuse 2015: 118 & 551)

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3.6. Redress WA Assessment Matrix

Assessment Matrix

Assessment Matrix **Name:** **Application No: 00000**

SRO **Check** **Approval**

1.Severity of Abuse and/or Neglect

Scale for this section: Moderate =1 Serious= 2 Severe= 3-4 Very Severe= 5

a) Sexual/Physical Abuse (give rating for highest- do not average or add)

b) Emotional/Psychological Abuse

c) Neglect

d) Frequency Nature of Abuse and/or Neglect

Subtotal 0 0 0

2. Compounding or Ameliorating Factors

a) Period of Time in Abusive Care

The longer the period in abusive care, the more adverse the impact on the child's development and wellbeing. Assess the time in abusive care, not the entire period of wardship or guardianship

Moderate (<3 yr)= 1 Serious (3-5 yrs)= 2 Severe (5-10 yrs)= 3 Very Severe (>10 yrs)= 4

b) Age of Child at Entry to First Abusive Care Placement

The younger the child the more adverse the impact abuse and/or neglect may have on the child's development and wellbeing

Moderate (>13 yrs)= 1 Serious (10-13 yrs)= 2 Severe (6-10 yrs)= 3 Very Severe (<6)= 4

c) Isolation and Depersonalization

Isolation as it relates to being in a mission or other institution with no or little contact with the outside world, or being in a foster care situation but not permitted contact except for school and/or depersonalization as it relate to being place in an institution or mission and living in dormitories and/or being dressed in similar clothes not being called by your name etc

Moderate= 1 Serious= 2 Severe=3 Very Severe= 4

d) Amount of Contact with Parent(s) or Extended Family

(Use contact time while in care, regardless of whether or not it was negative or positive)

Moderate (>5 contacts)= 1 Serious (3-5)=2 Severe (1-3)= 3 Very Severe (No contact)= 4

e) Position or Role of Abuser in the Placement or Organisation

Moderate	Stranger or Visitor= 1
Serious	Gardener or Cleaner= 2
Severe	Manager, Team Leader, Other Residents, Volunteer, Relative= 3
Very Severe	Superintendent, Matron, Welfare Officer, Direct Care Worker, House Parent, Foster Parent, Group Worker, Parent or Significant Carer= 4

Subtotal 0 0 0

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(*cont.*)

3. Consequential Harm - Extent of Injury, Loss or Harm Resulting from Abuse and/or Neglect

Scale for this section: Moderate =1 Serious= 2 Severe= 3-4 Very Severe= 5

a) Physical Harm (consider care period and ongoing consequences)

b) Psychological/Psychiatric Harm (consider care period and ongoing consequences)

c) Social Harm- Behavioural/psychosocial (consider care period and ongoing consequences)

d) Sexual Impact (sexual dysfunction, negative body image, anxiety about sex etc)

Subtotal	0	0	0

4. Aggravating Factors (combined with acts of abuse and/or neglect that occurred during care)

To be determined by applicants statements and/or assessment of the case

Scale for this section: Moderate level or short time in care = .05 Very severe level and longer time in care = 2

a) Verbal Abuse

b) Racist Acts

c)Threats/Intimidation (ie direct threats)

d) Intimidation/Inability to complain; oppression (ie indirect threats)

e) Humiliation; degradation

f) Sexual abuse accompanied by violence

g) Abuse of particularly vulnerable child (eg age <6; disability; language; absence of parent)

h) Failure to provide care of emotional support following abuse requiring such care

i) Witnessing another child being subject to abuse

j) Use of religious doctrine, paraphernalia or authority during, or in order to, facilitate the abuse

Subtotal	0	0	0
Total	0	0	0

Level

0	0	0

Comments

Certified: Date: / / 2010 Approved: Date: / / 2010

Source: (Government of Western Australia 2010: 47)

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3.7. Redress WA Severity Standards

Descriptions	
– Excessive harsh discipline and emotional or physical abuse of an ongoing or sustained nature inconsistent with care standards of time with identified severe psycho-social or medical impacts – Loss of family contact/identity – Multiple placements resulting in isolation and depersonalisation over a sustained period of time – Denial of rights including educational opportunities over a sustained period with long term social impacts leading to loss of opportunity – Sexual abuse of a sustained or severe nature (ongoing incidents) resulting in severe psychological trauma and/or social impacts – Possible need for counselling or other assistance on a long term basis – In care for 10++ years	Extreme
– Excessive harsh discipline and emotional or physical abuse of an ongoing or sustained nature inconsistent with care standards of time – Loss of family contact-identity – Multiple placements resulting in isolation and depersonalisation over a sustained period of time – Denial of rights including educational opportunities over a sustained period – Sexual abuse of a sustained or severe nature (single or ongoing incidents by a caregiver or someone authorised to supervise the child) resulting in severe psychological trauma and/or social impacts. – Counselling or other assistance likely to be required on an ongoing basis – In care 10+ years	

