A Submission to the Senate Inquiry on Government Compensation Payments

Frank Golding

Thank you for the opportunity to make this submission on a critically important issue to many thousands of Australians. I am the Vice-President of Care Leavers of Australia Network (CLAN) but please note this is a personal submission following earlier submissions that I made to the *Forgotten Australians* inquiry (2004) and the review of the progress of the 39 recommendations of that inquiry (2009). I am also a member of the Alliance for Forgotten Australians, VANISH and the Victorian Sector Working Party on the Forgotten Australians, but do not claim to represent the views of those organisations in this submission.

1. Definitions and terminology

The label 'Forgotten Australians' was first popularised by the Senate Report of that title (2004).[1] While the term initially appealed as a catchy shorthand equivalent to the 'Stolen Generation', many of the people to whom it was applied became uncomfortable with the term because it was not their choice, and because of its connotations of passivity and victimhood. They preferred the more common Care Leavers or former Care Leavers (often with the word 'care' in quotation marks to draw attention to the irony); or Homies; or specific variants on childhood status such as Wardies or Foster Kids. After the national apology in November 2009, many came to use the label 'Remembered Australians' taking their cue from the political leaders' speeches.

The terminology is more than mere semantics. It reflects a struggle for identity – specifically how you see yourself - and your exercise of the power to name yourself rather than to have a name imposed upon you by outside commentators. In practice, the labelling has also become a badging issue: the two national groups, Care Leavers of Australia Network (CLAN) and the Alliance for Forgotten Australians (AFA) are committed to their respective organisational terms, while not denying the importance of using descriptive labels that carry some meaning to the ordinary citizen.

In this document I prefer to use 'Care Leaver' as formally defined by the Commonwealth Department of Health and Ageing. The Department defines a '*Care-leaver*' as

> *a person who was in institutional care or other form of out-of-home care, including foster care, as a child or youth, or both, at some time during the 20th century.*

---

[1] The Senate, Community Affairs References Committee, *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children*, (hereafter the *Forgotten Australians* Report) (2004).

The Department then goes on to define *institutional care* as referring to

> *residential care provided by a government or non-government organisation. This is explained as including, but not being limited to, institutions such as any of the following:*
>
> *(a) orphanages;*
> *(b) children's homes;*
> *(c) industrial, training or farm schools;*
> *(d) dormitory or group cottage houses;*
> *(e) juvenile detention centres;*
> *(f) mental health or disability facilities.*[2]

These definitions are useful because taken together they are inclusive of the broad range of types of situations that children and young people found themselves in when they were not able to be raised by their direct families (the exception being kin care).

The overwhelming majority of children in 'care' in Australia were not orphans; most were either wards of the state because of being in need of 'care and protection' (sometimes a euphemism for living in extreme poverty) or were 'voluntary' admissions placed by parents unable to look after them. It must also be said that children and young people may have been in out-of-home care permanently, or intermittently, or for short periods of time and the time factor is an important variable in the diversity of the group, whatever label is preferred. Many Australians spent virtually the whole of their childhood in the care of the state, churches or charities.

It is important to consider the meaning of the common term 'abuse' because it covers a wide range of actions. I recommend to the Committee the meaning given under the Irish *Child Abuse (Amendment) Act*, 2005 in which abuse of a child means –

(a) the wilful, reckless or negligent infliction of physical injury on, or failure to prevent such injury to, the child;
(b) the use of the child by a person for sexual arousal or sexual gratification of that person or another person;
(c) failure to care for the child which results in serious impairment of the physical or mental health or development of the child or serious adverse effects on his or her behaviour or welfare, or
(d) any other act or omission towards the child which results in serious impairment of the physical or mental health or development of the child or serious adverse effects on his or her behaviour or welfare.[3]

---

[2] Explanatory statement issued by the authority of the Minister for Ageing, Aged Care Act 1997 Allocation Amendment Principles 2009 (No. 2).

[3] The Residential Institutions Redress Board, *A Guide to the Redress Scheme under the Residential Institutions Redress Act, 2002 as amended by the Commission to Inquire into Child Abuse (Amendment) Act, 2005*, 3rd edition, issued in December 2005, Dublin.

2. The long silence before the storm

Your Committee has access to the key sources which document the experiences of Care Leavers while in Institutional 'care'[4] and I know that the Committee will receive numbers of submissions from Care Leavers who have never had the opportunity to tell their tragic story to the Forgotten Australians inquiry or to any other inquiry. In that light, I draw attention to a short summary from the *Forgotten Australians Report* (2004) to emphasise that in Australia we are indeed dealing with what Prime Minister Rudd aptly called "an ugly chapter in our nation's history"[5].

> *The Committee received hundreds of graphic and disturbing accounts about the treatment and care experienced by children in out-of-home care. Many care leavers showed immense courage in putting intensely personal life stories on the public record. Their stories outlined a litany of emotional, physical and sexual abuse, and often criminal physical and sexual assault. Their stories also told of neglect, humiliation and deprivation of food, education and healthcare. Such abuse and assault was widespread across institutions, across States and across the government, religious and other care providers.*[6]

This summary is supported by data collected by CLAN (2008) and the summary description by AFA (2009).[7] All the material shows that the vulnerable children of yesterday are the damaged adults of today.

