Three harrowing reports on the lives of children in care, including *Bringing Them Home*, dealing with the Stolen Generations[1], the child migrant report *Lost Innocents* [2] and the institutional abuse report *Forgotten Australians* [3] have outlined in horrifying detail that abuse to which many of these children were subjected.

Each of these reports have included recommendations regarding compensation for the victims. In particular, the recommendations of the report into the Forgotten Australians recommended that the Commonwealth of Australia set up a National Reparation Fund.

Despite these recommendations and despite National Apologies to the Stolen Generations and to the Child Migrants and Forgotten Australians, the Commonwealth Government has failed to implement recommendations regarding compensation nor has it attempted to co-ordinate the States' responses which have been piece meal and varied.

The current review of Government Compensation Payments is welcome but it is important that this review results in some positive action by the Commonwealth other than the National Apologies which to date have been the sole contribution of the Commonwealth with regard to offering redress to the hundreds of thousands of children who were abused in state care in the last century.

INTERNATIONAL SCHEMES

Canada and Ireland are two countries who have set up compensation or redress schemes for children abused in care.

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[1] Human Rights and Equal Opportunity Commission, Bringing Them Home – Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (April 1997), Reconciliation and Social Justice Library <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/prelim.html>.

[2] Senate Community Affairs Reference Committee, Lost Innocents: Righting the Record - Report on Child Migration (30 August 2001), Parliament of Australia, Senate Website. <http://www.aph.gov.au/Senate/committee/clac_ctte/completed_inquiries/1999-02/child_migrat/report/index.htm>.

[3] Senate Community Affairs Committee, Forgotten Australians: A Report on Australians who experienced institutional or out-of-home care as children (30 August 2004), Parliament of Australia, Senate Website. <http://www.aph.gov.au/senate/committee/clac_ctte/completed_inquiries/2004-07/inst_care/report/>.

In 2006, the Canadian Government agreed to pay more than 2 billion Canadian dollars to compensate an estimated 80,000 survivors of indigenous background who were forcibly removed and/or placed in care. Furthermore, the Canadian Government, with the churches who ran many of the residential institutions, agreed to take other steps to address the legacy of the residential schools.

These steps include the establishment of a 'truth and reconciliation commission' which allows claimants to tell their stories and which will provide the basis for a critical review of how such widespread systemic abuse was allowed to occur and to provide lessons so that similar abuses can be avoided.

The Irish scheme is probably the most relevant to Australia, not only because many Australians of Irish background successfully pursued claims but because the Irish system of removing children and placing them in care was very similar to that which occurred in Australia. Also, the level and descriptions of abuse which were documented in Ireland were strikingly similar to the Australian experience. In addition, Ireland has a very similar system of law which means that Irish victims faced largely the same legal barriers as do Australian victims seeking justice.

The Irish scheme provided for "severity of abuse and injury/effect of abuse."[4] The types of abuse, although not exhaustive, included sexual abuse, physical abuse, emotional abuse and neglect.[5] In the Australian context, particularly in relation to the Stolen Generations and Child Migrants, a further category of abuse should be included being "loss of culture and identity."

The "severity of abuse" was then given a weighting (1-25) as was the severity of the injury and effect of abuse. In relation to the latter, weightings of 1-30 were given for medically verified physical and psychological abuse, 1-30 for psychosexual sequelae and 1-15 for loss of opportunity.[6]

[4] January 2002, "Towards Redress and Recovery" Report to the Minister for Education and Science by the Compensation Advisory Committee appointed under s14 of the Irish Residential Institutions Redress Bill 2001.
[5] ibid p 69
[6] ibid p 68

Total scores were then used to provide for a banding which equated to a range of financial compensation payable eg a score of 70 or more (band V) resulted in a payment of between 200,000 to 300,000 euro down to a score of less than 25 (band I) which resulted in payments of up to 50,000 euro.[7] Interestingly, the lowest "band" in Ireland resulted in higher compensation payments than under the highest payment available to any Australian under the various Redress Funds that have been set up here.

