

Submission to the Senate Affairs Committee: Review of Government Compensation Payments

What compensation payments are made by Commonwealth, State and Territory Governments to people adversely affected by Government policies, legislation or unlawful actions?

The Community Affairs References Committee (2004) recommended that the Commonwealth Government establish and maintain a national reparations fund for victims of institutional abuse and in out of home care settings. However, the Commonwealth Government refuses to establish this fund as they believe the burden lies with the individual state governments as well as the churches and charities that ran the institutions. It has been suggested by Mr Golding (2004) that the Commonwealth government has the opportunity to coordinate the state redress schemes and bring about some common guidelines for the functioning of these schemes. Only three states at present have introduced a redress scheme, all of which have different requirements and payments. It has become necessary for the Commonwealth Government to show some initiative in this area so that each and every state or territory which placed or enabled children into out-of- home care settings establishes some sort of redress scheme in order to compensate the individuals who were victims of this system. While no amount of money can ever change or compensate what has happened to care leavers, redress is necessary to start righting the wrongs that care leavers were subjected to. Care leavers not only carry the physical and emotional scars of their childhood, but many have been left to pay for years of psychological therapy and counselling as well as seeking medical attention for the multitude of physical problems that they have suffered whilst in care. Furthermore the lack of pressure shown by the Commonwealth Government to the states which have not yet implemented a redress scheme is inexcusable. An apology from the Commonwealth was given to care leavers of all states, not just Queensland, Tasmanian and Western Australian care leavers. Thus the onus is on the Commonwealth to help care leavers of all states to access redress.

Nevertheless, the redress schemes which do already exist are far from perfect. For example the Tasmanian scheme only allows for state wards to apply and devalues the exact same experiences that care leavers who were 'voluntarily' placed in institutions or Foster Care by relatives or friends. For example CLAN has a 73 year old member who was placed in Mt St Canice for two years and worked in their laundry but is ineligible for redress as she was not a state ward. Furthermore, a husband and wife who both grew up in Tasmanian homes saw only the husband eligible for redress as he was a state ward compared to his wife who was a 'private' placement. Whether or not a child was placed

in an out of home care setting by the state or by family, it does not diminish the responsibility the state had to regulate institutions and the foster care system so as to ensure that children were receiving adequate care.

Similarly through the Queensland redress scheme those who have been in foster care are not eligible for redress. As with the Tasmanian redress scheme, the QLD government has belittled the experiences of those who were in foster care and in doing this have not accepted their responsibility to those children who were placed in foster care.

Whilst the Western Australian redress scheme recognises their responsibility to provide redress to all care leavers, the tiered system by which they provide payments has been a poor option, once again detracting from the traumatic and horrendous experiences that care leavers lived through. To rate a person's suffering through a 'tiered approach' is completely wrong. A government cannot say that one type of abuse is better or worse than another type, each individual is different and reacts to different stimuli in a different way and as such redress should be examined on a case by case basis. Additionally, the Western Australian government have been and still are taking a lot of time before dealing with payouts. A CLAN member Barry Pinell who was terminally ill, died in 2009 and was left in a Perth Morgue for two months before he was buried with no money, no will and no family, with his redress claim still not sorted. There needs to be urgent attention to deal with redress claims especially for those in dire need.

Furthermore, both the Queensland and Western Australian schemes have closed with no plans to reopen, heightening the injustice that most care leavers already suffer through. To punish those who were not aware of the opening of these redress schemes is completely unjust. Tasmania however, has set aside a trust fund whereby individuals can still submit claims, and although the payment will be capped at the average payment made, this is a good beginning towards making the redress process fairer for all concerned. Nevertheless, a large number of care leavers will miss out on redress due to the short durations for which it is opened.

New South Wales, Victoria, and South Australia have all announced that they will not establish a redress scheme in their states and instead have referred care leavers to the respective Victims of Crime Compensation schemes in these states. Although compensation payouts are generally higher when paid through a Victims of Crime scheme as opposed to a redress scheme, there are a large number of obstacles presented to care leavers before they can even have a claim considered through Victims of Crime. There are a number of limitations of these schemes as well as a number of barriers faced by care leavers to accessing these schemes. Some of these barriers include proving the abuse occurred and that certain injuries were obtained from the abuse, as well as the exact date of the abuse, limitation periods for certain crimes, the costs and time associated with a court case and most of all, the trauma which arises from going through the whole process. The limitations of Victims of Crime compensation schemes mean that most care leavers are unable to go through with a claim or are unable to access the system. This indicates

that care leavers from NSW, SA, and VIC are at a distinct disadvantage when it comes to any type of compensation or redress.