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(*cont.*)

Descriptions	
– Excessive harsh discipline and emotional or physical abuse of an ongoing or sustained nature inconsistent with care standards of time – Loss of family contact – Multiple placements resulting in isolation and depersonalisation over a sustained period of time – Denial of rights including educational opportunities over a sustained period – Sexual abuse of a sustained or severe nature or over a long period of time by a caregiver or someone authorised to supervise the child resulting in long term psychological harm – In care 8–10 years	Severe
– Excessive harsh discipline and emotional or physical abuse of an ongoing or sustained nature inconsistent with care standards of time – Loss of family contact – Multiple placements resulting in isolation and depersonalisation over a sustained period of time – Denial of rights including educational opportunities over a sustained period – Sexual abuse advances which destroyed trust and innocence over a sustained period by a caregiver or someone authorised to supervise the child – In care 6–8 years	
– Excessive harsh discipline and emotional or physical abuse of an ongoing or sustained nature inconsistent with care standards of time – Loss of family contact resulting in ongoing psychological or social harm – Denial of rights including educational opportunities – Sexual advances of a mild or limited nature by a caregiver or someone authorised to supervise – In care 5–6 years	

(*cont.*)

Descriptions	
– Excessive harsh discipline and physical abuse of an ongoing or sustained nature inconsistent with care standards of time – Denial of rights including, for example, loss of educational opportunities – Loss of family contact or identity for a sustained period of time – Moderate long term psychological, social or medical impacts – Sexual advances or abuse of a severe or ongoing nature by someone other than caregiver or person in authority – In care 4–5 years – Excessive and harsh discipline of a severe and ongoing nature inconsistent with care standard of [*sic*] – Denial of rights including, for example, loss of educational opportunities – Loss of family contact – Mild psychological or social impacts of an ongoing nature – Sexual advances or abuse of a limited or mild nature by someone other than caregiver or person in authority – In care 3–4 years	Serious
– Excessive discipline/moderate physical abuse of an ongoing nature (multiple incidents/ongoing) inconsistent with care standards of time – Loss of family contact – Mild loss of rights, including educational opportunities – No allegations of sexual abuse – In care up to 3 years	Moderate
– Harsh discipline/moderate physical abuse inconsistent with care standards of time – Short period – Minimal ongoing psycho-social impacts – No allegations of sexual abuse – In care up to 2 years	
– Harsh discipline/mild physical abuse inconsistent with care standards of time – Limited period of placement – Minimal ongoing impacts – No allegations of sexual abuse – In care up to 12 months.	

Source (Government of Western Australia 2010: 65)

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3.8. IAP Abuse and Harm

	Acts Proven	Compensation Points
SL5	• Repeated, persistent incidents of anal or vaginal intercourse. • Repeated, persistent incidents of anal/vaginal penetration with an object.	45–60
SL4	• One or more incidents of anal or vaginal intercourse. • Repeated, persistent incidents of oral intercourse. • One or more incidents of anal/vaginal penetration with an object.	36–44
SL3	• One or more incidents of oral intercourse. • One or more incidents of digital anal/vaginal penetration. • One or more incidents of attempted anal/vaginal penetration (excluding attempted digital penetration). • Repeated, persistent incidents of masturbation.	26–35
PL	• One or more physical assaults causing a physical injury that led to or should have led to hospitalization or serious medical treatment by a physician; permanent or demonstrated long-term physical injury, impairment or disfigurement; loss of consciousness; broken bones; or a serious but temporary incapacitation such that bed rest or infirmary care of several days duration was required. Examples include severe beating, whipping, and second-degree burning.	11–25
SL2	• One or more incidents of simulated intercourse. • One or more incidents of masturbation. • Repeated, persistent fondling under clothing.	11–25

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(*cont.*)

	Acts Proven	Compensation Points
SL1	• One or more incidents of fondling or kissing. • Nude photographs taken of the Claimant. • The act of an adult employee or other adult lawfully on the premises exposing themselves. • Any touching of a student, including touching with an object, by an adult employee or other adult lawfully on the premises which exceeds recognized parental contact and violates the sexual integrity of the student.	5–10
OWA	• Being singled out for physical abuse by an adult employee or other adult lawfully on the premises which was grossly excessive in duration and frequency and which caused psychological consequential harms at the H3 level or higher. • Any other wrongful act committed by an adult employee or other adult lawfully on the premises which is proven to have caused psychological consequential harms at the H4 or H5 level.	5–25

