

## SUBMISSION

### To: Senate Legal & Constitutional Committee inquiry into the 'administration and effectiveness of current mechanisms used by governments to provide discretionary payments in special circumstances'.

The Alliance for Forgotten Australians (AFA) appreciates this opportunity to make a submission for consideration by the Senate Legal & Constitutional Affairs Committee - Review of Government Compensation Payments. This submission focuses on the following aspects:

- ***State statutory schemes relating to children in care***
- ***Payments made under 'defective administration' schemes ...compensation for detriment caused by Defective Administration<sup>1</sup>***
- ***Act of grace and ex gratia payments***

### Background

AFA was established in 2006 and launched in 2007. AFA is a national group of organisations and individuals from across Australia that promotes the interests of the estimated 500,000 people who experienced institutional or other out-of-home care as children in the last century. Some are members of support groups (HAN, Open Place, CLAN, FACT and Origins/Harp); others are working to set up support groups in States/Territories where support services do not currently exist.

AFA structure and governance consists of a Steering Committee of Forgotten Australians and an Advisory Group (Association for Children's Welfare Agencies (ACWA) NSW; Berry Street; Broken Rites; Centre for Excellence in Child and Family Welfare, Vic; Families Australia; Micah Projects Qld; Relationships Australia Qld; RPR Consulting; SNAICC; University of Western Australia; and a

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<sup>1</sup> Explanation of defective administration: Where it can be shown that an individual or group has suffered loss as a result of poor administration on the part of a government agency, the Compensation for Detriment caused by Defective Administration scheme (CDDA) can provide compensation on a discretionary basis. The scheme is intended to compensate those to whom there is no legal obligation to pay compensation so, unlike payment in settlement of a claim, legal liability is not required. Compensation can be granted for both financial and non-financial loss (i.e. pain and suffering which the claimant can demonstrate having suffered despite taking reasonable steps to mitigate the loss). Law handbook SA downloaded from: <http://www.lawhandbook.sa.gov.au/ch07s02s11.php>

representative from the Qld Department of Communities) all of whom are committed to advocating and supporting adult survivors of institutional care. Auspice and Secretariat support is provided by Families Australia. AFA works to advance its objectives at all levels of government in Australia. Comments made about damage in institutional care, however, should equally apply to survivors who entered those institutions through the child migrant program or, indeed, through racist policies of removal of children from their families.

AFA is committed to:

1. Obtaining adequate accountability and redress<sup>2</sup> for past wrongs.
2. Achieving the full implementation of the recommendations of the Senate Report.
3. Formation of a National Watch Committee that would include Forgotten Australians (at least 51%) to monitor the implementation of the Senate Recommendations.

Forgotten Australians not only experienced a range of institutional settings as children in care but many also had multiple placements in orphanages, foster care, 'Homes' and juvenile detention centres during their childhood. It is generally understood that what happened was abhorrent and falls within any definition of 'defective administration.' It is worth reminding the Legal Affairs Committee that the Senate Community Affairs References Committee has made it very clear that many children experienced:

'...wide scale unsafe, improper and unlawful care of children, a failure of duty of care, and serious and repeated breaches of statutory obligations'<sup>3</sup>

Compensation schemes need to be underpinned by an understanding of moral and ethical positions, rather than relying on legalistic argument and mechanisms. Redress designers need to consider that Human Rights abuses occurred to a vulnerable population - even after Australia had signed up to the International Covenant in Civil and Political Rights.

The Senate Community Affairs References Committee has released a number of reports about Forgotten Australians and child migrants from a range of Commonwealth countries, as noted below.<sup>4</sup> These documents record the pain and suffering many children experienced in Australia's institutional child welfare system. As one Forgotten Australian says:

'I knew the violence was wrong, but because it was government, I did not realise it was illegal.'

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<sup>2</sup> Redress defined as 'to put right again' and to 'restore equality.' Pocket Oxford Dictionary (1966)

<sup>3</sup> Forgotten Australians: A report on Australians who experiences institutional or out-of home care (2004)

<sup>4</sup> *ibid*; Lost Innocents: Righting the record – report on child migration (2001); Protecting vulnerable children: a national challenge – second report on the inquiry into children in institutional or out-of-home care (2005)

The details of severe physical, emotional and sexual abuse while in State care during the twentieth century are beyond belief and are a sad indictment on the child welfare systems in operation around Australia. The reports also document the impact of their childhood treatment as leading to serious lifelong effects on their education, employment, emotional, physical and spiritual health and wellbeing.

