

**Cherie Marian - Paper Presented at National 'Surviving Care' Conference  
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Thank you to the consortium of services which came together to bring us today's conference: Bellingen Institute, Centre for Peace and Social Justice, Southern Cross University, Care Leavers Australia Network, and the Historical Abuse Network.

I began lobbying for a Victorian Redress scheme in 2006 in my role as the community development officer at Fitzroy Legal Service (FLS). Fitzroy Legal Service provides critical analysis of legal issues within a broad social context and serves members of the community whose access to legal resources is limited. The practice at Fitzroy Legal Service specialises in criminal and family law. During my time at FLS, clients presented to the service seeking legal advice for abuse in care<sup>1</sup>. I assisted these clients to apply for records and to access appropriate support services. FLS solicitors have represented clients seeking remedy for abuse in care in Victoria and interstate and continue to do so.

Since leaving Fitzroy Legal Service, I've continued to advocate for the establishment of a Victorian redress scheme in a volunteer capacity, with a small group of stakeholders, including representatives of St Kilda Legal Service, Fitzroy Legal Service, VANISH, Care Leavers Australia Network (CLAN), Ryan Carlisle Thomas, Waller Legal and the Federation of Community Legal Centres (FCLC).

In 1993-94 I conducted a small qualitative research project into life outcomes for women 10-15 years post release from state care.<sup>2</sup> The study looked at all areas of life chances, including health, education, employment, housing, crime, and victimization. Emerging themes in my research were: homelessness upon exiting care, educational deficits, adolescent parenthood, substance abuse, mental health issues, exposure to domestic violence, and sexual abuse and physical assault both in care and post release from care.

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<sup>1</sup> For the purpose of consistency with the Inquiry into Children in Institutional Care (hereby referred to as 'the inquiry') 'historical abuse' refers to abuse perpetrated prior to the introduction of the *Children and Young Persons Act 1989*. The phrase 'abuse in care' shall be read to be inclusive of historical neglect, psychological abuse, physical and sexual assault in institutional and out-of-home care.

<sup>2</sup> Marian, C. *Where Are They Now: who knows, who cares? What becomes of young women post - release from protective care?* November, 1994. (unpublished)

These findings shocked me at the time but are consistent with the findings of more recent research, including that:

- 42% of Australia's homeless youth have a 'protective care' history.<sup>3</sup>
- Once entering the juvenile justice system, 90% of 'protective care' clients will graduate to the adult criminal justice system.<sup>4</sup>
- 65% of the Victorian female prisoner population has a 'protective care' history.<sup>5</sup>
- 1 in 3 females will leave the protective care system at age 16 pregnant or already with a child.<sup>6</sup>
- 53 % of care leavers report being physically assaulted by so called 'carers' whilst in 'care'.<sup>7</sup>
- 29% of care leavers report having been sexually abused by a staff member of the facility they resided in.<sup>8</sup>
- 1 in 3 care leavers report having attempt suicide.<sup>9</sup>
- Only 3.78% of care leavers complete secondary school to year 12 or equivalent.<sup>10</sup>
- Only 7.9% of the care leaver population will complete an undergraduate degree to university level.<sup>11</sup>

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<sup>3</sup> Chamberlain, C. Johnson, G. & Theobald, J., *Homelessness in Melbourne: Confronting the Challenge*, Centre for Applied Social Research, RMIT University, February 2007.

<sup>4</sup> Senate Community Affairs Reference Committee Inquiry, Committee Hansard, 4 February 2004, p.30 cited in Senator Andrew Murray and Dr Marilyn Rock, *The Impact of Childhood Trauma Across the Lifespan: Historical Denial – Current Challenges*, September, 2005.

<sup>5</sup> Colvin, K., *The Women and Poverty Report: More than Half – Less than Equal*, Victorian Council of Social Services, October, 2001, p 15.

<sup>6</sup> Senate Community Affairs Reference Committee Inquiry, Committee Hansard, 4 February 2004, p.30 cited in Senator Andrew Murray and Dr Marilyn Rock, *The Impact of Childhood Trauma Across the Lifespan: Historical Denial – Current Challenges*, September, 2005.

<sup>7</sup> CLAN, 'Care Leaver Survey' July 2007 (data collected in 2006) Physical assault is defined by the category 'boxed on ears' a colloquial term indicating blows to the side of the head.

<sup>8</sup> CLAN, 'Care Leaver Survey' July 2007 (data collected in 2006)

<sup>9</sup> CLAN, 'Care Leaver Survey' July 2007 (data collected in 2006)

<sup>10</sup> CLAN, 'Care Leaver Survey' July 2007 (data collected in 2006)

<sup>11</sup> CLAN, 'Care Leaver Survey' July 2007 (data collected in 2006)

Whilst the list of systematic disadvantage goes on ad infinitum, this sample of appalling outcomes is indicative of what the term 'surviving care' actually means.

In 2003, I prepared a submission to the Inquiry into Children in Institutional Care (ICIC). I subsequently gave evidence at this inquiry. Some of my recommendations made it into the *Forgotten Australians* report, and were incorporated into new legislation governing Victorian statutory child protection authorities (*Children Youth and Families Act 2005*).

