COMMONWEALTH OF AUSTRALIA

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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

Reference: Government compensation schemes

TUESDAY, 2 NOVEMBER 2010

SYDNEY

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

REFERENCES COMMITTEE

Tuesday, 2 November 2010

Members: Senator Barnett (Chair), Senator Crossin (Deputy Chair) and Senators Furner, Ludlam, Parry and Pratt

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Coonan, Cormann, Eggleston, Faulkner, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Macdonald, Marshall, Mason, McEwen, McGauran, Milne, Minchin, Moore, Nash, O'Brien, Payne, Polley, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Crossin, Parry, Pratt and Siewert

Terms of reference for the inquiry:

To inquire into and report on:

The administration and effectiveness of current mechanisms used by federal and state and territory governments to provide discretionary payments in special circumstances, or to provide financial relief from amounts owing to governments, namely:

- state statutory schemes relating to children in care;
- payments made under 'defective administration' schemes, such as the Commonwealth Scheme for Compensation for Detriment caused by Defective Administration;
- act of grace and ex gratia payments; and
- waiver of debt schemes.

WITNESSES

Committee met at 1.18 pm

CHAIR (Senator Barnett)—This public hearing is for the Senate Legal and Constitutional Affairs References Committee's inquiry into government compensation schemes. Following the election, the inquiry was readopted by the Senate on 30 September 2010 for inquiry and report by 24 November. The committee has received 182 submissions for this inquiry. Some submissions have been authorised for publication and have been made available on the committee's website. Others have been accepted as confidential submissions to the inquiry.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. The committee prefers all evidence to be given in public, but under the Senate's resolutions witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

I remind senators that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Officers of departments are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim.

[1.20 pm]

RUNDLE, Mr Graham, Member, Care Leavers Australia Network

SHEEDY, Ms Leonie, President and Co-Founder, Care Leavers Australia Network

WANGMANN, Dr Jane, University of Technology Sydney

CHAIR—I now welcome representatives from Care Leavers Australia Network. Do you have any comments to make on the capacity in which you appear?

Dr Wangmann—I am an academic at the University of Technology Sydney and I have previously done some research with Professor Regina Graycar from the University of Sydney around redress schemes.

CHAIR—Care Leavers Australia Network has lodged submission No. 139. Do you wish to make any amendments or alterations to that?

Ms Sheedy—No.

CHAIR—I invite you to make an opening statement, after which we will have questions. Can I indicate that we have Senator Rachel Siewert on the line from Perth, Western Australia and, for Senator Siewert's edification, we are joined by Senator Trish Crossin, deputy chair, and Senator Stephen Parry. Over to you, Ms Sheedy.

Ms Sheedy—Thanks very much for the opportunity to come and give evidence to this very important Senate inquiry. I think people who belong to CLAN and people who do not belong to CLAN are extremely frustrated, angry and upset that there are no national reparations and there is no redress scheme. There are some redress schemes in Australia, which are very inadequate, and I think a lot of people have lost their trust in governments, especially after the Senate inquiry and the apology.

One of the recommendations in the *Forgotten Australians* report was that the Commonwealth set up a national reparations and redress fund, and the federal government continue to wash their hands of this issue and say it is a states and territories issue. We know that there are three states in Australia that have set up some form of redress scheme but the two largest states, New South Wales and Victoria, continue to put their heads in the sand and hope that we will all die early deaths and they will not have to address this injustice. South Australia has given redress in a form where if you were sexually used as a child in state care in South Australia then you can put in a claim through victims of crime compensation, but too bad if you got abused in other ways.

We want to be treated equally. It should not matter which state you were raised in. We are all Australian citizens and we all deserve redress and reparations regardless of where the harm and damage was done. I hope that in the recommendations to come out of this inquiry your committee will put pressure on the federal government to show leadership and set up a national reparations fund that creates equity for everybody.

In the states that do have redress we have had—for instance, when the Western Australia government had ads on TV encouraging people to come forward and put in a claim for redress in that state—the most distressing phone calls from people saying, 'I'm a Victorian but I live in Western Australia and I am not eligible for this redress.' It has created so much pain amongst care leavers and forgotten Australians. It is really unfair. So I hope that your committee will do the ethical thing and encourage the federal government to set up a national reparation fund like Ireland has.

CHAIR—Dr Wangmann, I understand you have tabled a letter as your submission for us today.

Dr Wangmann—I did not put in a formal submission to the inquiry. I have had contact with CLAN more recently and they asked me whether I would come along to give some evidence today. What I have provided you with are the submissions that Professor Graycar and myself made to the earlier inquiry about children in institutional care. We made both a written submission and a supplementary submission. We also gave oral evidence. They are the first documents that you have. The final document, which is a lengthy research report, is a detailed examination of a particular redress scheme from Canada called the Grandview agreement.

What I propose to do today is to talk about some of our research around redress schemes and to talk about why we pointed to the Grandview Agreement, and particularly about having some attention to process. It is not good enough just to set up a compensation scheme if we do not have a bit of focus on the process by which it was developed.

CHAIR—Can I indicate on behalf of the committee that we have received that letter and those submissions. Thank you very much for that. Would you like to make any further remarks with respect to those papers? We have not had a chance to peruse them—we just received them at lunch time.

Dr Wangmann—Yes, I know. I am sorry about that and I apologise.

CHAIR—That is okay.

Dr Wangmann—I would like to draw your attention to a number of things about our research. Professor Graycar had an Australian Research Council grant; she was the chief investigator on that project. We looked at both the limitations of the tort system, something which Graham Rundle will probably talk more about in his submission and about the difficulties of that process. At the time that we did our research there were no Australian alternative redress schemes established. There were none in Tasmania, Queensland or Western Australia, so we looked to Canada and Ireland. I will leave the reports with you to read, but one of the things I wanted to talk about today was the importance of process. It is not sufficient to simply talk about an outcome—for governments to say, 'We have provided compensation'—if that was not effective for survivors of institutional abuse. We need to ask whether or not it was an effective and appropriate response.

A guiding framework for our research was the extensive work by the then Law Commission of Canada, which in 2000 delivered a report titled *Restoring dignity: responding to child abuse in Canadian institutions*. It examined a range of ways in which governments may respond to

institutional child abuse ranging from civil and criminal actions—those traditional actions. They looked at ex gratia payment systems, public inquiries, as well as redress schemes. The commission compared them across a range of criteria. These were drawn from the needs of survivors and, of course, survivors have a range of different needs but these were ones that had some commonality.

The commission looked at whether or not a scheme had respect, engagement and informed choice; whether or not it had a fact-finding process; the accountability that it had for both institutions and individual offenders; whether it was fair; whether it provided an acknowledgment of apology and reconciliation; whether it provided compensation, counselling and education; whether it addressed the needs of families, communities and peoples; and whether it had an element of prevention and public education. Some processes had this to greater or lesser degrees. These are questions that we need to think about when we determine the effectiveness of compensation schemes.

We looked at a range of schemes in Canada where numerous schemes have been set up over the last decade-and-a-half. I am sure you are aware of their most recent extensive scheme: the Indian Residential Schools Agreement. I am not going to talk about that scheme today. What I want to talk about is the variability of those schemes. Often they call themselves 'redress' and I think that this is an issue in Australia. Some of them are about redress—they do something alternative. They look at how they might do something differently. They consult thoroughly with victims and survivors. Others are really what we are talking about: non court based settlements, or out-of-court settlements. They are doing nothing more than facilitating a speedy resolution of the matter.

We can look at those schemes as being government devised and imposed, rather than a system of consultation with victims about, (1), what their harms are and, (2), what types of remedies they might want from that. In our research, and this is what our lengthy report goes to, is the Grandview agreement. This is an agreement reached by the Ontario Provincial Government and the Grandview survivors support group in 1994. It is a very small-scale redress scheme and it addressed harms that were sexual, physical and psychological for girls who were institutionalised in the Grandview Training School.

It is seen as a truly alternative model because it did a number of things. One is that it had the active involvement of victims in defining their harms and the nature and form of redress that they wanted. They did this from the outset. The government engaged and negotiated with the survivors' support group from the outset. You can see the extent of the victims' involvement because of some of the elements that are included in the package. There is a financial component that we would see in most packages. An example of their involvement is that they also included tattoo removal. These women as girls tattooed themselves inside the institution. It was a marker of their time there and it was something that constantly reminded them of their time in care and something that they wanted removed. So part of that package was having laser removal. This is not something that government officers think about; it is not something that lawyers think about. You can see the way in which victims were involved in the package.

The other thing is that it involved multiple elements. There were group benefits, so in acknowledgment there was a group dimension to the harm. There were individual benefits and there were community benefits in the package. It was small. If you established an individual

harm you could apply for between C$3,000 to C$60,000. That is small today and it was small at the time. It was particularly small comparable to what you would get if you were successful in a tort claim, but it meant that all the survivors had access to some type of money.

They paid attention to the people employed on the scheme. So we are talking about administrative staff—for instance, the people who answer the phone. They selected people who had some training and knowledge about the impact of institutional abuse. They paid attention to the adjudicators that they employed and provided training about the types of effects that having been in institutional care has on people—the way in which they might go on to use alcohol and other drugs; the way in which they might be involved in crime and have mental health issues, and the way in which that might affect the quality of their evidence.

They also gave attention to the process of the hearing. For this process they did have oral evidence as a hearing mechanism. That does not necessarily have to be the case, but it did provide a mechanism by which the survivors talked about the fact that they were being heard by someone in authority and were believed—and that was really important. That can happen through a written process, but care needs to be taken about how that might take place.

They paid attention to their written decisions. One is that they made a decision that satisfied the government—so establishing the legal grounds for making the payment—but they also gave extensive reasons for their decision, and this was written for the survivor, saying 'We have heard your story. We have believed these elements of it. There are some parts that we can't compensate because perhaps they do not fit within the compensation scheme, but we acknowledge that we have heard it and we can see that it harmed you.' So they addressed those elements and provided meaning to the payment.

I think this is important when we look at what courts do. Courts provide meaning to the decisions that they give. The judge provides extensive written decisions. We need to see how compensation schemes can include this so that people know that the money—which can never replace what has happened to them—has some sort of symbolic meaning and provides recognition of the harm that is done and is not seen as a payoff or a mechanism of silencing. The extensive report addresses this.

In summary, I think we need to look at the compensation schemes that exist in the states and ask ourselves whether or not survivors are being treated with respect in the process; whether they are actively involved, whether it provides something that is timely; and the adequacy of support to go through that process. Are they supported to write their application and are they supported to give evidence? Some people have never spoken to anyone about it before. We need to ask whether they are kept informed of all stages of the process and whether or not it is transparent—some of these schemes have changed the rules in the middle, which does not make people feel comfortable with the process—and whether attention has been paid to the hearing setting and so on.

This leads us to the point about whether or not we think a scheme is effective. Applicants rarely talk about the process in terms of its numerical value. So, yes, the money is important and it means something, but they talk about whether or not they were believed, heard, listened to and acknowledged in the process. I think that is what we need to talk about when we set up a compensation scheme.

CHAIR—Thank you very much. Mr Rundle, would you like to make an opening statement?

Mr Rundle—I have been asked to come along and give you an idea of what it is like to fight a case. I was 7½ years old and I was in the Eden Park Boys Home in South Australia. The Salvation Army approached me in 2000 with a letter and the case basically started then. But of course I had a statute of limitations, so I had to fight that and I won that case. That was appealed along the way. In the mean time, I also took criminal action against the perpetrator, who was found guilty and jailed—but they also appealed that.

It is not easy for the average person to do it, let alone a person who has been in a boys home. You do not have education. You take the word of the Salvation Army lawyers, which I did, and within a few months they started to lie and said I was lying. Therefore, they put you in doubt. You are abused all over again, but in a different way. I am lucky enough that I had assets and I could sell things to fight them. I had to sell my cars. I had a lot of antiques. I had to sell all my antiques. My marriage broke up. This was over a 10-year period. They knew that it had happened, but they will not admit it. So they just keep fighting, fighting, fighting.

