



## **How Can Care Leavers Achieve justice? Legal and Practical Issues**

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Many care leavers tell us that they want the perpetrators who abused them, the State who placed them in care, and the institutions who were meant to look after them to be held responsible for the abuse they suffered. They also tell us that they need closure from the process. This can only be provided where there is proper redress, including punishment of the perpetrators who are still alive, acknowledgment that the abuse occurred with sincere apologies, and compensation from the State and individual institutions where care leavers suffered abuse.

Unfortunately, under the current system there is no guarantee that any of these needs will be met. This is because care leavers who were victims of abuse whilst in institutional care face significant legal and practical barriers.

### **1. TYPES OF MATTERS**

People wanting to take legal action for abuse they suffered in care may have a number of options available to them. Firstly, if the offender is still alive, they can report the matter to the police for criminal investigation and prosecution. Secondly, they can make a claim for compensation at common law which is a civil matter heard in Court called a claim for institutional abuse or for negligence. This could involve a claim against the government for placing them in care, against the institution/s where they were abused, and/or against the individual perpetrator who abused them if they are still alive. Thirdly, they can participate in informal settlement conferences with religious orders, philanthropic organisations and/or government departments who were responsible for their care at the particular homes where

they were sent. Fourthly, they can apply for compensation through one of the State redress schemes if they were in care in a State that has a redress scheme in place. Fifthly, they can make a claim through crimes compensation in the State where they were abused as a victim of crime, even if the perpetrator has not been convicted or charged. This is a statutory scheme, and is called the Victims of Crime Assistance Tribunal or VOCAT in Victoria, but there are similar schemes in other States. Finally, if there has been a criminal conviction of the perpetrator in question, a victim who has suffered an injury as a result can make a Court Application under the Sentencing Act in the relevant State. The Court has the power to order the convicted offender to pay compensation to the victim out of his/her own pocket.

## **2. GENERAL DIFFICULTIES**

Whichever path or paths care leavers decide to go down, they face a number of hurdles sometimes outside of the formal legal system.

Firstly, there are emotional hurdles. Sometimes people are just too traumatized to tell their stories or are afraid of the stigma if friends and family find out what happened to them. Others do not know they have legal rights available to them. They may be incarcerated, socially isolated, or living in remote areas where access to justice is more limited. Other times they may be reluctant to tell a lawyer, police officer, psychologist or psychiatrist what happened to them. This could be because they fear that they won't be believed or they see such people as authority figures, and have had trouble with authority as a result of the abuse they suffered. They may also feel uncomfortable talking to a male or female about the abuse because of the particular type of abuse they suffered.

Some care leavers who do come forward tell us that they feel too ashamed, guilty, angry, confused, embarrassed or drug and alcohol affected to remember many details of the abuse they suffered.

In many cases, care leavers find it hard to name or identify the people who abused them. This can be for a number of reasons. For example, they may never have known the names of the people who abused them because they were made to call them by their rank or position, such as "Captain" or "Officer" or "Boss" or because they were too young. In other situations, they may once have remembered the name of the perpetrator, but forgotten it either because of the passing of time or because they have tried very hard to forget the abuse and who did it to them for many years. Other times people think they remember the

name of the person who abused them, but it turns out that the name is wrong for whatever reason, and this can be used to try to attack their credibility or the truth of what they are saying. Their reliability can also be attacked if they don't remember all the abuse they suffered straight away, and remember it at a later date after the other side has been notified of their claim.

Some care leavers also have had a limited education as a result of the poor schooling they received in care, or because they were unable to concentrate in class after being abused. The process of taking a matter to court or participating in an out of court settlement often involves reading documents, which are often complex. Problems can arise when care leavers sign Statements or Affidavits they have not properly understood and they are then asked by the other side to explain inconsistencies that arise if their story differs from the written document. It is important for lawyers and those assisting care leavers to ensure that such documents have been properly understood.

Even once people tell their story, there can be difficulties getting evidence to support their claims. When defending these claims, the other side often ask for corroborative evidence. Such evidence can come from a number of sources, including people's Wardship records or records from the specific institutions where they were placed. Wardship records are only available if people were Wards of the State under control of the government. Although the government has kept some Wardship records, others have been destroyed and are not available to back people up when they say they were at a particular Home or placement, and there for a particular length of time. For example, the NSW Department of Community Services does not apparently have wardship records for an estimated 16% of mature-age former wards who apply to access their records.<sup>1</sup>

Where wardship records are released, sometimes they are only partially released. There are often a number of exemptions the governments rely on so they don't have to release certain documents to Wards of the State, or so that they release them with parts missing. This can make the task of gathering evidence even harder, especially when names of offenders or even family details have been blanked out. Where Wardship or institutional records do exist, it can still be hard to find evidence to support claims. Many of our clients are often disappointed that their records don't contain much detail or don't detail the abuse they suffered when they complained about it to the authorities in charge.

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<sup>1</sup> The Weekend Australian, 8-9 May 2010, Weekend Professional page 2.

In most cases, children did not feel able to complain to those in charge at the time because they were children and did not think they were believed, and because in some cases the very people in charge were the ones abusing them.

