# 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.