Despite these inquiries and recommendations, many people who experienced abuse, including criminal behaviours, while in State 'care' have had great difficulty in seeking redress through State statutory schemes relating to children in care. In attempting to seek justice against 'defective administration', Forgotten Australians have been largely unsuccessful. Using a Human Rights approach has been equally unsuccessful. In pursuit of perpetrators and criminal compensation: the success rate has been extremely low. Forgotten Australians who have tried to use the legal system to highlight the criminal abuse, neglect and lack of care that public, private and religious organisations provided during their childhoods report having been re-traumatised by the experience.

People who were institutionalised as children during the twentieth century (Forgotten Australians, Child Migrants and Stolen Generations) need the continuing leadership of the Australian Government to put things right and make amends. AFA envisions this as a leadership and coordination role in establishing a national agenda for redress and reparation which is essential for achieving parity across the States and Territories.

## **Summary of Recommendations**

***AFA is seeking a fairer reparation<sup>5</sup> and redress system that gives this group of Australian citizens a chance to overcome the legal and judicial stumbling blocks to achieve justice and compensation for an largely .***

1. AFA supports compensation for those who have suffered harm from government policies and programs.
2. Compensation schemes need to be established with commitment to a common framework of criteria; e.g. in South Australia the focus for compensation is only for victims of child sexual abuse.
3. Compensation Criteria should be applicable to all Forgotten Australians and based on their experience, not on any perceived ability to overcome a defective childhood while in 'care'. A Tasmanian claimant was advised that the criteria for deciding compensation was 'how you got on with your life' despite being on a Department of Veterans Affairs Pension. To add insult to injury, the assessor also commented: 'you've done alright considering your problems.'

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<sup>5</sup> Reparation defined as: amends, compensation. Pocket Oxford Dictionary (1966)

4. Compensation scheme hearings should be before a tribunal rather than in a court setting, and survivors must have access to support before, during and after the hearing by a person of their choice, with additional access to counselling and expert advice.
5. Individual compensation or redress payments are an important part of returning dignity and control to the lives of survivors, although payments in themselves can never compensate fully for the damage done.
6. In addition to being able to overcome legal barriers and obtain redress, survivors of such systems also need practical forms of compensation, such as: dedicated support services; a 'gold card' for access to medical and health care; help with literacy and numeracy as appropriate; priority access to housing; help with TAFE and University education fees; access to legal support; access to records; ongoing counselling; expanded roles for the Commonwealth Ombudsman and Human Rights Commission.

## **Legal problems and barriers to discretionary payments schemes**

### **Legal obstacles**

Forgotten Australians continue to be disadvantaged in taking civil action against public, private and religious institutions for the harm they experienced as children in 'care'. On the whole, for this group, taking legal action has generally resulted in further trauma and in some cases serious ill health. Many feel as though the obstacles placed in their path are protecting the perpetrators of the abuse: 'it was too long ago and the perpetrator is ill' being standard advice. A number of Forgotten Australians report being told by their lawyers: 'you don't have enough money to take on the Government; even if you did, it would take years. Just take what they give you.'

While the Australian Parliamentary Apology 16<sup>th</sup> November 2009 was a welcome and a necessary step, AFA contends that people who experienced neglect, exploitation, physical, emotional and sexual abuse as children in Australian institutions need to achieve justice, not merely recognition for the harm done when they were children. Forgotten Australians need to be considered a 'special needs' group within the judicial system, as many experienced personal injury at the hands of adults who were responsible for their care and protection.

There is reported confusion in the way officials refer to payments that have been made under redress schemes. There is a significant difference between ex-gratia payments and compensation, and yet officials have used the terms interchangeably when referring to the nature of payments to individuals, which in turn confuses the issue for victims and the general public.

