Legal and Constitutional Affairs Committee

Senate Review of Government Compensation Payments

What compensation?

Submission by Cherie Marian, June, 2010.

About the Author

The writer is an advocate for the establishment of redress schemes to compensate Forgotten Australians for historical abuse and neglect in institutional and out-of-home 'care', with a particular focus on Victoria (and to a lesser extent New South Wales). Various stakeholders have assisted my efforts to lobby for redress; however, I make this submission as an individual and not as a representative of those organisations. I have worked in Victoria's community services sector in a variety of roles over the past 17 years. In addition I made submissions to and subsequently gave evidence to the Inquiry into Children in Institutional Care and the Inquiry into the Implementation of the Recommendations of the Lost Innocents and Forgotten Australians Reports. A number of my recommendations to these Inquiries (which were not dissimilar to the recommendations of many others) were incorporated into both reports of the Senate Community Affairs References Committee.

Scope

The scope of this submission is limited to the terms of the inquiry as they relate to *Forgotten Australians* and *Lost Innocents and Forgotten Australians Revisited* Re, in the State of Victoria (except where otherwise stated). Primarily, it explores the Victorian Governments' failure to establish a redress scheme to deliver justice to survivors of historical neglect and abuse in institutional and out-of-home 'care'.

For the purpose of consistency with the Inquiry into Children in Institutional Care the phrase '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 neglect, psychological abuse, physical and sexual assault in institutional and out-of-home 'care'.

The word 'care' is used loosely in the context of the subject matter. Put simply, had an experience of appropriate 'care' been provided in the first instance, the current fight for justice, which at its core must include monetary compensation for injuries sustained as a result of the abuse, would not be necessary.

Analysis of church-based compensation schemes, or schemes offered by individual charity organisations, is not provided. State redress schemes are compared nationally.

Background

The writer commenced advocacy for the establishment of a Victorian redress scheme in collaboration with key stakeholders in 2006 whilst employed as the community development officer at Fitzroy Legal Service (FLS). FLS provides critical analysis of legal issues within a broad social context and serves members of the community whose access to legal resources is limited. Whilst employed at FLS, clients presented to the service seeking legal advice for abuse in 'care'. I assisted these clients to apply for records, and access appropriate support services. FLS solicitors have represented survivors of abuse in 'care' in Victoria and interState and continue to do so.

Since the expiry of my contract with FLS in 2007, I've continued to lobby for redress in a volunteer capacity. The following individuals and organisations have assisted my efforts:

- Adrian Snodgrass – solicitor, formerly of St Kilda Legal Service
- Meghan Fitzgerald - solicitor, Fitzroy Legal Service
- Victorian Adoption Network for Information and Self Help (VANISH)
- Leonie Sheedy OAM & Frank Golding – Care Leaver Australia Network (CLAN), national advocacy and support service
- Alliance for Forgotten Australians – national peak body for support and advocacy services
- Angela Sdrinis - Partner, Ryan Carlisle & Thomas.
- Dr Vivian Waller - Waller Legal
- Federation of Community Legal Centres - Victorian State peak body for community legal centres
- Bernie Geary OAM – Victorian Child Safety Commissioner

As part of this work, in April 2008, the Federation of Community Legal Centres passed a policy motion stating that the Federation supports the call for the establishment of a 'non-adversarial compensation scheme' for survivors of historical abuse in institutional and out-of-home 'care'.

Whilst the paucity of research into the life outcomes of care leavers has been acknowledged[1], findings which are available suggest:

- In 2001, 65% of the Victorian female prisoner population had a 'protective care' history[2]

- In 2007, 42% of Australia's homeless youth had a 'protective care' history[3]

[1] Senate Community Affairs Reference Committee, *Forgotten Australians: a report on Australians who experienced institutional or out of home care as children*, August 2004, p 332.
[2] Colvin, K., *The Women and Poverty Report: More than Half – Less than Equal,* Victorian Council of Social Services, October, 2001, p 15.
[3] Chamberlain, C. Johnson, G. & Theobald, J., *Homelessness in Melbourne: Confronting the Challenge, Centre for Applied Social Research,* RMIT University, February 2007.