The phrase 'care and protection' represents a tragic irony. It is timely to remind ourselves that hundreds of thousands of children were placed in institutions and foster families precisely because they needed care and protection. In many cases, the very reason children were removed from their family homes was to protect them from abuse or neglect. It is an irony of tragic proportions that many of these children were then abused and neglected by the very people charged with the duty of ensuring that abuse and neglect ceased. But these vulnerable children needed not only protection but also affection, nurturing, stability and connection to people who might offer affection. In a massive breach of trust, many of these children were repeatedly and brutally sexually abused at the hands of paedophiles employed by authorities negligent of the need for screening. Others were confronted by vicious disciplinarians given free reign by the lack of any reasonable monitoring of, or accountability for, their behaviour. Some children were physically abused so often that they suffered permanent injuries and scarring.

---

[4] I refer to the reports above together with Joanna Penglase, *Orphans of the Living: Growing up in 'care' in twentieth-century Australia*; CLAN, *A Terrible Way to Grow Up: The experience of institutional carte and its outcomes for care leavers in Australia*, CLAN 2008; and Alliance for Forgotten Australians, *Forgotten Australians: Supporting survivors of childhood institutional care in Australia*, 2008, 2010.

[5] Transcript of Address at the Apology to Forgotten Australians and Former Child Migrants, Parliament House, 16 November 2009 Canberra.

[6] *The Forgotten Australians* Report, (2004), p. xv.

[7] Alliance for Forgotten Australians, *Forgotten Australians: Supporting survivors of childhood institutional care in Australia*, Canberra, 2008, 2010.

Other children were emotionally abused. These children were so traumatised that the abuse they experienced has caused permanent damage to their mental health. The scars and the pain live on in their adult lives.

While no one can give a child back their lost childhood years, and money can't take away the pain of a traumatic childhood, it is a common theme of these reports and many others that there is a need for restitution of what was lost. Compensation is a tangible means of acknowledging the wrongfulness of the abuse and the harm that was done; it can close an unhappy chapter in a person's life and be the start of a healing process. Compensation is also a form of vindication: in acknowledging the truth of the matter the victim is set free from the suffering caused by abuse all those long years ago.

That is not to discount the very tangible monetary costs to Care Leavers of their years in 'care' and subsequently. The *Forgotten Australians* Report drew up a partial list:

> *The enormous direct social and economic costs of children who have lived in care include: medical care for injuries; medical care for long term effects; mental health care; substance abuse treatment; costs through the criminal justice system; costs of intervention services such as counselling; and social services costs for case workers and shelters.*[8]

If abuse in all its forms was so prevalent, why didn't children speak out at the time? Why are they coming out now as adults? The reasons are obvious. As children, those with the courage or the opportunity to complain about what they were experiencing were mostly not believed or punished for speaking up. Sexual abuse in particular is a secret imposed on the victim by the perpetrator. It's your word against their obviously more powerful voice with a vested interest in discrediting the child. Except in the most blatant cases sexual manipulation and exploitation by adults of the children in their 'care' involves separation and secrecy. Institutions were so isolated, unaccountable and closed that there were no support mechanisms to counteract either the threat or the impact.

Many children in institutions were highly vulnerable because they lacked the ability to identify and name their own body and had only a low-level command of the words to describe sexual contact. They did not know how to cope with what they felt sexually and were powerless to make decisions in the face of people of authority – priest, nun or 'care' giver. How could a person so young comprehend the reasons why the sexual and psychological needs of those responsible for their 'care' were put above their (the children's) safety and wellbeing?

Child victims of sexual abuse often feared the explosive consequences if they dared tell their 'dirty' secret, so they often took extraordinary measures to conceal the abuse. They feared recrimination from other children and staff. In most instances disclosure has only come about many years later when they feel safe in the company of other victims or support organisations like CLAN. I still meet mature-aged people who have never told

---

[8] *The Forgotten Australians* Report (2004) para. 6.54.

even their family or their closest friends what they experienced as a child, or waited until they were well into their mature years. In some instances the child had idealised their 'carer' and there was a shattering disillusionment with the idealised person. This disillusionment could extend to the whole institution and in some cases, the whole concept of trust in authority. So many Care Leavers carry this mistrust of people in authority into and throughout their adult lives. Ex-residents report that it was bad enough at the time being humiliated and degraded; but added to that was an oppressive environment which engendered feelings of isolation, of being singled out in a place where there was no escape. Some in later life now say they believed at the time that it might even have been their own fault, that they might have brought the events on by the way they behaved.

Solicitors Angela Sdrinis and Linda Gyorki, who are handling a large number of complaints and have interviewed hundreds of abused people, say:

> *The fear of complaining coupled with the shame of complaining has meant that many former wards of the state have taken many years to come forward and discuss their abuse. Others have and will continue to go to the grave with the secrets of their abuse.*[9]

Sdrinis and Gyorki cite another reason for non-reporting:

> *[T]he stories of former wards of the state are often unheard because they are harrowing. People do not want to accept that a civilised society is capable of abusing its most vulnerable so horrifically and brutally. However, this abuse did happen and it is a black mark on Australia's history.*[10]

There is a cherished if misguided faith that church and government are, by definition, trustworthy and morally upright custodians of children who come into their care. Among other things, that would explain why so many child victims recall their bewilderment at being severely reprimanded for "telling lies" and sent packing when they told the awful truth. In some cases they were savagely beaten for having such "wicked thoughts". This ensured they never complained again. Some were also ashamed and feared the stigma attached to abuse and the threats that perpetrators often make to victims of childhood abuse. Victims often blame themselves for the abuse that they experienced. Some people never recover from this trauma because their need to talk freely about what happened to them was closed off at the time because of their overwhelming feelings of fear of recriminations, guilt and shame and the need for secrecy. This was trauma piled on top of already existing trauma of rejection, abandonment and isolation that accompanied their coming to live apart from their parents and siblings in the first place.

