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TO: Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions

FROM: Dr Stephen Winter, Senior Lecturer in Political Theory.

DATE: 19 December 2019

RE: Issues paper: Redress (civil litigation): Submission Part A

Preamble

As per my email exchange with Boris van Beusekom on 5 December 2019, my submission on this issue will comprise two parts (A & B). This document comprises Part A of my submission and concerns the operation of the Ministry of Social Development's Historic Claims Unit 2004-2018. However, New Zealand's processes are changing, in part, as a result of the Commission. For example, in 2019 the Ministry published the guidelines it is now using to process claims, which is a significant step forward (Hrstich-Meyer, 2019). Part B of this submission will follow in early 2020 and will concern ameliorative recommendations. I would like to thank the Commission for this flexible arrangement.

Background

For the past several years, my primary field of research has been the operation of monetary redress programmes for survivors of institutional abuse. I have published several works on this topic,[1] the most relevant is appended to this submission. Internationally, I am a founding executive member of the 'Dialogues for Historical Justice and Memory' and take a leading role in the International Network on Studies of Inquiries into Child Abuse, Politics of Apology and Historical Representations of Children in Out-of-Home Care. Domestically, I work with the Royal Commission Forum. This submission is made on behalf of myself and does not reflect the opinions of any other person or agency.

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[1] (Winter, 2008, 2009, 2011; 2014, Chapter 9; 2015, 2017, 2018a, 2018b, 2019) This submission reproduces some material from (Winter 2018a).

I am happy to put my expertise at the service of the Commission, insofar as I can spare time from other duties. As a scholar of politics, my research focusses on state-run programmes that aim to remedy injuries experienced by young people while in state care. In particular, I have been collecting in-depth data on the operation of seven monetary programmes in four countries:

Ireland: Residential Institutions Redress (Industrial Schools) programme (2003–16)

Ireland: Magdalene Laundries Restorative Justice Scheme (2013-)

Canada: Common Experience Payment (CEP), which is part of the Indian Residential Schools Settlement Agreement (2006–13),

Canada: Individual Assessment Process (IAP), which is part of the Indian Residential Schools Settlement Agreement (2006–),

New Zealand: Historic Claims Process (2008–);

Australia: Western Australia's Redress WA programme (2007–2012)

Australia: Queensland's Redress Scheme (2007–2010).

That data includes information interviews with stakeholders in all four countries, including eight interviews conducted with twelve interviewees in New Zealand in 2017. Those interviewees were drawn from state institutions as well as non-governmental organisations (NGOs). Interviewees were senior officials with comprehensive knowledge of monetary redress operations and/or the effect of those operations on survivors. As interviewees were assured anonymity, the submission references different interviews by number.

Summary of this submission

In 2018, the "Short Report" of a Hui[2] held in Wellington (14-15 February) to contribute to the Royal Commission's consultation process concluded:

> The state 'compensation' processes of MSD, MOE and MOH are widely regarded as flawed, non-transparent and led by a culture of state protection. No survivors were consulted in establishing these schemes. They cannot continue in their present form and the Commission must act quickly to understand the current processes and make

[2] The author attended and contributed to that Hui.

> recommendations to develop new redress schemes for victims. In doing so, the RC must provide recommendations on acceptable levels of compensation, as overseas Inquiries have done (Stanley, Cooper, Noonan, & Erueti, 2018, unpaginated)

Those judgements are accurate. But these faults are not attributable to the work of Ministry staff, who, it is my belief, work hard to be holistic, flexible and survivor-focussed. The problems are, at root, structural.

The Commission's August issue paper asks for comment on a number of points both descriptive and critical. This submission primarily addresses "Point 2 - Equal and effective access to justice: the challenges of litigation". Among the topics that Point 2 invites comment upon, this submission primarily concerns the final subpoint:

> *The approach of Crown agencies and other organisations to resolving civil claims through out of court processes, including settlement of claims and confidentiality agreements*

This submission describes the Ministry of Social Development's approach to the settlement of claims and identifies nine key criticisms: a lack of appropriate **regulation**, **non-transparency**, a lack of **impartiality, and consistency**, the **limited and uncertain range of redressable injuries**, the **slow speed** of the programme, its lack of **Māori engagement** and insufficient provisions for **records access** and **survivor support**.

In the course of that discussion, the submission provides data relevant to four supplementary points:

> POINT 4 - Access to relevant information
>
> POINT 5 - Well-being of survivors
>
> POINT 6 - The impact of abuse on families and whanau
>
> POINT 8 - Adequate, prompt, and effective redress

I highlight paragraphs relevant to those supplementary points.

Background to the New Zealand process

The New Zealand courts tend to be more hostile to historic claims than some overseas jurisdictions, where, although the difficulties are significant, at least some survivor claims are successful. My understanding is that no claim has obtained a judgement favourable to survivors in New Zealand, although that may be partly due to the Crown's willingness to settle better-founded claims out-of-court.

Over the past couple of decades, three New Zealand ministries have operated out-of-court redress processes: Health, Education and Social Development. The Ministry of Social Development garners the most attention as it has received most of the claims. This submission will focus on The Ministry of Social Development (the Ministry) and its predecessor and/or successor institutions.

New Zealand's out-of-court process developed very differently from programmes in other countries. Elsewhere, specific policy documents or legislation create a redress programme's operative structure, however, in New Zealand, the process emerged in response to specific claims. Those responses coalesced into a set of practices, which, as the number of claims rose, became the responsibility of a specific agency within the Ministry of Social Development, the Historic Claims Unit (previously known as the Care Claims and Resolution Team).

At no point did New Zealand pass enabling legislation or otherwise 'establish' a distinctive redress programme. Therefore, whereas other states undertook to pay redress at certain values for specific forms of injury, New Zealand did not prospectively accept responsibility. New Zealand did not publish eligibility criteria, a procedural description nor payment schedules. The New Zealand approach was, effectively, an individual ADR or negotiation process. Indeed, before the 'Fast Track' (Two-Path) process started in 2015, it would be reasonable to argue that New Zealand did not have what most observers would call a redress programme.

New Zealand's process might be said to originate in 2004, when two Ministry staff were assigned to find relevant historical records to aid the Ministry in a specific case (*White v Attorney-General* [2010] NZCA 139). As further claims were received, in

2006, that team consulted with several litigants to ascertain what survivors might seek in an out-of-court process.

That feedback helped shape a programme that gave priority to survivors being "heard and acknowledged" (NZ Interview 6). New Zealand's programme was designed to help survivors obtain a remedy for their injuries through a process that was equitable, caring and personal. Validated claims would be remedied by formal acknowledgement or apology and a monetary settlement. Each claim was addressed holistically, with a highly individuated approach. The object of the procedure was to establish whether the Ministry had legal responsibility for the survivor's welfare when the survivor experienced abuse and determine an appropriate remedial response. The Ministry also took responsibility for helping provide access to records and counselling to support survivors in litigation. Although at first these services were provided as an adjunct to litigation, as the number of cases grew, the service developed an independent remit.

Historic litigation raised questions about the lawfulness of practice at different times by Ministry staff. Answering those questions required the Ministry to determine what laws and policies that were applicable contemporaneously. The Ministry contracted an outside researcher, Wendy Parker, to report on legal and practice standards between 1950 and 1994. Parker's report was supplemented by 15 institution-specific accounts of infrastructure, policy and staff (Parker, 2006). That information provided the Unit with baseline data to use in assessing claims. Based largely on official records, such as annual reports, Parker observes that the institutional reports describe recorded instances of abuse, training programs and significant events, such as fires, but they do not draw from survivor testimony or other unofficial sources (Parker, 2006, p. 7). As time passed, it is my understanding that the Unit has used information from subsequent claims to develop a database with information about particular institutions and individuals.

Since 2008, the primary policy governing historic claims has been the Crown litigation strategy. The strategy has three components:

(1) 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. (Office of the Minister of Social Development, 2014, p. 2 2)

POINT 8 – ADEQUATE, PROMPT, AND EFFECTIVE REDRESS

Points 1 and 2 provided a minimal regulatory framework for the process. The process is not amenable to judicial oversight. In *XY and Others* [2016] the court found that because the programme operated within the prerogative of the Crown, "the decisions in question [regarding redress] are not susceptible to assessment in terms of legality or otherwise and are therefore non-justiciable." Other accountability devices operated sub-optimally. The Ombudsman may exercise persuasive authority with regard to specific cases, however, it has a significant backlog of complaints and delays in Ministerial responses to requests for information by the Ombudsman impairs its effectiveness (NZ Interview 2). The New Zealand Human Rights Commission has been subject to serious government interference. In 2011, the Human Rights Commission wrote a draft report that strongly criticised the process (Human Rights Commission, 2011). Attorney General Chris Finlayson opposed the draft and the report was never published.[3] This left the programme in an almost unique situation. Without threat of liability and without adequate and effective legal or administrative oversight, survivors are in a very disadvantageous position.

Staffing

The Ministry's Historic Claims Unit grew slowly in response to the increasing number of claims. Staff turnover has been relatively low. The fact that the Unit is comprised of Ministerial staff and housed within the Ministry responsible for out of home care in New Zealand has raised significant criticisms pertaining to its impartiality. Claims are managed by 'advisors' who are all senior social workers and long-term employees of the Ministry (Hrstich-Meyer, 2017, p. 7). In some cases, advisors worked at facilities in which abuses occurred, which has raised concerns about their impartiality (Ministry of Social Development, 2018c, p. 12). Moreover, the location of the Unit within the Ministry limits its independence and may deter claimants (Stanley, 2015, p. 1155). The

[3] As of December 2019, the letters exchanged between Finlayson and the Commission were available at https://assets.documentcloud.org/documents/3224939/HRC-Letters.pdf.

former chair of the Confidential Listening & Assistance Service (CLAS), Judge Henwood observes:

> The department [The Ministry] 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)

Two interviewees argued that a lack of impartiality in the process caused the failure of meritorious claims (NZ Interviews 2 and 8).

Publicity

POINT 4 – ACCESS TO RELEVANT INFORMATION

The programme has had limited public exposure. Staff in the Unit did not have regular contact with survivor groups (NZ Interviews 1, 6, 8). Most applicants heard about the claims process through 'word of mouth' or through a referral from a service agency, such as CLAS (Allen and Clarke Policy and Regulatory Specialists Limited, 2018, p. 2; Ministry of Social Development, 2018c, p. 11). The public 'face' of the programme was a ministerial webspace with limited information (Ministry of Social Development, 2017). The programme's modest publicity is in part a response to capacity concerns. Because the programme has never kept pace with incoming claims, it did not seek publicity, in part, to avoid stimulating new claims (NZ Interview 6).

POINT 4 – ACCESS TO RELEVANT INFORMATION

Throughout the period under discussion, there was little information publicly available regarding the programme. There are were no published guidelines and settlements were private. The absence of information was not wholly accidental. Non-transparency was a considered policy decision (Kirk, 2015). One interviewee suggested that the lack of information prevented claimants from manipulating their applications to suit the programme (NZ Interview 4). However, the lack of programmatic information also reflected the programme's holistic character: the flexible nature of the process enabled different claims can follow different paths (NZ Interview 2). The 'downside' of this approach is that cases were treated inconsistently, the Ministry would change its procedures without explanation or prior notice.

Access

Claimants accessed the programme through three main routes. Claimants without legal representation contacted the Ministry directly, usually by phone, and spoke with an historic claims advisor. The advisor opened a file and began to compile relevant information; including the period the claimant was in care, locations thereof, and the general nature of any abuse. Advisors had social work backgrounds and, ideally, those 'direct-to-Ministry' claimants would work with a single advisor throughout the process. The survivor must have been alive to lodge a claim. I understand that if the survivor died after having lodged a claim, their estate could receive the settlement. However, I do not know how that posthumous process worked.