The strength of the Irish scheme has been firstly that adequate compensation was made available to victims but it also provided for a more "consistent" and transparent method of assessing compensation as compared to the Australian models.

THE AUSTRALIAN SCHEMES

TASMANIA[8]

The Tasmanian Government under the late Jim Bacon set up the first Government scheme to compensate children abused in care. The Tasmanian Government also subsequently set up the first and only redress fund for members of the Stolen Generation.

Initially the Tasmanian scheme provided for payments of compensation of up to $60,000.00. Despite an initial closing date for claims, the scheme has been extended although there is a current maximum payment of $35,000.00 available to claimants.

Unfortunately, the scheme only applies to those who were abused whilst in the care of the Tasmanian Department of Health and Human Services. Unfortunately, the scheme does not apply to those who were privately placed in Approved Children's Homes or homes certified for the care of children are not eligible.

'Abuse' is defined in the *Children, Young Persons and Their Families Act 1997* and means:
• Sexual abuse; or
• Physical or emotional injury or other abuse, or neglect, to the extent that the injured, abused or neglected person has suffered, or is likely to suffer, physical or psychological harm detrimental to the person's well being;

[7] ibid p 67
[8] http://www.dhhs.tas.gov.au/__data/assets/pdf_file/0017/31670/HCORP9026-05_Abuse_Booklet_P5.pdf

-or the injured, abused or neglected person's physical or psychological development is in jeopardy.

The claim is made in writing by way of an application form with supporting documentation and a meeting is usually held with the Claimant following which a decision is made regarding compensation. Applications are processed by an Assessment Team and generally a member of the team will meet with the applicant.

Further, the assessment team has the power to refer complaints of abuse regarding identifiable perpetrators to the police. This is a vital step in identifying alleged criminals, many of whom we know through anecdotal evidence continued to abuse children after the Orphanages and Children's Homes of the last century were closed. Ensuring that the perpetrators are punished and that they are removed from the possibility of abusing other children is vital to the healing of the clients for whom I act.

Once the assessment process is complete, the claim is referred to an "independent" Assessor who is appointed by the Tasmanian Government and who makes a recommendation regarding the amount of compensation, if any, that will be offered.

If an offer of settlement is accepted by the claimant, s/he is required to sign a release finalising all potential claims against the State of Tasmania.

QUEENSLAND[9]

In May 2007, the Queensland Government introduced its own Redress Scheme with funding of up to $100 million. The Redress Scheme was set up in response to the recommendations of the Forde Inquiry into the Abuse of Children in Queensland institutions.[10]

The scheme provided ex gratia payments ranging from a "first level" payment of $7,000 to a maximum of $40,000. Applications for a payment under the scheme opened on 1 October 2007 and closed on 30 September 2008.

The scheme offered two levels of payment to acknowledge the impact of past abuse and neglect and help people move forward with their lives:

Level 1 payment of $7,000 to applicants who met the scheme's eligibility criteria ie people who were placed in children's institutions in Queensland, whether government or non-government and had experienced institutional abuse or neglect.

[9] http://www.communityservices.qld.gov.au/community/redress-scheme/about-scheme.html
[10] http://www.communityservices.qld.gov.au/community/redress-scheme/documents/forde_comminquiry.pdf

Level 2 payment of up to $33,000 to approved Level 1 applicants who were assessed by a 'panel of experts' as having suffered more serious harm to the extent needed to qualify for a Level 2 payment.

The scheme did not extend to other forms of out-of-home care such as foster care, hospitals, facilities for people with a disability or other institutions which did not fall within the scope of the Forde Inquiry.

Payments under the scheme were dependent on an applicant signing a Deed of Release, discharging and releasing the State and its agents from any current or future legal claims relating to matters which fall within the scope of the scheme.

Applicants were provided with independent legal advice to assist them in making an informed decision on signing a Deed of Release which essentially meant that all claims against the State were finalised. The scheme funded one conference with a legal practitioner to a set fee ($500) for this purpose.