Source: (Canada et al. 2006: Schedule D)

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3.9. IAP Consequential Harms

Level of Harm	Consequential Harm	Points
H5	Continued harm resulting in serious dysfunction. Evidenced by: psychotic disorganization, loss of ego boundaries, personality disorders, pregnancy resulting from a defined sexual assault or the forced termination of such pregnancy or being required to place for adoption a child resulting therefrom, self-injury, suicidal tendencies, inability to form or maintain personal relationships, chronic post-traumatic state, sexual dysfunction, or eating disorders.	**20–25**
H4	Harm resulting in some dysfunction. Evidenced by: frequent difficulties with interpersonal relationships, development of obsessive-compulsive and panic states, severe anxiety, occasional suicidal tendencies, permanent significantly disabling physical injury, overwhelming guilt, self-blame, lack of trust in others, severe post-traumatic stress disorder, some sexual dysfunction, or eating disorders.	**16–19**
H3	Continued detrimental impact. Evidenced by: difficulties with interpersonal relationships, occasional obsessive-compulsive and panic states, some post-traumatic stress disorder, occasional sexual dysfunction, addiction to drugs, alcohol or substances, a long term significantly disabling physical injury resulting from a defined sexual assault, or lasting and significant anxiety, guilt, self-blame, lack of trust in others, nightmares, bed-wetting, aggression, hyper-vigilance, anger, retaliatory rage and possibly self-inflicted injury.	**11–15**

(*cont.*)

Level of Harm	Consequential Harm	Points
H2	Some detrimental impact. Evidenced by: occasional difficulty with personal relationships, some mild post-traumatic stress disorder, self-blame, lack of trust in others, and low self-esteem; and/or several occasions and several symptoms of: anxiety, guilt, nightmares, bed-wetting, aggression, panic states, hyper-vigilance, retaliatory rage, depression, humiliation, loss of self-esteem.	**6–10**
H1	Modest Detrimental Impact. Evidenced by: occasional short-term, one of: anxiety, nightmares, bed-wetting, aggression, panic states, hyper-vigilance, retaliatory rage, depression, humiliation, loss of self-esteem.	**1–5**

Source: (Canada et al. 2006: Schedule D)

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3.10. IAP Aggravating Factors

Add 5–15% of points for Act and Harm combined
Verbal abuse
Racist acts
Threats
Intimidation/inability to complain; oppression
Humiliation; degradation
Sexual abuse accompanied by violence
Age of the victim or abuse of a particularly vulnerable child
Failure to provide care or emotional support following abuse requiring such care
Witnessing another student being subjected to an act set out on page 3
Use of religious doctrine, paraphernalia or authority during, or in order to facilitate, the abuse
Being abused by an adult who had built a particular relationship of trust and caring with the victim (betrayal)

Source: (Canada et al. 2006: Schedule D)

3.11. IAP Future Care

Future Care	Additional Compensation
General – medical treatment, counselling	up to $10,000
If psychiatric treatment required, cumulative total	up to $15,000

Source: (Canada et al. 2006: Schedule D)

3.12. IAP Consequential Loss of Opportunity

Consequential Loss of Opportunity		Points
OL5	Chronic inability to obtain employment	21–25
OL4	Chronic inability to retain employment	16–20
OL3	Periodic inability to obtain or retain employment	11–15
OL2	Inability to undertake/complete education or training resulting in underemployment, and/or unemployment	6–10
OL1	Diminished work capacity – physical strength, attention span	1–5

Source: (Canada et al. 2006: Schedule D)

3.13. IAP Points to Payment Conversion

Compensation Points	Compensation ($)
1–10	$5,000–$10,000
11–20	$11,000–$20,000
21–30	$21,000–$35,000
31–40	$36,000–$50,000
41–50	$51,000–$65,000
51–60	$66,000–$85,000
61–70	$86,000–$105,000
71–80	$106,000–$125,000
81–90	$126,000–$150,000
91–100	$151,000–$180,000
101–110	$181,000–$210,000
111–120	$211,000–$245,000
121 or more	Up to $275,000

Source: (Independent Assessment Process Oversight Committee 2021: 95)

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3.14. New Zealand's HCP Assessment Matrix (Fast Track Process)