There needs to be some sort of government compensation scheme, where someone could go along and just state their case, because the average person probably could not go through what I have been through. It is not easy to wake up every morning facing this. I sleep two hours a night. I have slept two hours a night for probably 40 or 50 years. I am 58. I started the case when I was 48 and I have now turned 58. It started on 20 August 2000 and it finished on 31 August 2010.

All the way along, you have to prove it. You have to keep fighting. Even when the court found for the extension of time, they misled the court and they were found guilty—on seven charges for one lawyer and four for another. But that does not seem to make any difference. They just keep being able to do what they do. At no time have I ever heard from the Salvation Army at all. In all the years that I have been fighting, I have never heard from the Salvation Army. There has never been a letter. Since it finished, I have never heard from the Salvation Army. That is the sort of thing that I think needs to be re-addressed. Extension of time is the biggest problem. Tort law is a problem in itself, but the extension of time has to be done. In South Australia, they lifted the extension of time for criminal. They said that there would be an avalanche the moment they did that. Well, there was no avalanche. There were half-a-dozen cases, and only four of them went to trial. I think the biggest thing for victims is extension of time.

CHAIR—All right. Now that you have given your opening remarks, we will proceed to questions. Ms Sheedy, you indicated that there were regimes in four states and you singled out New South Wales and Victoria, who do not have regimes. Could I ask you, as a devil's advocate, what if New South Wales and Victoria—and all the states and territories—had regimes in place? Would there therefore be no need for a Commonwealth scheme?

Ms Sheedy—If South Australia, Victoria and New South Wales implemented redress schemes—you are right—there would not be a need for a Commonwealth one. But there is no pressure brought on those three states to bring this issue to a head and introduce schemes, and there is no pressure brought on the churches and charities that ran these institutions and caused this harm. They were responsible for the damage that was done on their turf.

CHAIR—Are you aware of any cases brought within the territories or directly to the Commonwealth and are you aware of their response?

Ms Sheedy—Only the Aboriginal ones, the stolen generation case. The Commonwealth won that. But the Commonwealth does have a responsibility to us. Our parents' child endowment was taken off our parents and given to the churches and charities that ran these institutions, and there were no checks and balances done on this. The Commonwealth just washed its hands of this. We are all Australian citizens, and the Commonwealth must show leadership in this.

Dr Wangmann—I think there is an issue that there is an absence in some of the states. There is also a lack of consistency about the schemes that have been established. Yes, we could have them across the jurisdictions, but to have different entitlements just because you were institutionalised in one state and not another creates inequity for people.

CHAIR—Understood.

Mr Rundle—The time factor is a problem in South Australia. For example, with the scheme, if you went back to 1960, which I did, you are only entitled to $1,000. And it would cost you $500 to fill out the documents and pay for the lawyers to process it. So that is a problem there. There is a statute on that. They have taken that back as well. It should just be open.

Senator CROSSIN—Do you have any members from the Northern Territory or the ACT?

Ms Sheedy—Yes, we do.

Senator CROSSIN—Can you give me an idea of how many there are from the Territory?

Ms Sheedy—There are between five and seven members. They were not raised in Northern Territory institutions. Most people cannot reside in the home state where the trauma happened. They flee. Some people cannot even reside in this country.

Senator CROSSIN—I suspect most people in the Territory are actually descendants of the stolen generations, more than from orphanages or other institutional care.

Ms Sheedy—We have one Aboriginal member, who does not refer to herself as being a member of the stolen generation. She identifies with being a forgotten Australian. She lives in the Northern Territory. The others are Anglo-Celtic people who were raised in orphanages in other states.

Senator CROSSIN—There is a very real issue about the Northern Territory—that is, there is no doubt about responsibility prior to self-government in 1978 but there is a question about recognition of that responsibility. I suppose your members would take action from the states or territories in which they were institutionalised. Is that right?

Ms Sheedy—That is are right.

Senator CROSSIN—Have you had a look at what would be the likely funding implications for a national redress scheme?

Ms Sheedy—No, we have not, but we have just got the Western Australian Redress newsletter. When the Labor government were in power, they committed $114 million to a redress scheme in Western Australia. The latest newsletter states that, I think, only $90.2 million was allotted for the payments but the rest went into infrastructure and advertising—$24 million went into setting up a redress scheme and advertising it! One of our members is 88. She lives in Eurobodalla down near Bega and she did not know anything about the Western Australian redress scheme. The scheme had closed by the time she found out. We wrote a letter to the Premier, Colin Barnett, to ask whether they would accept a late application on behalf of Flo Hickson and they declined.

At least Tasmania is open-ended. If an 88-year-old lady comes to CLAN from Tasmania I can put her on the phone to fill out an application form. A man came to the CLAN office on Friday. He was just walking past Bankstown. When his partner saw the images on the window, they walked across. They were looking at all the images outside the door and I said, 'Would you like to come in?' He is a Queensland homie. He knew nothing about the Queensland redress scheme. He did not even know that the Prime Minister had said an apology. He had never heard of the Senate inquiry, so he has missed out. There are so many I could rabbit on to you all afternoon about the people who have missed out. It is just appalling. Everybody's button gets pressed when they do hear of a redress scheme, every time it is publicised.

Senator CROSSIN—Looking at the stolen generations do you have a view about the effectiveness of the Healing Foundation, which has been established. You mentioned a doctor in some of the redress schemes. They do not just go to monetary compensation; they go to all the other elements to help you deal with where you have been to where you are now, similar to what is trying to be achieved in the Healing Foundation.

Dr Wangmann—I cannot make a comment directly about the Healing Foundation, but when I was preparing for today I was thinking about the way in which in Australia we have tended to compartmentalise our responses. So at one point we had an apology, at one point we will set up a counselling scheme, at one point we will do something about connecting with family and at another point we will start to talk about compensation. I think survivors need to see these things as a package and as they have to fight for each response, they do not get that sense of reparation or redress because they are all seen as separate elements. I think that takes away from its effectiveness. I think the stolen generations still want compensation. The Healing Foundation is just one part of that.

CHAIR—Senator Siewert, are you there?

Senator SIEWERT—Yes, I am. I missed a little bit of your evidence—I will catch up with that in the *Hansard*. I want to follow up on the process issue. I agree that it is very important. As I understand it, you are saying that any new redress scheme that we develop in Australia needs to be assessed against the criteria that you were listing from the Ontario example, in particular.

Ms Sheedy—That and the work of the Law Commission of Canada in particular.

Senator SIEWERT—Sorry, I cannot hear your response.

Ms Sheedy—Looking at the Grandview agreement, which the Law Commission of Canada held up as a prime example of a scheme that attempted to do something alternative, I think we do need to look at assessing our criteria against those matters. They may not be able to satisfy each element but we need to think about the needs of survivors and not simply think about ticking off a box for the government in terms of saying, 'We've delivered compensation.'

Senator SIEWERT—Thank you. Ms Sheedy, with respect to the comments around a national scheme—you may have heard that we asked the department on Friday—can you go through how you would see such a national scheme operating? As I understand it from your submission, you are suggesting that states and territories and church organisations would put in to a national fund that would be coordinated nationally and administered nationally. Is that your vision for where you see redress schemes going?

Ms Sheedy—Yes. I think that we could learn from the Irish model. The Catholic Church were made to sell assets in Ireland and contribute to a redress fund in Ireland. There was also an organisation in Canada. Christian Brothers had to sell assets in Newfoundland, didn't they?

Dr Wangmann—Canada has experience with institution based agreements as well, where the institution pays separate from any government organisation. The initial Indian residential school settlement did involve the various church groups, although I believe not all of them signed up, putting in some money towards the package.

Senator PARRY—Going back to the Ireland model, Ms Sheedy, you have mentioned it twice in response to Senator Siewert. What is it that you like about it, apart from the sale of assets? What are the other features that you like?

Ms Sheedy—In Ireland, they came to Australia to advertise for Irish survivors in this country, and we helped the Irish redress board. We advertised in our newsletter and on our website. We have got Irish survivors in CLAN, and they were telling us that the average payout for an Irish survivor was $A150,000. When you think of the Queensland model, the first tier is $7,000—enough to pay for your funeral.

Senator PARRY—So you like the fact that the institutions had to sell assets—

Ms Sheedy—Yes, and contribute—

Senator PARRY—the dollar value in compensation. My understanding is that it only went for three years, between 2002 and 2005. Applications were received only between those years. Is that correct?

Ms Sheedy—I think so.

Senator PARRY—That means it is a capped scheme in the sense of a time frame, which goes against what Mr Rundle is advocating for. Is that a negative aspect with the Irish scheme?

Ms Sheedy—I thought they had opened it up a couple of times and extended it.

Senator PARRY—There may have been different rounds then. What about the weighting table? I am interested in the weighting table—where compensation is paid in accordance with severity based upon determinants and, I suppose, adjudication, which is always difficult.

Ms Sheedy—How do you put a monetary value on all forms of abuse?

Senator PARRY—Are you against the weighting table, or you do not like that aspect of the Irish system?

Dr Wangmann—I think there is a lot of debate about using the weighting table. What is interesting about the Grandview agreement is that they did indeed use a weighting table. However, I emphasise that the women themselves agreed to that. They agreed to have that table as the way in which their claims would be assessed. Some people say, 'Maybe we should have just a flat fee where everybody gets the same thing.' I think we need to have some more discussion about that. One of the attractive things about the Indian residential school agreement is that it does offer both. There is an element where you can just get your common experience payment, and I imagine that a lot of people will do that. They can also choose to go through the independent assessment process, where you can be eligible for compensation payments that are much more comparable to tort law but again go through a much more stringent validation process, and you have to prove particular types of harm. I think that is worth investigating further. I do not think it is as simple as being able to provide an answer about when and where it might be appropriate, but I think that what these schemes do need to grapple with is group and individual dimensions of harm.

Senator PARRY—Could I switch to the state systems, and maybe Ms Sheedy can answer. Which state of the current states that operate a redress system do you prefer?

Ms Sheedy—I do not think there is one vested practice in Australia. The Tasmanian one is good because it is open-ended, but the negative side of the Tasmanian one is that it is only for those who are Tasmanian state wards, so if you are a private placement there is no place for you to go. Yet the sadists and the paedophiles did not pick out just the state wards for abuse. We did not even know we were state wards when we were in an orphanage.

The Queensland one was capped at $30,000 and that it is not very much for a lifetime. Many of these people spent a lifetime in these places and were abused in all manner of ways. You can read the examples we give in our submission. I think that fellow got $900,000 for getting whacked on his hands at a Sydney school one day. I just do not understand the differences. Queensland set an upper limit of $30,000 and if your institution is not mentioned in the Ford inquiry then you miss out and if you are a state ward in Queensland and you are in foster care you miss out. We have an example of a 54-year-old woman who was a state ward in Queensland when she was placed in foster care. Her 84-year-old father was in an orphanage and he got redress. There are too many disparities in these schemes.

We all know what happened in the Western Australian one. It was introduced with an upper limit of $80,000. Then when the Liberal government came in, it was cut back to $45,000. People feel absolutely gutted. They came forward in good faith telling their stories. They did not all expect to get up to $80,000, but they certainly did not expect that it would be cut to $45,000. They really have lost their trust in government.

Senator PARRY—Finally, in a national system, how would you see the states contributing? I know one of your ideals is that the states would contribute to a national system. How would they do that? Would that be per capita based on state population or per capita based on the number of people that suffered abuse within the state, or do you have another model? I am happy for you to take that on notice.

Dr Wangmann—We can take it on consideration and have a discussion about that.

Senator PARRY—All right; thank you.

Senator PRATT—I would like to know the characteristics of schemes that exacerbate hardship. Dr Wangmann, I know you have been through some of those, but I was particularly struck by the West Australian example, where the act of cutting back compensation detracts from the apology and the recognition that is supposed to come with it.