The scheme has now closed.

WESTERN AUSTRALIA[11]

On 17 December 2007, the Western Australian Government announced a $114 million Redress WA Scheme for those adults who, as children, were abused and/or neglected in WA State care in Western Australia.

The initial scheme allowed for ex gratia payments of up to $80,000.00 but following the defeat of the then Labour government, the newly elected Liberal Government announced that the scheme was inadequately funded and rather than allowing for an increase in funding, reduced the maximum payment to $45,000.00 with a first level payment of up to $10,000.00.

A first level payment of up to $10,000.00 is available to claimants who are able to satisfy WA Redress that they were a victim of abuse. If the Claimant is able to show that he or she had suffered injuries as a result of the abuse, whether physical or psychological, they were entitled to a maximum payment of $45,000.00.

Initially, claims died with the Applicants but following protests at the delays in claims being processed, the Minister announced that the deceased estates of people eligible for Redress WA, but who have passed away before their application for an ex-gratia payment is finalised, would receive a $5,000 eligibility payment.[12]

[11] http://www.communities.wa.gov.au/Services/Redress/Documents/4760%20Final%20version%20of%20Redress%20WA%20Guidelines-100217.pdf

[12] http://www.mediastatements.wa.gov.au/Lists/Statements/DispForm.aspx?ID=132448

Claims are made by way of an application form with supporting documentation. Generally, interviews with the claimants are not required and written offers are made following the assessment process.

The WA Government does not require claimants to sign a release or waive any further rights they may have against the state of Western Australia, however as Western Australia has the most restrictive Statute of Limitations[13], it is doubtful that many victims of historical abuse would seek to sue the state in any event.

Western Australia also has a system whereby allegations of abuse against identifiable perpetrators are, with the applicant's permission, referred to the police.

The Western Australian scheme has also now closed.

SOUTH AUSTRALIA

Following the Mullighan Report,[14] the Government of South Australia established a panel of experts to consider a model for restorative justice in regard to complaints of sexual abuse made by children in state care. However, the Government is yet to announce a Redress Scheme. Further, the terms of reference refer only to 'sexual abuse" and not the other myriad forms of abuse that we know children in state care were subjected to.[15]

Instead, ex gratia payments are available under the Victims of Crime Compensation Act[16] which allow for payments of up to $50,000.00 to be made to children who experienced sexual abuse whilst in care.

Unfortunately, this "ex gratia" scheme does not apply to children who suffered physical abuse, even if that abuse would be regarded as constituting a criminal offence, and certainly would not apply in cases of neglect and/or emotional abuse.

However South Australia probably has the most generous Statute of Limitations and to this extent, victims of historical abuse may resort to legal action more readily than in other states. [17]

VICTORIA

The Victorian Government has steadfastly refused to set up a compensation or redress fund for children abused in care and until recently would only deal with claims once proceedings were issued and then vigorously fought any legal claims brought against it.

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[13] Limitation Act WA 1935
[14] http://www.sa.gov.au/subject/Crime%2C+justice+and+the+law/Mullighan+Inquiry/Children+in+State+Care
[15] http://www.sa.gov.au/upload/franchise/Crime,%20justice%20and%20the%20law/Mullighan_Inquiry/IMPLEMENTATION%20REPORT%20250808.pdf recommendation 37
[16] s31 Victims of Crime Act 2001
[17] Limitation of Actions Act SA 1936

More recently, the Victorian Premier John Brumby has announced that his Government would deal compassionately with claims made by former wards of the state. Further, the State of Victoria will now deal with claimants even where proceedings have not been issued and where legal defences would be available to it.

However, the State of Victoria will not make offers where there is no "legal" basis for the claim ie they still require evidence of breach of duty and require that a claimant has "evidence" in support of their allegations. Further they will not make offers of compensation in cases of neglect, emotional abuse or where they believe that physical punishments were consistent with the standards of the time.