- Once entering the juvenile justice system, as many as 90 % of 'protective care' clients will graduate to the adult criminal justice system[4]

- Almost 1 in 3 females leave the protective care system at age 16 having been pregnant or already with a child[5]

Moreover, in 2007, a survey of 291 Forgotten Australians revealed that:

- Almost 1 in 4 experienced primary homelessness subsequent to leaving 'care'[6]

- More than half reported physical assault perpetrated by so called 'carers' whist in 'care'[7]

- Slightly less than one third reported sexual abuse perpetrated by a staff member of a facility in which they resided[8]

- 1 in 3 had attempted suicide[9]

- Fewer than 4 % completed secondary school to year 12 or equivalent[10]

- Fewer than 8 % completed an undergraduate degree to university level[11]

- More than half were income support recipients[12]

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[4] 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.

[5] 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.

[6] Care Leaver Australia Network, *A Terrible Way to Grow up: the experiences of institutional care and its outcomes for care leavers in Australia.* 2006-07. Homelessness is charactarised as 'living on the streets'. Of note, undoubtedly, a great many more Forgotten Australians have experienced secondary homelessness which is charactarised by use of emergency accommodation and staying temporarily with others, and tertiary homelessness which is boarding house accommodation that does not offer security of tenure provided by a lease. These definitions of homelessness are used by the Australian Bureau of Statistics and were developed by Chamberlain, C. and MacKenzie, D. (1992)'Understanding Contemporary Homelessness: Issues of Definition and Meaning', Australian Journal of Social Issues, 27(4), 274-297)

[7] CLAN *Care Leaver Survey* July 2007 (data collected in 2006) Physical assault defined by the category 'boxed on ears' a colloquial term indicating blows to the side of the head.

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] Ibid.

[12] Ibid.

- 1 in 4 were disability pension recipients.[13]

This litany of disadvantage is a powerful indicator of what it is care leavers are seeking redress / compensation for. Notwithstanding substantial damage resulting from sexual and physical abuse, make no mistake; neglect has caused forgotten Australians as much exponential harm through educational deficits and homelessness, for example, as have more overt forms of abuse in 'care', *if not more*, due to its greater prevalence.

My work as an advocate for the establishment of a Victorian redress scheme is ongoing. It includes educating the community sector about the plight of Forgotten Australians, liaison with various stakeholders including community legal centres representing abuse in 'care' clients, and lobbying for justice for care leavers at State and federal levels of government.

Barriers to Justice

Survivors of physical and sexual assault are by definition victims of violent crime. The *Victims Charter Act* 2006 (Vic) sets forth the right of victims of violent crime "to request that the court order the offender to pay compensation", and to 'apply for financial assistance from the Government for harm resulting from a violent crime".[14]

In Victoria, eligibility for compensation from the Victims of Crime Assistance Tribunal (VOCAT) is contingent upon the crime being reported to the police.[15] Claims for compensation must be lodged within two years of the commission of the crime and if the victim was a child at the time, then an explanation must be provided as to why the claim was not lodged within reasonable time after turning 18 years old.[16] If the offender is not convicted or presented for trial there is no legislated right to claim special financial assistance.[17]

[13] Ibid.
[14] *The Victims' Charter Respecting your rights as a victim,* Department of Justice Fact Sheet
[15] State of Victoria, *General Information Brochure,* Victims of Crime Assistance Tribunal.
[16] Ibid.
[17] Sdrinis, A. CLAN newsletter , no 46, August, 2008 p 13.

Typically, survivors of abuse in 'care' take decades to disclose their abuse,[18] much less seek recompense. Many decline to make police reports due to a lack of witnesses and evidence to corroborate what occurred, which they know will go against them. Others attempted to disclose as children but were told they were 'liars'. Why would anyone believe them now, when they were not believed in the first instance; particularly if as a result of the abuse a person has, at times, experienced hardship which may be considered at odds with being a 'credible witness' (i.e. mental illness, substance abuse or crime)? Indeed, VOCAT is required to take the criminal records of applicants into account in its deliberations.[19] In all but the most severe cases many struggle with the implications of making a police report, (including primarily, the psychological cost to themselves), and in the end decide it's simply too big an ask.

Of those who do make reports, significant deterrents to civil actions 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 act as further barriers.[20]

Furthermore, in cases of neglect such as the failure to adequately shelter, feed, clothe or educate a child, and/or failure to provide appropriate aftercare support, it is often "difficult to formulate a cause of action which is recognised under our tort law."[21]

Finally, the historical nature of the abuse and neglect documented in *Forgotten Australians,* combined with its effects, means that many survivors are of advancing age and poor health. Indeed some, (including clients I have supported in a professional capacity), are literally dying as they wait in vain for access to justice.