### **State statutory schemes**

While we commend the States that went ahead with redress, it must be noted that there have been flaws in the design and administration of these schemes. These reparation funds have fostered resentment due to disparity in criteria, and assessment procedures, discretionary decision making and time limitations. For example, a claimant who sustained repeated physical and sexual assault as a young person in care received half the amount of their sibling, when the two cases were heard separately by the same person.

Forgotten Australians have reported difficulty in providing suitable proof of identity. Many had date-of-birth, name, parent and family identifiers changed on entry to the institution, or their childhood records have been lost or destroyed. Freedom of Information appears to have been used to prevent access to information that would provide family information and evidence of certain events and perpetrators of abuse.

Most worrying is that some States and Territories have still not made any commitment to provide redress at all. AFA is generally disappointed with the responses made by governments and past providers. State Governments have been very variable in the establishment and administration of their Redress Schemes. Schemes were introduced in Queensland, Western Australia and Tasmania. Victoria and NSW have held no inquiries, nor have they implemented redress. All States could do more to assist this group.

The schemes implemented by Tasmania, Queensland and Western Australia differ considerably in almost every aspect, including the amounts involved. Tasmania had a flat payment amount and is only open to State wards; Queensland and Western Australia had a two-tier system (base payment and additional funds for demonstrated abuse). The South Australian response is limited to child sexual abuse, and victims still need to use current victim of crime provisions.

Many Forgotten Australians have been disadvantaged by scheme cut-off dates. As with other hard-to-reach people and families, many Forgotten Australians are more mobile than the general population. They tend not to live in the State or Territory where they were children. Many are socially isolated, not part of community or support groups, don't regularly read newspapers or listen to the news. Frailty and old age have also created problems for individuals accessing redress schemes given their isolation from mainstream services. The Tasmanian system is (now) open-ended although the payment amount has been cut by half; the others have retained cut-off dates for applications. It should be noted that neither Tasmania nor Western Australia offered State based support services as part of their redress schemes.

A national scheme is critical, not just because it is fairer, but because many Forgotten Australians have chosen to leave the State or Territory where they spent their childhood and are unable to access State based services. It is understandable that the transient and restless nature of Forgotten Australians is due to the trauma incurred from childhood. In addition a national scheme avoids placing Forgotten Australians in an adversarial battle with bureaucrats from State governments where their abuse occurred. Many Forgotten Australians report being ground down by the bureaucracy and bureaucratic processes. In some instances there are still bureaucrats and officials in positions of power who implemented the shortcomings of past defective policies. Victims can't be certain of a lack of bias against them.

The legal system needs to address the evidence<sup>6</sup> that people who are adult survivors of child abuse have great difficulty in disclosing their abuse within statute of limitations periods.

AFA contends that this has been a major legal barrier and obstructs Forgotten Australians' access to legal redress. There is no clear route for gaining justice for people who report childhood abuse in institutional settings. Mathews<sup>7</sup> suggests there is a 'bewildering array of legislative provisions' making it difficult to navigate for the legal profession as well as the victims of 'defective administration.' This is confirmed by the personal experiences of Forgotten Australians attempting to seek justice.

## **Alternative redress and administrative options**

### **Commonwealth Ombudsman**

The Ombudsman Act 1976 (Cth) confers a number of powers and roles. The relevant role in this instance is to perform administrative review and investigation of Australian Government agencies and staff as a result of a complaint that may result in a recommendation for redress through the Discretionary Payments of Compensation provisions.<sup>8</sup>

From the Senate Inquiry, it is clear that agencies and administrators across the country, at all levels of government, were not inclined to believe, or motivated to address, complaints by children against welfare agencies, police and magistrates. The system seemed immobilised and deaf to the pleas of vulnerable children and families. In addition, child migration and child removal on the basis of race are understood to have caused great harm and to be misguided public

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<sup>6</sup> Mathews, B. (2003) Limitation periods & child sexual abuse cases: law, psychology, time and justice *Torts Law Journal* pp 218-243.

<sup>7</sup> Mathews, B. (2004) Post-Ipp special limitations periods for cases of injury to a child by a parent or close associate: new jurisdictional gulfs *Torts Law Journal* pp 239-258

<sup>8</sup> Commonwealth Ombudsman, (2010) Report 4. *Comcare and Department of Finance and Deregulation: Discretionary payments of compensation.*



policy and a failure by governments<sup>9</sup> to care for children under government protection adequately.