Problems often arise from the value judgments that are contained in the records about care leavers. For example, horrible and often untrue things are written about their families and why they were taken away, or about their personal conduct and character. When this is written in the records, and they are often the only written records that exist, it makes it very hard for care leavers to disprove what is on the paper, even where the records are wrong. We have acted for clients who swear that they didn't commit crimes they are recorded as having committed in their wardship records, or who are sure that they were at institutions that are not recorded in their records, or that they were there for longer than the records state. We also often find that trying to locate records from individual institutions where care leavers were sent is a much harder task than locating wardship records and that they are usually very brief. Many institutional records have been lost or destroyed by the institutions in question, or they were poorly maintained and only have a few dates of admission and discharge. We have had a number of situations where clients have been told by government agencies or institutions that they have no records but then the records have been located at a later date under a different name or birth date or by a different person searching the records.

By way of example, we had a client who was privately placed by his parents at a boys' home. Because he was a private placement, the Victorian Department of Human Services did not have any Wardship records for him. The institution where he was privately placed also had no records for him despite the many years he said he had spent there. They were trying to suggest that our client had not been there for as long as he said he had. It was a case of his word against the institution's until he miraculously managed to find his father's cheque stubs in his belongings. His father had kept records of each and every payment he had made to the institution in question to care for our client. Lo and behold, the dates of the payments matched our client's claims about the length of time he had been placed at the home. We have also has some success stories where clients have managed to find photos that their family members took of them at a Home to help prove that they were sent there in the absence of any other record.

Another way of gathering corroborative evidence is to obtain witness statements from people who can support that fact that a particular care leaver or staff member was in an institution at a particular time, or who witnessed the abuse occurring, or the effect it had on the care

leavers in question. Our firm is lucky in that we act for hundreds of care leavers, and many are happy to be contacted to provide supporting statements if they are able to. That said, it is often a long and difficult process trying to locate clients who were in the homes at the same time as each other who can provide supporting evidence. For example, we had one client who was a private placement and had a strong recollection of being abused at the Home where he was placed, but had no records to back up the fact that he was there. He believed that he had been at the Home for many years, and could draw a very good map of how the Home looked at the time he was there, and name a number of perpetrators who were at the Home at the time he claimed he was there. However, his memory of the names of other staff members and children at the institution in question was quite poor. This was because despite the length of time he was at the Home, the abuse he suffered overshadowed his other memories. The institution in question did not accept that he was there for as long as he claimed, and initially offered no compensation. We rang dozens of other clients to try to get some supportive evidence with no luck, perhaps because our client was a quiet child. Ultimately we found one other client who remembered him, and luckily this was enough to encourage the other side to make an offer of compensation. However, if there had been records to support the length of time he was there, I have no doubt that the compensation paid would have been higher.

A further problem care leavers face is that the perpetrators of abuse are often now dead and can't be brought to justice individually, although the institutions can still be held responsible. Where the perpetrators are still alive, most of them try to proclaim their innocence. Thankfully, this doesn't always wash, and a number of perpetrators have been incarcerated in recent times for abuse they committed decades ago.

We also find that government agencies and institutions sometimes try to claim that perpetrators were innocent because they have no other statements from other care leavers who said that they had no problem with the perpetrator in question. Other times there are unfortunately dozens of victims of the same perpetrator, and it is easier to provide corroborative evidence of abuse.

### **3. CIVIL CASES**

To be entitled to damages in a civil court claim, care leavers must show that there was a breach in the duty of care that they were owed either at common law or in statute, and that

they have suffered injury as a result of that breach. The standard of proof is on the balance of probabilities.

Claims can include matters such as an institution or government's failing to properly supervise a care leaver; permitting or allowing sexual or physical abuse to occur (or to continue to occur once the abuse was known or should have been known to the supervising officers); failing to ensure that care leavers were not unnecessarily punished and disciplined; and failing to properly or adequately supervise, inspect and/or review the Home to ensure it complied with appropriate standards of care.

### **Statute of Limitations**

One of the major barriers to successfully litigating these claims is the Statute of Limitations. All Australian states have Statutes of Limitations which limit the time within which legal proceedings can be issued in relation to claims for damages for personal injuries. The harshness of this legislation varies from State to State. The problem is of course that limitation periods in Australia generally start to run from the time the claimant became 'aware' that they had suffered an 'injury.'

The nature of the injuries suffered by victims of abuse means that it is often decades after the actual abuse has occurred before individuals have the psychological strength to investigate these claims.

In Victoria, legal action for personal injury claims usually needs to be taken within 3 years of the abuse. There is an argument in Victoria to say that you should issue legal proceedings within 3 years of the discoverability of your cause of action. In the case of childhood abuse, there are special limitation periods, and the date discoverability is deemed to be at 25 years of age or the actual date of discoverability if this is later, with a 'long-stop' period of 12 years from when the victim turns 25 years old, ie until the age of 37 years old, if they can show they only became aware they had a legal claim within the previous three years.<sup>2</sup> The provisions are complex and the date a claim is statute barred is often difficult to predict with certainty.