The Victorian Department of Human Services has also announced funding for a range of services for former wards of the state including "Pathways" which was launched on n 3 December 2009 and is an online resource for people who as children were in out-of-home 'care' in Victoria. In addition, former wards can access funding for counselling, health care and life skills programs.

NEW SOUTH WALES

The New South Wales Government has also ruled out a compensation fund for children abused in care. NSW was also the last of the states to apologise to the children abused in its care and only just scraped in with its apology on 19th September 2009 only weeks before the National Apology which took place on 16th November 2009.

The NSW Government has provided funding for training, counselling and support for Forgotten Australians.

In NSW claimants must pursue their claims for compensation through the courts.

COMMONWEALTH

Whilst the Commonwealth can be sued for negligence, there is no successful precedent regarding claims against the Commonwealth brought by children abused in care. The case of Cubillo[18] was brought by a member of the Stolen Generations. The claim was vigorously fought by the Commonwealth and the Plaintiff was unsuccessful.

Further, the vast majority of children who were placed in care in the last century (and indeed to this day) were removed under state legislation and except in the cases of some members of the Stolen Generations or the Child Migrants, the Commonwealth had no direct duty of care.

Despite the recommendations of the Senate Reports referred to above, the Commonwealth both under John Howard and now under Kevin Rudd has refused to

[18] Cubillo v Commonwealth (2001) FCA 1213 (31 August 2001).

set up compensation or redress funds and has preferred to allow the states to manage this issue in the piece meal manner described above.

In the absence of a Commonwealth redress or compensation fund, Commonwealth agencies do have power to offer compensation pursuant to the "Scheme for Compensation for Detriment caused by Defective Administration' (CDDA scheme).

Funding for this scheme is made available pursuant to s 33 of the Financial Management and Accountability Act 1997, which states as follows:

(1) If the Finance Minister considers it appropriate to do so because of special circumstances, he or she may authorise the making of any of the following payments to a person (even though the payment or payments would not otherwise be authorised by law or required to meet a legal liability):

(a) one or more payments of an amount or amounts specified in the authorisation (or worked out in accordance with the authorisation);

(b) periodical payments of an amount specified in the authorisation (or worked out in accordance with the authorisation), during a period specified in the authorisation (or worked out in accordance with the authorisation).

Note: See also subparagraph 65(2)(a)(ia) (which allows regulations to be made about the Finance Minister considering a report from specified persons before authorising a total amount that is more than a specified amount).

(3) Conditions may be attached to payments under this section. If a condition is breached, the payment may be recovered by the Commonwealth as a debt in a court of competent jurisdiction.

Note: Act of grace payments under this section must be made from money appropriated by the Parliament. Generally, an act of grace payment can be debited against an Agency's annual appropriation, providing that it relates to some matter that has arisen in the course of its administration.

Most Commonwealth agencies have guidelines regarding the administration of the scheme and the Commonwealth Ombudsman has issued a fact sheet regarding the administration of the CDDA scheme.[19] Inter alia, these guidelines include the following:

- there is no onus on a CDDA applicant to prove their claim as they would need to prove a legal claim
- in determining a CDDA claim, all relevant information which is readily available should be considered, even if the applicant has not provided it
- a CDDA claim is to be considered from the perspective of a moral obligation and should not involve a 'compensation minimisation' approach

[19] http://www.ombudsman.gov.au/docs/fact-sheets/FactSheet9_CDDA.pdf

- if the staff handling CDDA claims are located in an agency's legal area or if the agency uses external legal advisers, it should be made clear to all involved, including the applicant, that the matter is not being dealt with as a legal dispute
- a CDDA claim should ordinarily be granted where the material before the decision maker provides a reasonable and proper basis for compensation to be paid—legal concepts and terms such as 'balance of probabilities', 'contributory negligence' and 'conclusive grounds' should be avoided

