

To solicitor@childabuseroyalcommission.gov.au

Royal Commission on Institutional Responses to Child Sexual Abuse

A response to Issues Paper No. 6 Redress Schemes

Frank Golding

Monday 19 May 2014

A. PREAMBLE

1. When I was an inmate of the [REDACTED] from the age of 4 to 15 from January 1943 to April 1953, I witnessed a number of rapes, sexual assaults and other forms of sexual exploitation against children. These involved staff abusing children and older children abusing younger children.

2. Since the mid-1990s I have been heavily involved in advocacy and support groups at state and national levels. I was founding secretary of the Victorian organisation ForWards (aka Innovate and LOSS) and with Care Leavers Australia Network (CLAN) I have been at various times Committee Member, Vice-President, newsletter Editor, researcher and compiler of surveys and submissions. I have written extensively on a range of matters affecting Care Leavers (or Forgotten Australians) and over the years I have encouraged an increasing number of Care Leavers to be engaged in telling their stories in public forums. I have acquired a deep understanding of Care Leaver needs. This submission is focussed on abuse in children's Homes and foster care and, although I am certain there are common experiences, I do not claim to have any specialised knowledge of people who were abused in other institutional settings.

3. This is a personal submission and does not claim to represent the views of any organisation with which I am associated. I am confident that my personal experiences at the [REDACTED] were to be found in many other institutions around Australia.

B. THE ENDURING TRAGEDY OF SEXUAL ABUSE IN INSTITUTIONAL SETTINGS

4. There have been attempts to frame sexual (and other forms of abuse) as bound to an historical context. With the demise of large congregate institutions, the argument runs, sexual abuse is greatly diminished and is now an historical issue to be put behind us.

5. In its guarded submission to the Senate's original *Forgotten Australians* Inquiry (2003-04), the then Victorian government shamefully muddled criminal acts against children with a proposition that it was all a matter of the circumstances of times past.

In the past, some children were abused and neglected while in care, and a larger number of children were subjected to standards of care which would not be considered adequate by today's standards. However, it is also important to recognise that the people who cared for children in the past, either in children's homes or in their own homes, generally did so as well as they could in the circumstances of the times, and that auspice organisations for children's homes and foster care programs generally sought to provide the type of care which they believed to be best.¹

6. On the Victorian government's account, the failure to exercise supervision where it was so desperately needed was based on invalid assumptions about children in out-of-home 'care': (a) that children would not be abused in foster care and (b) that children in institutions who had parents required no further protection.

The system, until the 1950s, was based on the flawed assumption that state wards would be placed in foster care and that charitable children's homes would only accommodate children placed voluntarily by their parents. As a result, there was no Departmental supervision of these institutions...²

7. In 2009 the Senate Committee revisited its *Forgotten Australians* Report (of 2004) to assess progress on the implementation of its 39 recommendations. The Victorian government – alone among the state governments – declined the invitation to make a submission.

8. Yet, there is alarming evidence that head-in-the-sand complacency is misguided because the sins 'of the past' continue. In 2010 the Victorian Ombudsman reported instances of children in 'care' today having:

- *been physically and sexually assaulted by foster and kinship carers*
- *had limbs broken or been knocked unconscious by residential carers*
- *been physically assaulted or raped by other children*
- *been placed with adult 'friends' who have then engaged them in sexual acts*
- *engaged in prostitution while in care*
- *reported their carers selling drugs to other children.³*

9. Furthermore, the Ombudsman identified the sexual exploitation of young people in the out of home care system as a significant issue "*with incident reports identifying a group of children in out of home care who are involved in prostitution and sexual exploitation*".⁴

¹ Submission by the Government of Victoria to the Senate Committee Inquiry into Children in Institutional Care No. 173, July 2003.

² Ibid.

³ Ombudsman Victoria, *Own motion investigation into Child Protection – out of home care*, May 2010, paras. 19-20.

10. There is another important sense in which the use of the term 'historical abuse' is highly dubious. For the survivors, experiences of abuse are not historical at all. Childhood abuse and neglect continue to scar the lives of scores of thousands of people who grew up in orphanages, children's Homes and other forms of institutional 'care'. Their experiences continue to have very real, present, enduring impacts. It is very little consolation to hear that things are managed better nowadays and that they should 'move on'. Survivors will never 'get over it' until they see justice done.

