Submission to the Royal Commission into Institutional Responses to Child Sex Abuse

Response to Royal Commission Consultation Paper: Redress and Civil Litigation, issued January 2015

From David Hill, endorsed by the Old Fairbridgians Association

March 2015

This submission makes a number of points in relation to the Commission's consultation paper Redress and Civil Litigation.

The Old Fairbridgians Association is an organisation representing the former children of the Fairbridge Farm School in Molong, New South Wales.

I am an interested individual and also the representative and advocate for a number of former child migrants who were the victims of sexual abuse while at the Fairbridge Farm School at Molong that operated from 1938 to 1974. I was at the Farm School between the age of twelve and fifteen years of age and before that spent time in children's institutions in England, including Barnardos Home in Barkingside, Essex. However, I am not making a submission or making any claim on my own behalf but as a public advocate of the former residents. I am also a member of the executive of the Old Fairbridgians Association. In 2007 I wrote a book about Fairbridge called *The Forgotten Children* and in 2010 participated in the production of a TV documentary titled *The Long Way Home*, which was shown on ABC TV. The book and the documentary told the story of some of the children's experiences.

In April 2014 I made a submission in relation to Issues Paper No. 5 ('Civil Litigation') and No. 6 ('Redress Schemes').

1. <u>The problem of civil litigation.</u>

I would like to reiterate the submission made in response to the Commission's Issues Paper No. 5 ('Civil Litigation') and No 6 ('Redress Schemes') that: the civil litigation process has failed to produce a resolution of the claims of abuse within a reasonable time and at a reasonable cost.

In 2007 a number of former Fairbridge children notified the Fairbridge Foundation of claims they wished to make for abuse they had suffered at the school. After attempts to negotiate the matter failed, the claimants brought a class action against the Fairbridge Foundation, the Federal Government and New South Wales State Government in 2009.

The civil litigation has already been before the New South Wales Supreme Court for almost 6 years. It has been listed for directions, the hearing various procedural disputes, and other matters on sixteen occasions. Although the matter has a hearing date starting in August 2015, that is just for the claims of the two representatives of the class. I am advised that to finalise all of the claims could take another five years, or even longer, depending on whether issues are

appealed during the process. Ten or more years to determine claims of sexual abuse of children is, by any reasonable measure, totally unacceptable

At the time I made the submission last year I was advised five of the original claimants had died. I am now advised another three have died. Most of the surviving claimants are in their 60's, 70's and 80's and many are in poor health.

2. Redress scheme - administration

There is an obvious need for a redress scheme.

Of all the options canvassed by the Commission I believe there should be a single national scheme administered by the Australian Government. Institutions would contribute to the funding of the scheme in accordance with their responsibility to individual survivors and in addition would meet their relative proportion of the costs of the scheme's administration.

It should also be noted that the Federal Government was directly involved with some of the Australian children's institutions. In the case of Fairbridge Farm School, the Federal Minister for Immigration became the guardian of the children who came to Australia as child migrants – and remained the guardian until the child reached 21 years of age. Whether the scheme is a national one or a series of state-based schemes, the Federal Government will need to be involved given its responsibility to children at Fairbridge, and to other child migrants.

3. Redress scheme - and victims who have already pursued civil litigation

The Commission notes (p163): 'there has been general support for the principle that those who have already received monetary payments should remain eligible to apply under a new redress scheme, provided that any previous monetary payments are taken into account.'

This is a fair suggestion. However, the amount of 'top up' for those who have received payment as a result of civil litigation should be applied to the 'net' amount after legal costs. The myriad procedural points that have been pursued by the defendants to the Fairbridge litigation, and the technical defences they still pursue, have inevitably blown out (and will further do so in future) the legal costs. It would be very unfair for claimants to be punished twice for this, by having to pay those costs, and then also having that payment of costs reduce or eliminate any top-up payment they might otherwise have received from a redress scheme.

4. Redress scheme – available funding

In Justice McClellan's statement that accompanied the Consultation Paper it is stated 'we understand that this issue emerges in an economic climate where governments must be particularly careful in committing public monies to areas not presently funded.'

I do not believe that government fiscal considerations should be the cause of survivors receiving less than they would otherwise be entitled.

5. Redress scheme – capping payments

In Justice McClellan's statement regarding the Commission's consultation paper it is stated: 'It is important to appreciate that the possible cost of a scheme is not significantly dependent on the cap but rather on the spread of amounts within the cap and the resulting average payment which may be appropriate for individual survivors.'

Accordingly, I would suggest there should be no absolute 'cap' and that there be no limit on the payment made in more extreme cases of abuse.

6. Direct Personal response.

This is very important. For many who were the victims of abuse as children, an apology and an acknowledgement from the perpetrator, or the offending institution, is more important than compensation.

7. Limitations.

The Commission notes (p198) that….'given what we know about the average length of time that victims of child sexual abuse take to disclose their abuse, standard limitation periods are fairly clearly inadequate for survivors.'

As part of the research for my book, I took 'oral histories' from dozens of former Fairbridge children. When I was interviewing them, a number told me they had not previously told anyone of the abuse they experienced even though it occurred many decades before. Two of the women were in their mid-seventies and had been first abused more than sixty years earlier. When asked why it had taken so long, many simply said they 'couldn't do it' before.

Also, a number of others I interviewed indicated they had been abused but did not want to talk about it. I believe they just aren't ready yet – and may take many more years before they are able.

In these circumstances, in cases of alleged child abuse the limitations period should be removed altogether. I support Victoria's approach to this issue, which is described in the Consultation Paper.

8. Model Litigation policy

The Commission notes (p 228) 'a general common law obligation on governments to act as 'model litigants'' and that (p 225) 'Australian courts have long recognised that governments are expected to act as model litigants.' The Commission also notes (p228) that on 3 November

2014, the New South Wales Government announced that it would ‘introduce 18 Guiding Principles to guide how its agencies respond to civil claims for child sexual abuse.’ The principles are said to ‘promote cultural change across NSW Government agencies’.

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9. Identifying the proper defendant.

The Commission has recognized that some survivors have experienced (p 34) ‘difficulties in finding a proper defendant to sue’ and that discussion of these difficulties ‘has focused on the absence of an incorporated body, particularly for some faith-based institutions.’

The Commissions should be aware that this practice is not limited to religious institutions. In the current case in the New South Wales Supreme Court, the Fairbridge Foundation says it ‘was the trustee of a charitable trust’ and it had ‘no control in relation to the care, supervision, welfare and education of the children at the Fairbridge Farm School.’ It has argued that under its constitution and other documents, its board was a separate body to a ‘board of governors’ who Fairbridge asserts was in control of the school. Fairbridge also points to the principal of the school for time to time as being the proper defendant, as well as a separate Fairbridge Society in London.

David Hill

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