Dr Wangmann—I think that change in the process had a number of effects. One is detracting from the apology in its sincerity and how far it went. It also detracts from people's engagement and their sense of informed choice. If you choose to engage in a process, you have to sign a waiver when you accept a payment, but suddenly the rules have changed going through the process. I think these schemes need to be as transparent as possible and that has not necessarily taken place in Australia. A particularly good example is the Indian Residential Schools Settlement Agreement. If you look at the website in Canada it has extensive information about where they are at in the procedure, how they are assessing claims and who is doing the assessing. We do not have that sort of transparency and informed choice in engaging with this process or choosing to do a tort claim.

Senator PRATT—What do you think is the source of the redress schemes in Australia being so underdeveloped? There probably has not been a lot of Commonwealth engagement, so states can be quite isolated as they develop these things. In trying to create some institutional arrangements that look at some of these things, what would you point us to?

Dr Wangmann—Do you mean in terms of examples?

Senator PRATT—I mean who leads the process? Where is the leadership? Clearly some of the leadership has to come from government, but someone has to take responsibility for driving that process.

Dr Wangmann—I think clearly there needs to be a government leader. At the same time, there needs to be quite concrete engagement with survivor groups—rather than suggesting, 'We know what your needs are,' actually talking about what they are and having an extensive period of consultation about how you might set that up.

Senator PRATT—I think, Ms Sheedy, you mentioned the forcible sale of assets in Ireland. If you have a compulsory scheme where organisations are forced to pay into it, I am just interested in whether there are examples of how arrangements have been put in place to say, 'Okay, if this happened in a Catholic institution then we are putting the call out to victims of abuse in Catholic institutions,' and how, when you start to create these pooled funds, these things are managed, including the fact that some people will have received payments from state schemes and will

have already been through some processes. Some might think that is sufficient acknowledgement; for others, there might be a gap between a state and federal scheme; others will not have had access to a scheme at all. What are some of the issues around that that we should be considering?

Dr Wangmann—There are not going to be easy answers. I think some people have signed that they no longer have any rights to sue or to seek compensation further, so there will be some issue around that. It may be that, if you were to set up a scheme, they deal with some gap element, if there is a gap element, and that would be a further issue. The only example I can give you is the flawed process in Canada that happened around 2003 with their first attempt at compensation for the Indian residential schools. I think they asked the churches to provide a voluntary contribution of some kind, and not all of the church groups came to the table. That meant that some people who went to an institution where one of the church groups did not participate in the process got a certain amount of compensation from the government, and the government said, 'You need to get the rest from the court system.' You can see why that was a flawed system and hence why it collapsed. If you went to a certain type of school, you could get 100 per cent compensation, but if you went to another school you only got 50 and you had to seek the rest.

Senator PRATT—What are the underlying principles of schemes that avoid those problems in terms of their universal access? Sometimes you have people who have suffered abuses from a wide variety of different institutions. You can have one kind of apology or one set of people and it does not include another. You can see that in the intersections between forgotten Australians, forced adoption practices and the stolen generations and the segmenting of groups of people that actually have quite a lot in common, where some people have been offered apologies and compensation and others have not. How can schemes be affordable for government but do maximum good?

Dr Wangmann—I think it is about transparency and information. I think there is a point where you cannot compensate everything, and even if you say that you are compensating certain things it is a symbolic gesture. It is about how you imbue it with meaning and about being explicit and careful about that. You can also acknowledge people's harms that you might not be able to compensate within this scheme, not denying that harms have taken place but providing enough clarity and information about it so that people do not feel it is including something that it is not including, and providing information and avenues so that if it is not being compensated within that scheme they can do it somewhere else, and it might be a tort claim.

Senator PRATT—So it is about giving it due process in that sense?

Dr Wangmann—And enough information so that people can make choices about what they are doing.

CHAIR—Thanks very much for your evidence today. It is greatly appreciated.

[1.59 pm]

MAWULI, Ms Vavaa, Senior Solicitor, Indigenous Justice Program, Public Interest Advocacy Centre

CHAIR—I welcome you to our inquiry today and say thank you very much for being here. We have your submission, numbered 114. Do you wish to make any amendments or alterations to that submission?

Ms Mawuli—I do not.

CHAIR—I invite you to make a short opening statement, after which we will have questions.

Ms Mawuli—Thank you. I would like to thank the committee for inviting me to provide evidence at the hearing today. I apologise in advance for my voice. I am just getting it back after some illness, so bear with me.

PIAC's submission to this inquiry focused on the effectiveness of government compensation schemes and ex gratia payments established to provide redress for historical wrongs committed by past governments against Indigenous Australians. Our experience with such schemes is largely based on our work with Aboriginal people who claimed unpaid wages and other trust moneys from the New South Wales Aboriginal Trust Fund Repayment Scheme. I am sure the committee will be aware of the basis upon which that scheme was established, but essentially it is providing Aboriginal people or their descendants with moneys which were placed in trust fund accounts between 1900 and 1969 by the New South Wales government and never repaid. The scheme was established in 2004 to repay those moneys.

I would like to briefly highlight the recommendations in PIAC's submission which are concerned with ensuring that government compensatory schemes and payments are administered in a manner which is procedurally fair and transparent and adequately and fairly addresses the particularities of the injustices suffered. In doing so, I would like to make three brief points.

Firstly, in our experience, government compensation schemes for Indigenous people are commonly structured to allow for informality, flexibility and speed. I should say that that is not just those schemes that apply to Indigenous people, but certainly many schemes are structured in this way. Many of these schemes are time limited, meaning that there is a set amount of time that claimants have to register a claim and then there is a set amount of time for the scheme to process their claims and make repayments in appropriate cases. While there are clear advantages to this informal process, there can also be some negative consequences where the informality of the decision-making process and the flexible nature of the scheme are at the expense of transparency, procedural fairness and natural justice for the claimants involved in those schemes.

The point I wish to make is that it is essential in establishing such schemes that governments get the balance right. On the one hand, it is important that claimants are able to participate in a scheme that does not put them on trial and subject them to the vigorous processes one might expect in a court. However, the basis upon which they operate should ensure that, at the very

least, claimants are afforded procedural fairness; there is consistency in the decision making of the scheme; there is transparency in the process so that claimants understand exactly the basis upon which their claims are either approved or denied; and there is an opportunity to adequately address and provide submissions in response to that decision.

Secondly, in designing the rules for entitlement to a compensation payment, there should be adequate and thorough consultation with the communities affected. There should be a thorough understanding by governments establishing such schemes of the particularities of the injustices suffered, and then and only then should rules be developed to adequately and appropriately address those injustices. To highlight this point, we can look at the way in which some schemes operate. In particular, I am referring to the New South Wales Aboriginal Trust Fund Repayment Scheme and to some extent also the Tasmanian stolen generations scheme, which was established to make compensation payments to members of the stolen generations there.

In these schemes, to be eligible for a payment, there must be evidence, and usually that evidence comes in the form of some historical government records, which proves the person's eligibility for a payment. However, it is widely known—certainly in the case of New South Wales and the Aboriginal Trust Fund Repayment Scheme it was acknowledged in setting up the scheme that the government records upon which a lot of the decisions are based are in a poor state, that records have been lost, destroyed, in many cases just not adequately kept at the first instance. So when looking at a structure for a scheme which relies heavily on the existence of these historical government records in order to prove a claim or to prove entitlement for a claim, you can certainly see how many claimants will not even get over the first hurdle in proving that claim.

The point that I wish to make is that those particular injustices really need to be taken into account in determining the rules for payment in the first place. The fact that the records are in a poor state needs to be considered and the rules need to develop around those particular injustices so that people are able to receive or be entitled to receive a payment even where there are difficulties with the records, and that really is a matter that lies squarely within the responsibility of governments.

The third issue I wish to raise and expand on from my submission is about the need for some form of independent review or appeal mechanism to an independent body from decisions made by such schemes. For example, in the Stolen Generations of Aboriginal Children Act in Tasmania, there is provision in that act that provides that the decision of the stolen generations' assessor, who in that scheme was the person responsible for making decisions as to whether or not claimants were eligible for payments, in relation to an application for an ex gratia payment is final and not subject to review, judicial or otherwise. In fact, whether or not expressly stated, this is a common element of many schemes that have been set up to compensate members of the stolen generations or Aboriginal people who have had their wages taken. It is not expressly stated in the New South Wales scheme that there is no right of review, but certainly that is the practical operation of that scheme. It is essential that review of these decisions is available to participants. That is fair. It also gives people the ability to effectively exercise their rights under that scheme and it gives people another avenue for redress where their initial attempts at trying to obtain a payment through the scheme are unsuccessful. It allows for an independent body to review the decision-maker's decision and to ensure that that decision is made in a manner which

is fair and takes into account those rules of natural justice that I referred to earlier. Those are the main points I wish to draw out of my submission.

Senator SIEWERT—Thank you for your evidence. As per usual you have done a really focused submission with some really helpful recommendations. I would like to ask you about the issue I asked CLAN about, the issue of a national scheme. What are your thoughts on that around state and territories, churches and other NGOs contributing to a national scheme? What about the role of the Commonwealth? How do you deal with the issue around stolen wages and the role of the Commonwealth, not only in the Northern Territory, but also, for example, Western Australia? Also, as CLAN points out, there were also some Commonwealth policies around child migrants; a lot of people say they were also partly responsible. How would you see such a scheme operating? Do you support such schemes?

Ms Mawuli—Thank you for the question. I was here for part of the evidence of the CLAN representatives and Dr Jane Wangmann—I apologise if my pronunciation is incorrect—and I largely agree with the comments made there. PIAC has also done some work on a proposal for a national stolen generations reparations scheme. I accept that that is a scheme which is only targeted at members of the stolen generations. Largely that is because a large part of our body of work has been with that group. Certainly the proposal we put to this committee previously was for members of the stolen generations. I do think the Commonwealth government needs to be the driver of a scheme and one which is national. I believe that there is a place for the Commonwealth government, state governments, territory governments and institutions involved in the removal of children and the institutionalisation of children—for all of those agencies and services—to be involved in a national scheme.

I acknowledge that there are certain state based schemes addressing stolen wages and also addressing compensation for children in state care. Because those schemes are in existence, if you were to set up a national scheme, that then poses some particular issues around how that scheme interacts with state based schemes that currently exist. I agree with the approach of Dr Wangmann, in that a consistent approach is needed across the board. That is why a national scheme would be important and is in fact still relevant in this discussion. Some rules will need to be developed around how, if you had accessed payments in state based schemes, that interacts with a claim that you may put in to a national scheme. But I think the starting point should be a national scheme—most importantly for consistency across the board.

Senator SIEWERT—The other approach you is could take is, instead of having a national scheme, have a nationally agreed process, as has been discussed. I must admit I am very attracted to the criteria that we discussed earlier. You could have a consistent approach across the country, still having state based schemes but an agreed national approach. There is so much inconsistency across states within areas of redress and across different redress schemes as well. Is that an issue you have looked at—so that there is equity across the country?

Ms Mawuli—That is not the approach that PIAC has taken to date. It is one which I think warrants consideration and discussion. That would remedy or at least address some of the issues with inconsistent approaches amongst the different states and territories. I do think though that there is still scope—in fact there is a lot of room—for the Commonwealth government to be involved in that type of process. So, while I would say that in principle that would be an approach worth considering, it should not be at the expense of Commonwealth government

involvement at the practical level—that is, contributing to those various schemes financially and also having involvement in the process—if there were individual schemes established.

Senator PARRY—Ms Mawuli, you indicated state governments have poor records—and in some cases not existent records. How would you then assess the legitimacy or the bona fides of a claim where there are no records? Would you accept there needs to be a fair degree of interrogation of each individual claimant?

Ms Mawuli—That is a good question and, in fact, it is a place where we have come to in the life of the New South Wales stolen wages scheme, if I could call it that in shorthand. There have been many instances of cases where claims were denied by that scheme because of the lack of existence of historical government records. Since the scheme was established PIAC has lobbied for rules to be developed which deal with that situation other than the way in which it used to be dealt with, which was simply to deny the claim because there was no government record which corroborated the claimant's story.