11. Criminal acts against children were wrong then; they are wrong now; they will be wrong in the future. There can be no amnesty or moratorium on crimes against children placed in the care of the State or churches and charities, and it is no excuse that (some of) it happened a long time ago.

12. Rape and sexual assault runs as a continuous dark thread through Australia's settlement history. In both Botany Bay and Norfolk Island where children were especially vulnerable, there were disturbing reports of child rape and sexual abuse.⁵ In 1796 Henry Wright was the first man to be convicted of child rape. The victim was an eight-year-old girl. The perpetrator's death sentence was commuted to a life sentence on Norfolk Island. Eighteen months later, Wright was free to strike again; this time his victim was a ten-year-old girl. The elements of this and similar stories - vulnerable girls afraid to tell anyone for fear of being beaten, legal defence alleging girls had been provocative, lenient sentences and irresponsible transfer of the perpetrator to fresh opportunity - would resonate even now with the Royal Commission in 2014.

13. The vulnerability of children, especially girls, was one of the chief motivations behind Governor King's establishment of the Female Orphan School on Norfolk Island in 1795 and Sydney's first orphanage (again for girls) in 1801. I understand that the Royal Commission has commissioned a study of previous inquiries (including Royal Commissions). From my own reading of Australian child welfare history, I expect that among the scores of earlier reports there will be ample evidence that children have been sexually assaulted in institutions for generation after generation. Questions arise: Why when authorities have been constantly alerted to this appalling situation have they done so little to prevent criminal behaviour into the future? Will this Royal Commission change anything?

C. IN ANY REDRESS SCHEME ABUSE MUST NOT BE NARROWLY DEFINED

⁴ Ibid.

⁵ Robert Holden, *Orphans of History: The forgotten children of the First Fleet*, (Melbourne, Text Publishing, 2000) p. 154.

14. There are aspects of sexual abuse that are often overlooked in the narratives of individual criminal acts against children. No fruitful discussion of redress can take place without consideration of these elements.

15. Sexual abuse is usually regarded as a phenomenon that takes place in secret or in a furtive manner with a single child victim abused by an adult perpetrator. While this is generally true, it was not unusual for sexual abuse in institutions to be conducted in a blatantly obvious manner such that children who were not primary victims were either passive witnesses or engaged complicitly in lewd or indecent incidents.

16. Like many other former inmates of children's institutions, I have strong memories of seeing and hearing children being abused by staff members and by older boys. In most cases I do not recall the dates and names of perpetrators and victims - memory of traumatic events does not always work like that. But for 50 years I have carried a clear image of being a child witness to recurrent sexual abuse throughout my years as an inmate.

17. With the residents numbering some 200 at any one time and staff on duty numbering just one or two at any one time, the [REDACTED], like many large institutions of its kind, was a violent place throughout the time I was an inmate. Aggression was commonplace among the staff and the children. Routinely, adults exercised virtually absolute power with no day-to-day accountability. Moreover, they delegated some of their power to older boys who, in some respects, were more vicious than their mentors. When the supervision of younger children was left to the older boys, events often became chaotic and sadistic. Violence and intimidation were elements of the environment that enabled sexual abuse to take place. Repeated violence and the threat of it created a climate of continual fear, humiliation and intimidation in which vulnerable and demoralised children who were starved of affection could be coerced into sexual behaviour, or made to comply with demands they might otherwise reject or resist.

18. While most inmates were not primary victims of sexual abuse, many of us lived in a state of constant fear that we would be the next victim, resulting in a constant state of confusion alternating between relief, survivor guilt and heightened trepidation. These childhood fears are the most tenacious escorts through life's journey.

19. The culture of violence and intimidation that enabled abuse to take place was also part of its perpetuation and suppression. Almost no cases of sexual abuse were ever reported at the [REDACTED]. In general, children were intimidated to such an extent that they were afraid to report abuse. This was certainly the case when older boys were the perpetrators: a code of silence was enforced through fear of retaliation. Abuse by older boys came to be accepted as part of the way of life of the institution. It took place in the large dormitories when there was minimal or no staff supervision.

20. I can recall only one occasion when a child [REDACTED] [REDACTED] reported sexual abuse by a staff member – and on that occasion the staff member was removed. I do not have any particulars of the action taken against the staff member because we were given no information at the time. In any event, it

is my belief that no documentation would exist in that case. In 2009, I made the following confidential statement in support of [REDACTED] legal claim against the State of Victoria and Ballarat Child and Family Services:

A man named [...] who was employed at the orphanage was known to the boys as a paedophile. I know that on one occasion he tried to secure [...] services not only as a victim but as an intermediary in the sexual abuse of another boy. [I will supply the names if so ordered by the Commission.]