If civil legal proceedings are issued by care leavers outside the relevant limitation period in their State, the State or institution or perpetrators involved will argue that their claim is too

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<sup>2</sup> Limitation of Actions Act (Vic) 1958 s271.

late, ie that their claim is statute barred under the relevant Statute of Limitations Act. This is an issue in the vast majority of claims we are pursuing for care leavers who were abused in care in the last century.

In order to take an out of time matter to court, it is necessary to apply for an extension of time.

The circumstances in which extensions of time will be granted are extremely restrictive in most jurisdictions. Applications are also costly and there is no guarantee that leave to issue proceedings will be granted. The cost of an extension of time application can be about \$15,000 or more for each side. If the application is unsuccessful, the Applicant in addition to his/her own legal costs will be liable for the other side's legal costs.

The case of *Stingel v Clark* is a case in point about costs.<sup>3</sup> Even though Ms. Stingel was not a Ward of the State, similar issues apply. Ms. Stingel alleged she was raped by Mr. Clark in about 1981. Ms. Stingel's claim took seven years to litigate with a number of appeals, including to the High Court, and ultimately a retrial in the County Court of Victoria where she was awarded \$20,000 by a Jury. The legal costs incurred by both sides however would have been in the hundreds of thousands of dollars.

A court must take a number of factors into account in deciding whether an extension of time should be granted. In Victoria, these factors include the reasons for the delay, the prejudice that the Defendant has suffered by the delay (eg the destruction of documents or the loss of witnesses) and the merit of the substantive claim.<sup>4</sup> The reality is that in most of these claims, the other side will have little difficulty in showing prejudice given that the last of the orphanages or children's homes closed in the early 80's.

In South Australia, the law relating to extensions of time is much more generous. Under South Australian law, an extension of time will be granted if the claimant acts within 12 months of the date they became aware of a 'material fact'. A material fact can include a diagnosis that the claimant is suffering a psychological injury as a result of the alleged abuse, the perpetrator being criminally prosecuted or some other 'fact' that enables the Plaintiff to argue that they only recently became aware that they may have a cause of action.<sup>5</sup>

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<sup>3</sup> *Stingel v Clark* [2006] HCA 37, *Clark v Stingel* [2007] VSCA 292.

<sup>4</sup> Limitation of Actions Act (Vic) 1958 s23A.

<sup>5</sup> Limitations of Actions Act (SA) 1936 s48

In *Rundle v the Salvation Army & Anor*<sup>6</sup> an application was made by the plaintiff, Mr Rundle for an extension of time within which to sue the Salvation Army and Mr Keith Ellis who was a carer in the Salvation Army's Eden Park Boy's Home where Mr Rundle was placed. Mr Rundle alleged that he had been repeatedly sexually abused by Ellis and by a number of other residents in the 1960s and that his complaints of these assaults had been ignored. Mr Rundle first lodged his claim in March of 2003. The trial judge granted an extension of time, and this decision was appealed by the Salvation Army. In 2007, the Supreme Court of NSW granted Mr Rundle an extension of time within which to sue for damages. However, some 6 years later, Mr Rundle's claim remains unresolved.

One of the factors a court can take into account in deciding whether to allow an extension of time is the delay in issuing proceedings from the time care leavers first receive legal advice regarding their claims and any delay that occurred between when a solicitor was first consulted and when legal proceedings were issued. Sometime delays occur in pursuing claims because care leavers are initially advised against pursuing their claims by lawyers because of the significant legal barriers involved. Even for firms like ours who deal with many cases of institutional abuse, it has taken us a number of years to collect enough evidence to show the level and degree of systemic abuse occurring in some institutions. We have only been able to do this because more and more care leavers have come forth with their claims.

## **Considerations**

The types of factors considered in Court in deciding whether to award compensation or how much to award care leavers can include things like:

- the extent of the "damage" suffered by care leavers before they went into care;
- the period of time care leavers spent in care and their age when they entered care;
- evidence of abuse from the employee or employees who were directly employed by the state or institution;
- evidence of systemic abuse at the Institution in which care leavers were placed; and
- evidence that the State or Institution knew or should have known that care leavers were being abused

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<sup>6</sup> *Rundle v the Salvation Army (South Australian Property Trust) and Anor* [2007 NSWSC 443]

Where care leavers were the victim of physical abuse, so many years after the events, it will often be difficult to show that, the corporal or physical punishment they received was so excessive as to amount to “abuse.” The law does not judge by today’s standards, but rather the standards that existed at the time, and there was more tolerance of physical abuse in previous decades.

Sexual abuse has never been tolerated in Australian society. But even with complaints of sexual abuse, there needs to be some evidence to prove that the abuse occurred if the matter goes to court. This can often be a difficult task where there is no reference to the abuse in care leavers’ records, and poor corroborative evidence about the accused perpetrator.

Often care leavers also complain of emotional abuse and sheer neglect they suffered as children in care eg. a failure to adequately feed, clothe, nurture, educate or lack of support services on release. Our tort law does not easily recognise emotional abuse as the basis for a legal cause of action.

In other cases, where negligence and breach of duty can be proved, there are causation issues. Often, but not always, children were removed from their families because they came from poor, dysfunctional or abusive families. After leaving care, many also went on to lead dysfunctional or abusive lives. In such cases, the other side will try to argue that it is not the abuse that occurred in their care which has caused the injury but the damage done to care leavers before or after they left their care. In other words, it can be difficult to “unscramble the eggs” and identify the cause of any ongoing symptoms, psychological injury, loss or damage as being directly caused by the abuse.