---

[9] Angela Sdrinis & Linda Gyorki, 'Ensuring the Protection of Wards of the State and Other Children in State Care', Unpublished Paper (Ryan Carlisle Thomas Lawyers, 2010).

[10] Ibid.

Adults who do now come forward to the police, government agencies and church authorities do so nursing a great fear that, as in their childhood, they will not be believed. Even after the disclosure has been accepted the survivor is confronted – as a consequence of coming forward - with great upheaval in their life. Even as adults many people have been disbelieved and repeatedly dismissed sometimes because of their inability to appear credible because of the way they present especially those who experience mental illness.

Yet for many survivors, the act of ultimate disclosure helps explain why life has taken the path it has for them: why they have struggled with intimate relationships and deep distrust of people who want to be intimate with them; why they take solace in drugs and alcohol; why they can't find work or keep it; why they are chronically sick. While many people find great relief in telling their story after so many years, many find themselves struggling with the emotional consequences of their disclosure. Having shared their dark secret they wonder how those closest to them will now perceive and value them. Disclosures about sexual abuse are met by mixed reaction, including skepticism, even among fellow ex-residents who did not experience abuse. Some victims express concern about what the bad publicity means for those who were responsible for them – despite their abuse, some feel the need to defend the 'good people' who looked after so many children in tough times.

Many people who were singled out, and physically or sexually abused, want justice and redress for what has happened to them. They would like the evil men and women who violated their innocence brought to account. But not all want that. Some judge the best option is to do nothing because they have developed strategies which enable them to move on with their life. Others can't do that – they have to confront the ugly past in order to move beyond the position they are in. Sometimes they are told bluntly to 'get over it', 'move on', or 'get a life'. This exacerbates the low self-esteem, and in many cases, pours oil on already troubled waters especially for those who have problems in forming significant relationships or who are still struggling with the truth about their life. This is why it is so important for people to have access to their records so that they can understand why decisions were made and get an accurate account of their childhood history. Sometimes they are blocked because of legislation or policies by authorities not to release records, which makes the quest for justice all the more difficult.

3. A plethora of reports – yet so little action

Australia is only one of a number of nations facing the issue of the abuse of children in 'care' settings. A number of countries face the task of dealing with the failure of institutions to protect children from various forms of abuse that occurred within trusted institutions for very long periods of time throughout the twentieth century.

Abuse of vulnerable children was well researched long before it became a 'media story' in the 1980s in places as diverse as

- Ireland: *Reformatory and Industrial Schools Systems Report* [The *Kennedy Report*], Dublin, Stationery Office, 1970;

- Canada: Michael Harris, 1991 *Unholy Orders: Tragedy at Mount Cashel, Toronto*, Penguin Books Canada; and
- USA: Jason Berry, 1992, *Lead Us Not Into Temptation: Catholic Priests and the Sexual Abuse of Children,* New York, Doubleday; and Charles Sennott 1992, *Broken Covenant,* New York, Simon & Schuster.

In Australia, Andrew Murray and Marilyn Rock remind us that there have been a host of inquiries into child protection and child abuse in this country dating date as far back as the 1930s.[11] In the last 10-15 years, we have seen a proliferation of these reports.

- Human Rights and Equal Opportunity Commission (HREOC) *Bringing them Home,* Report on the Aboriginal 'stolen generation' 1997
- *Commission of Inquiry into Abuse of Children in Queensland Institutions*, (Forde Report), 1999
- Senate Community Affairs References Committee, *Lost Innocents: Righting the Record, a report on child migration,* 2001
- *Putting the picture together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities*, (The Gordon Report), 2002
- New South Wales Legislative Council, Standing Committee on Social Issues, *Care and Support*, *Final Report on Child Protection Services*, Report 29, 2002
- *Our Best Investment – A State Plan To Protect and Advance the Interests of Children* (the Layton Report) 2003
- Tasmanian Ombudsman, *Review of Claims of Abuse from Adults in State Care as Children*, (O'Grady Review) 2004
- Crime and Misconduct Commission, Queensland, *Protecting Children: An inquiry into abuse of children in foster care*, 2004
- ACT Commissioner for Public Administration, *The Territory as Parent: Review of the Safety of Children in Care in the ACT and of ACT Child Protection Management*, (Vardon Report), 2004
- Senate Community Affairs References Committee, *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children,* 2004
- *Protecting Vulnerable Children: A national challenge*, Second report on the inquiry into children in institutional and other forms of out-of-home care, 2005
- Mullighan, E.P., *Children in State Care Commission of Inquiry: Allegations of Sexual Abuse and Death from Criminal Conduct,* 2008
- Senate Community Affairs References Committee, *Lost Innocents and Forgotten Australians Revisited: Report on the progress with the implementation of the recommendations of the Lost Innocents and Forgotten Australians Reports*, 2009.

---

[11] Andrew Murray and Dr Marilyn Rock, 'The Enduring Legacy of Growing Up In Care in 20th Century Australia', Paper presented to the Annual Conference of the Australasian Society for Traumatic Stress Studies**,** Perth Western Australia, 15 – 18 September 2005**.**

What has come out of these many reports? The short answer is: many more fine words and little practical action. As long ago as 2004, the Senate's *Forgotten Australians Report* argued that a national reparations fund was a necessary part of a package of support for Care Leavers. The wording of its pertinent recommendation was and is important. It suggested a clear methodology for how the reparations fund could be established and managed – as indicated by my emphasis of keywords in the recommendation as produced below.