21. From day one as an infant right through until I left the [REDACTED] at age 15, there was a complete lack of privacy. If this was not explicitly designed to cause children to feel embarrassed and humiliated then it certainly had that effect. We were ordered to dress and undress in front of each other, the doors on toilets were removed and showering was communal and poorly supervised. The best that can be said of the situation was that boys and girls had different dormitories and ablution blocks; but it was not uncommon for female workers to supervise adolescent boys when they were changing clothes or using the bathroom.

22. Punishments were humiliating and degrading. Children who wet their bed were punished in demeaning ways, such as having to stand naked with their wet sheets over their head.

23. The following extract from my memoir written in 2005 indicates some aspects that are often overlooked in discussions about child sexual abuse.

"Some of the male staff were attracted to the job because it brought them into contact with lots of naive young boys. 'Mr Pat' once ordered Bob to take down another boy's pants and belt his bare bum with the strap while he, Pat, looked on. If Bob refused he would get a thrashing himself. If he agreed, he would get the keys to Pat's room where under the pillow there would be some sweets. Bob took Pat's keys, the strap and the story to Superintendent Morton and Mr Pat moved out soon after. That was a rare victory: many boys were too afraid to speak up. They accepted what happened as part of growing up 'in care'. Their parents weren't there to protect them from predators.

"'Harvey Walker' came first as a Scout Master but stayed on as a member of the resident staff. He loved to be the centre of the boys' attention, often having boys in his bedroom, one by one or in a small group. 'Hold the picture of any nude woman up to the light,' he said, 'and you'll be able to see her fanny.' He provided the pictures and we followed his instructions; but, while other boys said they got it, I couldn't see anything and Walker and his boys revelled in my embarrassment.

"Many mornings at the crack of dawn Walker came around the dormitories calling out, 'Wakey, wakey, hands off snakey!' and pulled back the bedclothes to see who had a horn, our name for an erection. Dignity was an unimagined luxury.

"Some boys had a reputation among their peers for being 'bumboys'---we didn't know words to describe them any other way. These boys slept with anyone who wanted them including other boys and staff. Starved of affection, they paid whatever price was necessary to have someone pay attention to them. Others, trapped in power games, were exploited and became exploiters in turn.

"None of us felt entirely safe. Maybe it would happen to me next time. I counted myself lucky at the end of the day I remained a mere spectator of these encounters. Others didn't have my luck. Yet whenever sexual abuse happened, I felt grubby because there seemed no good reason it wasn't me. Others shared this reaction. For days afterwards, a subdued menace hung silent over the playground. It seems selfish to be pleased to have steered clear when others couldn't, but with power so heavily balanced against the inmates, survival was an individual matter, deeply personal, every boy for himself. One day an older boy invited me to his bed at Queenscliff to show me how to kiss girls. We practised for a while and he rewarded me with some Columbines. With plenty of spectators to ensure nothing more developed, I felt safe enough at the time. Besides Keith had a girlfriend; he can't have been 'one of them,' I thought."⁶

D. REDRESS – KEY QUESTIONS (I have not addressed all questions explicitly – and I have added a question which I strongly recommend the Royal Commission should address.)

QUESTION 1: What are the advantages and disadvantages of redress schemes as a means of providing redress or compensation to those who suffer child sexual abuse in institutional contexts, particularly in comparison to claims for damages made in civil litigation systems?

24. Despite the well-known difficulties in pursuing claims under civil law, there are some advantages in taking personal injury claims under civil law.

24.1 The amount awarded to claimants is often markedly higher than in most redress schemes. Six-figure examples include Trevorrow in SA (Stolen Generation)

⁶ Frank Golding, *An Orphan's Escape: Memories of a lost childhood*, Lothian 2005, pp. 21-22.

and the Cornelia Rau case (forced detention). I know of at least one civil complaint of school bullying that resulted in a payout larger than most redress lump-sums.

24.2 A public record is made available of the judge's articulation of what the award of compensation means and the reasons for the decision.

24.3 Adverse publicity, together with large financial awards, may provide incentives for institutions to change their behaviour for fear of being exposed to future claims.