Where injury can be established as having occurred, the argument will then centre around whether, notwithstanding the abuse, a religious or state run organisation is actually legally liable for the conduct of its agents or employees.

An organisation does not rape a child. Individuals are the abusers but in the normal course of events, claims are brought against the organisation who had a duty to protect the individual in its care.

When these claims are brought the organisation will argue that it did not know that the conduct was occurring and will simply seek to blame the individual abuser and say the

organisation had no way of knowing the conduct was occurring.

Given that many of these claims are brought years after the event, it is often extremely difficult to show that the responsible authority that owed the duty of care either knew or should have known the abuse was occurring. Various government departments and religious institutions in whose care children were placed will argue that they had no way of knowing the extent and the nature of the abuse.

Further, because the abuse relates to illegal conduct, the employing agency will argue that they cannot be held liable for the illegal conduct of their employees or agents. This argument has met with considerable legal success. In 2003, the High Court considered the extent to which authorities could be liable in negligence where there was no allegation of fault by the authority but where injury had occurred as a result of the misconduct of an employee. The High Court found that a non delegable duty of care did not extend to intentional criminal conduct. The Court also found that a school would not be vicariously liable for sexual abuse by its employees/teacher unless there was a close connection between the employer's enterprise and the conduct.<sup>7</sup>

In addition, even though many care leavers were Wards of the State, the State has argued that they fulfilled their duty by placing children in their care in so called "reputable" institutions. It is well documented that the Churches on the other hand allowed many of the children in their care to be subjected to the most horrific physical and emotional deprivation and in many cases to serial and significant sexual abuse. There were no systems for the ongoing independent auditing or inspection of these facilities by the government child welfare authorities and arguably no obligation to do so under the social welfare legislation at the time.

In cases of clerical abuse, Churches may also argue that a priest, brother or nun was not even an employee and therefore they cannot be held vicariously liable.<sup>8</sup>

Many care leavers were placed in the care of the Catholic Church and its religious orders or in other Church institutions. It is very difficult to sue the Catholic Church and its religious orders in cases of historical abuse. The Catholic Church in particular denies it can be sued because they argue they are not legal entities merely religious associations. This is because the Catholic Church has deliberately organised its legal affairs so that the only entities that

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<sup>7</sup> *Lepore v State of New South Wales* (2003) 212 CLR 511

<sup>8</sup> *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8.

exists and be sued is the Roman Catholic Church Property Trust and the current Archbishop or head of the relevant religious order.

In a case heard by the Court of Appeal of the Supreme Court of NSW<sup>9</sup> the Church argued that there was no legal entity that could be sued by a former altar boy Mr. John Ellis in relation to his alleged sexual abuse at the hands of a Priest.

This claim was originally brought by Mr. Ellis against the Trustees of the Roman Catholic Church and against His Eminence Cardinal George Pell Archbishop of Sydney. Mr. Ellis alleged that he was sexually assaulted by an assistant priest at Bass Hill Parish in Sydney between 1974 and 1979. The trial Judge found that the Trustees of the Roman Catholic Church could be sued and granted an extension of time to Mr. Ellis to allow him to pursue his claim.

This decision was appealed by the Trustees of the Roman Catholic Church. Even though the Church conceded on appeal that the evidence filed by the Plaintiff established an arguable case, it nevertheless argued that the claim should be dismissed on the basis that there was no legal entity that could be sued.

Whilst Archbishops can be sued, in cases of historical sexual abuse, the relevant archbishop has often passed away. The church's argument was that as this legal entity played no role in the oversight or appointment of priests, it could not be sued in a claim for clerical sexual abuse. The Church also argued that as there was no other legal entity that could be sued; Mr. Ellis's claim should be dismissed. This argument was endorsed by the Court of Appeal. The case went to the High Court, and in November 2007, the High Court agreed with the Catholic Church and refused special leave to appeal. This means that the legal position is now clear and the Catholic Church in NSW (and by extension in all Australian states where Churches have organised their affairs in a similar manner) is immune from litigation in many cases of past sexual abuse even in circumstances where it is clear that the church knew or should have known that children in its care were being abused and failed to act.<sup>10</sup>

The other significant impediment faced by potential claimants is the cost of litigation. Where proceedings are issued both the State governments and the churches brief lawyers from the top of end of town who spend a fortune in strike out applications and devices to delay a claim and to increase costs.

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<sup>9</sup> *The Trustees of the Roman Catholic Church v Ellis and Anor* [2007] NSWCA 117.

<sup>10</sup> *Trevorrow v State of South Australia* (No 5) [2007] SASC 285.

If care leavers pursue a civil legal claim and lose, they are liable for the other side's legal costs, which are likely to be significant. If they win their case, some of their legal costs are paid by the other side, but they are often still out of pocket for some legal and other expenses. A claim in the district courts or various State Supreme Courts where these proceedings are issued can cost many tens of thousands of dollars.