[18] Sdrinis, A. *Why an Apology is Not Enough,* 9th of September 2008, p 2.
[19] State of Victoria, *General Information Brochure,* Victims of Crime Assistance Tribunal.
[20] Sdrinis, A. *Why an Apology is Not Enough,* 9th of September 2008 & Commonwealth of Australia, *Australian Government Response to Forgotten Australians*: *a report on Australians who experienced institutional or out of home care as children*, 2005 p 199 – 212
[21] Sdrinis, A. *Why an Apology is Not Enough,* 9th of September 2008

Churches Use Legal Loophole To Avoid Being Sued

In the past, many wards of the State and children of 'voluntary'[22] care status were placed in the care of religious orders or philanthropic organisations, at which point the State, effectively absolved itself of responsibility for them. Systems to independently monitor the care of children in these facilities were virtually non-existent or ignored.[23] In such environments, abuse and neglect of children thrived dangerously unchecked.

A Victorian personal injury solicitor with expertise in this area, makes a compelling case that the Catholic Church in particular, "denies it can be sued because they argue that they are not legal entities but instead mere religious associations."[24] Angela Sdrinis, Partner at Ryan Carlisle Thomas, States:

The affairs of the many Church groups and religious orders have been organised in such a way that they are legally incorporated for the sole purpose of owning and disposing of property and the for the accumulation of wealth but that otherwise Churches argue that they have no more standing than a social group at the local tennis club".

Such arguments have met with some success in the Courts, with the inability to find an entity which can be sued further exacerbating the legal barriers faced by those seeking redress. [25]

[22] 'Voluntary' placement occurs when the State does not act to forcibly remove a child from the home by statutory order, but where instead, the child is relinquished 'voluntarily' to the care of the State by a parent or legal guardian. Referring to a child being placed in care 'voluntarily' is something of a misnomer as such action is typically taken as an option of last resort, often due to extenuating circumstances.

[23] 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 – 143.

[24] Sdrinis, A. *Why an Apology is Not Enough,* 9th of September, 2008.

[25] Sdrinis, A. retrieved from http://www.clan.org.au/page.php?pageID=7

Forgotten Australians Calls for Compensation

In an overt acknowledgement of the many legal barriers which, for most, block access to justice in the courts, recommendation six of the Inquiry into Children in Institutional Care called for the establishment of a "*national reparations fund*" to "*award monetary compensation*" to victims of abuse in 'care'. [26]

The Commonwealth responded:

"all reparations for victims, rests with those who managed or funded the institutions, namely State and Territory governments, charitable organisations and churches" involved in the provision of institutional and out-of-home care.[27]

Queensland, Tasmania and Western Australia have already established State redress schemes. South Australia convened a committee to review redress models as part of its response to the report of the Mulligan inquiry into the abuse of children in 'care' [28], however to date, has instead opted to provide only support services.

Victoria and New South Wales are the only States which are yet to even *consider* implementing redress schemes. This fact is a sad indictment on these State Governments.

Although some Victorian Members of Parliament support the call for redress[29], in the absence of the political will of the Brumby Government leadership, such views remain unrealised.

Support Services Verses Redress

The South Australian Government is not alone in providing support services for Forgotten Australians in lieu of redress; the Victorian and New South Wales Governments have responded similarly.

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[26] Ibid, p xx.
[27] Commonwealth of Australia, *Australian Government Response to Forgotten Australians*: *a report on Australians who experienced institutional or out of home care as children*, 2005, p 4.
[28] Care Leaver Australia Network, *The Clanicle,* December 2008, p19
[29] Mr Ryan, Leader of the National Party, Assembly Hansard transcript, 9th of August 2006.

Although support services for 'care' leavers are much needed in all States and territories, their provision ought not be viewed as relieving either the States or the Commonwealth of joint responsibility for ensuring that an appropriate body provides equitable access to redress for *all* survivors of historical abuse in 'care', not just those who were in 'care' in States which have subsequently implemented redress schemes.

Redress Resources Provided by the States

State redress schemes which have been established have been substantially resourced by those State governments. (Western Australia = $114 million, Queensland = $100 million, Tasmania = $25 million). In comparison, on the 9th of August 2006, the Office of the Victorian Premier issued a media release boasting settlement of approximately 60 compensation claims since 1995 totalling $4.3 million.[30] The disparity between this figure and funding provided by the aforementioned States, is the measure of justice yet to be served to survivors of abuse in 'care' in Victoria and New South Wales.