24.4 In some cases, the defence offers a more generous package at the last minute to avert a determination by the court. This is, of course, a feature that can work both ways – as a catalyst for a more generous settlement than might otherwise have been produced through a redress scheme, but also an impediment to a court determination of the merits of a case. On the other hand, the Melbourne Response has been characterised as little more than an out-of-court settlement mechanism.

25. Redress schemes have the potential to obviate some of the problems known to be associated with taking a claim under civil law.

25.1 Very few civil claims have been successfully completed. They are very difficult and complex cases to run and can be protracted.

25.2 Each case is different in important ways so there is no guarantee that, just because one claim has been successful, the next claim is going to be successful. Class actions are possible, but they are difficult to mount because of the disparate circumstances in members of the groups.

25.3 Seemingly insurmountable systemic difficulties in the court system including:

- time limitations⁷
- the adversarial nature of civil proceedings creates intensified emotional distress for people who are already traumatised
- legal costs take a considerable proportion of settlement payouts
- deciding who to sue is problematical - in some instances the individual perpetrator does not have the funds to support a compensation claim, or has died or is frail
- consequent problems in attributing responsibility in terms of vicarious liability
- many claims are relatively old, witnesses have died, documents have been destroyed or lost⁸

⁷ In its recent response to the *Betrayal of Trust* Report, the Victorian Government has given "in principle support" to recommendations to legislate to remove time limitations in civil proceedings of this type.

⁸ Angela Sdrinis, a specialist in personal injuries claims writes: "*Further, the lack of records and documented information contributes to the difficulties that are faced in litigating claims for damages for people abused in care. This is because it is obviously harder to prove allegations where no*

- o there are often considerable delays in getting the case to court
- o the capacity of the legal system to understand the types of harm that we are talking about (e.g. separation from siblings and parents is not a crime but it can wreak havoc on a person's life).

26. It is gratifying to note that, as part of a two-part reform package proposed by the Catholic Church's Truth Justice and Healing Council (TJHC), is a proposal to ensure that

*every Bishop, every diocese and every religious order makes available a legal entity, covered by insurance and wealth that survivors of child sex abuse can sue. Our hope is survivors will no longer feel intimidated by the Church or denied a fair hearing because of legal technical issues.*⁹

27. The second - and arguably more important - element of the TJHC reform package is a national compensation scheme. "It is quite clear", the TJHC writes, "that the only way forward is a sound and generous national compensation scheme, funded by the Catholic Church and other institutions for survivors of child sex abuse".¹⁰ Given the flaws and gaps in current and past redress schemes, there is strong support for the general concept of an independent authority investigating and determining compensation paid by the Churches or any other institution responsible for the abuse. The TJHC is right to believe that this would be "the most compassionate way forward and in the best long-term interest of survivors, many of whom have faced serious obstacles in having to litigate their claim in court".¹¹

28. The CEO of TJHC has written to all Attorneys-General of the Commonwealth, State and Territory governments asking them to consider a national compensation scheme for the survivors of child sex abuse. It would be important for the Royal Commission to ascertain the responses of the Attorneys - and to canvass the views of other major churches and relevant Community Service Organisations.

29. The potential advantages of redress schemes include:

29.1 A more user-friendly means of obviating many of the problems identified above in civil law actions. At their best, redress processes provide less adversarial, cheaper and quicker opportunities for individuals and groups to seek to put right a grave wrong away from the courts.

documentary evidence exists but also because where documentary evidence does exist, claimants believe it is either false or does not tell the whole truth, proving the contrary can be virtually impossible to do so many years after the events. In other words, the written word becomes the 'truth' and carries more weight in a court of law than the claimant's own evidence." "Getting Records from the Gatekeeper", *Information Quarterly*, May 2012, page 39.

⁹ Francis Sullivan, 'The Need for a National Compensation Scheme', 7 May 2014.

¹⁰ *ibid.*

¹¹ *ibid.*

29.2 A less stringent evidential basis which is especially appropriate in circumstances where critical documentation is non-existent either because events were never recorded or documents have been “lost”, are missing or destroyed.

29.3 Many more claimants are likely to be compensated under a redress scheme than through the courts. Therefore, many more victims will be provided with tangible recognition of the serious hurt and injury caused. In the words of the Irish scheme, redress can “allow many of those victims to pass the remainder of their years with a degree of physical and mental comfort which would otherwise not be readily obtainable.”