AFA contends that a valid role for the Commonwealth Ombudsman is to undertake an investigation and report to the Federal Government on defective administrations, breaches of statutory obligations, failure in duty of care and illegal actions that caused such widespread harm to children in the child welfare system, with a view to establishing a National Reparation Fund for the survivors of childhood institutional care using Discretionary Payments of Compensation provisions.

### **Commonwealth discretionary compensation schemes**

An example of the bewildering array of legislative provisions becomes clear when a person is seeking to use the Commonwealth's Discretionary Compensation Fund (which is administered by the Department of Finance and Administration). In a report on the revised mechanisms, Philip Harrison<sup>10</sup> in a Clayton Utz newsletter notes: 'An understanding of these mechanisms is essential when dealing with moral, rather than purely legal claims against the Commonwealth.'

The Clayton Utz newsletter highlights that these payments are made for Compensation for Detriment caused by Defective Administration (CDDA) Schemes – intended to cover losses (economic and non-economic) where a person suffers unintended consequences or losses as a result of administrative failure, and where no other legal redress is available. On the surface, this form of redress would seem to be a suitable avenue for former child migrants and people who were removed from family on racist grounds for seeking redress and compensation. Given that all governments failed to keep institutionalised children safe, AFA suggests that the Commonwealth has an opportunity to use this fund to seed a National Reparation Fund.

The Department of Finance Circular 2009/09<sup>11</sup> updates and provides guidance on CDDA and Act of Grace payments. It is clear that an Act of Grace payment is 'used where paramount obligation to the applicant is moral, rather than legal.' In the light of the harm done to Forgotten Australians, AFA suggests that any redress for Forgotten Australians would relate to a moral obligation to right past wrongs in a fair and just manner.

### **Human Rights Commission**

It is generally understood that many Forgotten Australians were denied basic human rights during their childhood in Australia's child welfare institutions: rights

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<sup>9</sup> Australian (November 2009) and British (February 2010) Apologies.

<sup>10</sup> Harrison, P. (2007) *Government Insights: Claims against the Commonwealth: revised discretionary compensation payments*. Newsletter - Clayton Utz Publications.

<sup>11</sup> Department of Finance and Deregulation (2009) *Finance Circular no 2009/09: To agencies subject to the Financial Management and Accountability Waiver Act 1997*.

to a safe environment, education, nurture, health care, emotional and spiritual development and family connections.

The Australian Human Rights Commission has demonstrated leadership and skill in undertaking investigation into the Stolen Generation and in providing assistance to the courts and government in matters involving the impact of laws and policies on vulnerable citizens. The Commission's engagement recognises that the Stolen Generation is a national issue, not just a State and Territory matter. The Special Purpose Commissioners hold a specialist position (*amicus curiae*) in matters arising from complaints to the Federal Court. The *amicus curiae* is given permission to provide advice and assistance to the court on lawful or relevant matters that may otherwise not have been heard.

Given the vulnerability of Forgotten Australians across the life course, AFA considers that the Human Rights Commission is in a singularly good position to help governments and organisations develop appropriate policy and legal responses to this complex situation.

## **Government actions needed to support Forgotten Australians**

### **Financial and Legal Recommendations**

**Proposal:** The Senate Report asserted that the Commonwealth had a moral responsibility to protect these children and recommended a national reparations fund, to be managed by the Commonwealth (Rec. #6).

*Detail:* State redress schemes have been diverse, and all have been capped and/or time limited. Differences between States in terms of redress and services have created unequal outcomes for Forgotten Australians, as noted previously. New South Wales has indicated (in its formal response) that it would consider redress only as part of a national scheme, coordinated by the Commonwealth.

#### **Financial, administrative and legal processes**

Government actions that need Commonwealth assistance and leadership:

- 1. National reparation fund:** That the Federal Government institute a national scheme of its own, while encouraging those State and Territory Governments who have not offered redress to do so; or establish a national scheme and invite all Governments to be part of it, by making contributions or simply by ensuring that their own schemes are in harmony with the national scheme.
- Eligibility needs to be as broad as possible. Excluding survivors of abuse in foster care, people in detention centres, people who were not State wards or people who were only in care for short periods, for example, creates undesirable divisions and adds to the administrative burden the



need to make judgements about who 'fits' the criteria and who does not and then to defend those judgements through an appeal system.