Inconsistency of State Redress Schemes' Ex-Gratia Payment Entitlements

A common criticism of redress schemes implemented in Queensland, Western Australia, and Tasmania is that entitlements to ex-gratia payments differed between the States. Of note, Queensland and Western Australia implemented 'two-tiered' schemes which required substantiation of "more serious abuse or neglect"[31] in order for claims for second level payments to be approved – a feature which was not evident in the Tasmanian scheme. Nevertheless, inequity of payment entitlements are evident:

[30] Office of the Premier, Media Release: *Victorians Apologise To Abused Former Wards,* 9th of August, 2006.

[31] Senate Community Affairs References Committee, Lost Innocents and Forgotten Australians Re-visited: Report on the progress with the implementation of the recommendations of the Lost Innocents and Forgotten Australian Reports. June 2009. P 36.

Table 1

Differences in State Redress Schemes Ex-Gratia Payment Entitlements

State	Level 1 Entitlement	Level 2 Entitlement	Maximum Entitlement
Tasmania	Unspecified	Unspecified	$60,000
Western Australia	$10,000	Unspecified	$80,000 (>$45,000)
Queensland	$7,000	$33,000	$40,000

Moreover, in a move considered outrageous by many [32], the maximum payment by the Western Australian scheme was cut from $80,000 to $45,000 following a change of Government, ostensibly due to issues of 'affordability'. The two-tiered system of payment for this scheme was replaced with a four-tiered system classifying abuse as either, moderate, serious, severe or very severe, with corresponding maximum payments of $5000, $13,000, $28,000 and $45,000. One victims advocate was so disgusted at the way in which this scheme was administered, that she resigned from her role on the council which provided the scheme with advice on child protection.[33] Another, Leonie Sheedy, co-founder of CLAN points out:

"Under this criteria, somebody who was 'moderately' abused and neglected every day for five years in an orphanage, children's home, mission or foster care, would receive $2.74 for each day of their abuse."[34]

To say that such an amount for any form of abuse is manifestly inadequate would be a gross under-statement.

[32] Hunt, N. *Abuse Payout Offer Insult,* South Australia, retrieved from http://www.clan.org.au/news_details.php?newsID=498 and The Senior, *Redress Insult to Former Wards,* Western Australia retrieved from http://www.clan.org.au/news_details.php?newsID=484

[33] Strutt. J. *Advisor Quits Redress Scheme*, The Western Australian, retrieved from http://www.clan.org.au/news_details.php?newsID=458

[34] The Senior, *Redress Insult to Former Wards,* WA retrieved from http://www.clan.org.au/news_details.php?newsID=484

Inconsistency of Eligibility for State Redress Schemes

A further criticism of the redress schemes which have been implemented is the inconsistency of eligibility criteria between the States. For example, Tasmania's scheme was open only to State wards, and not those placed in 'care' voluntarily. Western Australia, accepted claims from both State wards and those whose care status was 'voluntary', but excluded claims from people who had been adopted. Furthermore, Queensland excluded applications from individuals who had been placed in foster care.

Table 2

Differences in Eligibility for State Redress Schemes

State	Wards of the State Eligible? Yes / no	Children placed in care 'voluntarily' eligible? Yes/no	Other exclusion criteria?
Tasmania	Yes	No	No
Queensland	Yes, so long as claimant was a resident of one of the 159 institutions covered by the terms of reference of the Forde Inquiry 1998-99	Yes, so long as claimant was a resident of one of the 159 institutions covered by the terms of reference of the Forde Inquiry 1998-99.	Excluded those who had been placed in foster care & institutions providing care for children with disabilities or those suffering from acute or chronic health problem.
Western Australia	Yes	Yes	Excluded claims from adults who were adopted as children.

Limited Duration of State Redress Schemes

All three of the State redress schemes which have been implemented, had limited time-frames during which applications were accepted, and these time-frames all differed. Those wishing to make a claim after closure dates, due perhaps to not knowing that the scheme was being offered at the time of its duration, or to not being psychologically 'ready' to submit an application earlier, were unable to do so.