> *Recommendation 6*
>
> *That the Commonwealth Government **establish and manage** a national reparations fund for victims of institutional abuse in institutions and out-of-home care settings and that:*
> *• the scheme be **funded by contributions from the Commonwealth and State Governments and the Churches and agencies proportionately**;*
> *• the Commonwealth **have regard to the schemes already in operation in Canada, Ireland and Tasmania in the design and implementation** of the above scheme;*
> *• **a board be established to administer the scheme**, consider claims and award monetary compensation;*
> *• the board, in determining claims, be **satisfied that there was a 'reasonable likelihood' that the abuse occurred**;*
> *• the board should **have regard to whether legal redress has been pursued**;*
> *• the processes established in assessing claims **be non-adversarial and informal**; and*
> *• **compensation** be provided for individuals who have suffered **physical, sexual or emotional abuse** while residing in these institutions or out-of-home care settings*.[12]

The formulation of this recommendation warrants close attention by this Committee.

There was widespread dismay and disappointment with the then government's derisory response to this recommendation in 2005:

> *The Government does not support this recommendation. The Government deeply regrets the pain and suffering experienced by children in institutional care but is of the view that all reparations for victims rests with those who managed or funded the institutions, namely state and territory governments, charitable organisations and churches. It is for them to consider whether compensation is appropriate and how it should be administered, taking into account the situation of people who have moved interstate.*

---

[12] *Forgotten Australians Report*, p. 227-8.

The then Government was factually incorrect (it did indeed have some direct responsibility at the time [13]); but also it declined to provide moral leadership in the matter, or even any comprehension that it could exercise that leadership. The Government basically squibbed it.

In the light of the Commonwealth Government's reluctance to be engaged in funding such a scheme, the Senate Committee in 2009 watered down its position when it reviewed the lack of progress towards the implementation of recommendation 6 – as expressed in two new recommendations:

> ***Recommendation 4***
> *6.38 The Committee recommends that the Commonwealth government 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.*
>
> ***Recommendation 5***
> *6.39 The Committee recommends that the Commonwealth government pursue the establishment of State redress schemes through the Council of Australian Governments (COAG) and other appropriate national forums.*

The Committee had before it clear evidence that the result of leaving compensation to the states, churches and charitable organisations that ran children's Homes had led to schemes that were incomplete, incoherent and excluded more people than they included. I will enlarge on that claim in the next section of this submission.

Non-financial forms of redress exist in some states. For example, the Victorian Government provided some $7.1 million over four years to enable Berry Street and Relationships Australia Open Place to provide a limited service for 'Forgotten Australians' – mainly counselling, support for health services and 'life skills' activities. Unfortunately the service is restricted not only by the allocated budget but also by the refusal of some Care Leavers to use any services administered by a former provider of residential 'care'. The NSW Government is currently setting a similar service through a budget of $9.1 over five years – more than half of which was immediately siphoned off by DoCS to complete an existing records indexing project, a task that it told the 2004 Senate Committee inquiry was already being progressed in a serious way. The other states have provided token services - with the possible exception of Queensland although Care Leavers outside Brisbane complain that access is strictly limited.

It should not be allowed to go unnoticed that, where funding has been provided to Care Leaver services where they exist as a substitute for redress, the quantum is dismal when

---

[13] See the discussion in the Senate Report, *Lost Innocents and Forgotten Australians Revisited* (2009), pp. 34-35.

compared to the sums allocated to redress schemes. NSW's allocation of $9 million over five years and Victoria's $7 million over four years are like petty cash compared to the funds dedicated to redress by other states: Tasmania $68 million, Western Australia, (initially) $114 million and Queensland $100 million. To their shame the states that can afford to give the most are giving the least.

Some Care Leavers argue that priority access to good quality mainstream service particularly health (including dental and mental health), education, housing, aged services would be an appropriate and acceptable form of redress given the lack of access to health and education services in their childhood. A popular proposal for achieving this outcome is the provision of a Priority Access Card. Other Care Leavers are not convinced that merely speeding up access to existing entitlements is any form of compensation at all. It merely advances a need to which they have an existing entitlement.

4. Critique of government redress schemes in Australia

The governments of Tasmania, Queensland and Western Australia have established their respective redress schemes for Care Leavers; and South Australia has a limited scheme restricted to those who were sexually abused while under State 'care' (2009). Tasmania is the only state to have set up a redress scheme for Indigenous people (in 2007)[14], although Queensland has a somewhat derisory scheme to compensate individuals whose wages and savings were controlled by the authorities under government 'Protection Acts', and Redress WA encourages Indigenous people to make claims on its scheme for Care Leavers.

Some churches and a small number of charitable organisations have instituted redress schemes – a loose descriptor. No two schemes are alike: a map of this field calls to mind the crazy system of different sized railway gauges that once criss-crossed this nation – except that the two most populous states haven't yet laid down any tracks. That remains the first and most intractable problem for well over half of the Care leavers of Australia.

Compensation and redress schemes in Australia are so inconsistent as to produce grossly inequitable outcomes. The States with a current or now-closed redress scheme all

- operate in different ways
- set different eligibility criteria
- mandate different timeframes and
- offer different amounts of redress.

[14] It made headlines internationally e.g. The Guardian, UK, 22 January 2008.

The recent Senate Committee report[15] identified several sources of inequity in the current arrangements. The first is obvious: the system provides grossly unequal access. Care Leavers depend on the 'luck of the draw' in terms of where they grew up as to whether any compensation is available at all. CLAN has advocated without success on behalf of siblings who grew up in different states and who now find that a brother who was a ward in Tasmania receives compensation while a sister who was a ward in Victoria does not – yet both suffered sexual molestation. Care Leavers in NSW and Victoria have been greatly upset to see the WA scheme advertised in the media in NSW and Victoria. Redress WA advertised their scheme under the banner 'Acknowledging the Past' which is a fine sentiment unless you grew up in NSW or Victoria where the past is a different country. Usually, the schemes will deem eligible those who grew up in their state but now live elsewhere; on CLAN's database this is a highly significant number. It is no surprise to learn that they are disproportionately represented among those who miss out because they don't hear about the state schemes. CLAN had an agreement with the WA government to operate as the official agency to help applicants living outside WA through the application process. It now provides counselling for these 'outsiders'.