30. Whatever the advantages of redress schemes, the actuality across Australia is an *ad hoc* patchwork of inequitable and inconsistent arrangements designed in-house in conjunction with lawyers and insurers without input from potential beneficiaries. For many victims there are no redress schemes at all, or they have been deemed ineligible under arbitrary and apparently capricious rules. Other victims have had outcomes foisted upon them, e.g. in lieu of financial compensation, services have been made available that they did not seek and do not want. In some cases tenders for the provision of ‘redress’ services have been awarded to agencies associated with abusive practices and Care Leavers will not accept services from them. A summary review of State redress schemes is found in the Senate report, *Lost Innocents and Forgotten Australians Revisited* (2009).¹²

31. State-based schemes have been the subject of trenchant criticism. The State government schemes - which operated in Queensland, Tasmania and Western Australia for fixed periods of time and are now closed - were marked by inconsistencies and limitations in the criteria for eligibility, the processes for application, and the amounts of compensation available and paid. The *ad hoc* diversion of victims of sexual abuse into the Crimes Compensation Scheme in South Australia further complicated the situation. Victoria and NSW remained, and remain, aloof.

32. In respect of Victoria, the willingness of successive governments to provide redress seems to be at its strongest when their political party is in Opposition and weakest when it moves into Government. On the occasion of the Victorian apology to Forgotten Australians in 2006, the Hon. Peter Ryan (Leader of the Nationals, now Deputy Premier) stated:

However, I must say we think the job is only part done [with an apology]. We think the issue of compensation to these people must also be explored. The fact is that in other nations across the world — in Ireland and Canada in particular — steps have been taken within those jurisdictions to have appropriate regard to the issue of compensation. In the state of Tasmania ex gratia payments have been extended under a scheme which has been developed in that state. The statute law in South Australia has been amended to change the statute of limitations to enable claims of

¹² Government schemes on pages 35-56 and schemes run by religious bodies on pages 57-62.

*this nature to be investigated. We believe, therefore, that if we are going to deliver dignity and integrity to the people who have been subjected to this appalling treatment, the state of Victoria is also obliged to investigate a scheme or schemes which would deliver that justice to those people.*¹³

33. Eight years on, Victorian Care Leavers are no closer to a government-initiated or supported scheme. In its formal response on 8 May 2014 to *Betrayal of Trust: the report of the Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations*, the Victorian Government is still finding new reasons why it will not commit to a redress scheme in Victoria. Noting that “designing a fair redress scheme raises significant and difficult questions”, its position now is that it supports redress “in principle” and

*will continue to explore options for implementing the Committee’s recommendations and will follow closely the work of the Royal Commission in its consideration of how best to provide access and redress at national level.*¹⁴

34. It should be noted that the Victorian Parliamentary Committee made no recommendations about the principles that should underpin redress schemes for survivors of abuse in State-run institutions. Nor did it canvass the joint liability issues that stem from State funding and supervisory responsibilities for State wards in faith-based institutions and those run by other non-Government organisations. Instead it recommended a review of the functions of the Victims of Crime Assistance Tribunal in respect of claims against churches and charities. It is fair to suggest that the Royal Commission will get no guidance from the Victorian government. The Victorian Parliamentary Committee did not have a mandate to examine the responses of State-run agencies – a most disappointing omission.

35. It is important to note the wide disparities in expenditure on redress across the States and to compare financial outlays on the alternative forms of compensation in Victoria and NSW. In contrast to the funds made available for redress schemes in Tasmania, Queensland and WA, the Victorian government has paid a pittance on a case-by-case basis. And while portraying services to Forgotten Australians through Berry Street/Open Place as its major form of redress, the sums of money allocated are minuscule when compared with the sums made available in Tasmania, Queensland and WA. Many Forgotten Australians interpret this situation as cynical window-dressing to minimise costs and evade responsibility.

36. In respect of redress schemes operated by the churches, the Senate’s *Forgotten Australians* Report in 2004 found major problems in the schemes run by the Catholic, Anglican, and Uniting churches and the Salvation Army. The report made strong recommendations for reform to the churches and charities in this regard; but in 2009 when the Senate Committee reviewed progress, despite invitations to the major churches, not one single church was willing to offer a submission and none gave evidence at the hearings of that Senate Committee in 2009. Relying then on evidence of survivors and other

¹³ Hansard, Wednesday, 9 August 2006 ASSEMBLY 2673.