Category 1 NZD$50,000	**Prolonged and Serious Abuse** The claimant has suffered: • Serious physical abuse perpetrated by a staff member or caregiver; and/or • Serious sexual abuse perpetrated by a staff member or caregiver; **and** that abuse has been repeated and sustained over a significant period of time. The abuse may have occurred in one placement or multiple placements. **It is expected that most claimants in this category will have suffered both serious physical and serious sexual abuse.** This category also includes claimants who have suffered serious abuse **and** have also been subject to significant periods of false imprisonment. ***Definitions:*** *Serous physical abuse* in this category may be defined as closed fist punching; the use of implements and kicking/stomping that results in broken bones or other trauma and would ordinarily require medical attention or hospitalisation. *Serious sexual abuse* in this category may be defined as sexual violation or any other sexual offence that carries a maximum sentence of 10 years or more. *False imprisonment* is as legally defined – ie, held without any legal cause and includes being held in any form of alternate care without legal basis.
Category 2 NZD$40,000	**Serious Abuse – Multiple Incidents** The claimant has suffered: • Serious physical abuse perpetrated by one or more staff members or caregivers on more than 3 occasions; and/or • Serious sexual abuse perpetrated by one or more staff members or caregivers on more than 3 occasions; or • Has been subject to significant periods of false imprisonment. **It is expected that most claimants in this category will have suffered both serious physical and serious sexual abuse.**

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(*cont.*)

	This category is distinguished from Category 1 by the fact that the abuse is not over such a prolonged and sustained period of time. ***Definitions:*** *Serous physical abuse* in this category may be defined as closed fist punching; the use of implements and kicking/stomping that results in broken bones or other trauma and would ordinarily require medical attention or hospitalisation. *Serious sexual abuse* in this category may be defined as sexual violation or any other sexual offence that carries a maximum sentence of 10 years or more. *False imprisonment* is as legally defined – ie, held without any legal cause and includes being held in any form of alternate care without legal basis.
Category 3 NZD $30,000	**Serious Abuse** The claimant has suffered: • Serious physical abuse perpetrated by one or more staff members or caregivers on three (3) or fewer occasions; and/or • Serious sexual abuse perpetrated by one or more staff members or caregivers on three (3) or fewer occasions; or • Has been subjected to more than three (3) weeks in secure care without reasonable cause, **and** • Has suffered physical or sexual abuse either while in secure care or in other placements. ***Definitions:*** *Serous physical abuse* in this category may be defined as closed fist punching; the use of implements and kicking/stomping that results in broken bones or other trauma and would ordinarily require medical attention or hospitalisation. *Serious sexual abuse* in this category may be defined as sexual violation or any other sexual offence that carries a maximum sentence of 10 years or more. *False imprisonment* is as legally defined – ie, held without any legal cause and includes being held in any form of alternate care without legal basis.

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(*cont.*)

Category 4 NZD$20,000	**Moderate Abuse** The claimant has suffered: • Moderate physical abuse perpetrated by one or more staff members or caregivers; and/or • Moderate sexual abuse perpetrated by one or more staff members or caregivers; or • Serious sexual abuse (as previously defined) by other residents; or • Has been subjected to more than three (3) weeks in secure care without reasonable cause. ***Definitions:*** *Moderate physical abuse* in this category may be defined as assaults with or without hands that result in visible injury such as bruising or abrasions and ordinarily the need for medical attention. *Moderate sexual abuse* in this category may be defined as offences that attract a maximum penalty of less than 10 years. *Without reasonable cause* is defined as there being no identifiable or document rationale for placement in secure beyond that period of time.
Category 5 NZD$12,000	**Low Level Abuse** The claimant has suffered: • Low level physical abuse perpetrated by one or more staff members or caregivers; and/or; • Low level sexual abuse perpetrated by one or more staff members or caregivers or; • Sexual abuse (as previously defined) by other residents; or • Held in secure care for less than three (3) weeks without reasonable cause, and has suffered low level physical abuse. This category includes more serious sexual assaults by other children or young people that do not constitute the same breach of trust as above.

(*cont.*)

	Definitions: *Physical abuse* defined physical punishment beyond the standard allowed or assaults with or without hands that result in no injury other than bruising. *Sexual abuse* defined as watching, inappropriate touching and exposure.
Category 6 NZD$5000	Claims with Insufficient Particulars The claimant has made: • claims of physical abuse or ill-treatment where the claimant has been unable to provide sufficient particulars, or where the claimant readily identifies a practice failure that did not result in abuse.

Source: Anonymous[1]

[1] In response to an Official Information Act request, I was sent the numerical steps that occupy the left-hand column (MSD 20 September 2017, on file with the author). However, the descriptions were blanked out and I had to get them from an anonymous source.

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