Related to that primary inequity are unjustifiable variations in the ground rules. This has two elements: one relates to who is eligible in each State and the second to the amounts of compensation paid. For example, in Tasmania only former wards of the state are eligible for redress, other Care Leavers miss out even if they suffered the same kind and level of abuse. In one instance, a brother was a state ward in Tasmania while his sister was a 'voluntary' placement. He was eligible; she was not. The Queensland scheme is open to all care leavers who were institutionalised - state wards or 'voluntary' placements - but if you were fostered or wrongly incarcerated in an adult mental institution you are not eligible. In Western Australia eligibility is broad - including former wards of the State, including Indigenous children, child migrants, and anyone placed in state-approved foster homes and private or religious institutions in WA, including 'voluntary' placements. In South Australia you are eligible only if you were sexually abused, no other form of abuse counts. That is the only jurisdiction where that arbitrary distinction is declared.

The other important variation among and within the schemes is the amount of compensation paid to eligible applicants. The top levels of payments range from

- $60,000 in Tasmania
- $40,000 in Queensland (a first level payment of up to $7,000, and an additional payment of up to $33,000 where more severe abuse or neglect can be established)
- $45,000 in WA (cut without warning from the previous government's publicised commitment of $80,000 after applications had already been submitted in good faith) and
- a cap of $50,000 in SA under the Victims of Crime scheme.

---

[15] Ibid., especially pp. 212-216.

These are the top levels, and the middle and lower levels also vary from State to State. In Queensland, the two-tiered approach causes problems: we know some Care Leavers who might qualify for the higher level but who say that the stress involved in applying for the extra amount is far too great so they settle for the first level payment. The official information leaflet about this redress scheme states that second level payments will be finalised 'within the $100 million allocation for the scheme', i.e. presumably the more people apply for it, the smaller the second level sum available for each individual. Having an 'easier' track leads some people not to claim all that they might be entitled to. In WA, a four-tier system was introduced retrospectively with different payments for each category:

- 'Very Severe abuse or neglect with ongoing symptoms and disabilities'- $45,000;
- 'Severe abuse or neglect with ongoing symptoms and disabilities' - $28,000;
- 'Serious abuse or neglect with some ongoing symptoms and disabilities' - $13,000; and
- 'Moderate abuse or neglect' - $5,000.

No rationale for these amounts is available: they have all the appearance of an actuarial exercise and with the usual level of passion that actuaries bring to their work, although it must be said that applicants with a terminal or life-threatening illness may receive an interim payment. We know of at least one case of a man who died while his application was in process and he remained in the morgue for two months while some funds were negotiated to contribute to his burial.

A further anomaly of current state redress concerns the period of access. The Tasmanian Government was the first state government to set up a redress scheme for people who experienced abuse while in state care. It was initially opened in 2003, and closed mid 2005, then re-opened for a brief period in 2008 due to widespread demand, after which the decision was made to keep the scheme open indefinitely for new applicants. Tasmania is the only state with an open-dated arrangement whereby Care Leavers who are eligible can make an application whenever they get news of the scheme and when they are ready to make such application. Queensland's redress scheme is now closed: no further applications were accepted after 30 September 2008. In Western Australia applications closed on 30 April 2009 – and then long after applications had been made, on 15 February 2010, the Government introduced a new set of guidelines including the above-mentioned four-tiered system of assessing the severity of abuse or neglect. In sum, Queensland and WA provided one small window of opportunity and both are now closed simply to suit the administration. There is no consolation for even the most tragic case if it comes in late.

There are many sad stories of people finding out about the schemes just days after the closing date.[16] Some had compelling cases but, as things stand, despite pleas by CLAN and others for compassion, they will never get the opportunity to have their case tested. In some instances this is a double irony because their case would be that because of their

---

[16] Lotus Place in Brisbane had a list of some 70 otherwise eligible people who missed the cut-off date according to evidence given to the Senate Committee, ibid. p. 56.

treatment in institutions they have become socially isolated and mistrustful of bureaucracy. For these reasons, they failed to connect to the information channels used by government – their very isolation has created further disadvantage.

It is now clear that the existence of these wildly diverse schemes – flawed as each one is – alongside the vacuum in NSW and Victoria and different ad hoc church arrangements has produced a 'system' that is grossly inadequate and in urgent need of reform. That reform needs to be nation-wide and led by the Commonwealth.

5. Rough justice in NSW and Victoria

Despite their flaws and limitations, redress schemes operate as a form of systemic as opposed to individual compensation. Many claimants will, and should, receive payments on the basis of generalities about the experience of institutionalisation, loss of family, neglect of health, callous discipline and deprivation of opportunity for education and life skills. Over and above that, individuals may still be required to establish a specific case for a higher level of compensation to assist them in meeting any ongoing needs which resulted from particular forms of abuse and neglect. Whatever the shortcomings of redress schemes, they are much preferred to the case-by-case approach favoured by the NSW and Victorian governments.