The Ministry did not encourage survivors to obtain representation. For most of the period, only one legal practice in New Zealand has represented survivors; Cooper Legal has represented slightly more than half of all successful claimants. Other submissions will speak about the process for 'represented claims' from better epistemic perspectives. However, for what it is worth, my understanding is that represented claimants would first contact their lawyer to give a brief description of their case. The lawyer would notify the Ministry of the claim and request relevant records pertaining to the survivor. After receiving those records, the lawyer interviewed the client and prepared a 'letter of offer'. That 'letter' would be a full statement of the claim that described what happened to the survivor, what evidence is available to support their claim and specified the survivor's desired settlement (NZ Interview 2).

While represented applicants would be briefed on the redress process by their lawyer, usually in person, some unrepresented survivors concluded their initial contact with the Unit without understanding how the process would proceed and what would they would be required to do. After interviewing 13 survivors in early 2018, Allen and Clarke found:

POINT 4 – ACCESS TO RELEVANT INFORMATION

> 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, p. 4).

Procedures changed during the programme, making it difficult to know what procedure would be followed (NZ Interview 2). Uncertainly over the nature of the process was a source of stress for survivors. To mitigate this concern, in June 2018 the Ministry published a three page 'factsheet' outlining the process (Ministry of Social Development, 2018b).

Support

POINT 5 – WELL-BEING OF SURVIVORS

In comparison to other countries, support agencies in New Zealand were very under-developed. The Ministry did not consider engagement with survivors' organisations to be strategically important (NZ Interview 6). New Zealand provided little funding for specific support for redress claimants. Instead, survivors relied on general services, supported by a small number of advocacy groups. Until it closed in 2015, CLAS was a key support agency, brokering counselling and obtaining personal records on behalf of survivors and supported survivors in reading those files. CLAS hearings typically included a 'future plans' component wherein the survivor was asked if they wished to pursue monetary redress. CLAS referred 514 survivors to the Ministry's redress programme (Hrstich-Meyer, 2017, p. 8). Survivors could use recordings of their CLAS hearing in their application.

POINT 5 – WELL-BEING OF SURVIVORS

The Ministry offered most applicants funding for counselling. This was usually an initial six sessions with a private provider, but that could be extended through ACC. In many cases, counselling designed to help applicants avoid or mitigate re-traumatization was offered during the evidentiary interview (discussed below). There was no specialist counselling service for survivors and there was a shortage of appropriately trained counsellors (NZ Interview 1 and 2) (Allen and Clarke Policy and Regulatory Specialists Limited, 2018, p. 4). "[W]here support or counselling was provided it was perceived by them [survivors] as inadequate to help them deal with the effects of disclosing their experiences" (Ministry of Social Development, 2018c, p. 12 12). Very few survivors obtained professional medical or psychological assessments as part of the claim process (NZ Interview 2). As the state does not fund the application process, and the redress programme does not redress consequential harms, professional assessment was not cost effective. There was no dedicated financial

advice service for survivors, although claims advisors would direct survivors to a standardised financial services, if prompted.

POINT 5 – WELL-BEING OF SURVIVORS

New Zealand's lack of engagement with Māori organisations prompted a 2017 complaint to the Waitangi Tribunal (Te Mata Law, 2017). There were no Māori advisors in the Historic Claims Unit and survivors "reported that they had not encountered any Māori at any time during the [redress] process nor did they feel their cultural needs were recognised or catered for" (Ministry of Social Development, 2018c, p. 3). The individualistic and legalistic character of the process "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, p. 9).

The programme's primary strategic relationship has been with Cooper Legal. As mentioned above, by late 2017, just over half of all applicants were represented by Cooper Legal. Prior to 2013, Cooper Legal worked effectively with the Ministry staff. However, the relationship deteriorated. Indeed, without exception, every support organisation I interviewed in New Zealand expressed hostility to the Ministry's programme.

POINT 5 – WELL-BEING OF SURVIVORS

The Ministry did not pay the survivor's legal fees. Legal Aid funded some representation, with the Ministry paying around 66% of the 'reasonable costs' of any Legal Aid debt (Legal Aid assumed the remainder). Legal Aid does not guarantee funding. Again, other submissions will have better information on the use of Legal Aid, but it is my understanding that survivors needed to demonstrate that their case had a reasonable chance of success. In essence, many survivors went through a preliminary claim procedure with Legal Aid so that they could get funding to pursue their substantive claims. After the abovementioned *White* trial failed in 2010,[4] Legal Aid began to withdraw support from all survivors (Cooper, 2017). Cooper Legal fought that decision in the courts until 2013, when Legal Aid agreed to re-establish funding.

[4] The *White* action did not succeed for a number of reasons, including failing to overcome New Zealand's limitations defence.

POINT 5 – WELL-BEING OF SURVIVORS

The fact that funding for legal advice is not assured has significant consequences for survivors. For example, if a claimant is unsatisfied with the Ministry's initial offer or there is a belief that a formal trial process would engender better quality records, then the survivor might seek to file their claim in court and pursue a judicial settlement conference. But that requires first applying to Legal Aid, which adds costs and delays to the process. Moreover, Legal Aid will only fund survivors who are judged incapable of funding their own representation. Better off survivors must pay for their lawyers. The settlement received by Netta Christian, a prominent care leaver advocate, only covered her legal fees (Collins, 2011).

Records

POINT 4 – ACCESS TO RELEVANT INFORMATION

Record searches are complex. Unlike some overseas jurisdictions, there has been no trans-ministerial initiative to collate and digitise records. Each application initiated a paper-based search (NZ Interview 5). In addition to the claimant's personal records, the search may include institutional and staffing records, particularly employee files. Most investigations involve more than one ministry. Although some older files are held by Archives New Zealand, New Zealand has a decentralised file management system. For example, Ministry of Health files are held by individual district health boards – there are 20 health boards in New Zealand. There was no coherent policy of record-keeping or record-destruction for public files, and the quality of records for private placements and institutions varies significantly.

POINT 4 – ACCESS TO RELEVANT INFORMATION

Most record searches were coordinated by the Historic Claims Unit in the Ministry. Some survivors obtained their records prior to filing an application: as noted above, CLAS facilitated records-access for those survivors it accepted. After CLAS closed, Cooper Legal became the only independent survivor support service with specialist expertise in records searching. For represented claimants, the Ministry provides relevant documents directly to the lawyer who conducts the research. For unrepresented claimants, Ministry staff conduct the documentary research. There has been no legislative or policy initiative to facilitate records access for survivors. Each individual must apply to access their records under the relevant general legislation. Personal records are accessed through the *Privacy Act*. Institutional records are

accessed through the *Official Information Act*. Historic Claims Unit staff administer the retrieval of records and the redaction of third-party information.

POINT 4 – ACCESS TO RELEVANT INFORMATION

The Allen and Clarke report suggests that most applicants found accessing what they were provided "relatively quick and easy" (Allen and Clarke Policy and Regulatory Specialists Limited, 2018, p. 2). By contrast, the principal of Cooper Legal has outlined significant concerns with the quality of records provision from the Ministry (Cooper, 2017). Unrepresented survivors who lack external support may not know what records exist and what they could reasonably hope to obtain (NZ Interview 2). "Claimants' files were often incomplete, irretrievable and in some cases, missing" (Ministry of Social Development, 2018c, p. 13). For example, Ministerial staff files were culled in 2009, eliminating many employee records (NZ Interview 2). A February 2018 report on a survey of 422 survivors indicated that 90% of respondents believed that they would benefit from improved support in accessing records (Stanley et al., 2018, p. unpaginated).

POINT 4 – ACCESS TO RELEVANT INFORMATION

Redaction was a significant concern. While survivors were entitled to personal information, they are not permitted information regarding other individuals. Personal and institutional records usually contain large amounts of third-party information; therefore, survivor could receive files with hundreds of redacted pages (NZ Interview 2). Family and institutional photographs could have individual faces blocked out to prevent identification. Redaction might make it harder to settle a case or obtain higher settlement figures. In *N v The Attorney-General* [2016] NZHC 547, Judge Ellis compared a set of redacted documents with their un-redacted counterparts. The judgement records Ellis's "concern that some of the material redacted is plainly relevant to the claim of the particular plaintiff involved." Some survivors believed redactions protect the state from liability (Allen and Clarke Policy and Regulatory Specialists Limited, 2018, p. 2. Survivors were sometimes suspicious, '[they] think, 'well, what's there, what are they hiding from me?' (NZ Interview 3).

Redaction eliminates information about the survivor's cultural and family background (IR Interview 1) (Ministry of Social Development, 2018c, p. 13). This was challenging for all survivors but had particular resonance for Māori survivors seeking information about their cultural background. The redaction of information relating to their whānau and hapū contributed to their social alienation (Ministry of Social Development, 2018c, p. 9). Records do not merely confirm or contradict memory: records are part of the remembering process, helping survivors learn what happened to them. In this sense, access to records is part of the process of constructing survivor testimony. "[Y]ou read it and then you think about it, and then you can work something else out. It doesn't all become apparent when you read it [the first time]' (NZ Interview 8).

Assessment

Evidentiary interviews were central to the Ministry's understanding of the process as survivor-oriented (Young, 2017, p. 3). Originally, both represented and unrepresented applicants were interviewed, with lawyers for Crown Law or the Ministry meeting with represented survivors and their lawyers. However, interviews with represented claimants ceased before 2017. "…it got to the point where they realised there were far too many people and few too few of them and it was costing a fortune to travel everywhere and meet everyone" (NZ Interview 2).

All unrepresented claimants have an evidentiary interview. Advisors prepare for the interview by compiling and becoming familiar with the survivor's Ministerial records. The survivor would meet with one or two advisors, usually held at a venue chosen by the applicant and near their home. Common venues included maraes, community meeting halls or Ministerial offices. Interviews rarely happen in personal homes, for reasons of privacy and safety. In addition, there is a psychological benefit to having the testimony happen in a place that the survivor is able to leave (NZ Interview 6). Survivors are encouraged to bring a support person or persons with them. Interviews are audio-recorded and often take several hours.[5] The lead advisor conducts the interview, obtaining details of the survivor's experience in care and

[5] Interviews were formerly transcribed, but this was discontinued for reasons of cost.

determining what evidence might be available to support his or her testimony. Survivors would be informed during the meeting that they could obtain their records and, as mentioned above, offered counselling.

POINT 5 – WELL-BEING OF SURVIVORS

It is well-recognised internationally that a survivors' involvement in the assessment process has the potential to harm (Pembroke, 2019, p. 7; Reimer, Bombay, Ellsworth, Fryer, & Logan, 2010, p. 36ff). Often this is described as re-traumatisation (Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, p. 134). Interviews put survivors under pressure to revisit traumatising memories in a stressful environment (Brounéus, 2008). The Allen and Clarke report indicates "that most claimants stated that they experienced high levels of distress following the interview, with intrusive memories common" (Allen and Clarke Policy and Regulatory Specialists Limited, 2018, p. 3).

After the interview, advisors pursued any further information that may be relevant to the claim. The advisor may contact former staff members to ask them to respond to allegations. The investigation also included an assessment of the social work practices experienced by the claimant to identify practice that did not meet the legislative and policy standards of the time. This investigation and assessment process draws upon all available information - primarily, the claimant's testimony, their files and any additional information held by the Ministry (Young, 2017, p. 4).

POINT 4 – ACCESS TO RELEVANT INFORMATION

Cooper Legal has an extensive database containing client testimony and information about offenders' involvement in prior claims and criminal convictions. They used the information to provide 'similar fact' evidence in their settlement offers. The Ministry also has a database of settlements with information about survivors and offenders. Both Cooper Legal and the Ministry are, therefore, able to make similar fact assessments in some cases. However, interviewees provided conflicting information as to the use of similar fact evidence. One pair of interviewees stated categorically that the Ministry did not accept similar fact evidence (NZ Interview 2), while others indicated that they did (NZ Interviews 4 and 6).

