

CHAPTER 8

REPARATION AND REDRESS SCHEMES

In my heart I feel if there is to be real peace for myself and others like me, I expect some acknowledgment, some justice...from society. I would like to be treated respectfully and fairly – to be given a fair hearing, the Australian "fair go"...Lawful institutions, whether under the State or Federal Government, the Churches or different religious organisations, play a legitimate role in creating justice for victims. There is no simple way for society to shirk the responsibility of recognising the torture and pain that was inflicted upon innocent children.¹

Measures of reparation

8.1 There was much discussion in evidence during the inquiry on the means by which reparation for past wrongs experienced by care leavers could be made. A variety of mechanisms were canvassed and these included:

- legal options through the courts;
- various redress/reparations schemes, both overseas and in Australia;
- internal Church-based redress schemes;
- redress through victims compensation tribunals;
- establishing a Royal Commission; and
- significantly boosting and enhancing dedicated services for care leavers.

These options are discussed below. The provision of services for and acknowledgement of care leavers in terms of offering redress are discussed in later chapters.

Civil litigation

8.2 One option open to victims of abuse whilst in institutional care is to pursue compensation through the civil court system. Some care leavers indicated a clear desire to pursue civil actions for damages for institutional child abuse. One care leaver stated:

Why can't I have my justice? I believe that if I had my justice in a court room then maybe I could get on with my life...I want my day in court with these people, they [the church] are liars and will say anything just to shut you up. (Sub 219)

8.3 There are a number of potential advantages that the civil system offers. These include:

¹ Submission 219, p.6.

- the openness of the process and the resultant 'public record' – this may also play a role in prevention and deterrence;
- the fact-finding capability of the process;
- the ability to hold defendants publicly accountable for the harms suffered;
- the larger amount of financial compensation available – generally the financial compensation available under redress schemes is much less than would be awarded if the person were successful in a civil action; and
- as the judicial system is accorded a certain legitimacy and authority, a successful outcome might be considered a greater 'victory' than through alternative means of resolving claims.²

8.4 A number of Churches and religious Orders have entered into settlements as a result of the commencement of legal action by victims. The Christian Brothers have entered into many out of court settlements with former residents of homes operated by the Order in Victoria and Western Australia.³ Settlements of this nature have been a feature in the USA, Canada and Ireland.

8.5 In August 1993, civil legal action was begun in the Supreme Court of NSW against 21 Catholic Church defendants, though proceedings were eventually discontinued against all except the Christian Brothers. The approximately 250 plaintiffs were mostly, but not exclusively, former child migrants, of Christian Brothers' homes in Western Australia. The case involved complex legal issues and included matters of jurisdiction, statutes of limitation, and lack of corroborating witnesses. Most events under consideration took place in the 1940s and 1950s.

8.6 While the Christian Brothers accepted that some individual Brothers had physically and sexually abused some of their students, they did not accept the accusation that there had been neglect or dereliction of duty at the level of the Order's administration. Consequently, an out of court settlement was reached in August 1996. The Christian Brothers provided \$5 million of which \$1.5 million was for the plaintiffs legal costs and \$3.5 million was placed in an independent trust to be distributed, against agreed criteria, to the plaintiffs who signed on.⁴

8.7 Other religious Orders have also entered into out of court settlements. In 2002 the St John of God Brothers reached an out of court settlement of \$3.64 million with 24 intellectually disabled men who had been sexually abused while in their care. Individual compensation payments ranged from \$50 000 to \$400 000. Broken Rites stated that previously, individual victims of this Order received financial settlements 'with ridiculously small amounts of money being paid, and complainants being

2 *Submissions* 147, pp.5-6 (Professor Cunneen); 51, pp.8-9 (Professor Graycar).

3 *Submission* 79, p.6 (Broken Rites).

4 *Submission* 65, p.5 (Christian Brothers).

required to sign secrecy agreements'.⁵ Various other religious orders have provided confidential settlement payments to ex-residents.⁶

8.8 The Salvation Army has also provided compensation payment to ex-residents. One payment to a former resident of Nedlands Boys Home in Perth was not revealed but was understood to be 'modest'. Slater and Gordon, which handled the claim, is negotiating claims on behalf of other state wards. Other settlements have included \$10 000 paid to a former resident of the Salvation Army's Toowong home in Queensland. In another case the Salvation Army provided compensation and apologies to up to ten ex-residents of its homes in Victoria.⁷

8.9 Some care leavers who have been through the court system expressed frustration and disappointment with the legal system and a sense that justice had been denied.