Apart from compensation or redress paid to care leavers and Forgotten Australians, there are numerous situations in which both the Commonwealth and State governments allow for compensation payments. The large number of circumstances in which other individuals may receive compensation begs the question of why care leavers in each state have not seen the establishment of fair and just redress schemes. For example, in 2004 a woman named Cornelia Rau was wrongfully detained by the immigration department for 10 months after she discharged herself from Manly hospital and was suffering from a mental illness. In 2005 Rau was compensated \$2.6million by the Commonwealth government for her wrongful detention. Similarly, since 2005 nineteen NSW prison inmates have won public liability compensation from the NSW government amounting to \$7.025 million for injuries such as being hit by a cupboard and collapsing during muster. Furthermore Mr Andrew Mallard was given a \$3.25 million dollar payout by the Western Australian government after he was wrongfully jailed for twelve years for the murder of a Perth woman in 1994. In another case an aboriginal man Bruce Trevorrow was given a \$525 000 payout by the SA government for being taken from his family more than fifty years ago.

In light of these cases it is simply incomprehensible as to why care leavers still struggle to get redress especially in comparison to the payouts granted by the governments above. Each and every care leaver had been taken away from their family and most were even split up from their siblings upon entering the child welfare system. Upon entering the system, care leavers were placed in out of home care and most were placed in institutions where they were detained, abused, neglected, malnourished, deprived of an education, and forced to work. While some care leavers were placed in foster care that did not mean they were treated better and all of the above experiences apply bar them being institutionalised (unless they were shuttled back and forth between children's homes and foster care, as many were). Additionally there were some care leavers who endured these experiences for up to 21 years if they were placed in a children's home at birth and not released until this age, meaning that they lived through these experiences for much longer than any of the other compensation cases mentioned.

There are also a number of other occasions for which governments pay compensation. If individuals have been inconvenienced or have suffered wrong decisions made by the Tax Office, Centrelink, and even regarding Superannuation. In all of these cases the government, whether it be state or commonwealth governments, can make legal liability payments, act of grace payments, and ex gratia payments. Moreover soldiers and defence force personnel can be compensated for any injury or impairment that occurred in the course of duty, and family members may be compensated in the event of their death. Ex Gratia payments have also been made have also been made to families whose loved one has taken their life after serving in the military and suffering abuse at the hands of other personnel. Hence the government and it's agencies seem to accept liability for those who have been given wrong advice and who have been harmed under government

organisations and policies, begging the question as to why each state government has not offered redress to care leavers who suffered under the practices and policies implemented, enforced and maintained by each state government.

What is the legal basis for payments, what defines their size and are there variations between the legal basis and amounts paid between state and federal government?

With regards to the legal basis of payments, each state government had a legal liability to provide adequate care to children and to ensure that private organisations complied with the standards set. Whilst the individual homes also carry liability, children were 'dealt with' according to state government regulations and were ultimately subjected to the practices which the government allowed to continue. Hence the government has a legal liability towards care leavers as their treatment was enabled from the practices, regulations and lack of monitoring of the children's homes and institutions.

In addition the practices of the various state governments on care leavers may infringe upon international human rights law. Some of these laws include rights to family life (International Covenant on Civil and Political Rights (ICCPR), art 23), liberty and security of person (ICCPR, art 9), equal protection before the law (ICCPR, art 26), a fair hearing (ICCPR, art 14), education (ICCPR, art 18), children's rights (Convention on the Rights of the Child), freedom from arbitrary interference with their privacy, family and the home (ICCPR, art17), and freedom from cruel, inhuman or degrading treatment (ICCPR, art 7; Torture Convention). According to International Human Rights Law, states which are guilty of any of these breaches are required to make reparations to the individuals including restitution and compensation.

Furthermore, many children whilst in 'care' were forced to work at the expense of their education and their health. This type of forced labour provides several bases for a compensation claim including unpaid/underpaid wages, medical expenses, pain and suffering, degrading treatment, and the loss of opportunities whilst made to work e.g. education. These are the legal bases for a compensation claim with regards to labour in 'care' but punitive damages should also be awarded for the wrongdoing and conduct of the government.

The government also provides a number of no-fault compensation schemes including workers compensation, road accident victims, sporting injuries at certain sporting events, as well as sickness and disability to persons who are incapacitated and thus incapable of supporting themselves. In all of these cases various governments pay compensation to help return the individual to similar circumstances before the injury/accident, regardless of who is at fault for the injury. From this perspective, even though the government did have a legal responsibility to children in care, no fault compensation sees this as irrelevant and as the governments responsibility to compensate victims whether it was their fault or not.