¹⁴ Page 2.

commentators, the Committee found that the problems that were identified in the church-based redress schemes in 2004 continued. The Victorian Parliamentary Inquiry report *Betrayal of Trust* (2013) also received strong evidence of serious problems experienced by claimants within the Catholic Church (Towards Healing and the Melbourne Response), the Salvation Army and the Anglican Diocese of Melbourne.¹⁵

37. While there are many problems associated with current redress schemes, there are many lessons that can be learned from these shortcomings.

QUESTION 2: What features are important for making redress schemes effective for claimants and institutions? What features make redress schemes less effective or more difficult for claimants and institutions?

38. In any redress scheme, principles and procedures should be established that enable persons seeking compensation to find the rules simple to understand and benefits easy to access.

- Counselling, archival and financial assistance and support should be available for dealing with the process and gathering evidence.
- All applicants should have the right to be supported by a person of their choice during any hearing and to be kept informed at all stages of the process.
- All available documentation should be equally available to all parties in any discussion and negotiation of redress outcomes.
- Given that the sexual abuse of children mostly occurs where there are no witnesses and little documentation of abuse incidents, the level of verification or proof required to establish that a claimant has been sexually abused should follow the principle of 'reasonable likelihood'.¹⁶ Institutions should assist in verifying claims for compensation on the basis simply of confirming the person's residence in the institution.
- An independent assessment of at least a sample of redress processes and outcomes should be conducted on a regular basis to provide feedback on quality issues.

39. The features that make existing redress schemes less effective and more difficult for claimants can be summarised as follows:

- Too many survivors of sexual and other forms of abuse have not made claims for a range of reasons: schemes do not exist in their jurisdiction; or they do not know about schemes that do exist; or they lack adequate support or confidence that they will be treated with understanding; or they have heard about others who have experienced overly legalistic treatment; or they have fears about approaching organisations they see as responsible for their abuse.

¹⁵ Pages 102-108, 416-432.

¹⁶ *Forgotten Australians* Report 2004, paras. 2.190-2.208, para. 8.125.

- The veil of secrecy behind which some redress schemes operate creates great suspicion and discontent leaving some claimants to conclude they were not treated fairly but forced to accept an offer under duress. Discussion among Care Leavers is peppered with issues about fairness and inconsistent outcomes.
- The adversarial nature of some redress procedures e.g. one side having access to full documentation and the other side having no access, exacerbates a power imbalance.
- Some managers of redress schemes appear to adopt a take-it-or leave it approach with little real personal engagement through discussion and mediation or respect for informed choice.
- Many schemes fail the basic test of independence in handling claims.
- They fail to take account of the problem of abuse in multiple placements and there is no mechanism for coordination across agencies.
- While not so important as with civil litigation, problems with documentation are too common.
- Redress schemes are not generous. Even when a settlement is made, legal costs and/or demands for reimbursement of costs of counseling services paid under Medicare often leave the claimant with a derisory final amount.

QUESTION 3: What forms of redress should be offered through redress schemes? Should there be group benefits available to, say, all former residents of a residential institution where abuse was widespread? What should be the balance between individual and group redress?

40. *Ex gratia* financial payments are central for most claimants because monetary compensation maximises victims' rights and opportunities to make their own decisions about the priorities in their lives that lump-sum financial settlements will allow. I have heard varying anecdotes from people who have gained such payments: one mature-aged adult bought a new bed and a new mattress and this was an absolute first for her; another bought a piano and had music lessons because she had never had the chance to have music in her childhood; a third put the money towards her daughter's university education saying that she wanted her daughter to have a precious thing that she herself never had; a fourth paid off a large part of his mortgage thus reducing his monthly outlay and other debts; a fifth paid for a new set of dentures and took an extended holiday because he now "looked so good he wanted to show off". For people who grew up in a tightly controlled environment it is liberating to be able to make major decisions without deferring again to someone in authority.

41. However, there are other forms of compensation that are valued by some, including independent counselling, priority access to housing, health and mental health services and further education and training. Taking this option, the form of compensation should not be determined unilaterally but be through a process of genuine negotiation. No one solution will satisfy every claimant, but a concept which has widespread support among older Care

Leavers is the provision of a rapid access card that would facilitate the bearer's access to services provided by government and related agencies in areas of health, mental health, housing and further education and training.

QUESTION 4: What are the advantages and disadvantages of establishing a national redress scheme covering all institutions in relation to child sexual abuse claims? If there was such a scheme, should government institutions (including state and territory institutions) be part of that scheme? How and by whom should such a scheme be funded?