The case of *Trevorrow v State of South Australia*, which was heard by a Judge alone, is one of the few great victories for children abused in care. Mr Trevorrow was a member of the Stolen Generations, who was able to prove that he had been unlawfully removed from his family. The judge applied a common sense test of the issue of causation and found that there had been a breach of duty of care causing Mr Trevorrow damage and loss including life long depression.<sup>11</sup> Mr. Trevorrow was awarded \$525,000, including punitive damages, which went up to \$775,000 with interest. Whilst the Trevorrow case was a great win, it is a case which was ultimately decided on its facts and made possible by the admissions contained in Mr. Trevorrow's wardship file that the South Australian Government had no power to remove him. The reality is that the claims where the truth is told in the records, as was the case in Mr Trevorrow's matter, are few and far between.

Mr. Trevorrow's case is now subject to appeal by the South Australian Government. Sadly, Mr. Trevorrow died shortly after his judgement was handed down and even though the SA government have said that they do not want the money back, Mr Trevorrow died knowing that the decision in his case had been appealed.

In cases of historical sexual abuse, even if the application for an extension of time is ultimately successful (and this is a big 'If') the time and costs involved in seeking and obtaining the extension of time and arguing the case itself underline yet again why litigation is not the answer in cases of institutional abuse.

#### **4. INFORMAL SETTLEMENT PROCESS**

A number of the Churches that ran many of the Institutions in which children were placed have over a number of years paid compensation to victims of abuse and in the past few years some of these organisations have developed formal or informal protocols for dealing

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<sup>11</sup> Ibid at [1139].

with claims of institutional abuse without requiring litigation. These parties generally meet and discuss the issues and attempt to negotiate an informal settlement through a mediation style process.

Often care leavers choose to go down the informal out of court settlement process. This is because it can be too difficult to issue court proceedings because of the various hurdles outlined above. Some clients also understandably do not wish to air their claims in a public court setting.

Whilst the Catholic Church and some other religious institutions have set up compensation panels or informal processes to settle these claims, money is always paid with a denial of liability. Apologies are often extremely general, leaving some care leavers to believe they are insincere. Until recent community outcry, a term of settlement in such settlement agreements included a confidentiality clause which left care leavers feeling degraded and as though all they'd received was "hush money."

For care leavers abused in Catholic run institutions, The Catholic Church has the "Towards Healing" program which deals with all claims of clerical abuse, including claims of historical, institutional abuse. In our experience, offers of compensation made through the Towards Healing process are modest and the Church does not cover legal costs. The Melbourne Diocese of the Catholic Church also has a settlement protocol which allows for maximum payments of \$75,000.00.

The "Melbourne Response" has recently been criticised in the press for notifying alleged perpetrators of complaints before police have had the opportunity to conduct interviews thereby potentially compromising the police investigation. Further, police have been reported as calling for sweeping changes to the way in which the Church deals with sex crime allegations after it was revealed that despite nearly 300 allegations of sexual abuse having been substantiated by church investigations since 1996 when the "Melbourne Response" was first set up, only one priest had been defrocked.<sup>12</sup>

Formal and informal settlement processes developed by some churches and religious groups have been criticised as being designed to protect the brand name of the Church rather than to provide for genuine redress, acknowledgement and healing.

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<sup>12</sup> "The Age, 22<sup>nd</sup> April 2010, <http://www.theage.com.au/victoria/300-abuse-cases-one-defrocking-20100421-szz6.html>

## 5. REDRESS

Despite the States apologies and the National Apology last year, Australians who were abused in care have different rights depending on which state they happened to be placed in care. Making compensation available to one group of Australians but denying another group simply because of the state in which they were raised makes a mockery of the apology.

Western Australia, Queensland and Tasmania have set up redress funds and the South Australian Government is looking at doing so.

Under these models, compensation is for pain and suffering only. It does not matter when the abuse occurred. It is not necessary to prove negligence or breach of statutory duty.

### **Tasmania<sup>13</sup>**

In 2003, the Tasmanian Government under the late Jim Bacon set up the first Government scheme to compensate children abused in care. The Tasmanian Government also subsequently set up the first and only redress fund for members of the Stolen Generation

Initially the Tasmanian scheme provided for payments of compensation of up to \$60,000.00. Despite an initial closing date for claims, the scheme has been extended although there is a current maximum payment of \$35,000.00 available to claimants.

Unfortunately, the scheme only applies to Wards of the State who were abused whilst in the care of the Tasmanian Department of Health and Human Services. Unfortunately, the scheme does not apply to those who were privately placed in Approved Children's Homes and Homes certified for the care of children are not eligible. The scheme covers sexual abuse, physical abuse, emotional abuse and neglect.

The claim is made in writing by way of an application form with supporting documentation and a meeting is usually held with the Claimant following which a decision is made regarding compensation. Applications are processed by an Assessment Team and generally a member of the team will meet with the applicant.