The sole exception to this is the case of Tasmania, which has made provision for those who wish to submit applications going forward. Deputy Secretary of the Department of Health and Housing, Ms Alison Jacob States:

"The government has established a trust fund that would allow for an ongoing process for any person who subsequently comes forward to be able to have an application dealt with according to the same processes although … payments would be capped at the average payment that has been made to date, which is $35,000."[35]

The maximum payment amount under the Tasmanian scheme was originally $60,000. Further explanation of the reason for the discrepancy between these two maximum payment amounts (i.e $60,000 verses $35,000) has not been provided by the Tasmanian Government.

The Western Australian and Queensland redress schemes are now closed. As such, potential claimants in these States are reduced to having to write to their respective Premiers and other Members of Parliament begging 'cap in hand' for the schemes to be re-opened.

Why Are There Differences Between State Redress Schemes?

An explanation of the differences between the State redress schemes which have been established, lies with jurisdictional issues. Each State and Territory is self-governing. Child protection and compensation for victims of crime are areas governed by State and Territory law. Similarly, most criminal law matters are dealt with by State and Territory Courts. These factors combined, account for the inconsistencies between the State redress schemes which have been implemented.

[35] Senate Community Affairs References Committee, Lost Innocents and Forgotten Australians Re-visited: Report on the progress with the implementation of the recommendations of the Lost Innocents and Forgotten Australian Reports. June 2009. p 42.

The Impact of Inequities of State redress schemes

Of necessity, States which established redress schemes advertised these nationally in newspapers around the country. Whilst Victorian and New South Wales survivors of abuse in 'care' are pleased that their peers in other States have been provided with access to justice, it was most painful for them to be exposed to these advertisements, in full knowledge that currently, they are denied similar reparative measures.[36]

Understandably, there has been much dismay at the various inconsistencies between the State-based schemes which have been implemented. The fact that an individual whose substantiated case of the worst type and severity of abuse would be eligible for a maximum payment of $60,000 in Tasmania, whilst in Queensland, an individual in the same circumstances, would be eligible for only $40,000 violates all notions of fairness, equity and justice. Similar feelings of indignation arise upon consideration of other discrepancies between the State redress schemes which have been implemented. To date these schemes comprise hotchpotch of anomalies, which is no more organised, than a case of sheer 'pot luck'.

In this context the heated emotions which may accompany an already emotionally charged subject matter, are to be expected. Lack of oversight by the Commonwealth with regards to the establishment of redress schemes nation-wide has left the States 'rudderless'; floundering to address the issue in an ad-hoc fashion, which has in turn, has caused much confusion, dissention and in some cases outright bitterness, among those affected many of whom, feel that such an approach has added mere 'insult to injury'. [37]

[36] Donohue, B. *Time To Face Up To Sins,* Sunday Herald Sun 16th of November 2008

[37] Hunt, N. *Abuse Payout Offer Insult,* South Australia, retrieved from http://www.clan.org.au/news_details.php?newsID=498 and The Senior, *Redress Insult to Former Wards,* Western Australia retrieved from http://www.clan.org.au/news_details.php?newsID=484

Payment Amounts Internationally Disproportionate

The low level of 'top tier' payments for State redress schemes in Australia is disproportionate to payment amounts for similar types of abuse paid by governments overseas. Ireland is an excellent case in point. Maximum payments provided by the Irish Government's Residential Institutions Redress Board, which assesses similar claims, provides for five levels of compensation, with the maximum amount payable for the most severe cases of abuse (level five) being $513,000. Indeed the upper limit of level one payments in Ireland, (which are for the *least* severe forms of abuse), is $85,000; an amount which exceeds the *maximum* amount payable for any of the Australian schemes. The difference between the current maximum ex-gratia payment entitlement in Australia, ($35,000), and Ireland, ($513,000), is frankly, staggering. Such marked discrepancies are indicative of the lower level of importance which Australia, notwithstanding the issuing of various apologies, has placed to date, on righting the wrongs of the past to Australian survivors of historical abuse in 'care'.

Payment Amounts Must be Commensurate with Scale of Abuse

The proportionality of ex-gratia payments issued by redress schemes must take into account what the payment is being made *for*. The highest level payment currently available ($35,000 in Tasmania) is equivalent to approximately a mere one year annual average full-time salary. The question must be asked; is this amount reasonable in the case a survivor of sexual abuse spanning some years whose resulting psychiatric injuries have caused them to be unable to participate in paid employment for the majority of their adult life? To even the lay person, it would appear, surely not! Unfortunately, such a scenario is not unusual for these claims, many of which have further merit, due to physical injuries sustained as a result of the abuse.