42. The precise nature of a proposed national scheme cannot be spelled out here, but the design of the scheme must take account of the views of all stakeholders, especially Care Leaver advocates and victim support groups.

43. A scheme operating on a national basis should provide consistency, impartiality and fairness. A national scheme would plug the considerable gaps across the nation. It would draw on best practice from existing schemes and avoid the bad practices that have blighted the scene - the reverse side on the coin portrayed in the paragraphs above. If it operates, as it should, fully independently of government, churches and charities, it would have an autonomous statutory panel with the task of making determinations of fair and just levels of redress assessed on agreed published criteria.

44. The redress scheme should be open to claimants raised in all forms of Australian 'care' - wards of state and 'voluntary' inmates, regardless of whether the institutions were run by the State the churches or charities. Sexual abuse occurred in all manner of institutions no matter their auspice. And it occurred in foster situations.

45. Some children were raped in more than one institution. Some were raped or assaulted in all three types of institutions and/or in foster 'care'. I have met some Care leavers who are still so traumatised by their horrific childhood experiences that they can no longer state with any certainty where the crimes against them were committed. In the confused memory of their traumatic childhood, they can no longer pin-point the location of their exploitation. Some face the prospect of making claims through more than one scheme. A unified redress scheme should extend across the full range of children's institutions whether they were State-run, faith-based or under the aegis of charitable or other community agencies, and whether the claimant was in one Home, or more than one.

46. The scheme should be open-ended with no arbitrary closing date. Experience shows that as a result of childhood trauma, many Care Leavers live such dislocated lives that they are not connected with family, community support groups or public or commercial media and do not learn about redress schemes until it is too late. Administrators of schemes need to be mindful that applications will be abundant at the outset but continue to trickle in for many years after a scheme has begun.

47. The States, and the churches and charities that ran orphanages, children's Homes, foster care and other institutions must contribute funds equitably on some basis to be determined on independent advice.¹⁷ Non-complying agencies which fail to contribute to such a scheme should give rise to a review of government contracts and tax-free status. The Commonwealth government, although it did not run children's Homes (except that it was a direct participant in Child Migrant schemes) did provide child endowment funding direct to Homes and could be said to have a duty of care to the institutionalised children of the many servicemen who died or were seriously wounded or otherwise adversely affected by the various wars fought in the name of the nation. The Commonwealth has a moral leadership role in any a national scheme that should be discharged through a central coordinating role and through financial contributions.

QUESTION 7: Should seeking redress or compensation through a redress scheme be optional for claimants? Should claimants retain the ability to pursue civil litigation if they wish?

48. In any democracy, citizens should have the final say in how they wish to proceed with a personal injuries claim. If claimants wish not to seek compensation through a redress scheme they should retain the ability to pursue civil litigation if they wish. The question of "double dipping" is more complex. It would seem reasonable for a court when making a determination to take into account any payments made from a redress scheme for the same matters.

QUESTION 8: How should fairness be determined in redress schemes when some institutions have more assets than others? How should fairness and consistency between survivors be achieved in these circumstances? What should be the position if the institution has ceased to operate and has no clear successor institution?

49. In determining the level of payments to be made to claimants, models from overseas and the best features of schemes in Australia provide two main models – and reasonable arguments can be made for both. Some people prefer to have some sort of acknowledgement of different levels of harm. Others strongly prefer to have a flat-rate *ex gratia* payment.

50. The tiered system comprises a "common experience" payment plus "greater harm" payment such as found in the Indian residential schools in Canada, the Irish model and the Western Australian scheme. For example, at the "common experience" level, if you attended one of the Indian residential schools, you were awarded \$10 000 (Canadian) and then another \$3 000 for each additional year that you were in one of the schools. Authentication was simple – evidence of being an inmate for a confirmed number of years. In addition, if applicants wanted to claim a greater amount of compensation because they

¹⁷ See the *Forgotten Australians* Report (2004) paras. 8.117-8.118, 8.122-8.123.

suffered particular types of harms, including psychological, physical and sexual abuse, they could then choose to go through an independent assessment process. Here, more evidence was needed to support a claim. Survivors could choose to go down the easy path and just have a common experience payment, or they could choose to add to that the individual assessment process for additional payments.

51. A flat-rate model deals with all claims in a similar manner. The advantage of this scheme is that it is simpler to operate and minimises stress for applicants. It better accommodates those whose records have been lost or destroyed and is also preferred by those who continue to find the re-telling the story of their childhood abuse and neglect traumatic. However, this is a value question and there will be plenty of supporters of a tiered system.