The following submission relates to the attempts made by myself as Guardian ad Litem for [name]...to initiate legal proceedings leading to a remedy, over a period of more than a decade. These attempts have all ended in failure. (Sub 281)

My case has been through our so called judicial system only to be let down by the legal crap that was so unbelievable that I reverted back into my world of hatred and depression. (Sub 161)

8.10 Evidence to the inquiry highlighted the specific difficulties faced by people who have suffered abuse within institutions in successfully pursuing compensation through the civil court system.⁸ The major impediments include the limitation periods, establishing liability; the adversarial nature of the system and the cost of litigation. These issues are discussed below. The Churches have also used their considerable financial resources to thwart cases going to judgement.

Limitation periods

8.11 Statutes of limitations represent the primary hurdle – and it is the one that is insurmountable for many claimants.⁹ One care leaver stated that:

5 *Submission* 79, p.9 (Broken Rites).

6 *Submission* 159, p.8 (Forde Foundation).

7 'Salvos pay for abuse to ex-ward', *The West Australian*, 5.7.04; 'Salvos sorry for abuse', *Sun Herald*, 7.6.04; 'Salvos make abuse payout' *Queensland Times*, 24.6.04.

8 *Submissions* 51, pp.3-8 (Professor Graycar); 300, pp.1-35 (Dr Mathews). Similar problems were cited with respect to the Stolen Generations' civil litigation claims. See *Submission* 147 (Professor Cunneen).

9 *Submissions* 51, pp.4-5 (Professor Graycar); 295, pp.1-2 (Ms Sdrinis); 159, p.8 (Board of Advice of the Forde Foundation); 35, p.17 (NSW Commission for Children & Young People). See also *Committee Hansard* 4.2.04, p.90 (Professor Graycar).

To date no-one has gotten over the Statutes of Limitations...In my case I was instructed from not seeking damages for the matters of my false arrest, imprisonment, trespass, and theft of my child because it was conveyed to me that because I took too long to bring an action and that I would be barred by the limitations argument because the State could not defend itself against the multiple heads of damage, and I would be penalised by the court by bringing such an action. In other words they could penalise me for the many crimes committed to me by the state. (Sub 221)

8.12 All Australian States have Limitations of Actions legislation which limit the time within which proceedings can be issued in relation to claims for damages for personal injuries. Limitation legislation is intended to prevent a plaintiff from taking an unreasonable length of time to commence proceedings to enforce a right or rights claimed by the plaintiff. Actions for personal injury in Queensland, Victoria, South Australia, Tasmania, the ACT and the Northern Territory must generally be commenced within three years from the date on which the cause of action arose. In NSW, in general terms if the cause of action for personal injury accrued before 6 December 2002, the limitation period is three years. After this date, two limitation periods apply, a three year post discoverability limitation period, and a 12 year long-stop limitation period. An action cannot be brought after whichever of these two periods expires first. Similar rules of discoverability and long-stop periods apply in Victoria on and after 1 October 2003. In Western Australia the limitation period for personal injury action is six years from the date on which the cause of action accrues.

8.13 One submission noted that:

These statutory time limits place adult survivors of abuse in an invidious position, because most will simply and quite normally be incapable of bringing their action within the time set.¹⁰

8.14 Provisions relating to minors vary among jurisdictions. As a general rule, a child is presumed to be under a disability. Thus, a child's right to sue endures until the child reaches their majority and then the applicable limitation period starts to run. Once the limitation period has expired it may be possible for a person to ask a court to extend the limitation period. There have been recent changes to the law regarding minors in some jurisdictions. In NSW and Victoria, where a child who is in the custody of a capable parent or guardian sustains personal injuries then they have three years in which to commence proceedings through a parent or guardian without the traditional concession of time not running until the plaintiff attains legal majority. Special rules apply if the child has been abused by close relatives or close associates.

8.15 In 2003, South Australia under the *Criminal Law Consolidation (Abolition of Time Limit for Prosecution of Certain Sexual Offences) Amendment Act 2003* removed a three year limitation period for the prosecution of sexual offences committed between 1952 and 1982. In the period from 1952 and 1982, prosecutions

10 *Submission 300*, p.5 (Dr Mathews).

for sex offences had to be commenced within three years in South Australia. The Criminal Law Consolidation (Abolition of Time Limit for Prosecution of Certain Sexual Offences) Amendment Act operates in that window period of 30 years to remove the immunity from prosecution.