- The criteria needs to include the types of abuses experienced: neglect and psychological, physical, emotional and sexual abuse. In addition the following factors need to be taken into account: severity of abuse; age at which abuse started; frequency of abuse; who was involved; how many were involved; and for what length of time the abuse lasted during the child's time in the institutional or other out-of-home 'care' setting.
- Support to prepare claims must be provided as part of the system. This is not just legal support but sympathetic support that recognises the trauma such a process creates and offers advice on the amount of detail needed to establish an entitlement.
- Schemes should be open-ended, as eligible survivors are all at different stages in the acknowledgement process and should not be rushed into public declarations before they are ready. Forgotten Australians working in government departments fear discrimination if they disclose and will often elect to wait until retirement before claiming redress. There are also issues of awareness for people who cannot read, because an education was denied them, which may take them much longer to learn about a government policy or scheme. Deadlines are counterproductive.
- The two-tier schemes introduced by Queensland and Western Australia are a good way of ensuring all survivors can (relatively easily) claim a base amount without having to go through the additional trauma of producing a more detailed and documented account of their suffering. Those who are able and ready to claim the higher level of reparation can do so, with appropriate support and guidance.
- The decision about whether to proceed to claim the higher level of reparation must be made in the knowledge that support in the preparation of the claim will be available, and that unreasonable levels of detail will not be required.
- There needs to be independent legal support available, to assist people to make the right choice about accepting reparation and abandoning the court processes.

## **2. Commonwealth Ombudsman:**

- Extend the role and function of the Commonwealth Ombudsman to investigate and recommend a nationally consistent position for 'defective administration' schemes that operated in relation to children in all forms of institutional care in the twentieth century. This position has suitable expertise in advising departments and ministers in relation to making

payments where there is no legal recourse; where people have been disadvantaged by policies and practices of administrators. Types of payments would include ex-gratia and Act of Grace, although it could also include waiver of debt where a person has accumulated a HECS/HELP debt.

### **3. Human Rights Commission:**

- The Australian Government should form a National Watch Committee under the guidance of the Human Rights Commission that would include high levels of membership by Forgotten Australians (at least 51%). The National Watch Committee would make an annual report to the Parliament on the progress of national priorities (Senate and other Inquiry Recommendations) that help Forgotten Australians, Child Migrants and Stolen Generations overcome the past abuse, trauma and stigma.

### **4. Administration:**

- That the Commonwealth apply a 'whole of government approach' to program and services delivery as per Recommendation # 33<sup>12</sup>.
- That the Commonwealth and the States commit, through the Council of Australian Governments, to implementing a whole of government approach to the provision of programs and services for care leavers across policy areas such as health, housing and welfare and community services and other relevant policy areas.
- This would include a coordinated, targeted, case-management approach to delivering services across all levels of government to meet the complex and interwoven needs of this group of survivors.

## **Practical Support Recommendations**

**Proposal:** That the Federal Government focus on encouraging all States and Territories to provide services where they currently do not exist, to improve services and to improve access to services by Forgotten Australians **across the country**. It is essential that service provision is available in the State/Territory that Forgotten Australians currently reside in, as many no longer reside in the State in which they that were institutionalised as children.

These practical support recommendations underpin a type of redress and fairness for all Forgotten Australians in overcoming the disadvantage of their childhood experience. Forgotten Australians have already gained 'special needs' status in the Aged Care sector, and this needs to be extended across all other forms of community services.

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<sup>12</sup> Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children (2004.)

There are several elements in this approach where there is an important role for the Commonwealth in brokering reciprocity agreements. Any such agreements need to take into account accessibility in rural and regional areas.