52. It is well known that some agencies no longer exist and there is no clear successor agency. This should not be a barrier to a surviving claimant being eligible for compensation. The notion of a sector-wide collective responsibility should be applied analogous to the central principle in the world of insurance where the burden for one is shared by all. Moreover, in most if not all jurisdictions, the State child welfare authority had a duty of care to licence or register children's Homes and to supervise their operations. In most instances, government funding also was provided for non-government agencies and with that came a moral and legal obligation to ensure the well being of children in 'care'.

QUESTION 10: Given that the sexual abuse of children mostly occurs where there are no witnesses, what level of verification or proof should be required under a redress scheme to establish that a claimant has been sexually abused? How should institutions be involved in verifying or contesting claims for compensation?

53. Please refer to my earlier paragraphs on this issue which reference not only the lack of witnesses and the age and status of possible witnesses but also the very great difficulties in producing documentary "proof" and corroboration after many years have passed since the events took place. In all the circumstances, institutions would be well advised not to "play hard ball" in these matters but adopt a helping role in confirming where they can that the applicant was an inmate and that the claims might have reasonable validity.

QUESTION 12: If a claimant has already received some financial compensation for the abuse through one or more existing schemes or other processes, should the financial compensation already received be taken into account in any new scheme?

54. While it could be argued that people who have already received a payment in any previous or existing compensation scheme should not have a "second bite of the cherry", many will have agreed to a settlement under duress or under conditions that are now seen to be not fair and reasonable. Any such person should be entitled to have the

circumstances of their case reviewed by the independent panel, and the amount of compensation increased if that is found on the evidence to be justified.

QUESTION 13: Should a national redress scheme be restricted to claims of institutional sexual abuse or should other forms of abuse be part of the redress scheme?

55. This Royal Commission is mandated to examine institutional responses to child sexual abuse. It would be difficult to argue a case that sexual abuse of children is not the most heinous of all crimes against vulnerable children who were placed in 'care' for protection and were betrayed by the very people whose duty it was to protect them. However, rape and other forms of sexual abuse are not the only kinds of behaviour that caused life-long damaging consequences for children in institutional 'care'. Other forms of cruel and vicious treatment caused life-shattering humiliation, intimidation and degradation the consequences of which endure today. A national redress scheme should be open also to those who were abused in ways other than sexually.

56. The arguments for that position are implicit in Part C above which shows that sexual abuse and the threat of such abuse are closely related and are often also associated with violence, intimidation and other forms of humiliation and degradation; and

57. Strong supporting evidence is also found throughout the *Forgotten Australians* Report (2004) which referred to the "hundreds of graphic and disturbing accounts about the treatment and care experienced by children in out-of-home care". The report describes an overwhelming body of evidence as

*a litany of emotional, physical and sexual abuse, and often criminal physical and sexual assault. Their stories also told of neglect, humiliation and deprivation of food, education and healthcare. Such abuse and assault were widespread across institutions, across States and across the government, religious and other care providers"*¹⁸

58. It makes no sense to restrict a national redress scheme to sexual abuse alone in the face of several broader Senate inquiries and State government reports. A further Royal Commission on "non-sexual abuse" is out of the question. A "sexual abuse" only redress scheme would be out of step with existing redress schemes that have already paid compensation – as they should – for other serious forms of abuse and neglect in Australia and overseas.

E. CONCLUSION

59. My key messages:

¹⁸ The Senate's *Forgotten Australian* report, 2004, page xv.

- A national redress scheme to which all governments, major churches and relevant non-government organisations contribute equitably is among the most important outcomes that this Royal Commission could give rise to.
- Written evidence should not be expected in every case; many cases were not reported at the time, and records have been “lost” or destroyed.
- You do not have to have been raped or sexually assaulted to have been profoundly affected by sexual activity in children’s institutions.
- There is a strong connection between sexual abuse and violence which is often underestimated. While the phenomenon of grooming is increasingly well understood, its counterpart of violence and naked abuse of power is not.
- The same fear, humiliation and intimidation that enabled abuse to take place also served as a mechanism by which information about abuse was suppressed.
- The sexualised environment of children’s Homes contributed to the high incidence of abuse.
- It would be a profound disappointment to many who were abused in institutions if a “sexual abuse” only redress scheme were introduced given that existing redress schemes in Australia and overseas have already paid compensation – as they should - for other serious forms of abuse and neglect.