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<sup>13</sup> [http://www.dhhs.tas.gov.au/\\_\\_data/assets/pdf\\_file/0017/31670/HCORP9026-05\\_Abuse\\_Booklet\\_P5.pdf](http://www.dhhs.tas.gov.au/__data/assets/pdf_file/0017/31670/HCORP9026-05_Abuse_Booklet_P5.pdf)

Further, the Assessment Team has the power to refer complaints of abuse regarding identifiable perpetrators to the police. This is a vital step in identifying alleged criminals, many of whom we know through anecdotal evidence continued to abuse children after the Orphanages and Children's Homes of the last century were closed. Ensuring that the perpetrators are punished and that they are removed from the possibility of abusing other children is vital to the healing of the clients for whom we act.

Once the assessment process is complete, the claim is referred to an "independent" Assessor who is appointed by the Tasmanian Government and who makes a recommendation regarding the amount of compensation, if any, that will be offered. If an offer of settlement is accepted by the claimant, s/he is required to sign a release finalising all potential claims against the State of Tasmania.

## **Queensland<sup>14</sup>**

In May 2007, the Queensland Government introduced its own Redress Scheme with funding of up to \$100 million. The Redress Scheme was set up in response to the recommendations of the Forde Inquiry into the Abuse of Children in Queensland institutions.<sup>15</sup>

Applications for a payment under the scheme opened on 1 October 2007 and closed on 30 September 2008.

The scheme offered two levels of payment to acknowledge the impact of past abuse and neglect and help people move forward with their lives:

Level 1 payments of \$7,000 to applicants who met the scheme's eligibility criteria ie people who were placed in children's institutions in Queensland, whether government or non-government and had experienced institutional abuse or neglect.

Level 2 payments of up to \$33,000 to approved Level 1 applicants who were assessed by a 'panel of experts' as having suffered more serious harm to the extent needed to qualify for a Level 2 payment.

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<sup>14</sup> <http://www.communityservices.qld.gov.au/community/redress-scheme/about-scheme.html>

<sup>15</sup> [http://www.communityservices.qld.gov.au/community/redress-scheme/documents/forde\\_comminquiry.pdf](http://www.communityservices.qld.gov.au/community/redress-scheme/documents/forde_comminquiry.pdf)

The scheme did not extend to other forms of out-of-home care such as foster care, hospitals, facilities for people with a disability or other institutions which did not fall within the scope of the Forde Inquiry.

Payments under the scheme were dependent on an applicant signing a Deed of Release, discharging and releasing the State and its agents from any current or future legal claims relating to matters which fall within the scope of the scheme (which essentially meant that all claims against the State were finalised). Applicants were provided with independent legal advice to assist them in making an informed decision on signing a Deed of Release. The scheme funded one conference with a legal practitioner to a set fee (\$500) for this purpose.

### **Western Australia<sup>16</sup>**

On 17 December 2007, the Western Australian Government announced a \$114 million Redress WA Scheme for those adults who, as children, were abused and/or neglected in WA State care in Western Australia.

The initial scheme allowed for ex gratia payments of up to \$80,000.00 and was Australia's most generous redress fund to date for children abused in state care. However, following the defeat of the then Labour government, the newly elected Liberal Government announced that the scheme was inadequately funded and rather than allowing for an increase in funding, reduced the maximum payment available.

A first level payment of up to \$10,000.00 was available to claimants who were able to satisfy WA Redress that they were a victim of abuse. If the Claimant was able to show that he or she had suffered injuries as a result of the abuse, whether physical or psychological, they were entitled to a maximum payment of \$45,000.00.

Initially, claims died with the Applicants but following protests at the delays in claims being processed, the Minister announced that the deceased estates of people eligible for Redress WA, but who had passed away before their application for an ex-gratia payment was finalised, would receive a \$5,000 eligibility payment.<sup>17</sup>

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<sup>16</sup><http://www.communities.wa.gov.au/Services/Redress/Documents/4760%20Final%20version%20of%20Redress%20WA%20Guidelines-100217.pdf>

<sup>17</sup> <http://www.mediastatements.wa.gov.au/Lists/Statements/DispForm.aspx?ID=132448>

Claims were made by way of an application form with supporting documentation. Generally, interviews with the claimants were not required and written offers were made following the assessment process.

The WA Government did not require claimants to sign a release or waive any further rights they may have against the state of Western Australia, however as Western Australia has the most restrictive Statute of Limitations<sup>18</sup>, it is doubtful that many victims of historical abuse would seek to sue the state in any event.

The Western Australian scheme closed on 30 April 2009, although some care leavers have been told they will have to wait until June 2011 for a determination.

Western Australia also has a system whereby allegations of abuse against identifiable perpetrators are, with the applicant's permission, referred to the police.

## **South Australia**

Following the Mullighan Report,<sup>19</sup> the Government of South Australia established a panel of experts to consider a model for restorative justice in regard to complaints of sexual abuse made by children in state care. However, the Government is yet to announce a Redress Scheme. Further, the terms of reference refer only to 'sexual abuse' and not the other myriad forms of abuse that we know children in state care were subjected to.<sup>20</sup>

Instead, ex gratia payments are available under the Victims of Crime Compensation Act<sup>21</sup> which allow for payments of up to \$50,000.00 to be made to children who experienced sexual abuse whilst in care.

Unfortunately, this "ex gratia" scheme does not apply to children who suffered physical abuse, even if that abuse would be regarded as constituting a criminal offence, and certainly would not apply in cases of neglect and/or emotional abuse.