8.16 In June 2004 nine people were arrested by the South Australian Police paedophile taskforce in relation to child sexual abuse allegations. Some of the alleged actions occurred in the 1950s and 1960s. Pending prosecutions were made possible by the recent changes to the statute of limitations legislation in South Australia.¹¹

8.17 The nature of the injuries suffered by potential claimants in cases of institutional abuse means that it is often decades after the actual abuse has occurred before individuals have the psychological fortitude to pursue these claims – the victim/survivor might experience shame and embarrassment; might blame him or herself; may not realise the connection between their injury or illness and the abuse suffered at the hands of the defendant; or may need a considerable amount of time to come to terms with the experience.¹²

8.18 The nature of the acts experienced may also mean that the trauma associated with them may not manifest itself until later in life. This inquiry and the inquiry into child migration highlighted the fact that often decades pass before victims are able, or in some cases 'forced', often through a complete mental breakdown, to deal with crimes perpetrated upon them. It is as if they leave care, 'get on' with their lives but in the end have to face their 'demons'.

It took me 23 years to start dealing with [my abuse]. The past finally reared its ugly head and tormented me to the point that I was a danger not only to myself but to society. (Sub 161)

My life of trauma is getting worse as I grow older. (Sub 20)

I'm spending the second half of my life sorting out the first half. (Sub 196)

8.19 The nature of the acts are also different from typical tort actions. Dr Mathews of the Law School at QUT noted that in relation to acts of child sexual abuse:

The acts, which also constitute criminal acts are particularly abhorrent and cause longstanding damage...The acts involve a clear abuse of power. Physical and psychological coercion is required to perpetrate the abuse...These cases usually involve a series of acts continuing over an extended period, producing immediate trauma that then intensifies.¹³

8.20 Dr Mathews added that:

The nature of the acts rebuts any claim that the time limit is a justifiable guard of repose. At a moral level, a perpetrator of child abuse does not

11 'Nine held after child-sex squad raids', *The Age*, 21.6.04.

12 *Submissions* 51, p.4 (Professor Graycar); 300, pp.3-5 (Dr Mathews).

13 *Submission* 300, p.23 (Dr Mathews).

deserve the protection of time to escape civil trial. The survivor has had to bear the consequences of the abuse since the events. The perpetrator has done nothing to deserve the freedom to carry on with his or her life without having to face consequences for their acts. For the same reasons, the public interest argument is also irrelevant. There is no public interest in permitting the evasion by child abusers of civil legal consequences.¹⁴

8.21 Similar arguments can be made in relation to acts of child physical abuse in that they are criminal acts and often cause longstanding damage. The acts involve a clear abuse of power with physical and psychological coercion used to perpetrate the abuse. Cases of physical abuse usually involve a series of acts continuing over an extended period of time with consequent long term psychological and emotional effects, as in cases of sexual assault. Studies have shown that adults who have experienced childhood physical abuse display symptoms that parallel those who experience child sexual assault.¹⁵

8.22 Submissions also considered the argument that delay in bringing proceedings may unfairly prejudice a defendant's ability to obtain a fair trial. Dr Mathews argued that the legal system possesses adequate means to deal with this possibility through the usual procedures of the civil pretrial and trial process, costs awards and suppression orders. The plaintiff retains the onus of proving on the balance of probabilities that the events occurred. Moreover, it is the courts' duty to make judgments based on the credibility of witnesses and the import of any other evidence, and courts perform these judgements on a daily basis.¹⁶

8.23 A solicitor, who is involved in pursuing claims on behalf of institutional abuse victims, suggested that a not-for-profit legal centre should be established to represent cases such as these who, although barred by State statute, should be entitled to bring or threaten action against perpetrators be they an institution or governments. Such a centre could operate along similar lines to existing legal centres – 'run in a business like fashion, seeking to be self supporting but acting without regard to profit from any one case but on the basis that but for the States Limitations Acts the child has a good and provable compensable damages and case'.¹⁷

8.24 Submissions argued that in cases of institutional abuse the better analogy is with criminal conduct, not tortious conduct. For example, the acts committed in cases of child sexual assault are criminal offences and in general, limitation statutes do not apply to criminal proceedings.