The main barriers to pursuing claims through the courts were clearly identified in the Forgotten Australians Report *Forgotten Australians.*[17] They included

- Limitations periods for certain crimes. Before Premier Bracks made his apology in 2006, his government had cynically amended the Wrongs Act 1958 (Vic) s14J to the effect that an apology did not constitute an admission of liability. Bracks's apology offered little, and for most, especially those out in the tent at the rear of Parliament watching a too-small screen and not enough seats for all who were invited, it simply added insult to injury. This cynicism contrasts markedly with the actions of the Irish Government. There, a *Statute of Limitations (Amendment) Act 2000* altered limitations legislation retrospectively to facilitate litigation. Under the amended Irish law, if a person suffers from psychological injury due to child abuse, they shall be deemed to have a disability. The normal period of limitations (three years) does not start until they overcome the psychological injury. This approach if adopted in Australia would take account of a strong tendency of abuse victims to delay reporting the crime.

- The prohibitive cost of litigation and the ever-present fear of having to pay costs of the other side.

- The inordinate time delays associated with a court case. It is not unknown for

[17] The Forgotten Australians Report, pp. 208-.

cases to last a decade.

- The difficulty in proving injury with claimants facing significant evidentiary barriers due to their vulnerability while in care, trauma both during and after 'care' and the passage of time since the events. It is exceedingly difficult to prove even on the balance of probabilities that abuse occurred after so many years when possible witnesses are dead, difficult to find, or when found, have become frail or ill. At any rate, it is an inappropriate requirement to produce witnesses for sexual abuse given the clandestine, criminal nature of sexual abuse. What paedophile is going to record his actions on a child's file? Yet Care Leavers have been confronted with extraordinary demands for detailed evidence such as the exact date and time of the abuse. Well-paid lawyers are instructed by government to set unreasonably high demands on claimants to demonstrate that their current injuries, including mental health problems, were causally connected to their alleged childhood abuse. Care Leavers find it extraordinarily hard to produce evidence because of the difficulties in establishing the required onus of proof with the passage of time and the loss or destruction of records and material documents.

- Establishing vicarious liability of institutions, particularly those related to religious organisations which claim they are immune from legal action on the grounds that they are not a legal entity or on the argument that were not responsible for the actions of their agents or those they employed.[18]

- Most important of all, the trauma which arises from being required to live through the whole process again with experienced legal teams hired by government to aggressively cross-examine claimants in search of the slightest inconsistency of memory. Proceedings are dominated by legal issues such as negligence, duty of care, standard of care, burden of proof and calculation of loss. No matter what governments and churches say, as defendants they usually exploit the adversarial legal system in order to protect their own interests. In NSW and Victoria, there is still reluctance by governments, churches and charities to admit error and to approve creditable claims without a 'fight'. The scales are tilted towards protecting government revenue to the detriment of proper assessment of reasonable claims. Many Care Leavers suffer great distress at the suggestion that they have embellished or even fabricated their account of the dreadful events in their childhood or of the pain and suffering they have experienced as a consequence. We hear of cases which are settled at the eleventh hour by an offer from the defendant who up to that point had been playing hard ball in the hope that the plaintiff would withdraw.

Compared to the legal pathways, redress systems usually adopt a more reasonable threshold or standard of satisfactory evidence focused on a concept such as plausibility.

---

[18] See Ellis v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney [2007] HCATrans 697.

Care Leavers go into settlement negotiations with former service providers and the state governments with no confidence that they will get a fair hearing and that their case will be properly considered. If they are offered a payout, they are invariably met with demands for confidential terms and non-disclosure requirements. This makes it extremely difficult for Care Leavers to understand the patterns and to assess the likelihood of success. Despite repeated requests CLAN had been denied even general information about settlements, but one can be assured that the overall bottom line of settlements reached on a case-by-case basis is significantly below the amounts paid out under redress schemes in Tasmania, Queensland and WA. CLAN's incessant lobbying in NSW and Victoria has so far fallen on deaf ears. While it has never been said openly by these governments, it is abundantly clear that they are do not feel the requisite level of compassion for the children who were harmed in the years before they took office. Care Leavers in those two states draw the conclusion that the new services provided to Care Leavers running on a budget of less that $2,000,000 a year is a cynical substitute for real redress of the kind provided in Tasmania, Queensland and WA.

Redress schemes are strongly preferred to legal proceedings for other reasons too. Many of the wrongs done to children placed in institutions or foster families are apparently not actionable in the courts, even though they created great pain and suffering. Our common law system apparently does not recognise loss of family or loss of dignity as a legal wrong; nor does it recognise lying to children or their families or failing to pass on letters written to grieving children by their parents, and yet for many people these losses were the most painful and the most important. It is relatively easy to make a compensation decision based on actual dollar loss (e.g. in lost wages where a worker has suffered from an employer's negligence) but how do you put a figure on the loss of your family, the loss of your dignity and self-respect, the loss of an educational opportunity that other children take for granted?

6. Compensation in other environments

Compensation schemes that are widely known in the general community include payments for workplace injury, road traffic accident, sporting injuries at certain sporting events, and sickness and disability benefits. In all of these cases so long as there is a genuine injury or detriment to the claimant, and a duty of care can be shown to exist, compensation in one form or another will be paid without regard to fault.