POINT 4 – ACCESS TO RELEVANT INFORMATION

There is not much public information about what claims are eligible. Because New Zealand's process developed organically out of series of individual settlement negotiations, eligibility was determined by conventional practice. My understanding derives from Ministerial reports on procedure and discussions with stakeholders. The absence of a clear procedure is a recognised and serious concern (Ministry of Social Development, 2018c, p. 17).

Eligible claims were not limited to specific time periods. While New Zealand defined 'historical claims' as injuries occurring prior to 1993, the Unit used the same procedure for claims for injuries incurred up to 1 January 2008. The programme did not apply any limits pertaining to institutional residence or, indeed, to legal status. Instead, eligibility was determined by the Ministry's definition of a meritorious claim. This might arise in the context of residential care—in the early years of the programme, most claims came from former residences. However, as the programme developed, it also managed claims lodged by survivors who had been in foster care or other out of home care, or who had been legally taken into the care, custody or guardianship of the Ministry (or its predecessors), or when the person or family had been under the supervision of the Ministry (or its predecessors).

POINT 4 – ACCESS TO RELEVANT INFORMATION

A successful claim must show that the state had some 'quasi'-liability for an abuse. Because the Ministry is not legally required to settle any claim, it would be wrong to say that the ambit of redressable injury maps that of legal liability. But something like that concept operates within the programme. Demonstrating 'liability' is straightforward when abuse was inflicted by a state employee. But in some cases, the relationship to the Ministry is more tenuous. In those cases, claims could be denied, or the settlement quantum reduced. Only acts of abuse, or failings by the state that facilitate abuse, were compensable. Redressable emotional abuse included seriously degrading treatment. In addition, the Ministry would redress manifest failures to provide the survivor with the legal minimum level of education.

The Ministry would only redress serious injuries that were impermissible according to the standards of the day, including, for example, the unreasonable use of 'secure confinement'. However, many survivors suffered injuries that were thought

permissible by contemporaries. For example, physical abuse and secure confinement were widely accepted disciplinary techniques during much of the twentieth century in New Zealand. Therefore, to attract a settlement, physical abuse or wrongful confinement must exceed what was thought permissible at the time of the offense.

POINT 8 – ADEQUATE, PROMPT, AND EFFECTIVE REDRESS

It is possible that the Ministry has limited its 'liability' to injuries traceable to practice failures—these are failures of Ministerial staff to follow applicable policy or regulation. Put differently, it seems that an eligible redress claim required showing that the Ministry was at fault in some way for the injuries experienced by the survivor. That would explain why the investigation assessed contemporary practice norms. The regulation of social work practice changed significantly during the twentieth century and any injurious practice is assessed against standards operative at the time of the events. Interviewees made conflicting statements as to how the appropriate care standards are determined. One interviewee insisted that standards could be what was 'normal' in a particular context.

> 'Day to day practice absolutely varied from the expectations in the [regulations] manual and they [the Ministry] will still rely on that [day-to-day practice] as being the standards of the day'. (NZ Interview 2)

If that is correct, the relevant 'standards of the day' may authorise action that was impermissible according to prevailing regulations. That phenomenon is likely to affect the quantum of settlement, with 'normalised' abuse attracting lower settlement values.

POINT 6 – THE IMPACT OF ABUSE ON FAMILIES AND WHĀNAU

The Ministry did not redress consequential harms, which meant that it excluded injurious denial of cultural attachments, loss of personal identity or the severance of family relationships. Māori are significantly over-represented in care and constituted over 50-60% of claimants. Out-of-home care systemically disconnected Māori survivors from their cultural and family groups. (Ministry of Social Development, 2018c, p. 7). This is an extraordinarily serious concern. It is difficult to over-state the importance of whānau and hapū in Māori culture.

POINT 4 – ACCESS TO RELEVANT INFORMATION

The programme's evidentiary standard is unclear. The Ministry used records and interviews to verify claims. In general, this involved a 'loose' application of the balance of probability, within a holistic approach. However, interviewees disagreed over evidentiary standards. For example, one interviewee indicated that 'in the vast majority of cases, the allegations as stated are generally accepted' (NZ Interview 6). But it is clear that the Ministry rejected components of many claims. One interview characterised the evidentiary standard as equivalent to that of a legal case (NZ Interview 3). Some interviewees connected the need for a higher standard of evidence with the concern that the claimants might be ascribing a serious offence to someone and the state should not make payments, and implicitly accept the truth of those allegations, without robust evidence.

POINT 8 – ADEQUATE, PROMPT, AND EFFECTIVE REDRESS

The programme was very slow. New claims were addressed chronologically and placed on a waitlist prior to investigation which usually began around a year after initial contact (Allen and Clarke Policy and Regulatory Specialists Limited, 2018, p. 3). The process was individuated and detailed: the process is reported to take 180 staff-hours per claim (Webber, 2013, p. 18 n19). In *XY and Others* [2016] NZHC 1196, Judge Glendell suggested the average time to process a claim in New Zealand was 27 months. Every New Zealand interviewee expressed concern regarding delays, with one suggesting, 'Some of them [survivors] will commit suicide while they wait. Yes, or die of old age or associated [illness]. . .' (NZ Interview 8). Another interviewee said, '[the delays made me] cynical and [I] started to wonder if they really meant to settle them at all, or whether they were just playing everybody along' (NZ Interview 7). Official documents reflect this concern. "For many [survivors] the wait was stressful and traumatising particularly following the interview process...."(Ministry of Social Development, 2018c, p. 12 12).

POINT 5 – WELL-BEING OF SURVIVORS

The backlog of delayed cases was the primary driver for a 2014 initiative creating the 'fast-track' process. The fast-track process responded to the backlog of claims held by the Ministry in 2014. This optional process was only available to claims lodged as of 31 December 2014 and reduced the investigation to a three-part assessment that (1) the ministry had a legal responsibility or obligation to the claimant at the time of

the offence; (2) the survivor was resident in the institution(s) or home(s) where claimed offences occurred; and (3) those who were identified as offenders in the application were employed or otherwise present in the institution(s) or home(s). A total of 582 survivors received fast-track payments, clearing 57% of the claims awaiting settlement as of 31 December 2014. As of early 2018 a "substantial backlog has built up with claims currently taking up to four years to assess and close" (Allen and Clarke Policy and Regulatory Specialists Limited, 2018, p. 1 1). My calculations suggest that backlog might be closer to five years (Winter, 2018a, p. 15).

Settlement

The method for determining settlement values developed over time. The Ministry suggested that it benchmarked values so that "they are broadly in line with what a court might award if it went to a hearing" (Hrstich-Meyer, 2017, p. 2) Other observers suggest that payments are less than comparative court settlements (Cooper Legal, 2013, p. 2 2). It is clear that payment values are not comparable to similar procedures in Canada and Ireland. Once the Ministry had paid an initial set of claims, subsequent settlements were derived by comparing new cases with previous values and the Ministry used a database of past settlements to calibrate offers (Hrstich-Meyer, 2017, p. 7). This practice provides 'in-programme' equity, as similar cases receive similar payments.

There is very little public information concerning how the programme determines settlements. However, indicative information concerning assessment emerged from the 2015-2016 'fast-track process'. The fast-track process assessed applicants using six-row matrix (see Appendix 1). Ministry staff developed the matrix by analysing settlement practice during 2006–2013. Therefore, although used within the fast-track process only, the matrix provides the best available summary of practice. It is worth noting that the matrix was not published until 2018 (by me).

The matrix treats sexual and physical abuse as equally serious. Higher level payments require multiple acts of both sexual and physical abuse. Abuse by staff garners larger settlements than abuse by peers or other adults. False imprisonment garners more the longer it lasted. Emotional abuse and neglect do not appear in the

matrix; however, particularly undignified and insulting treatment may garner redress (NZ Interview 6). It is important to recognise that the matrix makes the process appear more rigid than it is in practice. The process is holistic. Settlement values are sensitive to the quality of evidence. A claim with very strong evidence of abuse may obtain more money than one with a similar history of abuse, but a lower quality of evidence in support.

The fast track process was subject to a moderation process. The original plan structured the range of settlement offers according to the programme's previous payment patterns. The following table sets out the pre-determined ratios:

Table 1 – Fast track moderation strategy.

Category and $ offer	% spread of past offers	Acceptable % range in each category
Over $50k	2.0%	0.8% - 3.2%
Cat 1 $50K	2.8%	1.4% - 4.2%
Cat 2 $40K	5.0%	3.1% - 6.9%
Cat 3 $30K	6.8%	4.6% - 9.0%
Cat 4 $20K	26.8%	22.9% - 30.7%
Cat 5 $12K	19.0%	15.6% - 22.4%
Cat 6 $5K	37.6%	33.4% - 41.8%

Source: (Ministry of Social Development, c2014)

That 2014 plan was merely a projection. The actual range of settlements set out in Table 2 (below) indicates that there was some inflationary pressure within the $5000-$30000 range. The fact that there is no evidence of inflationary pressure for settlements above $30 000 may be explained by a state policy that permits a Ministry's Chief Executive to make ex gratia payments of $30 000 or lower, but requires Ministerial authority for higher payments (Department of Prime Minister and the Cabinet, 2018). Approximately 71% of all settlements are below $20,000. The matrix in Appendix 1 suggests what types of injuries, and their severity, are associated with payments of each level.

Table 2: New Zealand payments made 1 January 2006 - 30 June 2017[6]

Payment Band	**Number**	**%**
Over $50 000	18	1%
$40 001 - $50 000	44	3%
$30 001 - $40 000	90	7%
$20 001 - $30 000	222	18%
$10 001 - $20 000	542	43%
$1 - $10 000	349	28%

Source: (Private Communication, Ministry of Social Development 26 July 2017).

For represented claimants, the Ministry provided the payment offer, an explanation and apology in writing. If a represented claimant of a 'filed claim' rejected the offer, and negotiation fails to resolve the difference, then the claim proceeded to a judicial settlement conference. Should that not result in an agreement, the claimant could proceed to trial (where they are likely to fail).

Offers for unrepresented applicants were communicated in a personal 'feedback session'. The feedback session is a second face-to-face interview during which the advisor provides the survivor "a timeline of their involvement with the Ministry and any other information that may assist the claimant to understand the context of their care" (Young, 2017, p. 5). The advisor may offer an oral apology and/or a formal written apology from the Chief Executive and explain any financial offer. Many survivors experienced this interview as a 'take it or leave it' offer (NZ Interview 2).

[6] Table 2 includes settlements for around 80 post-1992 (non-historic) claims. Disaggregated information is unavailable. However, given the relatively small numbers involved, and the common approach used to settle both historic and non-historic cases, the inclusion should distort the pattern for historic cases only slightly.

If the survivor accepts the offer, the settlement agreement is accompanied by a letter of apology drafted by the claims advisor. The personalised apology letter identifies key moments of the survivor's time in care and the general character of the abuse that the Ministry accepts they experienced. The apology is usually signed by the Chief Executive, although the Minister of Social Development will sign the letter at the request of the survivor (Price, 2016). Some survivors undoubtably appreciate the letter. However, others do not.

> [M]ost claimants found the [apology] letter to either be meaningless at best (e.g., something to joke about with friends) or insulting at worst. There was a view that only an apology from the individuals involved would be of any meaning and that an apology from a civil servant was of little to no relevance to claimants. (Allen and Clarke Policy and Regulatory Specialists Limited, 2018, p. 7)

As intimated above, payments with a value of under $30 000 are ex gratia. Payments over that figure are legal settlements and claimants are offered $250 to arrange for legal advice. Under $30 000 payments are may not constitute a 'full and final' settlement. One interviewee suggested that it is possible for recipients to reapply if they provide new information (NZ Interview 6). However, another source indicated that *all* settlements are 'full and final' and require the survivor to release the ministry from all liability (Anonymous Private Communication 21 May 2018).