Lost Innocents and Forgotten Australians Re-visited Calls for Redress in Victoria, New South Wales and South Australia

Recommendation four of the Inquiry to review the implementation of the recommendations of the Lost Innocents and Forgotten Australians Reports, echoed acknowledgement of the legal barriers in these cases. Explicitly it called upon the:

"*Commonwealth government to pursue all available policy and political options to ensure that South Australia, New South Wales and Victoria establish redress schemes for people who suffered neglect and/or abuse in institutional settings or out of home care in the last century; and that the remaining States make provision to ensure continued receipt of redress claims*."[38]

The response that redress is matter for the States and past 'care' providers to consider was again, repeated. [39] It was further noted that:

"the Australian Government raised this issue at the meeting of the Community and Disability Services Ministers' Conference on II September 2009."[40]

Detail on the outcome of this discussion was not provided.

Current Stance of the Victorian Government

The Victorian Government has long held the view that those wishing to pursue compensation for historical abuse in 'care' must do so through the Courts on a 'case by case' basis. Although this policy remains in place at the time of writing, challenges to this view continue to be made by potential claimants and advocates using various mechanisms, including those set forth in the *Charter of Human Rights and Responsibilities* (Vic).[41] It is envisaged that the use of such mechanisms, combined with pressure created by other initiatives such as the current Inquiry, will cause the burden of inequity to eventually become so overwhelming, that it will be politically

[38] Senate Community Affairs References Committee, Lost Innocents and Forgotten Australians Re-visited: Report on the progress with the implementation of the recommendations of the Lost Innocents and Forgotten Australian Reports. June 2009. p ix.

[39] Australian Government Response to The Senate Community Affairs References Committee Report, *Lost Innocents & Forgotten Australians Revisited Report on the progress with the implementation' of the recommendations Of the Lost Innocents and Forgotten Australians Reports,* June 2009. p 7.

[40] Ibid.

[41] For detailed analysis on how the Victorian Human Rights Charter may be used to further the case for redress in Victoria, see Branigan, L. and Soloman, R,. Rights for Redress: Making the Victorian Charter work for justice, pp 109-126, in *Surviving Care: Achieving justice and healing for Forgotten Australians,* 2010, Edited by Hill, R., and Branigan, L. (in press.)

damaging for the Victorian (and New South Wales) Governments not to implement redress schemes. On this, one cannot escape the fact that it is also an election year in the State of Victoria. Given the number of Victorian's directly and indirectly impacted by this issue, (estimated to be in the tens of thousands)[42], one suspects that a strong backlash will be felt at the polls, should this matter remain unaddressed.

Victorian Charter of Human Rights and Responsibilities

The *Charter of Human Rights and Responsibilities Act (2006)* came into full effect in January 2008. It requires the Victorian Government and public authorities to take into account the civil and political human rights it sets forth, under four key principles of freedom, respect, equality and dignity, in decision making, policy making and law making[43]. The Charter advances a dialogue model which involves discussion between parties to weigh up rights and responsibilities, and to guide decision making around competing or conflicting rights. The model is designed to "avoid the juridical approach which would see matters determined by the Courts and the State possibly becoming too deferential to the power of the Courts."[44]

The Charter of Human Rights and Responsibilities is not retrospective, and the infringement of a right, on its own, does not constitute an independent cause of action. It can, however, be argued that given that abuse in 'care' survivors continue to suffer the effects of their injuries, the Charter must be used as a framework for the Victorian Government's policy and decision making on the question of redress (with particular reference to clauses regarding 'forced or compulsory labour'[45], 'torture and cruel or degrading treatment or punishment, and medical or scientific experimentation without consent'[46], and 'the protection of families and children'[47]).

[42] There have been 10, 200 applications to the Queensland redress scheme**,** 1,878 applications to the Tasmanian redress scheme and 2000 applications thus far to the Western Australian redress scheme, which was still taking applications at the time of writing. Figures from Senate Community Affairs Reference Committee, Lost *Innocents and Forgotten Australians Revisited: Report on the progress of the implementation of the Lost Innocents and Forgotten Australians reports,* Commonwealth of Australia, June, 2009, pp. 38 - 42. Given that the number of children in 'care' over the past century would be higher for Victoria than for Queensland, Tasmania, or Western Australia, it fair to estimate that the number of potential claimants in this State would be also be proportionally greater.