Care Leavers also come across compensation payments from other environments on a regular basis. They read the details of the complaints lodged by plaintiffs and see obvious parallels to their own treatment. In some instances they rightly believe that their own maltreatment was far worse than that of the successful plaintiff. In the recent past they would have come across media accounts of very large compensation payments in areas such as

- Wrongful separation from parents (notably the Trevorrow case with a payout of $750,000 including interest)
- Bullying in schools (six figure payouts in an increasing number of cases for children of age similar to the time of their lives when they too were bullied)
- Discrimination and harassment (six figure payments sometimes based on incidents occurring over a short period of time compared with child molestation which might have lasted years)
- Wrongful arrest or imprisonment (A protestor in Queensland who was refused entry into a sitting of Parliament and wrongfully imprisoned by police for a matter of hours was awarded $20,000 plus interest.[19] The judge found that the plaintiff had suffered little or no shame, indignity and mental suffering but nevertheless had had his rights violated. In the USA 21 states, along with the federal government and the District of Columbia, have standardised compensation laws – offering people who are subsequently exonerated amounts ranging from US$15,000 to US$50,000 for every year of imprisonment – and 13 states introduced bills that year to either create or improve compensation for the wrongfully convicted (*The Christian Science Monitor*, May 30, 2007).
- Wrongful immigration detention and deportation (seven figure compensations)
- Injury while in gaol (infamously more than $93,000 compensation to a convicted paedophile, Anthony Douglas Walters, for plastic surgery, medical costs and future psychological counselling. On top of $65,000 in damages, the court also ordered that $28,750 be paid to Walters for legal costs.)

The last case caused utter consternation among Care Leavers who were victims of paedophiles but have not been able to bring an action against them. A more typical case that resonated with thousands of Care Leavers was that of 18 year old Aaron Emonson. In 2001 Aaron was awarded $60 000 by a Victorian County Court after the jury heard that he had endured three years of bullying at his former school, St Patrick's College, Ballarat. His solicitor said he had

> *been belted on the arm with a piece of wood in a woodwork class; there'd been another occasion where he'd been hosed down with a water hose, and had been required to remain at school for the balance of that day in saturated clothing; there'd been another incident where he had been choked with a length of material from carpet cord and throughout that period the parents had made various requests of the school to deal with it and the response was far less than adequate.*

- [19] *Coleman v Watson* [2007] QSC 343, BC200709939. Other cases: a man wrongfully arrested and imprisoned by police for 56 days pursuant awarded $75,000 plus interest (*Spautz v Butterworth* (1996) 41 NSWLR 1). A man attending a police station for an interview was arrested, charged and detained for three hours. It later transpired there were no reasonable grounds for the arrest. He was awarded $25 000 plus interest (*Zaravinos v NSW* (2005) 214 ALR 234).

> *... He had not progressed well at school and as a result he ceased his schooling at the end of Year 10.*[20]

Not to denigrate Aaron's experience and certainly not to question his compensation, but many Care Leavers experienced much worse bullying than that - and over a more sustained period of time. Many submissions that formed the basis of the *Forgotten Australians* Report reported more atrocious violence than Aaron experienced. What's more, the violence came not just from peers, but also from the adults running the Homes.

In addition to these periodic compensation events, another parallel to the sorts of redress schemes Care Leavers are envious of is the Commonwealth Compensation for Detriment Caused by Defective Administration Scheme (CDDA) established in October 1995 to enable Commonwealth agencies to compensate people who have no other avenues to seek redress for the adverse effects of 'defective' actions or inactions of such agencies. The scheme is intended to compensate those to whom there is no legal obligation to pay compensation. The Finance circular explains this distinction by saying that payments are approved at the discretion of the decision maker ... on the basis that there is a moral, rather than purely legal, obligation to the person or body concerned.[21]

The Commonwealth Ombudsman reinforces that position:

> *Decisions to compensate under the scheme are approved on the basis that there is a moral as distinct from a legal obligation to pay compensation to a claimant.*[22]

Care leavers feel very strongly that even if, in the face of the insurmountable difficulties of demonstrating a winnable case at law, they too are owed an obligation on moral grounds. This is conceded in Tasmania, Queensland and WA and was the finding of the Senate Community Affairs Committee on two occasions.

---

[20] ABC The Law Report http://www.abc.net.au/rn/lawreport/stories/2001/420793.htm

[21] http://www.finance.gov.au/publications/finance-circulars/2006/docs/FC_2006.05.pdf

[22] Commonwealth Ombudsman, *Putting Things Right: Compensating for defective administration: Administration of decision-making under the scheme for compensation for detriment caused by defective administration*, Report No. 11, August 2009 http://ombudsman.gov.au/files/investigation_2009_11.pdf (accessed 17 May 2010).

7. The Irish Model

There are many ways of developing a compensation system. The model that has most appeal for Australian Care Leavers is the Irish system. When the Irish Compensatory Advisory Committee was set up, its task was to devise a scheme that would be fair and reasonable and would provide predictable yet flexible assessments consistent with court awards in similar personal injury cases or likely pay-outs from future court awards.

It was acknowledged from the outset that it is not easy to devise a scheme that objectively and precisely measures the correct level of compensation for a victim of child abuse. The Advisory Committee did not accept the common claim that that no money can compensate (and therefore only token payments should be made). Instead the Committee took the position that when all relevant considerations are taken into account it then becomes a matter of sound judgment - the kind of judgment courts are used to making.

Rather than adopting the conventional position of trying to put the injured person in the position in which they were prior to abuse taking place, the Committee sought to provide solace for victims, to try to put right a grave wrong by provide victims with tangible recognition of the serious hurt and injury caused. Furthermore, the Irish philosophy that emerged was that redress can allow many of the victims and survivors to pass the remainder of their years with a degree of physical and mental comfort which would otherwise not be readily obtainable.