As of 31 December 2017, the Ministry had closed 1632 claims and paid 1315 settlements (Ministry of Social Development, 2018a). The mean average for historic claims is around $19,124 (Ministry of Social Development 2018). The programme's validation rate of 80.5% is comparable to overseas counterparts (Daly, 2014, p. Appendix 3B).

Conclusion

This conclusion will briefly return to the critical points identified in the opening summary.

Regulation

The most prominent point of critique and one that underpins many of the following point is the failure of successive governments to provide adequate regulation. The programme lacks authorising legislation or other regulatory structures. This means that the programme has operated under Ministerial discretion, decreasing its impartiality and transparency

Lack of impartiality

The programme was created, operated and funded by the Ministry. The Ministry manages the procurement of records, decides on procedure, runs the investigation and the determines settlement value. In effect, the Ministry serves not only as 'defendant' and 'judge', but also as the investigating 'police'.

Non-transparency

Little programme information has been published. Non-transparency prevents survivors from knowing how the investigation proceeds and how the ministry uses the information thereby obtained. Even the recent material on the process is heavily redacted (Hrstich-Meyer, 2019). Survivors with legal representation are likely to better informed than others. In general, survivors are not provided with the information necessary to understand the programme. In my research, I frequently noted that prominent stakeholders did have basic information about how the programme operated, or worst, had mistaken conceptions.

The uncertain and limited ambit of redress

The domain of injuries eligible for redress been unclear. The matrix for the fast track process was not published until 2018 (and then, not by the Ministry). It is clear that consequential harm is not included, which means that much of what is salient to survivors does not fall within the programme's scope.

Inconsistency

There have been significant changes in how the New Zealand programme operates, particularly with regard to acceptable evidence and settlement quanta (Sonja Cooper, Private Communication, 20 February 2018). A recent report observed, "[T]he rules were always changing and that there was inconsistency when interpreting the rules."

(Ministry of Social Development, 2018c, p. 17). Changes emerge from unpublicised decisions occurring inside the government and, as a consequence, it is impossible for anyone to know with certainty how the process will treat particular survivors.

The speed of the process

The process is protracted. The average processing time has been several years. Some claims have taken more than a decade (Ministry of Social Development, 2018a)

Lack of engagement with Māori organisations.

The lack of engagement with Māori organisations is surprising. Given the profile of children in care, the available strength of Māori organisation in New Zealand and recognised harms of cultural removal, this is a serious concern that inhibits the programme's aspirations to be survivor-focussed.

Records access and survivor support

Engagement with the programme can be difficult for survivors. The support available to survivors in New Zealand has not been satisfactory. External legal and psychological support has been inadequate and inequitable. New Zealand has failed to provide robust support for records access. Records provision has been controlled by the Ministry, as opposed to an independent organisation.

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Appendices

1. New Zealand Fast Track Settlement Matrix
2. Winter, S. (2018). "Redressing historic abuse in New Zealand: a comparative critique." *Political Science* 70(1): 1-25.

ABSTRACT: This paper provides a comparative institutionalist critique of New Zealand's monetary redress process for survivors of abuse in care. Using an Irish comparator, the paper advances an institutionalist critique that focusses on how programme operations affect survivors' interests. The paper first describes the historic claims processes in New Zealand and Ireland and then assesses monetary redress practice against four characteristic survivor interests: cost, transparency, support and justice.

Appendix 1: New Zealand Fast Track Settlement Matrix

Source: Anonymous.

Category 1 >$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 s 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 year 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 >$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 <u>both</u> serious physical and serious sexual abuse.** 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 year 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 >$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 year 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 4 >$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 offenses 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 >$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. ***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	Claims with Insufficient Particulars

>$5000	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.

Appendix 2.

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Redressing historic abuse in New Zealand: a comparative critique

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ABSTRACT

This paper provides a comparative institutionalist critique of New Zealand's monetary redress process for survivors of abuse in care. Using an Irish comparator, the paper advances an institutionalist critique that focusses on how programme operations affect survivors' interests. The paper first describes the historic claims processes in New Zealand and Ireland and then assesses monetary redress practice against four characteristic survivor interests: cost, transparency, support and justice.

KEYWORDS

Redress; reparations; compensation; alternative dispute resolution; abuse in care; New Zealand; Ireland

Introduction

Between 1950 and 1980, the New Zealand state reportedly took more than 100,000 children into care (Human Rights Commission 2017). The state placed those children in a variety of residences; including orphanages, group homes, foster care and borstals (Stanley 2016; Mirfin-Veitch and Conder 2017). The state operated some residences, while third parties, such as churches, were responsible for others. Many children who experienced serious abuse whilst in care are now, as adult survivors, lodging claims for monetary redress.

The historic claims process is the state's primary policy response. In 2012, the process received the Prime Minister's Award for Public Sector Excellence. The President of the Institute of Public Administration praised the process as an 'exceptional initiative [that] demonstrated outstanding innovation and vision in its approach and achieved excellent results for all involved' (Institute of Public Administration New Zealand 2013, 10). Similarly, a 2014 Cabinet paper described the historic claims process as 'a high quality personal approach which achieves enduring resolution' (Office of the Minister of Social Development 2014, 3). Another report of the same year indicated the process is 'innovative', 'world-leading' and 'cost-effective' (Ministry of Social Development 2014, 2).

However, several independent observers challenge those accolades. The UN Committee Against Torture expressed concern 'that victims have not been awarded with full redress, including compensation and rehabilitation' (Committee against Torture 2015, 7). Similarly, the UN Committee on the Rights of Child 2016 report was 'seriously concerned' about the '[d]ifficulties faced by child victims of abuse and neglect in State care to seek redress' [sic] (Committee on the Rights of the Child 2016, 6). The UN Committee on the Elimination of Racial Discrimination observed that the historic claims

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process 'fail[s] to expose the systemic problems' inherent in the over-representation of Māori, who constitute more than half of all survivors (Committee on the Elimination of Racial Discrimination 2016, 7).

This paper provides a comparative institutional critique of New Zealand's monetary redress process with the aim of indicating potential areas for improvement. As Michael Mintrom argued, 'effective policy responses to current problems are most likely to be struck on when policy design is closely informed by knowledge of actual working policy settings found elsewhere' (Mintrom 2012, 210). As a comparator, the paper reflects upon a redress programme for survivors of Ireland's industrial schools. The Irish programme is a suitable comparator because both the New Zealand and Irish programmes attempt to apportion settlement value to the individual survivor's particular experience of injury (Winter 2017). Moreover, the Irish programme operated in a similar time frame (2003–2015), addressed parallel problems of historical abuse in care and functioned within a state with strong similarities of politics, economics and culture. There are, of course, salient differences between the two polities, including New Zealand's indigenous Māori population. However, there are interesting parallels between the treatment of Ireland's Traveller population and that of Māori in the respective redress programmes.

In New Zealand, the paper focusses on the period of 2006–2017, encompassing the origins and operation of the redress programme prior to the February 2018 announcement of a Royal Commission of Inquiry into Historical Abuse in State Care (Ardern 2018). The forthcoming Royal Commission should review New Zealand's compensation practice: that prospect lends gravity to the analysis provided below. To further bound the discussion, the paper only addresses the monetary redress of historic claims – in New Zealand, these claims concern injuries that occurred before 1993.[1] The paper concentrates on policy implementation. Therefore, it ignores larger social or political causes and consequences, all private redress initiatives and any public non-monetary responses. At present, three New Zealand ministries operate monetary redress processes: Health, Education and Social Development.[2] The discussion addresses the Ministry of Social Development only. The process within Health differs significantly and warrants independent consideration.[3] The process used by Education is more similar to Social Development; however, the latter's programme is far larger. As of 31 December 2017, Social Development had settled 1315 claims (Ministry of Social Development 2018). By comparison, Health has settled around 160 claims; Education had settled fewer than 40.

Using Whittemore and Knafl's 'integrative approach' (2005), the paper combines public reports, ministerial documents and websites with interview material. The interviews comprise six semi-structured 'information interviews' conducted with 10 Irish interviewees in 2014 and 8 interviews conducted with 12 interviewees in New Zealand in 2017. Interviewees were drawn from state institutions as well as non-governmental organisations. These interviewees were invited to participate because they were senior officials with comprehensive knowledge of monetary redress operations and/or the effect of those operations on survivors. As there are very few organisations involved in the Irish and New Zealand's redress programmes, and interviewees were assured anonymity, the paper references different interviews by country prefix and number. Table A1 presents a numbered list of the interviews.

The paper first describes New Zealand and Ireland's redress programmes and then comparatively assesses those programmes against four characteristic survivor interests:

cost, transparency, support and justice. Those four criteria draw from comments made by interviewees and from an international literature on monetary redress (General Assembly of the United Nations 2006; Daly 2014; Lundy 2016; Lundy and Mahoney 2018; Sköld and Swain 2015; Cashmore and Shackel 2014; Kaladelfos, Small, and Finnane 2016; Murray 2015). The critique focusses on how programme operations affect survivors' interests. Put into the larger structure of institutional theory, the discussion focusses on the 'action arena' – the domain in which survivors engage with the redress programme (Ostrom 2005, 14). This narrow institutionalist focus facilitates a robust normative comparison that, in conclusion, indicates that New Zealand could improve its redress practice by limiting costs on survivors, enhancing the programme's transparency, developing a better support networks for survivors and increasing the quality of justice provided.

New Zealand's monetary redress process

By 2006, over 100 New Zealanders had sued the state seeking damages for abuse suffered as children in care. The government's response strategy had two components, the Confidential Listening and Assistance Service and the Crown litigation policy; the latter contains the monetary redress process.

The Confidential Listening and Assistance Service began in 2008. Chaired by Judge Carolyn Henwood, the service heard testimony from 1103 individuals. During its operation, the service facilitated engagement in monetary redress by informing survivors of the programme and referring them to the relevant ministry. Around 760 survivors obtained referrals. Testimony at panel hearings was recorded and, if the survivor desired, those recordings could comprise part of their application for monetary redress. The service also obtained personal files on behalf of survivors and supported survivors in reading those files. Survivors were offered counselling. A total of 89 cases were referred to the police and some prosecutions followed. The service submitted its final report in 2015, indicating that abuse in care was systemic (Henwood 2015, 12).

The second public policy response, the Crown litigation strategy, provides the framework for monetary redress. The strategy has three components:

(1) 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 (Office of the Minister of Social Development 2014, 2).

The Crown's position on litigation (point 3) makes New Zealand courts inhospitable to historical abuse claims. There have been no successful actions against the ministry (Cooper 2017; Human Rights Commission 2011; Stanley 2015). The primary routes to settlement are, therefore, either direct negotiation between the survivor and ministry (point 1) or 'represented claims' in which the survivor engages a lawyer to represent them (point 2). Those two points frame the monetary redress process.

The Historic Claims Unit within the Ministry of Social Development administers the redress programme. The unit has slightly fewer than 30 staff members and a relatively low public profile. Although the Confidential Listening Forum advertised in local

newspapers, the monetary redress programme does not have a significant marketing programme. Unit members do not maintain regular contact with survivor groups (NZ Interviews 1, 6, 8). The public 'face' of the programme is a ministerial webspace with basic information (Ministry of Social Development 2017). The programme's modest publicity is in part a response to capacity concerns. As evidenced below, the programme has never kept pace with incoming claims. The programme does not seek publicity, in part, to avoid stimulating new claims (NZ Interview 6).

If a survivor has legal representation, the initial contact with the ministry is a request by the lawyer for their client's personal files. After the lawyer reviews the files and interviews their client, they prepare a 'letter of offer' describing the grounds for the claim and indicating a desired settlement value. Some represented claimants file cases in the High Court, but, given the poor prospects for litigation, the process for filed and unfiled cases varies only slightly. Filed cases are mediated by Crown law but represented cases also include many 'unfiled' cases for which lawyers negotiate directly with the ministry on behalf of survivors.