I am pleased to say that the scheme has come quite a way since it first began in how it deals with the problem of no records. Now it relies quite heavily on the evidence of the claimant, whether that is provided orally or in the form of a statutory declaration. The scheme has been operating for five years and we have seen that there are emerging categories of people for whom it is clear that even if there are no government records to substantiate their claims those categories are very likely to have had a trust fund account, even if there are no records which say that.

As an example in the stolen wages scheme in New South Wales, young apprentices—young Aboriginal people aged about 13 or 14—who were sent out to work and essentially ceased going to school at that age have been very successful overall in having their claims for repayments approved. There is legislation which made young people apprentices at around the age of 14, and there are provisions which allowed for government agencies to withhold their money in trust fund accounts. In those cases, initially the scheme saw records which showed a pattern of that occurring. However, there—

Senator PARRY—But that is more unique, where those records could be found. What about people who have been in an institution and it cannot be proven that they were in that institution? What happens then? And what degree of interrogation do you think would be acceptable to establish the legitimacy of the claim?

Ms Mawuli—We have been able to have other people who were at the homes at the same time provide evidence corroborating that person's story. That has been successful in some cases in the New South Wales scheme. Also, just looking at the person's circumstances and what they have to say which corroborates other information that the scheme has may cause us to come to the conclusion that that person's story is, in fact, valid.

That can happen without vigorous interrogation of the like that you might see in court under cross-examination. There is a lot of information which is available. It does not point specifically to individuals who were at the homes but at least it paints a picture of the circumstances at a certain time in the homes. If you can corroborate that with evidence that individuals give about experiences they had and, even further, other people who say, 'Yes, they were there when I was

there, and perhaps there is a record showing that at least I was there,' then these are ways in which you can accept reliable evidence from claimants without subjecting them to interrogation.

Senator PARRY—Which then means you would need permission for sharing information, or at least establishing collective group sections of information?

Ms Mawuli—That is correct. That is an approach that we have taken in the New South Wales scheme, and it has been very successful. Many claimants are happy to share their information in those circumstances, to help others.

Senator CROSSIN—I have two questions. You talk about the Tasmanian compensation scheme for members of the stolen generations. I suggest, and you are suggesting, that it should be reviewable, so how do you think that ought to be done?

Ms Mawuli—In New South Wales, at least, there is the Administrative Decisions Tribunal Act, which allows people to seek a review of decisions.

Senator CROSSIN—So you think it should be under the AAT?

Ms Mawuli—I think that those mechanisms should be available in those circumstances. I think that it should be clear in those pieces of legislation that the decisions are reviewable, and that is the approach that I think should be taken. It is a cheaper option for many people. It is cheaper than seeking common-law judicial review. That is the approach that I think should be taken across the board depending on what pieces of legislation exist.

Senator PRATT—I am struck by the fact that New South Wales has a scheme for compensating for stolen wages but not for people who have been affected by care, and states like Western Australia have not addressed stolen wages and do have a redress scheme for people affected by care. It seems that, in terms of the community activism around this and the government response to a wide range of, I suppose, systemic abuses that would warrant redress, there is something missing in the way that we are looking at the big picture as far as all of these systemic abuses go. I wonder if you might comment on that.

Ms Mawuli—Certainly. One thing that we have learnt out of the New South Wales stolen wages scheme is that it did not just happen here; it happened in many places but in different ways. It happened in Queensland in a very different way from how it happened here. By that I mean that here the money was largely placed into trust fund accounts controlled by two government agencies over the 70 years, and in Queensland it was savings accounts that were established. So, from that perspective, you can see how different schemes have been set up in order to address the issue and the amounts that people are repaid are perhaps different. But we are strong advocates for the fact that there should be a national response to these issues. Certainly we have considered that in terms of stolen generations compensation and, as I say, we have developed a proposal for a national stolen generations reparations scheme which brings together a national response to the issue. I think that stolen wages are still something that is emerging; there is still a lot of work to be done to investigate the ways in which it occurred in the various states and territories, and I know a lot of work is being done in Victoria at the moment. Some work has been done in the Territory as well. I think that what is needed is for that work to be all brought together and some consideration given to a national scheme. The fact that

there are ones already, as I said earlier, certainly should not prohibit someone from engaging in that process, but it could be taken into account.

Senator PRATT—Clearly PIAC has been driving some of the work in relation to stolen wages.

Ms Mawuli—Yes.

Senator PRATT—What is PIAC's involvement in resolving those issues for people who were in care in New South Wales and might have suffered abuse?

Ms Mawuli—The approach we have taken so far has been to propose a national scheme. I certainly did not comprehensively address in this submission the report that we prepared in relation to a national scheme; I saw it more as an opportunity to provide comment on schemes that are currently in existence. But our approach has been for a national stolen generations reparations tribunal, and we have previously put a bill forward to—

Senator PRATT—What about distinguishing that from children who have been in care, as opposed to stolen generations?

Ms Mawuli—We have not been drivers of that movement. We are certainly aware that there are others who are engaged in a campaign that addresses that, but our work, given our experiences in representing members of the stolen generations, has largely been around members of the stolen generations.

Senator PRATT—I suppose I am just struck by the fact that, therefore, around the country you have different small institutions and different agencies picking up different groups to do some advocacy for them. As a result, different states have engaged with different issues and therefore it is very inconsistent around the country as to the kinds of outcomes a person can expect from state to state.

Ms Mawuli—I agree with that. I think that the advocacy services involved in this type of work could do better to coordinate some of our efforts and come together with a proposal or a plan that meets the needs of as many people as possible.

Senator PRATT—I suppose you would acknowledge that if you have already been systemically marginalised in some way, the lack of attention that your issue gets can actually exacerbate some of those isolation issues for you.

Ms Mawuli—I acknowledge that.

CHAIR—Thank you very much, Ms Mawuli, for your evidence today and for your submission; it is appreciated.

[2.26 pm]

ASHER, Mr Allan, Commonwealth Ombudsman

MASRI, Mr George, Senior Assistant Ombudsman

STANKEVICIUS, Mr Adam, A/Deputy Ombudsman

CHAIR—Welcome, Mr Asher and colleagues. Thank you very much for being here. The Acting Commonwealth Ombudsman has lodged submission No. 57. Do you wish to make any amendments to that submission?

Mr Asher—Perhaps—but after the questions we thought that if there were issues of interest to senators we could address those in an amended submission and submit it to you afterwards.

CHAIR—Thank you. Of course, that would be welcome in a supplementary submission. Perhaps you could make an opening statement, after which we will have questions from the committee. As you may have noted, Senator Rachel Siewert is online from Western Australia.

Mr Asher—The overall view of the Ombudsman is that the compensation schemes are a pretty vital part of the Commonwealth administrative structure, although there are 10 different schemes that we are aware of and the rules for each are somewhat different—the criteria—and it can be highly confusing to citizens or users of Commonwealth services in knowing how to go about that. While we see them as very valuable and while we see them as having been largely successful, the complexity requires pretty well constant vigilance to ensure that systems do not break down. Members of the inquiry might be familiar with the report that the Ombudsman's office prepared a year ago, in August 2009, looking specifically at the detriment caused by a defective administration stream. That is one fairly major part of it, although there are others as well. We think there are some inconsistencies, depending on the nature of the body. There are some where compensation can be had under this scheme, but for government business enterprises it is not available, and we do not see a clear rationale for that.

On the whole, though, the recommendations we made in our August 2009 report are echoed in many of the submissions made to this inquiry. That is about transparency. It is about the way in which agencies make people aware of the possibilities and of how to lodge a claim and get assistance in prosecuting a claim, and it is about decision making as well. We have found that a number of agencies tend to misinform themselves and want to apply some quasi legal test in what is essentially a moral obligation, while some others make arbitrary decisions that no claim can be granted if there is no evidence in their records. Given that the administrative deficiency is often going to arise there, it is not surprising that often a record would not exist.

We find, in the 200 to 250 complaints that we receive each year about these things and the 45 or so complaints that we receive under active grace systems, that some reasonably predictable errors occur time and time again. We think it is incumbent on all agencies to have a closer look at the report that we wrote, so that they can save themselves and their service users a lot of grief. We are also aware of some agencies which we think have done quite a good job in bringing all of

these things together—the Child Support Agency, for example. It would be useful for people to benchmark themselves against that.

Our submission relates only to Commonwealth schemes, although I note your terms of reference deal also with state based schemes.

CHAIR—Thank you. As there are no other opening remarks, we will move to questions. I will kick it off if that is okay. You mentioned the 2009 report *Putting things right: compensating for defective administration*. Thank you for that. We asked questions on Friday to a number of witnesses about the government's response to it. From your perspective and from your level of satisfaction in terms of the government response to that report, would you say that they have comprehensively responded to each and every recommendation? If not, can you identify the recommendations where that has not occurred?

Mr Asher—It is not so much a matter of government. We deal with 150 different agencies, and the level of response varies. Some see our work as an important part of their own quality assurance and look for systemic advice on improvements and things like that. There are a number of those. There are some others at the other end, such as Australia Post, that really do not care much at all about these things. And then there are a lot in between.

CHAIR—I hope we can be a little bit more specific perhaps. Could you take it on notice to provide further and better particulars. We are interested in your report. You put a lot of work into it. It is a very substantial report and it deserves serious consideration, review and response by the relevant agencies and departments. Are you happy to take that on notice?

Mr Asher—We would like to do that and then perhaps to break down some of the responses by some of the different schemes as well to amplify the point that I made earlier about them sometimes being somewhat at cross-purposes.

CHAIR—That is right.

Mr Masri—I might just make a point in relation to an agency's response. The Ombudsman mentioned the Child Support Agency. They clearly took into account the August 2009 report. They also took into account the amendments to the Finance circular, which took into account some of the points that we were making in the motion report. On 1 September they launched quite a comprehensive response to the recommendations, which was very pleasing. That response included some reforms around a specific hotline in relation to compensation—not just CDDA but other forms of compensation—having a dedicated team and actually putting more resources into their staffing of compensation.

They put a whole lot of information online, making sure that people had greater access to claim forms as well as information about the schemes. They took into account the issues that we had around procedural fairness deficiencies and actually put procedural fairness into their instructions and their team processes. They took into account the concerns we had about administrative drift, and they acknowledge each claim within 48 hours and have put in a 90-day ceiling. Those sorts of initiatives go to the heart of a lot of issues. Importantly, too, they are trying to utilise the CDDA or compensation claims to improve their systems, so part of the

process has a feedback loop back into business improvement. That is a good example of how an agency is taking up specific recommendations.

CHAIR—Thank you very much. On Friday we touched on the departmental advisory or review panel to deal with disputed CDDA claims. The Department of Finance and Deregulation were asked to consider the merits of that. What has the response been to date?

Mr Masri—There are two components to that recommendation. One is to share the information and have an interdepartmental forum. We have attended I think three of those which were hosted by the department of finance.

CHAIR—So that has been established and has happened?

Mr Masri—Yes, in relation to sharing information and bringing issues to the fore. The other component of the recommendation was to possibly have a review body in the very difficult cases. That recommendation, to my knowledge, has not been implemented. But the forums that go to looking at the best practices and issues around compensation have occurred.

CHAIR—To go to the CDDA specifically, again we asked questions on Friday, so please fill free to look at the *Hansard* and respond in any way you see appropriate. Clearly there are a number of limitations on it; you have set that out in your submission. One of them is that it only applies to certain departments and not necessarily to statutory authorities. Do you have a list of the entities to which it does not apply and, if so, could you forward that to our committee?

Mr Masri—That is available on the finance department website, but we will certainly send the committee the link, which is updated every time there are AAO changes by the department of finance as to who is within the Financial Management and Accountability Act framework and who is within the Commonwealth Authorities and Companies Act framework.

CHAIR—Very good; thanks very much for that. We are limited for time so I will pass to other senators.

Senator CROSSIN—I want to ask you about Comcare. Your submission notes Comcare has given an undertaking to explore how it could create a CDDA type of scheme. Can you provide me with a bit more information about that?