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<sup>18</sup> Limitation Act WA 1935

<sup>19</sup> <http://www.sa.gov.au/subject/Crime%2C+justice+and+the+law/Mullighan+Inquiry/Children+in+State+Care>

<sup>20</sup> [http://www.sa.gov.au/upload/franchise/Crime,%20justice%20and%20the%20law/Mullighan\\_Inquiry/IMPLEMENTATION%20REPORT%20250808.pdf](http://www.sa.gov.au/upload/franchise/Crime,%20justice%20and%20the%20law/Mullighan_Inquiry/IMPLEMENTATION%20REPORT%20250808.pdf) recommendation 37

<sup>21</sup> s31 Victims of Crime Act 2001

However South Australia probably has the most generous Statute of Limitations and to this extent, victims of historical abuse may resort to legal action more readily than in other states.<sup>22</sup>

## **Victoria**

The Victorian Government has steadfastly refused to set up a compensation or redress fund for children abused in care and until recently would only deal with claims once proceedings were issued and then vigorously fought any legal claims brought against it.

More recently, the Victorian Premier John Brumby has announced that his Government would deal compassionately with claims made by former Wards of the State. The State of Victoria will now deal with claimants even where proceedings have not been issued and where legal defences would be available to it. However, it will still only deal with matters on a case by case basis. Further, the State of Victoria will not make offers where there is no “legal” basis for the claim, that is, the State looks at whether there would be prospects of the care leaver winning a case in a court of law if the matter does not resolve informally. The State still requires evidence of breach of duty and requires that a claimant has “evidence” in support of their allegations. They will not make offers of compensation in cases of neglect, emotional abuse or where they believe that physical punishments were consistent with the standards of the time.

In the much publicised case of the Braybon brothers, we had settled claims against the Salvation Army and then pursued the State Government for its alleged failure to care for the brothers whilst they were at Salvation Army homes. We have now settled claims for the Braybon Brothers against the State on confidential terms. Notwithstanding their earlier settlements against the Salvation Army, the State was prepared to negotiate further settlements in each of these claims.

## **New South Wales**

The New South Wales Government has also ruled out a compensation fund for children abused in care. NSW was also the last of the states to apologise to the children abused in its

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<sup>22</sup> Limitation of Actions Act SA 1936

care and only just scraped in with its apology on 19<sup>th</sup> September 2009 only weeks before the National Apology which took place on 16<sup>th</sup> November 2009.

The NSW Government has provided funding for training, counselling and support for Forgotten Australians.

In NSW claimants must pursue their claims for compensation through the courts. We have been advised that NSW care leavers have been sent letters from solicitors advising them to be prepared to sell their homes to cover the legal costs involved.

## **Commonwealth**

Three harrowing reports on the lives of children in care, including *Bringing Them Home*, dealing with the Stolen Generations<sup>23</sup>, the child migrant report *Lost Innocents*<sup>24</sup> and the institutional abuse report *Forgotten Australians*<sup>25</sup> have outlined in horrifying detail that abuse many care leavers suffered.

Each of these reports have included recommendations regarding compensation for the victims. In particular, the recommendations of the report into the Forgotten Australians recommended that the Commonwealth of Australia set up a National Reparation Fund.

Despite these recommendations and despite National Apologies to the Stolen Generations and to the Child Migrants and Forgotten Australians, the Commonwealth Government has failed to implement recommendations regarding compensation nor has it attempted to co-ordinate the States' responses which have been piece meal and varied.

## **Senate Review**

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<sup>23</sup> Human Rights and Equal Opportunity Commission, *Bringing Them Home – Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (April 1997), Reconciliation and Social Justice Library

<<http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/prelim.html>>.

<sup>24</sup> Senate Community Affairs Reference Committee, *Lost Innocents: Righting the Record - Report on Child Migration* (30 August 2001), Parliament of Australia, Senate Website.

<[http://www.aph.gov.au/Senate/committee/clac\\_ctte/completed\\_inquiries/1999-02/child\\_migrat/report/index.htm](http://www.aph.gov.au/Senate/committee/clac_ctte/completed_inquiries/1999-02/child_migrat/report/index.htm)>.

<sup>25</sup> Senate Community Affairs Committee, *Forgotten Australians: A Report on Australians who experienced institutional or out-of-home care as children* (30 August 2004), Parliament of Australia, Senate Website. <[http://www.aph.gov.au/senate/committee/clac\\_ctte/completed\\_inquiries/2004-07/inst\\_care/report/](http://www.aph.gov.au/senate/committee/clac_ctte/completed_inquiries/2004-07/inst_care/report/)>.

There is a Senate review of Commonwealth Government Compensation Payments currently underway. It is important that this review results in some positive action by the Commonwealth other than the National Apologies which to date have been the sole contribution of the Commonwealth with regard to offering redress to the hundreds of thousands of children who were abused in state care in the last century

We need a national and consistent compensation system for care leavers. For claimants from those states who have already accepted their responsibilities (Tasmania, Queensland and Western Australia), there should be a top up arrangement depending on the maximum payments available through a national fund.

In Australia, any redress model should include a process whereby people can tell their stories and receive a genuine apology, written or otherwise. There should also be a process whereby perpetrators are tracked down and brought to account.