A claimant without legal representation contacts the ministry directly, usually by phone, and speaks with an historic claims advisor. The advisor opens a file and begins to compile relevant information; including the period the claimant was in care, locations thereof, and the general nature of any abuse. Advisors have social work backgrounds and, ideally, each claimant works with a single advisor throughout the process. The survivor must be alive to lodge a claim. If the survivor dies after having lodged a claim, their estate can receive the settlement. The programme prioritises claimants who are very elderly or ill.

New claims are addressed chronologically and placed on a waitlist prior to investigation. The object of the ministerial investigation is to establish whether the ministry had legal responsibility for the survivor's welfare when the survivor experienced abuse. The investigation involves interviews and record searches. Unrepresented survivors meet with one or two advisors for an interview. These interviews are audio-recorded and often take several hours. The lead advisor conducts the interview, obtaining details of the survivor's experience in care and determining what evidence might be available to support his or her testimony. Previously, lawyers for Crown Law or the ministry met with represented survivors and their lawyers to progress the application; however, that practice has ceased.

Legal and psychological support for survivors is limited. Remuneration for legal support derives primarily from legal aid and is not guaranteed. Slightly more than half of all claimants are represented by the Wellington-based law firm, Cooper Legal. The ministry does not encourage survivors to obtain representation. The ministry adopts a social work model that positions advisors as professionally responsible for their particular cases. With regard to psychological support, there is no specialist counselling service for the programme. The ministry will provide funding for counselling. This is usually an initial six sessions with a private provider, but that can be extended through New Zealand's accident and compensation programme. Two interviewees indicated that New Zealand confronts a serious shortage of appropriately trained counsellors (NZ Interview 1 and 2).

Records searches are essential to the investigation process. The most important records are the claimant's personal and family files. The ministry's personal records for 'wards of the state' should record salient changes in the claimant's legal status and placements (NZ Interview 3). Record searches are coordinated by the ministry. Some survivors obtain their records prior to filing an application: as noted above, the

Confidential Listing and Assistance Service facilitated records-access for survivors. With the closure of the Confidential Listening and Assistance Service, Cooper Legal is the only New Zealand agency (excepting government ministries) with specialist expertise in records searching. For represented claimants, the ministry provides relevant documents directly to the lawyer who conducts the research. For unrepresented claimants, ministerial staff manage the documentary research.

Record searches are complex. There has been no trans-ministerial initiative to collate and digitise records; therefore, each application initiates a paper-based search (NZ Interview 5). Most investigations involve more than one ministry. Although some older files are held by Archives New Zealand, New Zealand has a decentralised file management system. For example, Ministry of Health files are held by individual district health boards – there are 20 health boards in New Zealand. There was no coherent policy of record-keeping or record-destruction for public files, and the quality of records for private placements and institutions varies significantly. In addition to the claimant's personal records, the search may include institutional and staffing records, particularly employee files. The process is dynamic. Because many survivors were children at the time of their residence, they often have inaccurate recollections of residential duration and location. Over time, claimants may remember or disclose new information that is added to the file. Further, as the advisor, or lawyers, uncover documentary evidence, they may be in contact with the claimants or ministry to update claim files.

While most claimants can expect to obtain records of their time in care, these records rarely provide evidence of abuse (Stanley 2016, 94–96). In some cases, criminal trials, medical records, punishment logs or case worker notes record injuries or provide collaborating evidence. But most documentary evidence is silent concerning abuse. Children may not report abuse and, if they do so, they may not be believed (Ferguson 2007). Children in care could quickly learn that reporting injuries was ineffective and encouraged reprisals. Care institutions had little incentive to record events that would expose the institution, or staff, to criticism.

A successful claim must show that the state was partially liable for an abuse. Establishing liability is straightforward when abuse was inflicted by a state employee. But in some cases, the relationship to the ministry is more tenuous. In those cases, the settlement quantum may be reduced. Only acts of abuse, or failings by the state that facilitate abuse, are compensable: no redress is available for the consequential effects of abuse: To illustrate, the programme may compensate survivors for having experienced an act of physical abuse but will not redress any effects that abuse had on, for example, their long-term psychological health.

Many survivors suffered injuries that were thought permissible by contemporaries. For example, physical abuse and secure confinement were widely accepted disciplinary techniques during much of the twentieth century in New Zealand. Therefore, to attract a settlement, physical abuse or wrongful confinement must exceed what was thought permissible at the time of the offense. Further, the regulation of social work practice changed significantly during the twentieth century and any 'practice failure' causative of injury is assessed against standards operative at the time of the events. Interviewees made conflicting statements as to how the appropriate care standards are determined. One interviewee insisted that standards could be what was 'normal' in a particular context. 'Day to day practice absolutely varied from the expectations in the [regulations]

manual and they [the ministry] will still rely on that [day-to-day practice] as being the standards of the day' (NZ Interview 2). If that is correct, the relevant 'standards of the day' may authorise action that was impermissible according to prevailing regulations. That phenomenon is likely to affect the quantum of settlement, with 'normalised' abuse attracting lower settlement values.

The programme's evidentiary standard is a 'loose' application of the balance of probability, within a holistic approach. However, stakeholders disagree over evidentiary standards. For example, one interviewee indicated that 'in the vast majority of cases, the allegations as stated are generally accepted' (NZ Interview 6). However, another said, '[evidence] has to be there to support the claim. Just by saying something happened to me is not going to cut it really' (NZ Interview 4). Another characterised the standard as equivalent to that of a legal case (NZ Interview 3). Some interviewees connected the need for a higher standard of evidence with the concern that the claimants might be ascribing a serious offence to someone and the state should not make payments, and implicitly accept the truth of those allegations, without robust evidence. The advisor may contact former staff members to ask them to respond to allegations. The ministry reports all allegations of abuse to the police.

Because Cooper Legal has an extensive database of client testimony, they can include cross-referenced evidence in their settlement offers. This information can include details of relevant offenders' involvement in prior claims and criminal convictions. The ministry also has a database of settlements with information about particular complaints and offenders. Both Cooper Legal and the ministry are, therefore, able to make 'similar fact' assessments in some cases. However, again interviewees provided conflicting information. One pair of interviewees stated categorically the ministry would not accept similar fact evidence (NZ Interview 2), while others indicated that they did (NZ Interviews 4 and 6).

The final phase of the historic claims process is the calculation of settlement value. The method for determining settlement quanta developed over time. In the first few settlements, the ministry benchmarked values against what similar injuries would obtain in the courts and in New Zealand's statutory no-fault accident compensation programme.[4] However, actual payments are less than comparative court settlements (Cooper Legal 2013, 2). Subsequent settlements were derived by comparing new cases with previous values. The ministry now uses its database of past settlements to calibrate offers. This practice provides 'in-programme' equity, as similar cases receive similar payments.

There is very little public information concerning how the programme determines settlements.[5] However, there is indicative information concerning assessment that was developed for, and applied within, a 'fast-track process' operative in 2015 and 2016. The fast-track process responded to the backlog of claims held by the ministry in 2014. This optional process was only available to claims lodged as of 31 December 2014 and reduced the evidentiary standard to a three-part assessment that (1) the ministry had a legal responsibility or obligation to the claimant at the time of the offence; (2) the survivor was resident in the institution(s) or home(s) where claimed offences occurred; and (3) those who were identified as offenders in the application were employed or otherwise present in the institution(s) or home(s). A total of 582 survivors received fast-track payments.

The fast-track process assessed applicants using the six-row matrix visible in Table 1. Ministry staff developed Table 1 by analysing settlement practice during 2006–2013. Therefore, although only used within the fast-track process, Table 1 provides the best

Table 1. New Zealand fast-track settlement matrix.

Category 1 >$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 s 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 year or more *False imprisonment* is as legally defined – i.e. held without any legal cause and includes being held in any form of alternate care without legal basis
Category 2 >$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 three occasions; and/or • Serious sexual abuse perpetrated by one or more staff members or caregivers on more than three 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** 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 year or more *False imprisonment* is as legally defined – i.e. held without any legal cause and includes being held in any form of alternate care without legal basis
Category 3 >$30,000	**Serious abuse** The claimant has suffered: • Serious physical abuse perpetrated by one or more staff members or caregivers on three or fewer occasions; and/or • Serious sexual abuse perpetrated by one or more staff members or caregivers on three or fewer occasions; or • Has been subjected to more than 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 year or more *False imprisonment* is as legally defined – i.e. held without any legal cause and includes being held in any form of alternate care without legal basis
Category 4 >$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 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 offenses 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

(*Continued*)

Table 1. (Continued).

Category 5 >$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 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 ***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 >$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.

available summary of practice. The ministry has not published the matrix and redacted significant information from its response to an Official Information Act request. However, I was able to source the complete matrix independently from a reputable source. To my knowledge, this is the first time it has been published.

The settlement method treats sexual and physical abuse as equally serious. Higher level payments require multiple acts of both sexual and physical abuse. Abuse by staff garners larger settlements than abuse by peers or other adults. False imprisonment garners more the longer it lasted. Emotional abuse and neglect do not appear in the matrix; however, particularly undignified and insulting treatment may garner redress (NZ Interview 6). The process is both flexible and holistic. Settlement values are sensitive to the quality of evidence. A claim with very strong evidence of abuse may obtain more money than one with a similar history of abuse, but a lower quality of evidence supporting that history.

The settlement offer is usually communicated to unrepresented applicants in person. Settlement offers for represented survivors are conveyed in writing to their lawyer. Payments with a value of under $30,000[6] are ex gratia. One interviewee indicated that these payments do not constitute a 'full and final' settlement and it is possible for recipients to reapply if they provide new information and that only claimants who obtained more than $30,000 are required to release the ministry from all legal liability (NZ Interview 6). However, another source indicated that all settlements are 'full and final' and require the survivor to release the ministry from all liability (Anonymous Private Communication 21 May 2018). Either way, if the survivor accepts the offer, the settlement agreement is accompanied by a letter of apology drafted by the claims advisor. The personalised apology letter identifies key moments of the survivor's time in care and the general character of the abuse that the ministry accepts they experienced. The apology is usually signed by the Chief Executive, although the Minister of Social Development will sign the letter at the request of the survivor (Price 2016).

As of 31 December 2017, the ministry had closed 1632 claims and paid 1315 settlements (Ministry of Social Development 2018). Table 2 indicates that approximately 71% of all settlements are below $20,000 – characterised by Category 5 in Table 1 as 'low-

Table 2. New Zealand payments made 1 January 2006–30 June 2017 (includes c.80 post-1992 claims)*.

Payment band	Number	%
Over $50,000	18	1
$40,001–$50,000	44	3
$30,001–$40,000	90	7
$20,001–$30,000	222	18
$10,001–$20,000	542	43
$1–$10,000	349	28

Source: (Private Communication, Ministry of Social Development 26 July 2017).
*Table 2 includes settlements for around 80 post-1992 (non-historic) claims. Disaggregated information is unavailable. However, given the relatively small numbers involved, and the common approach used to settle both historic and non-historic cases, the inclusion should distort the pattern for historic cases only slightly.

level abuse'. The mean average for historic claims is around $19,124 (Ministry of Social Development 2018). Table 2 only includes cases in which payments are made.

Prior to 2014, the average cost to the ministry per claim was between $37,000 and $40,000, including both administrative and settlement costs.[7] The present average cost per settlement is likely to be lower – pre-2014 estimates do not include cost savings realised by the fast-track programme. By comparison, a High Court case costs the state approximately $640,000, excluding settlement costs (Office of the Minister of Social Development 2014, 2). The difference is, therefore, at least 94%.

