
Supplementary Submission to the Senate Community Affairs References Committee Inquiry into Children in Institutional Care

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Thank you for inviting us to give oral evidence to the Senate Committee in its public hearings in Sydney on 4 February 2004. As a result of issues/questions raised during our oral presentation, we are writing to provide you with some further information and clarification to assist the Committee in its deliberations.

Redress/reparation schemes

In our evidence to the Committee we detailed a number of the disadvantages associated with litigation and canvassed some examples of redress/reparations schemes that are, or have been, established in Canada and Ireland. We believe that these redress schemes have the potential to provide victim/survivors with a range of different responses that may assist in healing and reconciliation. In particular we pointed to the example provided by the *Grandview Agreement* made between survivors of the Grandview Training School and the Ontario Government.

The reason we draw attention to the *Grandview Agreement* as an example of an excellent redress package is that it was designed with extensive victim/survivor involvement at all stages. It was in no way imposed on the victim/survivors – but rather met their needs and concerns precisely because they were actively involved in stating what those concerns and needs were, and how resolution should take place. This needs to be borne in mind when suggesting that there should be a redress/reparations package. Without active and real involvement by victim/survivors, it is unlikely that any such scheme will meet their needs or assist in healing.

For information regarding the Grandview agreement we refer you to the following documents that we mentioned in our evidence on 4 February 2004:

- Feldthusen, Bruce, Olena Hankivsky and Lorraine Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' (2000) 12 *Canadian Journal of Women and the Law* 66.
- Leach, Deborah, *Evaluation of the Grandview Agreement Process*, 1998. Available at <http://www.grandviewsurvivors.on.ca/gsummary.htm> (accessed on 19 February 2004).

It is also possible for large-scale redress packages to be developed with victim/survivor involvement. For example the recent creation of the Alternative Dispute Resolution (ADR) Process for Indian Residential schools in Canada was preceded by 'exploratory dialogues' during 1998-1999 across the country involving government, church and victim/survivor groups. This was followed by the conduct of pilot projects and the final development of the ADR Process. The ADR Process

makes it clear that it is but one of three options that a victim/survivor may wish to pursue to resolve their claims (the other two being a civil action, or an out-of-court settlement in the context of a civil action).

The evidence received by the Committee concerns a number of different institutions. There are a range of differences between these institutional contexts: eg they were operated by different organisations, in different jurisdictions with different legislative environments, the experiences at institutions varied, sometimes governments were involved in the operation and sometimes they were not, and so on. These types of differences may mean that a single redress approach is not suitable and may be unable to provide for the extent of victim involvement that, in our view, is necessary for a well-designed and appropriate redress package.

Compensation/financial concerns

There are many different types of institution about which claims of abuse have been made. The committee should be wary of focusing on any one type of compensatory structure that imposes respective liabilities upon federal, state and/or other perpetrator bodies. In some cases one institution may bear full responsibility. In other words, notions of contribution (as used in contract or tort law), or of proportionate liability, should be generally avoided; what is needed, rather, is a focus on the realities of who is to blame for what activity with a pragmatic recognition of the respective abilities of various actors to provide appropriate remedial responses.

Moreover, the time delays that ensue when negotiating contributions from other organisations may also exacerbate delay in resolving the claims of people who have experienced abuse as children in institutions. Delay is obviously a factor that does not contribute to healing.

It must be acknowledged that measures that assist victim/survivors on the road to healing are only partially and spasmodically provided (via counselling, mental health services etc) by state and federal government agencies and services. Whilst victim/survivors may well access these services, they are not designed to deal with the particular experiences with which the committee is concerned – they do not replace a well designed redress package that includes many components directed at meeting the particular and specific needs of victim/survivors.

Update on Ireland

The third interim report of the Commission to Inquire into Child Abuse was released on 30 January 2004. It makes a number of criticisms of the role of the Department of Education and Science, the various church organisations and legal representatives. This report is of particular interest because it is the first to make findings in relation to specific institutions. The report is available at <http://www.childabusecommission.ie/Statements/Rulings/abuse.pdf> (accessed on 19 February 2004)

Apologies

We refer you to the following:

- Hingorani, Melanie, Tina Wong and Gilli Vafidis, 'Patients' and doctors' attitudes to amount of information given after unintended injury during treatment: Cross sectional, questionnaire survey' (1999) 318 *British Medical*

Journal 640. Available at <http://bmj.bmjournals.com/> (accessed on 19 February 2004)

- The legal review (2002) conducted by Corrs Chambers Westgarth for the Open Disclosure Project of the Clinical Practice Improvement Unit available at http://www.nsh.nsw.gov.au/teachresearch/cpiu/open_disclosure.shtml (accessed on 19 February 2004)
- Alter, Susan, *Apologising for Serious Wrongdoing: Social, Psychological and Legal Considerations*, Prepared for the Law Commission of Canada, 1999. Available at <http://www.lcc.gc.ca/en/themes/mr/ica/2000/html/apology.asp> (accessed on 19 February 2004)

NSW Ombudsman and advice on apologies

The Chair of the Committee raised with us questions concerning the NSW Ombudsman's advice regarding the giving of apologies and provided us with a copy of the Ombudsman's fact sheet. This fact sheet concerns the provision of apologies in the light of the *Civil Liability Act 2002* (NSW). You will note that the Act provides that apologies given, in certain circumstances, will not constitute an admission of liability, and will not be admissible in court. These provisions do not apply to situations involving intentional torts, such as sexual assault.

The Ombudsman's fact sheet does not purport to set out the general law regarding the relationship between apologies and legal liability. The Ombudsman's fact sheet is confined solely to the legal situation under the *Civil Liability Act 2002* (NSW).

Apologies and statements of regret have been offered in institutional harm contexts – eg we have seen apologies given in respect of institutional harms particularly concerning the Stolen Generations;¹ see also the apologies offered in overseas contexts which we referred to in our oral evidence – which have not resulted in mass scale litigation (on the basis of that apology).

Statute of Limitations

We refer you to:

- Matthews, Ben, 'Limitation periods and child sexual abuse cases: Law, psychology, time and justice' (2003) 11 *Torts Law Journal* 119. In particular see footnotes 63-65 which provides examples of legislation in different jurisdictions that have limitation periods for child sexual assault claims, or introduced moratoriums etc.

¹ Eg see apology provided ACT, 17 June 1997, Week Six, *Hansard*, p 1602; Northern Territory, 24 October 2001, *Debates – Ninth Assembly – First Session*; Western Australia, 28 May 1997, *Hansard*, pp 3333/1 – 3343/1; NSW, 14 November 1996, *Hansard Legislative Assembly*; and again more specifically on 18 June 1997, *Hansard Legislative Assembly*, after the release of *Bringing them Home*; Queensland, 26 May 1999, *Hansard*, pp 1946-1982; Victoria, 17 September 1997, *Hansard*, pp 107-120. For some examples of early church statements of regret and/or apologies see HREOC, *Bringing them Home*, Chapter 14 'Making Reparation', Acknowledgement and Apology.