8.25 Each jurisdiction in Australia now has a provision that allows for a limited extension of time in certain circumstances for civil claims. The circumstances in

14 *Submission* 300, p.23 (Dr Mathews).

15 *Submission* 49, pp.7-9 (CBERS).

16 *Submission* 300, p.25 (Dr Mathews).

17 *Submission* 346, p.1 (Mr Owen).

which such extensions will be granted are, however, extremely restrictive in most jurisdictions. Generally a number of factors must be considered before leave can be given to issue proceedings out of time. These include the reasons for the delay, the prejudice that the defendant has suffered by the delay and the merit of the substantive claim.

8.26 Applications for an extension of time within which to issue proceedings are costly (in the range of \$10 000 to \$15 000 for each side) and there is no guarantee that leave to issue proceedings will be granted. If the application is unsuccessful, the applicant in addition to his or her own legal costs will be liable for the other side's legal costs.

8.27 A number of overseas jurisdictions have addressed the limitation barrier by implementing legislative measures specifically designed for cases of adults abused as children.

8.28 Some overseas jurisdictions have eliminated limitation periods for all claims of child abuse. Statutes in several Canadian provinces, such as British Columbia and Saskatchewan, have abolished time limits for civil actions based on child abuse, giving adult survivors of abuse unlimited time in which to institute proceedings.

8.29 Other jurisdictions have imposed moratoria for certain types of actions. In California the limitations period for certain child sexual abuse claims was suspended for one year on 1 January 2003. The types of actions include actions against persons or entities who owed a duty of care to the plaintiff, who knew or had notice of any unlawful sexual conduct by an employee, and failed to take reasonable steps and to implement reasonable safeguards to avoid future acts of unlawful sexual conduct. This has allowed civil proceedings against the Catholic Church for sexual abuse allegedly committed by priests to be launched.¹⁸ In July 2004 pre-trial hearings commenced involving more than 150 lawsuits against Catholic dioceses in northern California.¹⁹ Professor Graycar and Ms Wangmann of the Law Faculty of the University of Sydney noted that these types of measures are important 'as they recognise the very real difficulties that people who experienced abuse as a child encounter when trying to fit within a legislative requirement that requires them to acknowledge and speak out about their abuse within a certain time period'.²⁰

18 *Submissions* 51, p.5 (Professor Graycar); 300, pp.18-19 (Dr Mathews).

19 'Church facing mega-suit', at www.sfgate.com. The Los Angeles Catholic archdiocese is seeking to join a challenge to the Californian state law on the statute of limitations arguing that it has been placed in an untenable position of having to defend itself against sexual abuse allegations now up to 70 years old. See www.signonsandiego.com

20 *Submission* 51, p.5 (Professor Graycar).

Liability

8.30 Even if proceedings are brought within time or an extension within which to issue is granted, claims for damages face significant other impediments. In order to be entitled to damages a claimant must show that he or she has suffered injuries as a result of the negligence of another party. To prove negligence, a claimant must establish that they are owed a duty of care and that there was a breach of duty of care which has resulted in injury.

Proving injury

8.31 In cases of sheer neglect, that is, a failure to adequately feed, clothe, nurture or educate it is often difficult to show 'injury' per se which involves proving physical damage or a diagnosable psychiatric illness. Where injury has occurred, defendants often argue that it is not the abuse that has occurred whilst the children were wards which has caused the injury. Defendants often argue that these children were already significantly physically or psychologically damaged and therefore it is difficult to identify the cause of any ongoing symptoms, loss or damage.²¹

Vicarious liability

8.32 Claimants often face difficulties in determining who to sue. Very occasionally the actual perpetrator of violence or abuse is sued, but even if the claim is successful it is unlikely that the individual will have the capacity to pay damages. Many victims of institutional child abuse also see the organisations, or the governments that facilitated their institutionalisation as responsible for their abuse. Proving direct or vicarious liability on the part of organisations, such as churches or the government has proved difficult in Australia. A recent case decided by the High Court in 2003, *Lepore, Rich and Samin*, left the matter open.²²

8.33 One submission noted that when cases are brought against organisations, the organisation will often argue that it did not know the conduct was occurring and will seek to blame the individual abuser. Given that many of the claims are brought years after the event, it is often difficult to show that the responsible authority either knew or should have known the abuse was occurring.