Ireland's monetary redress process

Redress for Irish survivors of industrial schools and associated institutions was provided by the Residential Institutions Redress Board (the RIRB). In 2000, the Irish government established the independent Compensation Advisory Committee to make recommendations on monetary redress (Compensation Advisory Committee 2002). Chaired by Seán Ryan, S.C., the recommendations in the committee's 2002 report were adopted, without amendment, into the Residential Institutions Redress Act, 2002. This statutory basis provided the RIRB with significant operative independence that is quite distinct from the ministerial prerogative encompassing New Zealand's programme. The Commission of Inquiry that prompted the Ireland's redress programme's development ran concurrently with the RIRB until 2009. The Commission believed that approximately 170,000 children were resident in an industrial school during the twentieth century; however, revised estimates indicated that the population was around 41,000 (Private Communication, Department of Education. 31 August 2015; O'Sullivan 2015).

Funding for redress came from the Department of Education and was not capped. In addition, the Irish government negotiated an agreement with most of the religious orders responsible for operating industrial schools. Those orders paid $223 million to the state in exchange for indemnity against any suit arising out of injuries for which redress is obtained from the RIRB. Therefore, applying to the RIRB required the survivor to cease any civil proceedings. Survivors were indemnified against the legal and court costs that would otherwise follow a plaintiff's unilateral termination of a case prior to judgement.

In contrast to New Zealand's less conspicuous programme, the RIRB engaged in a multi-layered outreach and publicity programme. In the first instance, the RIRB was subject to regular reporting in the news media. The RIRB also commissioned television, radio and print advertising (IR Interview 2). RIRB members met with survivor networks within Ireland and in the United Kingdom, undertaking a regular pattern of monthly meetings with leaders of survivor groups. The RIRB developed a well-run website, with its own domain (www.rirb.ie) publishing an irregular series of newsletters alongside its annual reports. Detailed 'Short' and 'Long' guides to the application process were available on the website. The Long Guide was a particularly valuable reference providing consistent, accessible and authoritative information.

The redress programme was open for applications from January 2003 until 15 December 2005. There was an enormous variation in the 'flow' of applications. In 2003 and 2004, the RIRB received 2573 and 2539 applications, respectively (Residential Institutions Redress Board 2004, 8, 2005, 9). Then, in 2005 the RIRB received 9432 applications, of which 3700 were received in the 2 weeks prior to the closing deadline (Residential Institutions Redress Board 2006, 12). Many of those last-minute applications were submitted unfinished to preserve the survivor's access to the programme and a substantial backlog developed. It took several years to clear that backlog – by 2010 the programme had settled 90% of received applications. The RIRB also accepted nearly 3000 applications after the closing date. Ireland legislated to close the programme to new applications as of 17 September 2011.

Valid applications provided evidence of residence in one or more of the approximately 140 scheduled institutions. The primary documentary evidence of residence was the institution's register of entry, which should record the date and age of the survivor at the time they entered the institution. Other records may refer to the survivor during their residence, such as criminal, medical or school records, or documents pertaining to changes in the survivor's status in the care system. When no documentary evidence of residence was available, applicants could use corroborating datable evidence, such as memorable construction projects or changes in institutional personnel, and/or swear an affidavit describing the period of residency.

Valid applications had to provide evidence of injury suffered while resident in an scheduled institution. They were not required to demonstrate liability. Settlement values depended upon the severity of four types of abuse; sexual, physical, emotional abuse and wrongful neglect. Any sexual abuse was a valid component of a claim. However, physical abuse must have caused major damage – explanatory examples include broken limbs, serious scarring or long-term medical problems. Emotional abuse included both the experience of sustained fear and verbal abuse and 'depersonalisation' – damaging the survivor's family relations by, for example, lying to them about their birth names or about their siblings or parents. Finallly, wrongful neglect embraced impediments to the child's physical, mental and emotional development, including malnutrition, inadequate education and insufficient clothing and bedding.

Acts of abuse contributed 25% of the total settlement value. Testimony was the primary form of evidence of abuse. This was provided in written form, in some cases supplemented by oral testimony at a hearing. The written testimony should include what abuse happened, where and when it happened, and, if possible, the identity of any offender. Applicants were encouraged to list all relevant abuses: the RIRB's assessment

of severity depended upon the frequency and duration of abuse and whether particular forms of abuse were combined.

Medical evidence of injurious damage contributed 60% of the total settlement value. This damage component had two subdivisions, physical/psychiatric illness and psycho-social sequelae. Illness includes both physical damage, such as scars or diseases, as well as psychiatric disorders such as depression or post-traumatic stress disorder. Examples of injurious psycho-social sequelae included problems with family attachment, cognitive impairment and substance abuse. Valid claims for both of these categories required medical evidence presented in reports from one or more medical professionals. The RIRB paid the costs of obtaining medical reports, at a total cost of approximately $10.4 million (McCarthy 2016, 25). Those reports must demonstrate why and how specific illnesses and sequelae were a consequence of abuse experienced in an industrial school and a RIRB-contracted medical advisor reviewed the medical evidence in each application and provided a report to the panel.

The final 15% of the total settlement value was 'Loss of Opportunity'. This form of damage was threefold: first, it encompassed a failure by the institution to provide the survivor with the legal minimum of education. Second, loss of opportunity encompassed any chronic inability to retain employment, or, if applicants were employed, how miseducation affected their ability to progress in a career. Third, the category included applicants who concocted a false identity to 'cover up' their history in industrial schools.

Table 3, made available to all participants in the programme, sets out the weighting given to the four components of a claim.

When compared to the situation in New Zealand, applicants to the RIRB benefitted from much more comprehensive support, including legal advice, record-searching and counselling. Nearly 98% of applicants had lawyers (Residential Institutions Redress Board 2009). The remuneration obtained by lawyers reflects their central role in the process: the $344.5 million spent on legal fees constitutes around 20% of the settlement total. The RIRB only defrayed legal costs if the survivor accepted a settlement: the RIRB paid legal fees in respect to 15,345 applications (92%) with a mean average of $21,873 per case (McCarthy 2016, 31). Legal support strongly influenced survivors' engagement with the programme, as lawyers mediated communication between the survivor, record-holding bodies, medical consultants and the RIRB (IR Interviews 1, 3, 5).

In Ireland, survivors' access to records was comparatively well resourced. In the early 2000s, the Department of Education digitised its care records and, simultaneously, developed two services to help survivors access their records. Inside government, the Department of Education set up a designated response unit and, in addition, the state funded the Origins Tracing Service, operated by Barnados Ireland. The Origins service provided applicants with a professional agency that could search records held by

Table 3. Ireland weighting scale for evaluation of severity of abuse and consequential injury.

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

Source: The Compensation Advisory Committee (2002).

government departments and religious orders – enabling survivors to avoid contact with 'offending' institutions. As part of its service contract, Origins received direct access to the Department of Education's digital database as well as more limited access to other government departments. Origins provided records for approximately 5000 applicants to the redress scheme (IR Interview 6). In addition, most scheduled institutions developed protocols to respond to records requests. The respondent agency would conduct a record search, determine what information was personal to the applicant and, therefore, what they were legally permitted to release, and provide a report to the applicant's solicitor. If applicants experienced difficulties, the 2002 Act enabled the RIRB to compel third parties to provide relevant records.

Lastly, Ireland provided survivors with personal support, including counselling. In September 2000, Ireland established the National Counselling Service to support survivors. By November 2001, the service employed approximately 60 counsellors (Compensation Advisory Committee 2002, 65). Survivor-led organisations also offered survivor-specific support (IR Interviews 1, 3, 5, 6). Those support organisations helped explain the redress programme to survivors and referred them to solicitors and counsellors. Support agencies often attended the survivor's meetings with the RIRB and provided 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 a hearing or settlement conference. Moreover, the RIRB contracted with Finglas Money Advice and Budgeting Service to provide applicants with financial advice. After 2008, applicants were also referred to Ireland's Money Advice and Budgeting Service.

Paralleling the situation of Māori in New Zealand, Ireland's support services did not include specific engagement with, or services for, Irish Travellers. Although the total population of Irish Travellers is relatively small (around 31,000 at present), it is extremely likely that they would have been over-represented in the industrial schools (Helleiner 2000, 199). In general, the demography of the industrial schools over-represented children of marginalised populations. Travellers remain among the most marginalised people in Ireland. The schools were identified as a tool of assimilation in a 1963 report that described the difficulties police and civil authorities had in effecting the committal of Traveller children to the schools (Commission on Itinerancy 1963, 112f). Little is known about the Traveller experience of the industrial schools because the Commission to Inquire into Child Abuse Ireland did not investigate their history.[8] And, similarly, the RIRB ignored any challenges pertaining to Traveller engagement with the redress programme. This is oversight is particularly concerning, as the continuing marginalisation of the Traveller population would make it likely that they would experience disproportionate difficulties in obtaining redress.

Applications lodged with the RIRB were assigned to a case officer. The officer assessed the application for completeness and, if necessary, contacted the applicant's lawyer for further information. The RIRB offered interim payments for elderly applicants or if the survivor suffered from a life-threatening disease or a serious mental illness. The maximum interim award was $17,400, the value of which was deducted from any final award, and these applications were 'fast-tracked' for a more rapid resolution. By the end of 2015, the RIRB had fast-tracked 3284 applications (Residential Institutions Redress Board 2009).

The RIRB contacted any person or institution named in the application as an offender. Scheduled institutions were informed as to the nature of the abuse described in the

application, including the identity of the survivor and any individual named as an offender. Respondents would normally provide the RIRB with a written response that might acknowledge, confirm or contest information in the application. Respondent offenders and institutional representatives could request a hearing to contest or correct facts alleged in the application. While written responses were normal, involvement by scheduled institutions or notified individuals in hearings was very rare. The findings of the RIRB were confidential and inadmissible in court; therefore, its processes had no legal consequences for anyone other than the applicant. The RIRB did not defray legal costs for religious orders or alleged offenders.

Two members of the RIRB panel adjudicated each application. The initial 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 2). However, if the RIRB had disconfirming evidence, or parts of the application were disputed, the test became the tort law's balance of probability test and the application proceeded to a quasi-judicial evidentiary hearing. 3325 cases, approximately 33%, included a hearing.

Hearings were necessary when evidence was contested and in any case requiring testimony to support claims regarding damage, as only the hearing was 'sworn evidence'. In addition, an applicant might request a hearing if they wished to testify 'in person' or appeal a settlement offer. Most hearings were held at the RIRB's office in Dublin and the RIRB paid the applicant's and any support persons' travel costs (Residential Institutions Redress Board 2003). Panel members travelled to attend hearings with survivors for whom travel was too difficult. The RIRB held hearings in prisons and hospitals; however, this was not preferred and the RIRB developed protocols to have applicants transported to the RIRB's more convivial offices. RIRB held some hearings in the United Kingdom for expatriate survivors who could not travel to the Republic.

Claims were assessed according to the 'standards of the day'; therefore, applications pertaining to different time periods were judged differently. For example, since free secondary education only became available in 1967, a failure to receive secondary education was only compensable after that date. Similarly, assessment took into account the standards of care characteristic of the time. Ireland experienced widespread poverty during the 1930s and 1940s and, in some cases, poor nutrition received by children in care reflected that more general dearth.

Using the evidence in the file, and information derived from the hearing (if one occurred), the RIRB panel assigned the application a provisional numerical score according to the weighted points-matrix (Table 3). Then, in reference to the three columns on the left of Table 4, the panel assigned a provisional settlement value to the application. That provisional value formed the basis for a global reassessment of the application. The

Table 4. Ireland redress bands and awards accepted up to 31 December 2015.

Redress bands	Points	Award payable	Number of applications within the band	Percentage of total
V	70 or more	$348–522,000	48	0.30
IV	55–69	$261–348,000	280	1.8
III	40–54	$170–261,000	2073	13.31
II	25–39	$87–170,000	7523	48.28
I	Less than 25	Up to $87,000	5655	36.30
Total			15,79	

Source: McCarthy (2016, 29).