The States should also consider amending legislation to abolish the operation of the Statute of Limitations in cases of institutional childhood abuse to provide more justice for care leavers. This has been done in Canada and could be done here.

Whilst the Commonwealth can be sued for negligence, there is no successful precedent regarding claims against the Commonwealth brought by children abused in care. The case of *Cubillo v The Commonwealth*<sup>26</sup> was brought by a member of the Stolen Generations against the Commonwealth. The claim was vigorously fought by the Commonwealth and the Plaintiff was unsuccessful.

Further, the vast majority of children who were placed in care in the last century (and indeed to this day) were removed under State legislation and except in the cases of some members of the Stolen Generations or the Child Migrants, the Commonwealth had no direct duty of care.

## **6. OTHER OPTIONS**

### **Crimes Compensation**

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<sup>26</sup> *Cubillo v Commonwealth* (2001) FCA 1213 (31 August 2001).

All Australian states have schemes which allow victims of crime to claim compensation for their injuries. The aim is to provide financial assistance to victims of violent crime committed in the particular State

However, criminal injuries compensation by its very nature is only available to victims of crime which means that only sexual abuse and severe physical abuse (which would be regarded as constituting a crime) will be compensated.

Further, all jurisdictions have limitation periods and whilst it is possible to obtain an extension of time to pursue claims for compensation for historical crimes, there is no guarantee that an extension will be granted.

Maximum compensation payable varies from \$30,000.00 to a maximum of \$60,000.00 depending in which state the crime occurred.

## **Overseas**

A number of overseas governments with common law type legal systems like ours have recognised that the current systems of compensation are failing care leavers who were victims of abuse.

Canada and Ireland are two countries who have set up compensation or redress schemes for children abused in care.

In 2006, the Canadian Government agreed to pay more than 2 billion Canadian dollars to compensate an estimated 80,000 survivors of indigenous background who were forcibly removed and/or placed in care. Furthermore, the Canadian Government, with the churches who ran many of the residential institutions, agreed to take other steps to address the legacy of the residential schools.

These steps include the establishment of a 'truth and reconciliation commission' which allows claimants to tell their stories and which will provide the basis for a critical review of how such widespread systemic abuse was allowed to occur and to provide lessons so that similar abuses can be avoided.

The Irish scheme is probably the most relevant to Australia, not only because many Australians of Irish background successfully pursued claims but because the Irish system

of removing children and placing them in care was very similar to that which occurred in Australia. Also, the level and descriptions of abuse which were documented in Ireland were strikingly similar to the Australian experience. In addition, Ireland has a very similar system of law which means that Irish victims faced largely the same legal barriers as do Australian victims seeking justice.

The Irish scheme provided for “severity of abuse and injury/effect of abuse.”<sup>27</sup> The types of abuse, although not exhaustive, included sexual abuse, physical abuse, emotional abuse and neglect.<sup>28</sup> In the Australian context, particularly in relation to the Stolen Generations and Child Migrants, a further category of abuse should be included being “loss of culture and identity.”

The “severity of abuse” was then given a weighting (1-25) as was the severity of the injury and effect of abuse. In relation to the latter, weightings of 1-30 were given for medically verified physical and psychological abuse, 1-30 for psychosexual sequelae and 1-15 for loss of opportunity.<sup>29</sup>

Total scores were then used to provide for a banding which equated to a range of financial compensation payable eg a score of 70 or more (band V) resulted in a payment of between 200,000 to 300,000 euro down to a score of less than 25 (band I) which resulted in payments of up to 50,000 euro.<sup>30</sup> Interestingly, the lowest “band” in Ireland resulted in higher compensation payments than under the highest payment available to any Australian under the various Redress Funds that have been set up here.

The strength of the Irish scheme has been firstly that adequate compensation was made available to victims and secondly to provide for a more “consistent” and transparent method of assessing compensation as compared to the Australian models.

The Republic of Ireland is a small country and not very wealthy. Notwithstanding this, the Irish Government has put aside a substantial amount of money to provide monetary compensation but just as importantly has accepted responsibility for the pain, misery,

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<sup>27</sup> January 2002, “Towards Redress and Recovery” Report to the Minister for Education and Science by the Compensation Advisory Committee appointed under s14 of the Irish Residential Institutions Redress Bill 2001.

<sup>28</sup> *ibid* p 69

<sup>29</sup> *ibid* p 68

<sup>30</sup> *ibid* p 67

humiliation and neglect suffered by the children of Ireland who were placed in its care.

## **CONCLUSION**

Both going to court and the internal compensation processes often leave care leavers again feeling powerless and traumatised. There is no doubt that we need to find an alternative.

A recent Ombudsman's report in Victoria has released damning finding about the situation for children who are currently been placed in State care.<sup>31</sup> And you only have to turn on the television or open the newspaper to read damning articles of the Church's ongoing failure to protect victims of abuse. This highlights the importance of being able to hold the States and religious institutions legally responsible for cases of institutional abuse.

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<sup>31</sup> Victorian Ombudsman, Own motion investigation into Child Protection – out of home care, May 2010, Ordered to be printed Victorian government printer Session 2006-10 P.P. No. 308