Mr Masri—We are just waiting on a response as to the progress in relation to that. My understanding is that a submission went to the minister, but I may not be entirely accurate. From the discussions with Comcare, they were trying to look at what was available to actually rectify for and to compensate the individuals. They certainly acknowledged the limitations under the existing CDDA and act of grace programs and recognised the recommendation by the Ombudsman to look at a broader scheme. I think it was only a few weeks ago we were seeking further information as to the progress of that. I have yet to get Comcare's response.

Mr Stankevicius—We would have to acknowledge the very positive contribution of the new leadership of Comcare who has taken an active role in managing the two cases that were brought to our attention through complaints and is really seeking whatever way he can to improve the

handling of those cases and bring them to resolution. So there has been a real culture change there.

Mr Asher—We might invite the committee to consider commenting on the appropriateness of those different standards. From the point of view of individuals who suffer loss or damage, it seems to us to be largely irrelevant about the nature of the legal instrument by which the agency was established. If the nature of the loss or damage is quantifiable then, under that moral principle, people should be equally entitled to recover.

Senator CROSSIN—Isn't the case, though, that Comcare is looking at compensation for loss or damage of the Commonwealth's own employees?

Mr Masri—That is correct, but it is still on the basis of incorrect action. Comcare did acknowledge that one of the problems was that there was a case for compensation and the issue for them was: how do they redress at the wrong?

CHAIR—So are you saying that if Comcare has stepped up to the mark then Australian Post ought to? It should be consistent across agencies—is that what you are saying?

Mr Asher—That is right. We are looking at it more from the point of view of the affected individual, rather than the legal construct of the agency that made the error.

CHAIR—Or the bias of each agency.

Mr Asher—Well, that might be true too. But consider the extent to which Commonwealth programs are now being delivered through third-party contractors. Again, the rules change a lot. They should not. If somebody suffers loss or damage due to administrative deficiency then they should be entitled to restitution, and the fact that an agency has contracted that out should not change that.

Mr Stankevicius—As we were talking in preparation for the hearing, George had a good example in relation to job capacity assessments.

Mr Masri—Some job capacity assessments are conducted by Centrelink staff, and others are contracted out to private job capacity assessors. You might have a similar scenario, of the job assessment being inadequate or defective; as a result of that, there might have been a claim for CDDA if the actual assessor was a Centrelink staffer. But, in the same scenario, the person would not get compensation if the assessor was actually a private provider—a contracted service provider.

Senator PARRY—I am interested in the 250 complaints that you mentioned in your opening statement. How many of those would go towards the nature of investigation or interrogation or establishing the correctness or the validity of their claims?

Mr Masri—We will have to get back to you on those figures, because I have not got them. I have only the raw figures. Some of those 250 relate to cases where we have investigated a particular issue and the recommendation or suggestion was to seek compensation. In other cases

it was in fact about an adverse decision in relation to a compensation claim. But we can try to drill down further and provide the committee with more information.

Senator PARRY—Information I would like the committee to be provided with would be on complaints that go towards the nature of their dealings with particular agencies, and complaints that go towards the inadequacy of the amount or the attention to the complaint or to the claim.

Mr Stankevicius—We can break the complaints down by category for you and try to draw some of those themes out.

Senator PARRY—That would be good. Do you have a gut feeling you could provide? We will not hold you to it! Or would you prefer not to say?

Mr Masri—No, sorry; I have just got those raw figures. Apologies for that.

Senator PARRY—That is all right.

Mr Stankevicius—I suppose one of the overall messages is that the compensation schemes right across the board have not kept pace with changes in public administration. The way in which programs are delivered, services are provided, assessments are undertaken or decisions are made—whether by corporations or authorities, external service providers or government agencies themselves—is changing, as both Mr Masri and Mr Asher have pointed out. The compensation framework has not kept pace with that. That is what we see the fringes of, with the up to 250 complaints we are getting.

Senator PARRY—Correct me if I am wrong: ex gratia payments are determined by Prime Minister and Cabinet, whereas the grace payments are determined by the minister for each department.

Mr Masri—The act of grace payments, yes.

Senator PARRY—Is my understanding correct?

Mr Masri—Yes.

Senator PARRY—Could you also, in the breakdown of complaints, indicate those that relate to any act of grace payments and those that relate to ex gratia payments. Thank you.

Senator SIEWERT—I would like to follow up on the comments that were made in the Care Leavers of Australia Network, or CLAN, submission around the use of the CDDA provisions to look at redress for care leavers. I suppose I am looking at that because it deals with the issues around effective implementation of policy et cetera. What are your comments on their proposals?

Mr Asher—I wonder if we might ask for a little more context.

Senator SIEWERT—It is what the forgotten Australians having been talking about. Obviously we have had issues around redress and the fact that redress has not been provided in a

number of states. They are also proposing a national scheme and looking at the provisions under the CDDA scheme to look at possible avenues for redress. Do you have any comments on whether that program could be used for a national redress scheme?

Mr Asher—On the whole, the standard test of trying to either restore people to the situation they were in before or quantification of the loss or damage would, in those circumstances, be quite a complex issue and might require a different methodology for trying to quantify.

Senator SIEWERT—In other words, could you do that under the—

Mr Asher—That particular scheme does not look as though it is apt for a resolution to that problem.

Senator SIEWERT—Okay. So the provisions of that are too narrow for the sort of scope we are talking about for a redress scheme for forgotten Australians, or for the stolen generations for that matter?

Mr Asher—Yes. I think those require a much wider inquiry.

Senator SIEWERT—Obviously what we have been looking at is what the alliance and others are looking at under existing Commonwealth provisions. Where would such a redress scheme fit? Would we be better putting in place a whole different scheme?

Mr Asher—Perhaps it could fit even in the ex gratia set of decisions—they are the ones taken by the Prime Minister in consultation with the finance minister—or some such thing, because they are more at large in the criteria that they can take account of. In a sense also it is a very large thing, which might require some process of national assessment.

Senator SIEWERT—I did briefly explore that with the department on Friday, and the impression that I took away from that was that the department looked at the ex gratia payments as being for more immediate emergency or disaster rather than for the sorts of redress that we were talking about. So I am interested that you suggest that you could be looking at that scheme.

Mr Asher—Similarly, the 'act of grace' framework could possibly fit. But I think our level of expertise probably does not provide a helpful comment on that. But we could undertake to consider it again.

Mr Stankevicius—Certainly the Tasmanian ombudsman had some involvement in the schemes that were operated specifically to provide compensation for children in care in Tasmania, but that was a very distinct and different function from any of the ones we have at the Commonwealth level. Again, it was about a specifically defined scheme rather than trying to retrofit a class of claims into an existing program.

Senator SIEWERT—Thank you.

CHAIR—Senator Pratt, do you have any questions?

Senator PRATT—I think Senator Siewert just asked my question; it was clearly her question too.

CHAIR—Okay. Mr Asher, in regard to Tasmania and children in care, we have had this wretched, shocking incident in recent times—the sexual abuse of a young girl that has received a lot of media attention. Are you aware of that particular matter?

Mr Asher—Yes.

CHAIR—The question I asked on Friday was: what compensation is available for a victim like her in the circumstances? The witnesses on Friday did not know and so had to take it on notice. Are you able to—

Mr Asher—I could say that it is quite likely that none of the schemes I have referred to would be available to her, because in that case it is quite likely that there are some legal liability issues and, where there is legal liability, these schemes do not apply. That is not to say that there might not be some dimension beyond simply the legal liability, but it does take it outside the framework of most such schemes. It puts it into the statutory schemes.

Senator PARRY—That would put it back into victims of crime.

Mr Asher—That is part of it. It could also be common law issues of negligence or failure in duty of care. There is a range of other legal constructs which might be around that. The point I am making is that these schemes act where there is not a legal right of redress.

Senator PARRY—There would not be one for this, would there?

CHAIR—What has occurred in Tasmania with this poor girl is horrific. I understand the perpetrator, the foster mother is in jail. The girl is obviously damaged, clearly for life. I am wondering where we go as a society in terms of compensation. Obviously any amount of compensation would be entirely inadequate to deal with this situation. Where do you actually go? Can you comment on that?

Mr Stankevicius—I suppose previously governments have created systems instead of giving money in circumstances like that. Twenty-four hour support systems are usually provided through community, disability, ageing or child agencies. I think you will find that in some states they are called individual support packages and in other states they are called individual care services. They are the ones who undertake any holistic assessment of the kid's needs or the adult's needs, depending on their stage of life, and what kind of specialist and technical support they are going to need over their lifetime. They are modelled a package to fit that.

CHAIR—Who models the package? Is it the state government?

Mr Stankevicius—Yes, the state government does it.

CHAIR—That is a matter for them in this instance?

Mr Stankevicius—Yes. Child welfare is a state responsibility.

CHAIR—You mentioned failure of duty of care. That was one of the issues for the responsible state department. There was certainly an allegation of a breach of duty of care in that instance.

Mr Asher—The direction of your question might also have been what systems are going to provide the best incentive for agencies to do better in all of these things. We are constantly looking not just for the resolution of a particular issue but to see how an outcome might change the way an agency has its procedures, how it audits them and how it learns from them. I guess that is an important part of all of this. That is why I think the Department of Finance and Deregulation sought to put forward a central register of all of this information—so that it could be collected. At the moment, I doubt that anybody has even a close idea of the total quantum of compensation given under the 10 schemes I have described.

CHAIR—Thank you. if there is anything else you wish to contribute on notice to assist on that particular issue, that would be of merit. Thank you for your evidence today.

Proceedings suspended from 2.53 pm to 3.15 pm

FINLAY, Ms Jackie, Principal Solicitor, Welfare Rights Centre

THOMAS, Mr Gerard, Policy and Media Officer, Welfare Rights Centre

CHAIR—I welcome representatives from the Welfare Rights Centre. We have your submission, which is No. 172. Do you wish to make any amendments or alterations to that?

Ms Finlay—No.

CHAIR—We now ask you to make a short opening statement, after which we will have questions.

Ms Finlay—Thank you. The Welfare Rights Centre is a community legal centre that specialises in social security and family assistance law. We help people who have problems with Centrelink, and each year we speak to about 3,500 to 4,000 people. Of them, we would estimate that about 60 per cent contact us in relation to debts that they owe to Centrelink. Our submission focuses on debt waiver provisions. It is our understanding that we are probably one of the few organisations who have a detailed understanding of the legislation and who help the people who are affected by Centrelink decisions. But overall we would say that having the CDDA scheme, the act of grace scheme and waiver of debt schemes is a really good mix, and it does generally seem to capture all the issues that arise about owing amounts to government or being compensated by government.

However, we think there are significant problems with the debt waiver scheme. Basically, our position is that the current debt waiver provisions are unbalanced and cause significant hardship to people and families who owe debts. It seems to us that the risks in receiving payments are borne totally by social security recipients and there is very little risk to Centrelink. Due to the way the legislative provisions are drafted and have been tightened over the years, there is essentially little incentive for Centrelink officers or Centrelink in general to get a decision right and to prevent debts, because ultimately, if someone owes Centrelink money, most of the time they are going to have to pay it back and Centrelink will get their money back.

Our submission details specific provisions that we think need to be examined and amended, but when I was looking over them more broadly I realised that they essentially fall into two broad categories where we think there is inadequate relief available to people. They are, firstly, where Centrelink is the sole or primary cause of a debt and, secondly, where a person owes a debt but essentially they are in that position due to domestic violence or acting under duress, usually from an ex-partner. It is those two broad categories that are not addressed adequately in the legislation.

We detailed a number of areas where we think changes need to be made. Essentially, if Centrelink or one of its agencies is the sole or primary cause of a debt then it should be Centrelink and the government who wear that debt and not the individual. In relation to domestic violence situations, the way the act is drafted is that even if someone has special circumstances in their case—they are a victim of domestic violence and have had horrific circumstances associated with that—if they or the person they were living with knew they were making false

statements to Centrelink then they are going to owe that money back. We often see women who have left domestic violence situations and have been forced by their ex to claim payments, and it is they who wear the debt, not the ex-partner. We believe that capacity to address that imbalance should be put into the legislation.