Participating in these processes had a profound effect. I learned that, despite the daunting nature of the task which lies ahead, we really can effect positive change in 'the system', and that there is justice after all, at least to some extent, where once I had thought there was none.

The ICIC found that the 'unsafe, unlawful and improper care of children', including 'failure of duty of care,' and 'serious and repeated breaches of statutory obligations' was 'widespread'<sup>12</sup> right across Australia over the past century.

Types of abuse documented include unlawful medication experimentation, child slave labor, and extreme psychological, physical and sexual abuse, some of which, lawyers argue, constitutes torture.<sup>13</sup>

Recommendation 1 of the Inquiry called upon the Commonwealth Government to issue an apology, 'on behalf of the nation', to survivors of abuse in care for the 'hurt and distress' they have experienced and 'harms suffered' as a result of the abuse.<sup>14</sup>

A national apology to Forgotten Australians is yet to be forthcoming. Redress advocates urge the Rudd Government to address this issue as a matter of urgency.

Recommendation 6 of the Inquiry called for the establishment of a national reparations fund for victims of physical, sexual and emotional abuse in institutional care to be established.<sup>15</sup>

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<sup>12</sup>Senate Community Affairs Reference Committee, *Forgotten Australians: A report on Australians who experienced institutional or out of home care as children*, August 2004 p 126.

<sup>13</sup> Ibid p 85 -124 & Sdrinis, A. *Letter to the Premier*, the Hon Steve Bracks, 17<sup>th</sup> May 2007.

<sup>14</sup> Ibid, p xix.

The Commonwealth response to this recommendation was that, 'all reparations for victims rests with those who managed or funded the institutions, namely state and territory governments, charitable organisations and churches'<sup>16</sup> involved in the provision of institutional and out of home care.

This response was made by the then Howard Government. It is possible that the Rudd Government may wish to revisit the response of the Commonwealth and vary the particulars. Variation which encourages all States and Territories to resolve outstanding matters of redress, through the provision of resources to help pay for this where needed, is recommended, as is the implementation of a Federal approach to care leaver issues via the Coalition of Australian Governments.

QLD, TAS & WA have all established redress schemes, and SA has signalled clear intent to do so. VIC and NSW, the most heavily populated states, are the only states which are yet to commit to consider redress. This fact is a sad indictment on these State Governments.

Survivors of abuse in care (physical & sexual assault) are victims of violent crime.

In principle, Victorian victims of violent crime are entitled to apply for compensation under the *Victims' Charter Act 2006* (Vic).

There are significant barriers to survivors of abuse in care accessing compensation in the courts, which is the only avenue available to Victorian and NSW survivors.<sup>17</sup>

Significant deterrents to civil actions brought by survivors include limitation periods, burden of proof and causation issues (necessitating the resuscitation of wretched memories), and the further stress, expense, risk of costs and delay associated with the litigation process.

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<sup>15</sup> Ibid, p xx.

<sup>16</sup> Australian Government Response to *Forgotten Australians: A report on Australians who experienced institutional or out of home care as children*. Commonwealth of Australia, 2005, p 4.

<sup>17</sup> For consistency with the ICIC 'historical abuse' is defined as abuse perpetrated prior to the introduction of the *Children and Young Persons Act 1989*

For these reasons the vast majority of abuse in 'care' cases will never make it to court. Of those that do, most will fail; it may be the case that governments know this and are prepared cynically to bluff it out.

Most applicants in abuse in 'care' cases are ruled judgment barred due to the fact that they do not own any substantial assets. As such, legal costs of the defendants which may be awarded against them will end up being paid for by the State. It can be argued that it would be more economically viable for State Governments to establish redress schemes than to continue to deal with cases one by one in the courts.

In order to overcome the many barriers to justice in the courts, redress schemes for historical abuse in state 'care' must be established in ALL States and Territories.

This must occur ASAP. The historical nature of these crimes, combined with the effects of the abuse, mean that many survivors are of advanced age and poor health. Some, including clients I have worked with, are literally dying as they wait in vain for access to justice.

Lobbying by the CLC sector, CLAN, and VANISH eventually resulted in the announcement in the 08-09 Victorian state budget by the Brumby Government of \$7.1 million over 4 years for a Victorian care leaver service.

This quantum of funding pales into insignificance in comparison to funding dedicated to redress by other states. WA = \$114 million, QLD = \$100 million, TAS = \$75 million.

Moreover, the \$7.1 million does not include provision for redress, and will instead fund an independent service which will be bound by a service agreement to the Department of Human Services (DHS).

DHS is arguably THE primary perpetrator organisation in the State of Victoria in light of duty of care responsibilities to children in institutions and out-of-home care. It is not appropriate for restitution for victims of crime to be handled by perpetrator organisations, or those associated with them.

Principle 7 of the *Victims' Charter Act 2006* states that victims should, 'as far as practicable, be protected from unnecessary contact with, and intimidation by, the accused and their family and supporters, as well as defence witnesses while ... at court'

Having established that most survivors of abuse in care are blocked from access to justice in the courts, the argument can be made that ethically, this principle should apply as the 'next best and closest measure' to ensure that survivors of abuse in 'care' are similarly protected throughout restitution processes.