RIRB might use that reflection to revalue the settlement, to recalculate the provisional score or, in extremely exceptional cases (fewer than 10), add monies up to the value of 20% of the provisional assessment.

When the provisional determination was completed, the RIRB invited the applicant to a settlement conference. Those settlement negotiations could change the RIRB's original assessment and, in most cases, the parties agreed to a settlement during the hearing. Then the RIRB issued the survivor with a formal settlement offer. Survivors had 28 days to accept or decline the formal offer. Survivors who declined the formal offer might either seek to renegotiate or appeal to the Review Committee. The Review Committee reviewed 571 awards with a resulting increase to the average initial award of 39% (McCarthy 2016, 26). Applicants could also appeal to the ordinary courts. By 2016, 17 applicants had rejected their awards: a further 1069 applications were withdrawn by the applicant, refused by the RIRB or resulted in a zero-value award.

Awards were not taxable as income, nor should they have affected any means-tested benefit. However, applicants who accepted a settlement were required to waive all claims against the state and scheduled institutions. The Residential Institutions Redress 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 appropriately.

By September 2015, the RIRB had received 16,649 applications, of which 15,579 (93.5%) resulted in settlement offers (McCarthy 2016, 25, 46). The total cost of settlements was $1.69 billion. The RIRB itself spent around $124 million on administration, including $52.2 million on legal fees, while the overall cost of associated health, housing, educational and counselling services is estimated at $306 million. The total expended was approximately $2.61 billion at an average cost per settlement (excluding the $306 million on non-legal services) of $137,878 (McCarthy 2016, 10).

Discussion

New Zealand's programme helps many survivors obtain a remedy for their injuries through a process that is designed to be equitable, caring and personal. Each claim is addressed holistically, with a highly individuated approach. Ministerial staff are committed to being both sensitive and helpful. The following criticisms do not detract from their conscientious efforts. The remainder of this article uses the Irish comparator to assess New Zealand's practice against four criteria. The first discussion examines the cost imposed on survivors by delays and psychological challenges, attending in particular to problems with personal records. The second discussion considers the transparency of the programme. The third assesses the quality of support available to survivors. The fourth considers issues of procedural and substantive justice.

Cost

New Zealand's survivor population is (very likely) disproportionately affected by poverty, psychological illness and other disadvantages; therefore, there are good reasons to minimise the costs of settlement for survivors.[9] New Zealand's historic claims process imposes significant costs upon survivors. This section considers first the costs created by

delays in settling claims, followed by the psychological difficulties associated with making a claim and obtaining personal records.

The time taken by the programme to process a claim is a cost borne by claimants. Every New Zealand interviewee expressed concern regarding delays, with one suggesting, 'Some of them [survivors] will commit suicide while they wait. Yes, or die of old age or associated [illness]…' (NZ Interview 8). Another interviewee said, '[the delays made me] cynical and [I] started to wonder if they really meant to settle them at all, or whether they were just playing everybody along' (NZ Interview 7). Official documents reflect this concern. In 2013, a ministry report described the 'inordinately long period many claimants are facing for resolutions' (Webber 2013, 20).

In *XY and Others* [2016] NZHC 1196, Judge Glendell suggested the average time to process a claim in New Zealand was 27 months. That compares with an Irish average of less than 2 years during the period in which the programme was busiest – 2005–2006 (IR Interview 2). To use other data, in its first 2 years, the Irish programme completed 2425 of 5111 applications (47%). In a comparative timeframe, the New Zealand programme completed 17 of the 216 applications (8%) it received in its first 2 years (2006–2007). Table 5 shows the rate of 'flow' through New Zealand's redress process with the 'Remainder' figure (Column 4) indicating the number of claims awaiting closure at the end of each year. Table 5 suggests that if the process were to continue to close approximately 250 cases per year, it would take 5 years to complete all of the claims lodged as of 31 December 2017.

Processing time is a function of the time taken for each case and the amount of staff time available. It is generally true that the time taken for assessing a redress claim correlates strongly with the epistemic depth of that assessment (Winter 2017, 10–11). As described above, New Zealand's historic claims process involves acquiring and investigating a complex data set with each claim requiring an average of 180 hours (Webber 2013, 18 n9). The resulting backlog of long-delayed cases was the primary driver for the fast-track process, which, by reducing the epistemic depth of the investigation, cleared 57% of the claims awaiting settlement as of 31 December 2014. By comparison, the ministry's standard process closed around half the claims received in most years. As noted above, the ministry is not presently publicising the redress programme because it cannot process a larger inflow of applications

Table 5. New Zealand Annual applications received and closed as of 31 December 2017.

Year	Received	Closed	Remainder	Annual closed/received ratio (%)
2004	8	0	8	0
2005	24	0	32	0
2006	89	1	120	1
2007	95	16	199	17
2008	140	21	318	17
2009	100	40	378	40
2010	152	60	470	40
2011	243	97	616	40
2012	241	113	744	47
2013	239	129	854	54
2014	249	89	1014	38
2015	364	460	918	126
2016	268	383	803	143
2017	431	223	1011	52

Source: Ministry of Social Development (2018).

Delays are associated with other costs. For survivors experiencing severe economic disadvantage, waiting for a settlement may involve deprivation of necessary goods or services, putting pressure on survivors to accept a lower settlement. One interviewee said that survivors 'come to us and say, "I got offered $5000. I took it because I was sick, I was dying"' (NZ Interview 2). Another interviewee related an anecdote:

> 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)

Exposing very private elements of their personal lives in order to obtain redress can be very difficult. For some survivors, testimony is helpful and therapeutic, but many experience it as arduous (Miller-Karas 2015; Duckworth and Follette 2012). Importantly, both are true for many survivors, as psychological difficulties can follow an initial sense of catharsis. Because the historic claims process requires individual and holistic information, survivors must 'relive' past abuse in detail, sometimes on multiple occasions, and this can cause re-traumisation. One interviewee stressed the difficulties involved.

> You've got to articulate all the different things. Remember what happened. Remember how you felt at that time. The circumstances. Yes, it's awful; very traumatising. (NZ Interview 8)

Re-traumisation was a problem in both Ireland and New Zealand. However, in Ireland, the process was quicker and survivors had more support. In New Zealand, advisors attempt to make the procedure congenial and informal and to develop a personal relationship with survivors to help address any psychological difficulties, but delays inhibit that relationship and, as discussed below, there are fewer external provisions for support.

Furthermore, obtaining records can be very difficult. Ministerial files were not compiled to be read by survivors: their format can be hard to understand and their size intimidating. Technical language presents challenges. One interviewee said,

> [T]here's all sorts of little things that we have no idea what it actually means. We've kind of tried to find out from people currently working in the system what would *that* mean, and they don't know either. (NZ Interview 8)

As noted above, Ireland made significant efforts to relieve the difficulties survivors face in obtaining and reading records. These efforts included the digitisation of files, contracting professional records-search and counselling services, and ensuring access to legal support. By comparison, in New Zealand there has been no initiative to centralise and digitise records and, apart from Cooper Legal, no organisations have specialist expertise in survivor records. Moreover, New Zealand does not guarantee legal support.

Exposure to personal records can exacerbate the psychological costs of redress. Records often contain erroneous and hurtful information, including derogatory language concerning survivors and their family. The terms of reference for the Confidential

Listening and Assistance Service envisioned survivors correcting errors in their files, but this was very rare (Henwood 2015, 45).

> [T]heir files are so voluminous, and they have so many errors in them you'd never ever begin to … you know. And for half, when you got them, they were blacked out and redacted. So, people were very, very unhappy about that. (NZ Interview 7)

Interviewees in both New Zealand and Ireland articulated concerns regarding the redaction of third-party information. While survivors are entitled to personal information, they are not permitted information regarding other individuals. Personal and institutional records usually contain large amounts of third-party information; therefore, survivor files can contain hundreds of redacted pages. Some survivors believe redactions protect the state from liability, '[they] think, 'well, what's there, what are they hiding from me?' (NZ Interview 3). More importantly, redactions eliminate information about the survivor's cultural and family background (IR Interview 1). That is costly for survivors who lack alternative access to family history.

Redaction can make it harder to settle a case or obtain higher settlement figures. In *N v The Attorney-General* [2016] NZHC 547, Judge Ellis compared a set of redacted documents with their unredacted counterparts. The judgement records Ellis' 'concern that some of the material redacted is plainly relevant to the claim of the particular plaintiff involved.' Records do not merely confirm or contradict memory: records are part of the remembering process, helping survivors who are trying to learn what happened to them. In this sense, access to records is part of the process of constructing survivor testimony. '…you read it and then you think about it, and then you can work something else out. It doesn't all become apparent when you read it [the first time]' (NZ Interview 8).

In summary, delays in processing and difficulties in acquiring and working with personal files impose significant burdens upon survivors. New Zealand's process is more protracted and psychologically costly for many survivors than was Ireland's.

Transparency

Monetary settlement is only part of the value of the redress programme. The opportunity for survivors to 'tell their story' and be heard in a respectful manner is an important inherent benefit. New Zealand's programme aims to realise this interest by addressing each case holistically and individually. One interviewee remarked

> [T]hat first sit-down, face-to-face meeting where people can generally talk, often for the first time and in detail about what happened to them, what they went through, and how that's affected them, it's huge for people, it really, really is. (NZ Interview 6)

However, the non-transparency of the process may alienate survivors who do not understand how the programme operates. There is very little public information on New Zealand's monetary claims process. There are no published guidelines, information available in ministerial documents is limited and settlements are private. To an extent, these points reflect the holistic character of the programme: because the process is very flexible, different claims can follow different paths (NZ Interview 2). However, the absence of information is not wholly accidental. Non-transparency is a considered policy

decision (Kirk 2015). One interviewee suggested that the lack of information prevents claimants from manipulating their applications to suit the programme (NZ Interview 4).

New Zealand's redress process unfolds according to reasons of which survivors are ignorant and through mechanisms that are distant and mysterious. Although ministry staff meet with non-represented claimants to explain settlement offers, that meeting occurs after the ministry has determined a settlement value. Many survivors experience this meeting as a 'take it or leave it' offer (NZ Interview 2). For represented claimants, the ministry provides the explanation in writing. The 582 survivors who received 'fast-track' payments received limited explanations: recall that, as of 31 December 2017, fast-track payments constituted 44% of total settlements. In general, survivors are not provided with the information necessary to understand the programme during the years they are engaged with monetary redress.

New Zealand's non-transparent system contrasts sharply with the Irish programme. In Ireland, the RIRB's website contains substantial information as to how the redress process operated. This includes both the 'Short' and 'Long' guides to the redress process explaining how the programme operated, what evidence was required for a successful application and how that evidence would be assessed. The Irish assessment matrix was available throughout the programme. The RIRB's annual reports and newsletter provided information regarding developments in the process, and the legal support obtained by 98% of applicants ensured that most survivors could have an adequate knowledge of the programme. Finally, all survivors (via their lawyers) participated in a settlement negotiation during which the RIRB needed to justify any settlement valuation with regard to publicly available standards and procedures.

In New Zealand, non-transparency prevents survivors from knowing how the investigation proceeds and how the ministry uses the information thereby obtained. Some stakeholders are well informed, such as the lawyers at Cooper Legal. That epistemic disparity may underpin some difference in the value of the settlements provided to represented and unrepresented claimants.[10] However, there have been significant changes in how the New Zealand programme operates, particularly with regard to acceptable evidence and settlement quanta (Sonja Cooper, Private Communication, 20 February 2018). These changes emerge from unpublicised decisions occurring inside the government and, as a consequence, it is impossible for anyone to know with certainty how the process will treat particular survivors. The problem is apparent at several points above, where interviewees provide conflicting procedural information. To recall one example, one interviewee indicated that the programme could use 'similar fact' evidence, while other interviewees stated categorically that the programme did not use such information (NZ Interviews 2 and 6). This straightforward contradiction might reflect a practice in which similar fact evidence is accepted in some cases and rejected in others. Yet the question should not be in doubt: survivors should know the character of the process the ministry will follow when assessing their claim.