The aim of a CDDA payment is to restore a person to the position they would have been in if there had been no defective administration. "Defective administration" broadly means an agency's unreasonable failure to comply with its own administrative procedures, institute appropriate administrative procedures or give proper advice. Indeed, the CDDA scheme is most commonly used by individuals who incur an expense or lose eligibility for a benefit because of incorrect agency advice or where a debt or a penalty is wrongly imposed. Further, payments are made at the discretion of the Agency and the CDDA payments are only available where the relevant agency is subject to the Financial Management and Accountability Act 1997.[20]

Arguably, abuse can only arise where there has been "defective administration" by the responsible agency. However, given the lack of direct involvement by the Commonwealth in the administration and management of out of home services for the vast majority of children who were abused in care, it is hard to see how the CDDA scheme will have much relevance to the groups that we call the "Forgotten Australians" or indeed the Child Migrants and/or the Stolen Generations, most of whom were placed in care under state laws in Homes or institutions that were directly monitored by the States.

CRIMES COMPENSATION

All Australian states have schemes which allow victims of crime to claim compensation for their injuries.

However, criminal injuries compensation by its very nature is only available to victims of crime which means that only sexual abuse and severe physical abuse (which would be regarded as constituting a crime) will be compensated

Further, all jurisdictions have limitation periods and whilst it is possible to obtain an extension of time to pursue claims for compensation for historical crimes, there is no guarantee that an extension will be granted.

Maximum compensation payable varies from $30,000.00 to a maximum of $60,000.00 depending in which state the crime occurred.

[20] ibid p1

CHURCHES

A number of the Churches that ran many of the Institutions in which children were placed have over a number of years paid compensation to victims of abuse and in the past few years some of these organisations have developed formal or informal protocols for dealing with claims of institutional abuse.

The Catholic Church for example has the "Towards Healing" program which deals with all claims of clerical abuse, including claims of historical, institutional abuse. The Melbourne Diocese of the Catholic Church also has a settlement protocol which allows for maximum payments of $75,0000.00.

The "Melbourne Response" has recently been criticised in the press for notifying alleged perpetrators of complaints before police have had the opportunity to conduct interviews thereby potentially compromising the police investigation.

Further, police have been reported as calling for sweeping changes to the way in which the Church deals with sex crime allegations after it was revealed that despite nearly 300 allegations of sexual abuse having been substantiated by church investigations since 1996 when the "Melbourne Response" was first set up, only one priest had been defrocked.[21]

Although, the issue of criminal prosecution of alleged perpetrators is beyond the terms of reference of this inquiry, this is an area where more needs to be done to ensure that the criminals who were employed in many of the children's homes and whose crimes were concealed by a culture of silence and of blaming the victim, are brought to justice. Religious institutions were some of the most culpable in this regard, with perpetrators being protected for decades in some cases, whilst they serially and horrifically abused dozens of children.

In this connection, both the formal and informal settlement processes developed by some churches and religious groups have been criticised as being designed to protect the brand name of the Church rather than to provide for genuine redress, acknowledgement and healing.

CONCLUSION

Despite the National Apology, Australians who were abused in care have different rights depending on which state they happened to be placed in care. Making compensation available to one group of Australians but denying another group

[21] "The Age, 22nd April 2010, http://www.theage.com.au/victoria/300-abuse-cases-one-defrocking-20100421-szz6.html

simply because of the state in which they were raised makes a mockery of the apology.

The Federal Government should seek the States' support through the Council of Australian Governments (COAG) and invite all states to participate in a redress fund to which all stakeholders, including the Churches and philanthropic groups that ran many of the Homes, should contribute.

On this point, whilst religious and philanthropic organisations have pocketed vast amounts of money from the sale of the real estate of many of these orphanages and also profited from the hard labour that many of these children performed without pay, they refuse to acknowledge the rights of the children they abused to share in this wealth.

For claimants from those states who have already accepted their responsibilities ie Tasmania, Queensland and Western Australia, there should be a top up arrangement depending on the maximum payments available through a national fund.

Following the apologies, the Rudd Government squandered an historic opportunity to finally lay to rest a tragic chapter of our history. This inquiry gives all stakeholders another opportunity to finally deal with the ghosts of our past.

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4th June 2010