Advocates do not begrudge the DHS finally taking some responsibility for the enormous damage inflicted upon the lives of survivors of abuse in 'care'. The need is obvious and the provision of generalist 'after care' support services is not problematic.

Rather, in the absence of a redress scheme administered by the Department of Justice, the current Victorian situation risks being perceived as a cynical attempt by the Brumby Government to avoid the far more substantial costs of compensation rightfully owed to survivors.

If DHS is genuine in its attempt to right the wrongs of the past, the Minister will lobby within her parliamentary peers to ensure that the Victorian care leaver service is complemented by a redress scheme run by the Department of Justice. Anything less may be construed as mere 'window dressing' aimed at making the government 'look good' whilst prolonging the considerable pain and suffering of survivors.

I have written to the Victorian Premier (the Hon. John Brumby), and Attorney General (the Hon. Rob Hulls) requesting that this matter be examined by the Department of Justice, which handles all other victim of crime issues. I received curt replies from Chiefs of Staff saying that redress is a matter for DHS and the Minister for Community Services (the Hon. Lisa Neville) to consider.

One of the replies went so far as to provide me with a contact phone number for DHS; a gesture which was rather baffling, given my letters clearly pointed out conflict of interest issues with DHS.

How redress for crimes for which DHS is vicariously liable can possibly be the responsibility of that same department was not explained in the Ministerial replies. This is because there is no explanation for such an outrageous suggestion, which totally violates all notions of entitlement to fair hearing without prejudice and to independence in justice mechanisms.

The current situation in Victoria is wholly unacceptable as are the extraordinary lengths which redress advocates are needing to go to in order to get anyone in an appropriate Ministerial position in the Victorian Government to examine these issues.

The views put forth by redress advocates are not outlandish or extraordinary. Evidence that this abuse and neglect occurred abounds. Restitution is the logical next step to resolving these issues, notwithstanding survivors will endure the legacy of the abuse for the rest of their lives.

Refusal to examine the matter of redress shows some elements of the Brumby Government to have been unresponsive and lacking an appropriate sense of justice or compassion on these issues.

The *Victorian Charter of Human Rights and Responsibilities (2006)* which came into full effect in January 2008 may be used to support the call for redress. Government and public authorities are to take into account the human rights set forth in the Charter in decision making, policy making and law making. Whilst the charter is not retrospective, it can be argued that as survivors continue to experience the terrible legacy of abuse in 'care', it should be used as a framework for policy development on the issue of redress (with particular reference to clauses against forced labor, medical experimentation without consent, torture etc).

Should ongoing dialogue with the Brumby Government fail to establish a commitment to explore redress, administrative review by the Ombudsman will be requested under provisions of the HR Charter.

The matter of redress for abuse in care must be examined by the Victorian Department of Justice as well as by the equivalent department in NSW.

Anything less is a miscarriage of justice of the highest order which will continue to be played out in the courts and media, until such time as someone in Government finally sees the light.

On the community legal centre sector specifically:

A meeting of key stakeholders for redress in Victoria was held in March 2008 at the FCLC. This meeting resolved that, in due course, funding would be sought to employ a project worker to lobby for redress, within a human rights framework.

A policy motion was later passed at the 2008 April members' meeting of the FCLC giving the Victorian state peak a mandate to lobby for this cause.

Getting the work to this stage required the writing of a 5000 word legal discussion paper arguing the case for the CLC sector to get involved.<sup>18</sup>

Consistent lobbying of the CLC sector has been required to educate CLCs about issues of historical abuse in state 'care', and to promote the fact that Forgotten Australians already comprise a substantial proportion of CLC client groups.

Similar community education is now being expanded into wider community networks.

Barriers to widespread CLC support include the lack of resources in the CLC sector and time constraints upon workers who are already overwhelmed with the existing demand for legal advice services.

A similar response can be expected from other community service providers. Most are underfunded and overworked. Abuse in 'care' may be seen as 'just another cause' vying for recognition in a service system which is already severely overstretched.

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<sup>18</sup> Marian, C. *'The Case for the CLC Sector to Co-ordinate a Campaign for the Establishment of a Non-adversarial Compensation Scheme for Survivors of Neglect and Abuse in Institutions and Out of Home Care: Discussion Paper for the Federation of Community Legal Centre's.'* February, 2008. (Unpublished)

Moreover, abuse in care cases are typically complex and labor intensive. The search for records can take months (sometimes years), and clients require additional support as a result of injuries sustained as a result of the abuse.

Resources have been made available to assist Victorian CLCs in their work with Forgotten Australians, including lists of care leaver support services and solicitors with AIC expertise.

The CLC sector is uniquely placed to champion this cause. Thousands of survivors of abuse in care have nowhere left to turn. CLCs were established to deliver justice to the poor and marginalised; Forgotten Australians undoubtedly meet these criteria.

Only when justice has been served, will survivors of abuse in care be free to focus on the more difficult task of healing and restoring dignity to their lives.