[43] State of Victoria, *The Victorian Charter of Human Rights and Responsibilities: Civil and political rights explained.* Victorian Equal Opportunity and Human Rights Commission

[44] Hill, R., Branigan, L. (Editors) *Surviving Care: Achieving justice and healing for the Forgotten Australians.* (in press), p 117

[45] Section 11, Charter of Human Rights and Responsibilities Act 2006. No. 43 of 2006. Version as at 1 January 2008

[46] Section 10, Charter of Human Rights and Responsibilities Act 2006. No. 43 of 2006. Version as at 1 January 2008

Continued refusal by the Victorian Government to establish a redress scheme for survivors of historical abuse in 'care' may be referred to the Victorian Ombudsman which has the regulatory "power to enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter of Human Rights and Responsibilities."[48]

Conclusion

On the day of the erstwhile Victorian Bracks Government's apology to forgotten Australians for abuse in 'care', only the Leader of the National Party, Mr Peter Ryan, made direct reference to the matter of compensation:

"… *the issue of compensation to these people must … be explored… If we are going to deliver dignity and integrity to the people who have been subjected to this appalling treatment, the State of Victoria is also obliged to investigate a scheme which would deliver justice to these people …"*[49]

The current Inquiry provides a vehicle through which the voices of those who rightfully demand justice for survivors of this abuse can be heard; for this I thank the Committee.

It is unacceptable for support services for survivors of historical abuse in 'care' to be provided instead of redress; for redress to be available in some States but not others; for there to be discrepancies in the eligibility criteria and amounts of ex-gratia payments payable between States; for there to be wide variation in ex gratia payment entitlements for similar abuse overseas and in Australia, and for only one State, (Tasmania), to have provisions to process redress applications going forward.

In accordance with the principles of justice, fairness and equity, redress schemes must be implemented in *all* States and Territories as soon as possible, in order to minimise the trauma which continues to be experienced by many abuse survivors in

[47] Section 17, Charter of Human Rights and Responsibilities Act 2006. No. 43 of 2006. Version as at 1 January 2008
[48] Section 13 (1A) Charter of Human Rights and Responsibilities Act 2006. No. 43 of 2006. Version as at 1 January 2008
[49] Mr Ryan, Leader of the National Party, Assembly Hansard transcript, 9th of August 2006.

the interim, as a consequence of the lack of closure which characterises the status quo.[50] The obstinacy of both the Victorian and New South Wales Governments, suggests that neither will take such action until they are forced to do so. As such, particular pressure should be brought to bear upon these States.

In addition, provisions must be made to process applications for redress going forward in all States and Territories, such that individuals are not disadvantaged by missing the schemes' closure dates. Amounts payable for all schemes must be commensurate with the impact of the abuse which claimants have suffered, as well as with amounts payable nationally and internationally, for comparable forms of abuse. Equity of payment entitlements nationally is a basic first level requirement.

A cohesive national approach to redress via the Coalition of Australian Governments (COAG) is critical to resolve this issue, alongside the development of corresponding mechanisms and policy drivers to aid this endeavour. It is suggested that a memorandum of understanding or heads of agreement between the States and Territories be developed at COAG, to commence this process as a matter of urgency. Critically, such an approach would enable the States and Commonwealth to work together to bring about resolution of these issues once and for all, thus bringing to a close, this shameful chapter of Australia's history.

Furthermore, legislation to prevent Churches and religious orders from claiming they are incorporated for the sole purpose of obtaining and disposing of property must be developed, such that survivors are able to find an entity which can be sued regardless of which State or Territory the abuse occurred in. This is especially applicable to cases of abuse perpetrated by clergy of these orders, where it is evident that the Church knew of or should have known that this abuse was occurring.

Provision of both redress and support services for forgotten Australians in all States and Territories, as recommended by both of the aforementioned previous Senate Inquiries, is essential for reparative measures to be complete. No amount of monetary recompense can repay the innocence of a childhood stolen. It can,

[50] *Give Us Closure,* Letters to the Editor, *The Age,* 15th of November, 2008.

however, make things that little bit easier for people whose experiences have resulted in physical and psychiatric injuries, and caused decades of distress not only to themselves but to their children and families also, in circumstances perhaps best described, “as beyond the comprehension of ordinary Australians, who have led less marginalised lives.”[51]

[51] Senate Community Affairs Reference Committee, *Forgotten Australians: A report on Australians who experienced institutional or out of home care as children,* August, 2004, p 165.