Support

Professional support is essential to a well-functioning redress programme. This is evident in the advantages obtained by represented claimants in New Zealand, for whom Cooper Legal provides expert knowledge, psychological support and logistical assistance. Internationally, it is normal to 'contract out' tasks and responsibilities to support

organisations. Those organisations mediate between the programme and survivors and public funding helps those organisations develop necessary skills and knowledge.

In some cases, survivor organisations are embedded in the programme. In Ireland, survivor-led organisations such as the Aislinn Centre, Right of Place and One in Four helped claimants write applications, research relevant records, and provided logistical and personal support through the process. By incorporating these organisations into the redress programme, Ireland improved the quality of redress applications and the survivors' experience of the programme. Ireland spent around $73 million on survivor support organisations – including the Origins service (McCarthy 2016, 36). New Zealand has no comparative initiatives or funding commitments. As of 2017, evidence provided by two interviewees suggested that New Zealand organisations received $765,000 in funding from the ministry prior to 2017. I could find no evidence of any further funding, indicating that New Zealand organisations may have received as little as 1% of that provided in Ireland. Regardless of funding, despite good work by advocates, New Zealand's support organisations remain comparatively underdeveloped and, therefore, less able to support survivors and contribute to programme development.

Two further points illustrate New Zealand's comparatively weak complement of support services. First, although New Zealand provides funding for counselling, unlike Ireland's National Counselling Service, there are no government-sponsored specialist counselling services for survivors. Second, survivors are not provided with dedicated financial support. If a survivor was judged incapable of managing the monies, Ireland's RIRB could place the settlement in trust and pay it out in instalments. Further, Ireland sponsored two services: Finglas Money Advice and Budgeting Service and Ireland's public 'Money Advice and Budgeting Service'. In New Zealand there are no specific services, although MSD advisors will direct survivors to a standardised financial services, if prompted. In a population likely to have lower than average financial literacy, the absence of good financial advice, provided by people with appropriate training, is a serious concern. One interviewee related an anecdote about a survivor who received one of the largest settlements in New Zealand.

> I said, 'How much have you got left?' I think Mike said a few thousand. I said, 'What have you got?' Mike only had some electronic gear and a pair of shoes. 'Right, what happened?' 'Oh, so and so called round and wanted to borrow some money. So and so called round'…. Now, where is he now? Mike had a lot of money. Now, he's not only back to where he was in the beginning, Mike is in a worse place than he was because, as Mike said, 'I'm a fucking hopeless useless bastard. (NZ Interview 1)[11]

The anecdote relates an extreme case in which obtaining monetary redress without adequate financial support may have been detrimental to the survivor's interests. The more general point is that the New Zealand programme lacks the services that would optimise survivors' engagement with the programme.

New Zealand's lack of strategic engagement with Māori organisations is particularly problematic. Māori organisations may support individual claimants; however, there is no strategic relationship between the ministry and any Māori organisation, despite Māori constituting approximately over 50% of claimants (Young 2017). There are no Māori staff in the historic claims unit. While advisors hold interviews on marae and incorporate Māori tikanga in interviews, the overall process lacks Māori input and character. The

individualistic and legalistic character of the process is likely to be incompatible with the whanaungatanga of some Māori survivors and was the subject of a 2017 compliant to the Waitangi Tribunal (Te Mata Law 2017).

Ireland's comparator programme did not have an indigenous aspect. As noted above, the Traveller population, despite (probable) over-representation in the industrial schools, did not receive particular support from the redress programme (Helleiner 2000, 199). However, looking elsewhere, Canada's Independent Assessment Process devolved considerable responsibility to indigenous agencies.[12] To mitigate the individual and legalistic character of the redress process, the Canadian redress programme collaborated with the Assembly of First Nations to develop a distinctive group application process (Indian Residential Schools Independent Assessment Secretariat 2015). In this group process, the state provides funding, and an indigenous organisation provides the infrastructure for survivors to engage with monetary redress within a culturally appropriate, mutually supportive network.

A robust support network can improve survivor experiences directly. Also as occurred in Canada, it can develop general programme operations as third-parties provide improvement-inducing feedback. At present, the primary strategic relationship for New Zealand's programme is with Cooper Legal. Prior to 2013, Cooper Legal worked effectively with ministry staff. However, the relationship is now marked by mistrust and acrimony. Indeed, without exception, every support organisation I interviewed in New Zealand expressed hostility to a programme they perceived as distant and alien.

Justice

Concerns with the justice of New Zealand's redress programme embrace both procedure and substance. Procedurally, the historic claims investigation is a very quiet process in which the ministry investigates its own practice. The Historic Claims Unit is located within the Ministry of Social Development and is, therefore, beholden to changing ministerial priorities and funding. By comparison, Ireland's RIRB was an independent body, created by statute, secure in its funding and beholden to the rule of law. That independent character was secured by greater internal accountability. Two independent RIRB panel members adjudicated each application, which was then subject to negotiation with the survivor's solicitor. In New Zealand, a public employee writes a report justifying a settlement offer that is communicated to the survivor or their solicitor.

There is no effective oversight of New Zealand's programme. While the Ombudsman exercises some persuasive authority, it has a significant backlog of complaints and delays in ministerial response to requests for information by the Ombudsman reduce its effectiveness (NZ Interview 2). Action by government has also undermined the effectiveness of oversight bodies. In 2011, the Human Rights Commission wrote a draft report that was critical of the redress process (Human Rights Commission 2011). Attorney General Chris Finlayson opposed the draft and the report was never published.[13] There is little independent judicial oversight. In *XY and Others* [2016] the court found that because the programme operates within the prerogative of the Crown, 'the decisions in question [regarding redress] are not susceptible to assessment in terms of legality or otherwise and are therefore non-justiciable.' By comparison, the Irish programme was subject to effective review. As observed above, the programme incorporated a Review Committee that, on average, increased referred settlements by 39%. In

addition, The Irish programme's statutory basis made it clearly justiciable and the programme was subject to robust scrutiny by the ordinary courts.

The lack of a clearly impartial redress agency raises procedural injustice concerns. In addition, some survivors may be deterred from engaging in a process administered by the 'offending' agency (Stanley 2015, 1155). As Judge Carolyn Henwood observes,

> The department [The ministry] is the perpetrator and also the person trying to put it right. Some people are very, very anti the department 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)

Interviewees connected the apparent lack of impartiality to the failure of meritorious claims (NZ Interviews 2 and 8). New Zealand's programme has a relatively low 'success' rate (80.5%) of monetary settlements.[14] The comparative success rate in Ireland was 93.7%. The comparison is not clear evidence that New Zealand denies meritorious settlements, but the concern with procedural partiality provides a ready explanation for grievances.

Turning to the survivors' interest in the substantial justice of an appropriate settlement value, a redress programme can be substantially unjust in two ways: it can be partial in scope and partial in relief. A programme is unjustly partial in scope when it excludes relevant injuries. New Zealand's programme is comparatively narrow. For comparison, the Irish programme included emotional abuse and depersonalisation as grounds for redress. The New Zealand programme does not. Another exclusion is the loss of cultural and family identity. Cultural disconnection was systemic and affected thousands of Māori (Stanley 2016, 76). Yet the programme does not redress cultural injury. Finally, the New Zealand programme only redresses injurious actions and not the consequences thereof. In comparison, Irish applicants were compensated for subsequent damage resulting from abuse and neglect, including detrimental effects on the survivor's employment.

Reducing the scope of redress tends to reduce the quantum of relief. There are serious concerns that New Zealand's redress is unreasonably low. In Ireland's programme, the average payment was $108,315. The average payment received in New Zealand was $19,124 – 17.6% of the comparator. There is no reason to think that abuse in care was, on average, 555% more severe in Ireland. Given the comparison, there are reasonable concerns that New Zealand survivors are not receiving just settlements.

Conclusion

New Zealand's historic claims process has received numerous accolades. However, comparison with a similar Irish programme indicates significant concerns with respect to the high costs imposed on survivors, non-transparency, inadequate support and injustice. These concerns are serious and the need for change is urgent. Therefore, the Royal Commission of Inquiry into Historical Abuse in State Care should consider ameliorative approaches. One obvious initiative would be to reopen the fast-track process. However, while that would address concerns with delays, it would not to respond to the other concerns identified. Guided by what has worked in Ireland, ameliorative revisions to the programme might include, *inter alia*: supporting survivors in terms of access to legal representation, records and counselling; reducing costs for survivors by increasing

the speed of the process and developing alternatives to the presently individual-focussed practice; improving independence and transparency by lodging responsibility for the programme with a stand-alone board that operates according to public regulations and is subject to robust accountability mechanisms, such as judicial review. Finally, programme developers should consider increasing settlement values to provide a more just response to the experience of abuse in care.

Notes

1. New Zealand uses the same institutional processes, *mutatis mutandis*, for contemporary claims.
2. Some claimants lodge 'joint claims' with more than one ministry. In these cases, the ministries coordinate a response.
3. For some information on the historic claims process in Health, see Webber (2013). The details of Health's process are redacted from the public version of that report. As of 10 November 2017, the redacted report is available on www.parliamentnz.co.nz.
4. For New Zealand's accident compensation programme, see Bismark and Paterson (2006).
5. *XY and Others* [2016] NZHC 1196 offers the best publicly available discussion.
6. All monetary values are given in unadjusted New Zealand dollars. For Irish values (originally in euros), 1 January 2006 was used as a benchmark conversion date, representing the point at which the Irish programme had issued approximate 50% of settlements. The conversion rate is 1.74 NZ dollars to 1 euro. Historic conversion data were derived from www.ofx.com.
7. The $37,700 figure is given by the Office of the Minister of Social Development (2014, 6). An amount of $40,000 is given in Webber (2013, 16).
8. Traveller children are mentioned in the report, but there is no serious investigation of their experience in care. For discussion of Travellers in the Ryan Report see O'Sullivan (2009).
9. I could not find demographic data on New Zealand survivors. However, international data suggest that survivor populations tend to experience significant overlapping disadvantages (Higgins 2010; Lundy 2016, 15 f28, Royal Commission into Institutional Responses to Child Sexual Abuse 2015, 179, Watson 2011).
10. Average payments for unfiled and filed claims are $18,860 and $19,809, respectively (Ministry of Social Development 2018). Since all filed claims are represented, and filed claims have a higher average value, this is evidence that representation is associated with higher settlements. However, that variance may reflect the influence of confounding variables, such as evidential quality.
11. Names and specific details were changed to preserve anonymity.
12. The Canadian Independent Assessment Process was a component of the 2006 Indian Residential Settlement Agreement. For information about this programme, see Regan (2010).
13. As of 20 December 2017, the letters exchanged between Finlayson and the Commission were available at https://assets.documentcloud.org/documents/3224939/HRC-Letters.pdf.
14. Prior to the fast-track programme the 'success' rate was 63% (Webber 2013, 17).

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Appendix 1

Table A1. Referenced interviews.

No. of interview	Start time	Date	Number of interviewees
Ireland			
1	1030	6 November 2014	1
2	1430	10 November 2014	2
3	1030	13 November 2014	2
4	1100	18 November 2014	2
5	1030	20 November 2014	2
6	930	28 November 2014	1
New Zealand			
1	1500	24 May 2017	1
2	1100	13 June 2017	2
3	1400	13 June 2017	3
4	1100	14 June 2017	1
5	1400	14 June 2017	1
6	1000	17 July 2017	1
6 (con't)	1130	25 July 2017	–
7	1000	18 July 2017	1
8	1100	30 July 2017	2