Gerard Thomas will also speak a little bit about debt waiver, but briefly, in relation to the act of grace scheme and the CDDA scheme, the main issue we would see with act of grace claims is the delay in getting a decision under the act of grace scheme. Certainly when we discussed it with the Department of Finance and Deregulation we were advised that most of that delay is due to Centrelink's delay in providing their opinion to the department as to whether an act of grace payment should be made or not. Six to 12 months on average seems to be the time it takes someone to get a decision about their act of grace claim, which we say is excessive.

The submission of the Department of Finance and Deregulation was interesting. In one of the case studies they gave, they identified what they thought was a problem, they made an act-of-grace payment and then they recommended to the Minister for Families, Housing, Community Services and Indigenous Affairs that some legislative changes be made. In fact, my understanding about their case study 1 is that that proposal has been taken up with the minister and legislation is being introduced to fix up that problem. I would certainly be keen to see the Department of Finance and Deregulation playing more of an active role in that respect so that, if they see a series of act-of-grace claims that are similar, the secretary goes to the appropriate minister to discuss the fact that they have seen this chain of similar claims and changes can be made.

In relation to the CDDA scheme, we generally endorse the Commonwealth Ombudsman's view, the information they have in their submission to the inquiry and also their report from last year. Certainly the main problem we see is delays and, secondly, where the failure has been caused by an agency that the government has contracted the service out to: job capacity assessors and also Job Network providers. It seems to us for the same reasons the Ombudsman gave you earlier that there should be redress available if someone suffers a loss due to the actions of those providing contracted-out services.

CHAIR—Mr Thomas, do you want to make a few remarks at this stage?

Mr Thomas—Yes. As my colleague Jackie said, getting overpayments is one of the biggest problems facing our clients. We get many calls from electorate offices and from community organisations referring people who have got significant amounts of overpayments. Our concern is not just the way the debts are raised but also the way in which these overpayments are recovered. Centrelink has standard procedures in place which take 15 per cent of a person's social security payment. That was increased from 14 per cent to 15 per cent from 1 January this year, and from 1 January next year Centrelink is going to try to speed up the rate of repayment of many of those debts. Given the low rates of social security payments, many people—about 70 per cent—who owe a debt to Centrelink are on less than a standard rate of repayment; that is, less than 15 per cent. Many people cannot afford to pay higher rates of payment, but Centrelink expects to obtain an extra $42 million over the next four years by calling people every three months to see if their circumstances have changed and they can afford to pay more. For many people, this is really going to be no more than harassing people who are experiencing difficult

times to pay more from what are—certainly from our point of view—inadequate social security payments.

We notice that the FaHCSIA submission to the inquiry says:

… the current debt waiver provisions provide an appropriate balance between recovering amounts that exceed a person's entitlement and avoiding onerous outcomes for customers.

That is certainly not the view of the Welfare Rights Centre and certainly not the view of our national organisation, the National Welfare Rights Network. Our organisations, the welfare rights network across the country, have been meeting with Centrelink and FaHCSIA for a number of years to discuss issues around debt waiver, debt prevention and debt recovery, and we recently had a working party with FaHCSIA, Human Services, Veterans' Affairs and Centrelink which met in February this year. We discussed a number of the sorts of suggestions that we have in our submission as issues which FaHCSIA said needed looking at and perhaps looking at whether the guide needed to be strengthened or whether there were some legislative reforms which could make the system fairer. So we were a bit surprised to read in their submission that they thought the current system was fair and balanced, because that is not the impression that we have received.

I have given the secretariat here a copy of a broader submission from the National Welfare Rights Network on debt prevention, which we have provided to the policy departments and service delivery departments, Centrelink and Human Services, and which we produced in May 2009. It is called *Redressing the balance of risk and responsibility through active debt prevention strategies*. From our perspective—

CHAIR—Mr Thomas, have you already given that to our committee?

Mr Thomas—I tabled a copy with them just five minutes ago.

CHAIR—So our committee has received it.

Mr Thomas—Yes.

CHAIR—Thank you for that. Continue.

Mr Thomas—The amount of debts in the system is quite significant. There are over two million Centrelink and family assistance debts raised a year. When you look at the annual report, many of those are very small amounts, so they are automatically waived—I think if they are under $50. But certainly debts that arise over a number of years can cause significant hardship to many people. If the debts are over a certain amount—amounts over $5,000—Centrelink has considered those amounts for consideration for prosecution of social security fraud. There was a recent report by the Australian National Audit Office which raised a whole lot of questions about the fairness of that process and a lot of the procedures that Centrelink undertakes in relation to the prosecution of clients for social security fraud.

One of the things that concern us is that we know from the casework and the calls—we get calls every single day—is that just a couple of hundred dollars is a significant amount of money

for people to pay back. Since 2003-04, there have been nine inquiries by the Audit Office into Centrelink overpayments and fraud related activities and debt activities. But—and I must say, there is only one submission to this inquiry from a consumer organisation addressing substantive issues around debts—it is a much broader issue. It has a significant impact on individuals' lives. There really needs to be a much broader parliamentary inquiry into the whole issue of the causes of debts and things like the confusion between gross and net. People often do not know that you can align pay days with your Centrelink payment days. There has been confusion in existence since I have been in this area, for over 20 years. There is correspondence with stuff hidden on the backs of letters and addressing all those sorts of issues. People get letters telling them that they have got a debt. It says, 'account paid'. People think that is like a telephone bill and put it aside. I know there has been a lot of work under the previous government and continuing now to address letters and correspondence, but it is certainly an issue which deserves much greater investigation, because the process of people getting Centrelink overpayments and the debt recovery experience is, for many of our clients, literally enough to make them ill. In fact, we have had some debts that have been waived by the SAT because of the special circumstances we have to look at, and Centrelink acted to recover the debt from individuals. I will just close with those comments.

CHAIR—Thank you very much. We will firstly go to Senator Siewert for questions.

Senator SIEWERT—I would like to take up where you just left off. You have suggested some legislative amendments, which I will go to in a minute, but a lot of what you are talking about was specifically around administration and interpretation of the rules. There are two issues here, as I understand it. There are legislative changes that you want to see made, but there is also a process of how people are interpreting the administration of the existing laws. Would that be a correct understanding?

Mr Thomas—Yes.

Senator SIEWERT—In terms of the last points you were making around the need for an inquiry, I understand the issues but what we are looking at there is how to better interpret existing legislation. Is that correct?

Mr Thomas—Part of the problem is that there are problems with some of the existing legislation. Family tax benefit debts cannot be waived, even when Centrelink is 100 per cent responsible for causing that debt. If you have told Centrelink for two years, 'I have one child who is no longer in my care,' and if they raise another payment of, say, $15,000 against you, you can only get that waived if you can prove that you are in severe financial hardship.

Even if you have $5 left per week out of your social security payment, it is almost impossible to prove you are in financial hardship. Again, that sort of special rule does not apply to other social security payments. When Centrelink is 100 per cent wrong you should not have to wear the payment of the debt. That is where the legislation needs to be changed.

Senator SIEWERT—Mr Thomas, for me, that would not fall into misinterpretation or being unable to interpret the legislation. As you rightly pointed out, that falls into concerns about the legislation.

Mr Thomas—Yes.

Senator SIEWERT—Of the clients you deal with, how many complaints would be related to a Centrelink error of the kind you were just talking about?

Mr Thomas—It is really hard to say. Centrelink claims that around 3½ per cent to four per cent of debts are a result of Centrelink error. Certainly when we talk to clients and when we get their files under freedom of information—once a client calls us, we get a copy of their file. Senator, you are on the telephone and obviously cannot see us but this file is about a 200-page document. If it is a large debt that may have gone over a number of years, there may be a 500-page or a 1,000-page document which they need to interpret, understand the various codings and find out whether Centrelink has in fact made an error. We are a low-funded organisation. Across the country there are 24 people who do what Welfare Rights does, which is to provide assistance. We have solicitors and case workers. In the scheme of things, there are 24 of us but there are 27,000 Centrelink staff and six million or seven million Centrelink clients. There is only a very small number that we do. We touch the surface on these things, but we often find things that Centrelink have coded as zero instead of 16,000 or have coded as negative income, or they have made some other mistake. Whilst Centrelink do a good job, we think they still make too many errors. If you listen to their spokespeople, it seems as though they claim infallibility along with the bloke in Rome. In our experience that is certainly not the case.

Senator SIEWERT—The other issue, which I think goes to your case study No. 1, is where initially it was Centrelink that made the error. If I understand the case study correctly, they then said that it was not their fault because Mr B. did not contact them after they made their error. Would that be classed as their error or Mr B's error, and how many examples are there of those sorts of cases?

Ms Finlay—I would say that, of the 60 per cent of clients who contact us about debts, maybe five per cent to 10 per cent concede they were overpaid and concede that it was their fault. That leaves about 50 per cent and, of those people, at least half would have significant Centrelink errors. As in case study No. 1, Mr B. has not actively done anything wrong. He went to Centrelink and advised his income on two different claim forms to two separate sections at Centrelink. What has happened is that he would have got, as most of our clients get, regular letters from Centrelink. On the front there is usually very sparse writing. It is very clear on the front to see what is being asked of you or what you are being told. You are being told your rate of payment for this fortnight and for the fortnights henceforth is $560 per fortnight, with a little box giving you a phone number to ring. On the back, in about font size 8, there is a significant list of, I would say, close to 100 different things that you must tell Centrelink. So what has happened with Mr B.—and with a good quarter of our clients—is that he has not read the fine print on the back of the letters to make him realise: 'Centrelink has made a mistake in coding my income and I need to tell them that it is wrong.'

Senator SIEWERT—In that case will that directly relate to the inability to be waived?

Ms Finlay—That is right. Mr B. cannot have his debt waived because the way that section 1237A of the Social Security Act has been interpreted in the Federal Court is that, once you are put on notice, albeit in a manner you would not understand, technically you have been put on

notice that Centrelink is not paying you the right rate and you have been told 'you need to tell us if it is wrong'. He has not done that.

Senator SIEWERT—Okay. How do you suggest we fix that? In your opinion, what would be the best way to fix that? It seems to me that it is hard for people to actually understand that list. How would you suggest we rectify that so that it is as clear as possible for somebody to correct if they see an error? The onus is on them to correct it, not Centrelink—is that a correct understanding?

Ms Finlay—Yes, that is correct. In relation to a debt waiver ground, it needs to be changed to something like 'predominantly' and then you would obviously require Centrelink officers and tribunals to interpret that and look at the facts in that particular case. If this change were to be introduced, we would see it as having a positive, far-reaching effect. If, over time, more and more debts that are predominantly Centrelink's fault, which we would say Mr B. is an example of, are waived, there will finally be pressure on Centrelink to get it right and to prevent debts in the first place. We believe we would see more effort put into correctly coding information on forms. There would be clearer letters. If Centrelink were no longer allowed to rely on their small-sized-font list of 100 factors on the back, we think that more effort would be made to send letters that clearly state what you have to do.

Senator SIEWERT—I will play devil's advocate for a minute and say: if the changes are made and someone realises that there is a mistake but they do not raise it, is it proposed that, once it is under consideration, the tribunal would look at the weight of evidence to suggest whether or not it was likely that someone knew that an error had been made?

Ms Finlay—That is right. Already the second limb of the sole admin error waiver ground is that you must have received the payments in good faith. Even now when you have a client who is clear that the debt is 100 per cent Centrelink's fault, a number of debts are not waived because the person knew or suspected that they were being overpaid.

Senator SIEWERT—In other words, the protection is already in the system to counter that happening.

Ms Finlay—Yes, that is right.

Senator SIEWERT—Thank you.

Senator CROSSIN—I am trying to make a comparison here with industrial relations, because I have represented many people where an administrative error is just absolutely thrown out and discredited. For example, if as an employee I am being underpaid I have an expectation that that will be corrected. An employer who overpays me has an expectation that that will be corrected. There is a quid pro quo here—there are swings and roundabouts. I am being a bit of a devil's advocate here, but there would be just as many people who would be underpaid by Centrelink and Centrelink would acknowledge that and make good that payment.