When the Irish scheme was put in place in 2002, it allowed claims in respect of a broad range of ill-treatment including neglect and emotional damage.[23] Neglect is often ill-defined, but the Redress Board was able to identify and enumerate concrete examples such as severe malnutrition; inadequate clothing, bedding or heating; failure to provide the legally prescribed minimum of school instruction; lack of appropriate vocational training and training in life skills; failure to protect the child against abusive placements; and inadequate protection against dangerous equipment in places where children were required to work. The guidelines under the Irish scheme are very clear and could usefully be adapted to any Australian scheme.

- A distinction was made between physical injuries and physical illnesses. Examples of physical injury were loss of sight or hearing, loss of or damage to teeth and permanent scars or disfigurement. Examples of physical illness were sexually transmitted diseases, respiratory diseases and skin diseases.
- Psychiatric illnesses included post-traumatic stress disorder, severe depression with suicide attempts and personality disorder. Emotional disorders included inability to show affection or trust, low self-esteem and persistent feelings of shame or guilt and recurrent nightmares or flashbacks.

---

[23] The Residential Institutions Redress Board, op.cit., December 2005.

- Cognitive impairment/ educational retardation were exemplified by literacy levels being well below capability, impoverished thought processes and limited vocabulary causing communication difficulties.
- Another injury was described as psychosocial maladjustment and anti-social behaviour. Typical examples included marital difficulties involving sexual dysfunction, low frustration tolerance, withdrawal from mixing with people, substance abuse, compulsive stealing and physical aggressiveness.
- A final category of injury was called loss of opportunity. This included having to refuse employment opportunity or promotion because of illiteracy, the need to concoct a false identity and to live a lie with work-mates and being unable to pursue certain occupations because of your 'record'.

The Board assessed and weighted four elements of these groups of injury by:

- severity of the abuse
- the extent of physical and mental injury suffered
- the psycho-social consequences and
- loss of opportunity resulting from abuse.

In this manner the Redress Board was able to classify all applications by one of five bands. Applicants in the top band were awarded payments of €200,000-€300,000 (about A$290,000-$435,000 at today's exchange rate) and those in the lowest band payments of up to €50,000 (A$70,000). In fact, of the 12,929 payments to December 2009, only 29 were in the highest band and the single highest payment was €300,000. Nearly 11,000 payments were in the two lowest bands. Overall, the average payment was €63,210 (or about A$90,000).[24]

In acknowledging the need for urgency in some cases, the Board gave priority to applicants

- who were born before 1 January 1934 (later amended to 1 January 1936), or
- who at the time when the application was made were suffering from a medical illness or psychiatric condition which is life-threatening, as confirmed in writing by a letter from the applicant's regular medical adviser.

It also made interim payments where there was a strong likelihood of an entitlement and age and infirmity made it reasonable to do so.[25]

The Redress Board was wholly independent and was chaired by judge. The application period within which victims and survivors could apply was three years – from December 2002 to December 2005. Advertisements were placed in the Irish and international media. Board officers travelled to the US and the UK to hear evidence and take

---

[24] Residential Institutions Redress Board, *Newsletter,* No. 18, December 2009.

[25] *A Guide to the Redress Scheme under the Residential Institutions Redress Act, 2002*, op. cit., paras. 50 & 101.

submissions. A total of 2,667 applications were finalised by 2006.[26] Since its inception, the Board has issued some 18 newsletters to keep applicants and potential applicants fully informed of progress.

Evidence taken at the Board is not admissible in either civil or criminal proceedings. The Board did not make findings of fault or negligence and applicants were not required to produce evidence of negligence by a person, the person's employer or a public body. Where there was a conflict of evidence, the Board's decision and the making of an award to an applicant did not constitute a finding of fact or fault.

The fact that applicants did not have to prove fault distinguished the Irish redress scheme from litigation, where proof of fault is the key to success or failure.

8. The Principles of Redress

From all the foregoing, it is clear that two types of values should inform any compensation scheme: substantive values and procedural values.

Substantive values are first order principles which should flow on to the way in which the scheme should be delivered. Substantive values should include:

- Assessments made on the basis of the cost to the survivor of the gap between what a 'normal' family would have provided for their children and what the State, churches and charities provided to children in their 'care' in orphanages, children's Homes and in foster care.
- Outcomes should be commensurate with the harm suffered.
- Assessment should be independent and should not rely on the past provider's self-interested unilateral assessment of the harm.
- Outcomes should be ethical, putting aside the cost to government or agencies.
- Outcomes should be fair and consistent across all jurisdictions and the focus must be on years in 'care' regardless of the legal or bureaucratic status of the child at the time.
- The compensation scheme should be free of charge to applicants unless it is demonstrated that an applicant is knowingly dishonest.

Process values should include:

- All procedures must be transparent so that Care Leavers can understand the principles on which any compensation system is based, and how a request should be assessed.
- While all assessments of harm should be rigorous they should not be adversarial and every effort must be made to avoid repeating the trauma for claimants.

---

[26] Residential Institutions Redress Board, *Annual Report,* 2006.

- Acts of grace and ex gratia payments are infinitely preferable to requiring full evidentiary exposition. Claims should not be rejected out of hand simply because the evidence is inadequate. In some cases records do not exist because the agency has lost or destroyed the child's records – to reject a claim on that basis is morally unacceptable because the person is being twice penalised.
- The assessors should provide adequate and clear reasons for rejecting a claim and claimants should be told what appeals or review mechanisms exist and support should be offered as to how their case many be strengthened.
- Claims should be handled expeditiously. Delays compound the detriment suffered by a person who has already experienced years of trauma. In cases where delays are unavoidable, the authority should provide progress reports.
- In all cases the records relating to a claim must be made available to the claimant. No records should be withheld from them during the process.
- Government and agencies should be flexible rather than rigidly bureaucratic in the way they interpret the rules.