### **Targeted Services**

- 1. Aged Care:** Targeted Aged Care service providers need to recognise the fear many Forgotten Australians have of finding themselves helpless in an institution again. There needs to be a national program ensuring that Forgotten Australians are supported to stay in their own homes as long as possible. When this is no longer safe for them, prior consultation with them and their families should aim to ensure they feel empowered and supported wherever they go. **Priority of access** to Home and Community Care, Supported Accommodation, Community Aged Care and Extended Aged Care Packages is needed, to support Forgotten Australians to stay in the community for as long as possible, in the light of their fear of re-institutionalisation in old age. Provide access to pilot program funding for aged Forgotten Australians to identify suitable alternatives for this group. Senate Recommendation # 26, #27 and #28<sup>13</sup>.
- 2. Health:** Forgotten Australians should be given priority access to services similar to those provided to Department of Veterans Affairs Gold Card holders. This suggestion has some support in the House of Representatives<sup>14</sup>. Providing 'gold card' access to health care would recognise the extreme disadvantage suffered by survivors who had poor medical and dental care as children and who now have high needs for which they cannot afford to pay. Some report refusal by private health insurers on the basis that their poor health arises from a prior, unspecified health condition. Dental care is a recurring theme in correspondence, as is mental health. A card would also be a useful signal to doctors and allied health care professionals, alerting them to the disadvantage and the multiple health issues faced by this group. Senate Recommendation # 25.
- 3. Emotional wellbeing:** Counselling and linked-up services, drop-in facilities and support – accessible across State boundaries – are needed. The reported tendency of Forgotten Australians to leave the State where they were in care means that counselling services available in the State of care may not be so readily available across borders. States are (naturally) focussed on providing services to those who were their responsibility. Many Forgotten Australians report finding it hard to have counselling by phone, preferring to see, as they say, that the person 'is really listening' to them. Senate Recommendation #19, #21, #22 and #23.

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<sup>13</sup> This reference covers all recommendations noted on this page - *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children* (2004.)

<sup>14</sup> Speech, Janelle Saffin, 18 November 2009, House of Representatives Chamber, Hansard pp 126-128.

- 4. Administrative support:** That Centrelink and Job Network providers case manage the Forgotten Australians as a 'special needs' cohort, where they choose to identify, in recognition of their multiple barriers to social and economic participation. Priority access to services for Forgotten Australians. The disadvantage experienced by Forgotten Australians as a group, because of their lack of adequate health care, education and support as children, needs to be acknowledged as a Social Inclusion issue. Isolation is a big factor inhibiting recognition by service providers of Forgotten Australians' needs as a community of survivors. Government and non-government agencies should collect data that identifies the needs and requirements of the Forgotten Australians as a specific group, in areas such as: housing; physical, mental and dental health; social welfare; drug and alcohol services; and corrective services. The aim would be to ensure a better response from those services.
- 5. Aged Care:** Targeted Aged Care service providers need to recognise the fear many Forgotten Australians have of finding themselves helpless in an institution again. There needs to be a national program ensuring that Forgotten Australians are supported to stay in their own homes as long as possible. When this is no longer safe for them, prior consultation with them and their families should aim to ensure they feel empowered and supported wherever they go. Priority of access to Home and Community Care, Supported Accommodation, Community Aged Care and Extended Aged Care Packages is needed, to support Forgotten Australians to stay in the community for as long as possible, in the light of their fear of re-institutionalisation in old age. Provide access to pilot program funding for aged Forgotten Australians to identify suitable alternatives for this group. Senate Recommendation # 26, #27 and #28<sup>15</sup>.
- 6. Education:** Literacy classes or one-on-one tuition for Forgotten Australians who lacked an adequate education are needed. Many literacy programs focus on migrants. As English is the language most Forgotten Australians speak at home, attending courses with newly-arrived migrants is of little benefit to them, and so many have never learned to read or write in later life. Submissions and letters telling their stories (e.g. to the Senate Inquiry) are often written by relatives or friends on their behalf. Forgotten Australians who have debts incurred by entering TAFE or Higher Education should have their fees waived in recognition of the difficulties they have overcome. Forgotten Australians should be identified as a special needs group for alternative entry to high school, TAFE and Higher Education courses. Senate Recommendation #29 and #30.

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<sup>15</sup> This reference covers all recommendations noted on this page - *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children* (2004.)

AFA representatives would be happy to meet with the Committee to discuss these issues further.

Yours sincerely

Caroline Carroll  
Chair  
Alliance for Forgotten Australians  
Date: 11 June 2010