Ms Finlay—The first thing I would say is that, if you have been underpaid by Centrelink, no, they will not, unless you pick it up within three months. Essentially there is a time limit. You need to challenge the Centrelink decision or Centrelink need to pick it up themselves. If they

pick it up or you challenge it more than 13 weeks later, no, you do not get back pay. That is a distinction. There is no guarantee you will get the right amount, even if Centrelink underpay you.

Senator CROSSIN—Yes, I have not known too many bosses who pick up an underpayment quite readily, either, I have to say.

Ms Finlay—But even if the individual picks it up, if they are out of time. The second thing is that we are talking about a government agency paying payments rather than an employer. I think that gives a different dynamic. There is a responsibility on the state, I guess, to alleviate hardships and to perform their actions correctly. Also, the very people who are affected by these Centrelink decisions are in significant hardship and have less than anyone on an income.

Senator CROSSIN—Okay. So the issues you raise in your submission are more policy issues that need to be corrected rather than administrative type corrections? For example, 'received in good faith' rather than 'acted in good faith' must be a policy decision, I would have thought.

Ms Finlay—It requires a legislative change, that is right.

Senator CROSSIN—Yes, but some legislative changes are made because the policy is not being enacted properly; it just clarifies it and clears it up. But I would have thought that a lot of what you are raising—for example, to remove 'solely' from section 1237A of the act—would need a policy change.

Ms Finlay—From now, yes, but I do not think from at the time it was enacted. At the time these provisions were enacted social security law was not as complicated. You did not get quite so many issues on the back page telling you what you need to tell us. It just was not as complex, so in that case it was a lot clearer: solely a Centrelink mistake or you contributed significantly. There is a lot more blurring now because of the complexity. I do believe that with 'received in good faith' and 'acted in good faith' the original drafters did not realise the impact of that. You can have someone going in and saying, 'You are paying me the wrong amount,' and they put their hand up three fortnight in a row—in fact there is a federal court case—and Centrelink ignored them and kept paying them, and they had to pay back the debt because they did not receive it in good faith. Albeit clearly they acted absolutely in good faith. I do not believe that the legislators intended for someone like that to have to repay a debt when they begged not to be overpaid.

Senator CROSSIN—Have you taken these anomalies to ministers pre 21 August and now post 21 August?

Ms Finlay—Yes, most of these provisions have been along—certainly as Mr Thomas was referring to. The last year or so FaHCSIA has paid more attention to debt issues and there was a working party, but it was suspended because this inquiry—

Senator CROSSIN—I am not talking about FaHCSIA. I am talking about the minister.

Ms Finlay—Yes, we have over the years.

Senator CROSSIN—Does 'over the years' mean in the last year or not?

Ms Finlay—I have been around for 12 years, so, yes, 12 years.

Mr Thomas—We have written to various ministers over the period on a range of debt related matters. It is the number 1 problem that we see in the social security system. It causes significant amounts of our work and problems for Centrelink clients and taxpayers. We recently met with Minister Macklin and we raised a number of these specific issues with her. I have been at Welfare Rights for eight years and we have been raising these same issues with ministers and departments for eight years.

Senator CROSSIN—Maybe we could get FaHCSIA to respond to each of the claims in your submission as part of this inquiry.

CHAIR—I think that would be a welcome development. You have raised what appear to be very well argued points and you have made some observations in your submission, so I think it is something we should do on behalf of the committee. The key questions have been covered. I want to go to the CDDA program. In your submission you have expressed similar views to the Ombudsman; it has got some limitations and you agree that it is limited to government departments and not to certain agencies and authorities. Are there any other observations you would make in terms of improving the CDDA arrangements?

Ms Finlay—I have one but I am not sure if it is of use. You now experience people saying a lot of the time that they have suffered a detriment because of incorrect advice from Centrelink—they were told something—and Centrelink does not have any record of that advice. Sometimes they do not have a record that the person came in or they have recorded it very differently. From my observation there is a tendency to say, 'We do not have a record of it and therefore we have not acted to your detriment,' which is difficult and I am not sure how you address that. I think the agency needs to be a little bit more open to listening to the story that comes in and, if there are consistencies, or there are other evidence around that supports it, accept that possibly their agency, Centrelink, has not acted correctly in that instance or has not recorded the contact.

CHAIR—Are you based in Sydney?

Ms Finlay—Yes.

CHAIR—Are your counterparts in other parts of Australia?

Ms Finlay—There is one in each capital city and three or four regional areas.

CHAIR—Do you have some government funding?

Ms Finlay—Yes, the Commonwealth Attorney-General funds about one-third of our services.

CHAIR—And the other two-thirds?

Ms Finlay—About a third from the state government and then we generate funding ourselves—we publish a handbook on social security law that some people pay us to read.

Mr Thomas—We have been around for about 21 years and initially there were plans to expand independent advice services across the country and there were promises by the current government prior to the 2004 election to provide an extra $2 million for welfare rights advocacy information across the country but that never transpired unfortunately. That was promised by the current Treasurer

CHAIR—Sure. You are still part of the National Welfare Rights Network.

Mr Thomas—That is right.

CHAIR—And that is a group of like minded organisations.

Ms Finlay—All the welfare rights centres in Australia.

CHAIR—Do you meet from time to time with relevant ministers and government departments?

Mr Thomas—Yes, we do. We met with Minister Macklin a few weeks ago and we are meeting with the Minister for Human Services in Sydney next week. We meet with Centrelink and FaHCSIA as well.

CHAIR—Have you raised these issues with them?

Mr Thomas—Yes.

Ms Finlay—Time and time again.

Mr Thomas—For many many years.

CHAIR—And you have not had an adequate response.

Ms Finlay—Gerard referred to the ANAO reports into prosecution. That was something again in our history in welfare rights where we have raised concerns. Certainly I recall two years ago we wrote formal submissions and we were reassured that prosecutions were being done well and it was fine. Of course the recent ANAO report says quite frankly that the system has been handled appallingly. I guess that is the frustration we have over the years. We are told that individuals can appeal and that they have appeal rights and they certainly do but it does not address systemic issues.

CHAIR—Yes, I am a member of the Joint Committee of Public Accounts and Audit and the ANAO did give a very comprehensive report which was quite telling in its implications for the department.

Mr Thomas—On the whole issue of clients' experiences with Centrelink in trying to report their income with the difficulties they experience, I tabled with your secretariat the transcript and comments from the public about an interview on the audit report from last week's ABC *National Interest* program. It may be of interest. We found it illuminating.

CHAIR—We now have those reports, thank you very much for that. Thank you for your evidence and for your submission today. We will now welcome our next witnesses.

[3.47 pm]

JONES, Ms Carolyn, Solicitor, Women's Legal Services NSW

MACDONALD, Ms Edwina, Solicitor, Women's Legal Services, NSW

CHAIR—Thank you for coming this afternoon. We welcome you to our committee. We have your submission numbered 108. Would you like to make any amendments or changes to it?

Ms Jones—No, we would not.

CHAIR—We ask you to make an opening statement after which we will have questions.

Ms Jones—Thank you for the opportunity to address the committee today. By way of background, Women's Legal Services New South Wales is a community legal centre that aims to promote access to justice and a just legal system for women in New South Wales. We seek to promote women's human rights, to redress inequalities experienced by women and to foster legal and social change through strategic casework services, community development, community legal education and law reform and policy work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic violence, sexual assault, family law, discrimination, victims' compensation, care and protection, human rights and access to justice. Through this work we often learn about other ways in which access to justice is obstructed. This is how we have come to assist clients with claims under a number of the discretionary payment mechanisms including the Aboriginal Trust Fund Repayment Scheme as well as payments made under the scheme for compensation for detriment caused by defective administration and act of grace payments.

Our decision to make a submission to this inquiry was largely based on the experience of one particular client, who has become the subject of a specific report by the Commonwealth Ombudsman in which she is known as Mrs X. As such we do not claim to have a specialty in the area of government compensation payments or administrative law but we wish to outline some specific issues that have a disproportionate impact on our clients.

Firstly, there are a number of systemic barriers to accessing the discretionary compensation mechanisms. The discretionary mechanisms are implemented with the guidance of general principles set out in a circular issued by the Department of Finance and Deregulation. These are stated to be permissive and designed to take individual circumstances into account, with the aim of achieving consistency and impartiality in evaluating the merits of cases in different circumstances. However, it is difficult for potential claimants to even obtain accessible information about their right to make a claim when they believe they have been adversely affected by government administrative action. The information is not consistently provided across agencies and in some instances requires the claimant to be able to access the internet. Claim forms such as those to be used for CDDA claims assume the claimant will be able to both obtain a copy of the relevant Finance circular and understand sophisticated distinctions between moral and legal frameworks. Additionally, claimants must be able to appreciate the scope and

limitations of the elements of a claim, such as defective administration and detriment, which I will address in more detail shortly.

Our clients typically experience significant disadvantage in their lives. They may be from culturally and linguistically diverse backgrounds or be living with a disability or impairment. They may be poor or illiterate. There may be a victim of family violence or they may be living in rural or regional areas where they cannot access internet services. They may be facing all of those challenges. We suspect that many potential claims for compensation for loss arising out of government action or inaction are simply not made because claimants do not understand their right to claim or, if they do, are unable to navigate the claim process.

At the very least, we believe that there is a clear need for uniformity in the information and forms provided for making claims for discretionary compensation payments. It is also necessary to provide clearer guidance about how to particularise claims. Ensuring that all information and forms include instructions about accessing an interpreter is also important. We also suggest that, once an individual makes a claim for one form of discretionary government payment, they be provided with a fact sheet which explains all the discretionary compensation payments.

We are also concerned that agencies approach the assessment of claims made under the discretionary mechanisms, particularly CDDA claims, using a legalistic approach. This is illustrated by the experience of our client which is referred to in our written submission. Her claim was against both the Child Support Agency and the Australian Federal Police. Both agencies engaged leading commercial law firms to represent them in response to our client's CDDA claim. The handling of the claim was protracted and confusing. At times it was not clear if they were blaming each other or working together. Our client definitely saw the CDDA claim as a legal dispute and not an internal, independent decision-making process. For example, she was told very early on by the Australian Federal Police to deal only with their solicitors and not directly with the agency. We suspect that the costs of defending our client's claim were probably disproportionate to any possible compensation award, and this is not in the spirit of the moral, as opposed to legal, obligation that is central to CDDA claims. We acknowledge that legal principles may have a role to play in assessing claims, but they should not dominate the process. We note that there is a useful analysis of the issues arising from the adoption of a legalistic approach in the Commonwealth Ombudsman's report *Putting things right: compensating for defective administration*.

Another issue we wish to highlight is the limitations in the current definition of 'detriment' for CDDA claims, particularly for clients who are already vulnerable and disadvantaged. As set out in the Finance circular:

Detriment means quantifiable financial loss that a applicant has suffered.

The circular also says there are three types of detriment: personal injury loss, including mental injury; pure economic loss; and detriment relating to damage to property. In relation to personal injury loss, an applicant may seek compensation for financial detriment related to a 'recognised psychiatric injury' suffered as a result of the defective administration. In this context, compensation will generally be payable if it was reasonably foreseeable that a person of normal fortitude might suffer psychiatric injury as a result of the defective administration. The guidelines state:

"Normal fortitude" refers to a person who is not suffering from a psychiatric illness and who has no predisposition to psychiatric injury.

The footnote attached to that states:

Given the different functions and different clientele which agencies deal with, agencies may decide in some cases to use thresholds that are lower than the test of 'normal fortitude'.

Information is not freely available as to how agencies are interpreting 'normal fortitude' or about how much evidence might be required to satisfy the agency that the claimant has a 'recognised psychiatric injury'.

We also note that victims of domestic violence with existing psychological injury or individuals who may have experienced trauma at the hands of authorities in their country of origin are very unlikely to meet the objective threshold of normal fortitude for psychiatric injury, even though later defective administration may clearly result in a further specific psychiatric injury.

The threshold for economic loss is also very high. The onus is on the applicant both to establish that there has been a lost opportunity and to quantify the amount lost. When it is a struggle for many clients simply to navigate the day-to-day procedures of government departments, it will be almost impossible to understand the mechanics of what constitutes loss under a CDDA claim. We submit that, as the authority to award compensation comes from the broad executive power under section 61 of the Constitution, there is opportunity for the government to consider alternative definitions of loss.

The final issue we will address is the review of decisions. In many instances, including in our client's case, there are no internal review mechanisms once the claim has been refused. The main external review option available to claimants is the Commonwealth Ombudsman. Our client availed herself of this option, but ultimately the agencies elected not to take up all of the Ombudsman's recommendations.

Key principles of administrative law include procedural fairness and the independent review of decisions. This should ideally be done by a body with determinative powers. In the absence of an option for review by forums such as the Administrative Appeals Tribunal or the federal courts, we support the recommendation made by the Ombudsman for the establishment of an independent interagency review panel. While this proposed model would allow agencies to retain discretion about whether to act on a recommendation, it introduces independent review and would hopefully lead to greater interagency cooperation and consistency.

In conclusion, discretionary compensation schemes must become more accessible, including offering greater assistance for individual claimants; communications with claimants and between agencies must improve; and a legalistic approach is to be avoided.

CHAIR—Thanks very much for that. Ms MacDonald, did you wish to make any comments?

Ms MacDonald—No, I do not have anything to add at this time.

CHAIR—In terms of the Ombudsman's recommendation for an independent interagency review panel: he did indicate earlier today that that has been established and is now operating. They indicated they have had a few meetings, so we are obviously pleased with that progress and I am sure you are too. Have a look at the *Hansard* and please feel free to reflect on that in any way you so wish.

Can I just go to this issue of the review of the decision. You mentioned an administrative review and then an appeal to the Federal Court. You refer to the Administrative Decisions (Judicial Review) Act and you say in your submission that as 'CDDA decisions are not made under an enactment, decisions are not amenable to judicial review under' that act. You go on to say it is 'possibly reviewable by the Federal Court under section 39B of the Judiciary Act' but you note that it would be costly and that it takes time and resources to do that. What would be your preferred way to have the decision under the CDDA act reviewed? What would be your preferred option?

Ms Jones—Ideally there would be a range of options. At this stage, based on the experience of our client, I think that it would go from being basically a refusal of the claim, and extensive investigation of the matter by the Ombudsman, to basically nothing. The option to have an interagency review panel is great, if there were options for potentially taking it to a court. Our view is that our clients most likely would not be accessing that option anyway. In theory it might be a really useful option to be able to take it through a litigation process and have a determination made in a completely independent forum, but I think it would be prohibitive and I also think that it might then undermine what I see as the great flexibility that is inherent in having this sort of scheme based on a moral obligation to recognise people who have been disadvantaged by government action or inaction. It is confusing, but it would be ideal to have a range of options, at least starting with the interagency review. I think we will see how that goes. It is a great step for us to know that we can potentially tell clients that they can go there.

CHAIR—Thanks very much. Do you want to add anything, Ms MacDonald?

Ms MacDonald—Just that I think that it is great that the interagency review is underway. Obviously we need to have a look at that and see the details of that before we can provide more comment on how that would meet the needs of the clients.

CHAIR—Sure. There were observations on a couple of parts this morning from the Ombudsman, but it is on the *Hansard*. Feel free to reflect on that.

Ms Jones—Has it actually commenced operations, or was he just saying that they have established it?

CHAIR—The way that I understood and reflected on his evidence this morning is that it has been established and they have had a few meetings. I think he mentioned 'meetings'. So they have got together and they are talking amongst each other. I do not know any more than what he has given in evidence to the committee today.

Senator PARRY—Can I just get a handle on the quantum of issues like this that you have raised? Your case study in your submission is one. How many of these would you deal with along those lines per annum or per month?

Ms Jones—As I noted in the beginning, it is not our speciality area. It is something where we might actually identify that there is a potential claim for clients and let them know that they have the opportunity to follow that up with a particular agency that they are dealing with. In some instance we will actually go to the website or contact that particular agency to find out if they have a relatively transparent process that the client could take on themselves to follow through.

We are currently dealing with a lot of the Aboriginal Trust Fund repayment scheme matters. We have quite a number of those. We are continuing with descendant claims at the moment. I note that this inquiry was not specifically directed to look into that, so we have not addressed that in our submission. In terms of act of grace payments, we have advised a number of clients about the availability of that as a remedy, but we are not specifically acting for clients.

The particular client in the case that we have followed through with is somebody that we were actually assisting in multiple jurisdictions for multiple legal problems. We adopt a holistic approach with clients, and we felt that it was appropriate that we retained some involvement with this particular client. She initiated the claim herself and then we came on board at a later date to see if we could assist her to progress it.

Senator PARRY—Do those that you advise to maybe self-help and try to engage with the agencies direct, come back and give you feedback? Do you know what percentage go through without any hassle?

Ms Jones—Not so much. Where possible, as community legal centres, we try to do warm referrals to other agencies that might be appropriate. For example, if it is related to social security, we would refer to Welfare Rights, who have appeared before you today, because we know that they have a specialty in dealing with matters that are linked to social security or Centrelink. Similarly, if issues come up with, for example, the Child Support Agency, we might actually talk to the Child Support Team at Legal Aid about what they might recommend to do. So a lot of it for us is just advocacy—to connect the client with appropriate remedies. Sometimes they might feed back, but generally probably not. We are a busy service and we—

Senator PARRY—Life is too busy to stop and go back to the ones that you are not dealing with.

Ms Jones—Yes.

Senator PARRY—Do you collaborate at all on the issues in general and get a feel for whether there is a predominance in one particular area—in particular the case that you have highlighted here today? Do you get a feel for that at all?

Ms Jones—No. I would probably say that that is outside the scope of what we are doing.

Ms MacDonald—Since this sort of compensation scheme is not our bread and butter, as Carolyn, mentioned, we do not so much on this one but we have on other schemes, where we are involved a lot more in talking with other organisations and also across other policy and legal areas. We are networking with a lot of other community legal centres and similar organisations.

Senator CROSSIN—Thanks very much for your submission and evidence today. I want to ask you about judicial review. Decisions made under the CDDA are not entitled to any review. If a review process was set up, how do you see that operating—by the AAT or by this new interagency committee?

Ms Jones—I do not think we have properly turned our mind to that. It is a bit of a wish list for us that there be other options. We would probably defer to expertise of other people who deal more typically with what that model might look like. As I said, we are quite excited about the idea that there is an independent interagency review panel. That is definitely a start. We were not expecting that to happen quite so quickly. We have had a lot of liaison with the Ombudsman in relation to this particular client, and have been advocating quite strongly for that. I am sorry, but I suppose we cannot add any further to that.

Senator CROSSIN—All you have said here in your submission is simply that decisions are not amenable to judicial review under the JDJR act, but you have not turned your mind as to whether they should be reviewable by any other means?

Ms Jones—I suppose we have turned our mind in relation to this particular client. We were looking very strongly into options for her, and that is where we have actually had to have a bit of a rapid introduction to this area of law, which we did not know much about prior to that.

In her particular case, absolutely we would have liked that because we were dealing with two government agencies that were more or less blaming each other. It would have been great to have somebody who could come in and make a decision. But in this particular instance we would have had to rely on pro bono assistance to do it. It is not something that we would be in a position to do. I think we would have also sought pro bono advice from counsel about the best options to take that forward. I do not feel that there is anything else we can add at this point.

Senator SIEWERT—I want to pick up on the issue that you mentioned about visibility of the various schemes et cetera. We raised that on Friday with the agency, and the agency said that they had started addressing that issue, which was raised by the ombudsman. I wonder if you have had a chance to look at what the department has done in implementing the recommendations around improving visibility and knowledge of the schemes in light of the comments that you have just articulated? Have there been some improvements that you have noticed?

Ms Jones—Can I clarify which department?

Senator SIEWERT—There was FaHCSIA and finance. We had both of them providing evidence on Friday.

Ms Jones—Did the department of finance indicate that they have put mechanisms in place holistically for visibility and transparency, or was it in relation to specific agencies?

Senator SIEWERT—I understood their comments to be more in relation to visibility. I wonder if you have had a chance to see if there has been any improvement?

Ms Jones—Not that I have noticed. I have recently looked at particular websites to see how easy it is to actually find information or forms in relation to making a claim for compensation. For example, I looked at the Taxation Office form in the last couple of days. It is easy enough to find, but I certainly think that there is still a lot to be done in making those forms accessible to clients. They tend to ask questions in isolation and in some instances you are lucky enough to be referred to the finance circular—there may be a link on there. But it is all very dependent on having access to the internet, being literate and being able to get your head around the finance circular, which is quite a lengthy and complex document. So I must say that I have not seen anything that would make me think that there is greater visibility. Certainly, there is nothing that has come through our networks to advise us that that has happened. We would keep an eye out for updates on when particular departments take initiatives to make their services more accessible.

Senator SIEWERT—Do you think there would be a role for a body where somebody could go to find out general information or more detail? As you have said, it is complex, there are a number of schemes and they do not necessarily refer on to another scheme or one of the other provisions if you do not succeed through one. Is there a role for an advocacy service, or somebody to be supported and funded to provide that sort of information and to give that advice?

Ms Jones—Possibly. For example, using the Taxation Office again, I am aware that they have a telephone service that is connected. If you go to their website and you look up their compensation payment mechanism, on the form they have a number you can call specifically to talk to someone in-house about any questions you have about that process. I think that if there were an alternative where you were able to call a service that was connected to all agencies that come under that particular finance circular it would be much more user friendly—absolutely.

Also it is quite useful to have phone numbers like that, which we can promote to communities and clients rather than a whole heap of different numbers or services for individual agencies. It is quite good when there is one central hotline and clients get to know that it exists. It would be much easier to do work around advertising the telephone interpreter service in relation to that line or to any other access number such as the National Relay Service. A big thing for us is having to constantly promote that these services need to be made accessible to all members of the community or else the system itself is, in effect, defective administration and we are going round in circles. So I think anything that would be a move towards coordinating a response would be great.

Senator SIEWERT—I would like to ask you a couple questions about stolen wages. As I do not know whether that is appropriate, you can tell me whether it is or not. In your submission and oral evidence today, you commented briefly on the work that you have been doing on stolen wages in New South Wales. What are some of the issues which you have to do deal with in relation to stolen wages? I am asking this in terms of how we would look at a scheme that could better meet people's needs if there were some systemic issues that you needed to deal with through the current process in New South Wales.

Ms Jones—I will make the comment right at the start that we have a team of solicitors in our Indigenous women's program that are more directly responsible for this area. However, I can make a couple of specific comments, because we have recently had some staff losses which have resulted in all of us having to have a crash course in stolen wages cases. Certainly from the brief

introduction I have had, a key thing is the collection of evidence and having to wait for quite a long time for the Department of Aboriginal Affairs to get records to you in order for you to back up your claims and then having to spend quite a lot of time going through that material in trying to find even the smallest of leads that might point you in the direction of someone else who could potentially be a witness. I know the time frames have been really difficult and we are aware that the descendant claim time frame is to conclude at the end of this year. This is creating huge stress, because for most of our descendant claim matters we have not yet had a response from government on the initial application to give us a sense of whether or not it has been accepted or further evidence is required. I suppose that is probably the main thing.

Our experience is that we regularly work with disadvantaged women and particularly with Aboriginal women who are in rural and regional areas. A big issue for us is just getting to meet with the clients to take instructions and to do statutory declarations in a way that is respectful and appropriate. So there is always a big issue around access. I think they are probably the things that I feel comfortable in saying. We can take on notice further information that you would like on that.

Senator SIEWERT—If you could take that on notice it would be very much appreciated.

Ms Jones—Yes, no problem.

CHAIR—I thank the witnesses today. I now declare this part of our meeting of the Senate Legal and Constitutional Affairs References Committee adjourned. I thank everybody for participating today, and we will back together again tomorrow in Melbourne.

Committee adjourned at 4.13 pm