21 *Submission 295*, pp.2-3 (Ms Sdrinis).

22 The High Court was asked to decide whether or not the school authorities had breached their duty of care in relation to children who had been sexually assaulted in a day school or whether vicarious liability was the correct way to approach the issue. One witness noted that 'the High Court by majority decided that vicarious liability was the most appropriate way to deal with it. But when you look at the judgements...the way in which each of the judges that adopts vicarious liability approaches the issue of child sexual assault shows a number of limitations about whether or not vicarious liability would be found'. *Committee Hansard 4.2.04*, p.89 (Ms Wangmann).

8.34 Various government departments and religious institutions will also argue that the conduct must be judged according to the standards of the time. For example, that corporal punishment was more acceptable in the 1940s or the 1950s than now. Often the abuse will relate to illegal conduct, particularly with reference to sexual abuse. In these circumstances, the employing agency will argue that they cannot be held liable for the illegal conduct of their employees or agents.²³

8.35 Submissions noted problems in suing religious institutions. One submission noted that many churches and religious groupings are not legally incorporated. If this is the case, the church will have no legal personality that is distinct from its members and therefore there will be difficulties for a person who wishes to sue in contract or tort. Some Catholic religious orders have been organised in such a way that they are legally incorporated for the sole purpose of the owning and disposing of property but otherwise the Catholic church and its religious orders argue that they have no more legal standing than, for example, a social group. These arguments have met with some success in the courts and this inability to find an entity that can actually be sued further aggravates the problems faced by those seeking redress.²⁴ One possible solution to this problem would be to make the tax concessions that Churches/charities can obtain a condition of incorporation.

8.36 The Committee raised this issue with Mercy Community Services. They indicated that its corporate structure, while designed to continue the mission of the Sisters of Mercy, may as a consequence serve to limit the liability of the organisation:

It may be an offshoot of it or a consequence of it that the disadvantages you see for people who are aggrieved could occur...The corporate structure as such is like any other corporate structure. The canon law side of it was so that the assets, the capital goods of the Sisters of Mercy, could go to a group so that they remain church goods and that they are not alienated from the church. Obviously, in civil law it was so that the entity could act within Corporations Law...it is not the purpose but it may be one of consequences of the structure.²⁵

8.37 In addition, where wards of the state have been placed in institutions run by religious groups, a process of 'denial' of responsibility occurs with the State attempting to place responsibility with the church and vice versa.

The adversarial system

8.38 The adversarial nature of court proceedings creates a number of difficulties for people giving evidence. The difficulty is exacerbated for people who are

23 *Submission 295*, pp.3-4 (Ms Sdrinis).

24 *Submission 295*, p.4 (Ms Sdrinis). See also *Submission 79*, p.18 (Broken Rites). See also Senate Community Affairs References Committee, *Lost Innocents: Righting the Record*, August 2001, pp.311-315.

25 *Committee Hansard 9.12.03*, p.37 (Mercy Community Services).

recounting traumatic events from their childhood. Victims often find the process of testifying and facing cross-examination painful, as it brings back memories and opens old wounds. Victims often complain that they feel as if they are the ones on trial because they are forced to 'prove' what happened to them.

8.39 The adversarial nature of traditional civil litigation, particularly as compared to redress mechanisms, mean that they are an unlikely forum for the promotion of acknowledgement, apology and reconciliation, as it encourages defendants to deny, not acknowledge, responsibility. This lack of scope for an apology is compounded by the process of challenging evidence that often involve personal challenges by the defendant about the plaintiff, his or her lifestyle and the substance of his or her claims.²⁶

Cost of litigation

8.40 Another significant impediment faced by potential claimants is the cost of litigation. One submission noted that a claim in the district courts or various State Supreme Courts, where these proceedings are issued, can cost 'many tens of thousands of dollars'.²⁷ Submissions also pointed to the unavailability of Legal Aid for anything other than criminal law cases.²⁸

8.41 One submission noted that a religious Order offered to settle a claim for \$50 000 suggesting that 'I should accept what the Order was offering because to take legal action would mean it would cost me a great deal of money'.²⁹ Another submission noted that 'although there is overwhelming evidence and in some cases the facts speak for themselves, they [the victims] are not in a position to finance any legal action'.³⁰

8.42 Submissions commented that both governments and the religious groups defend the actions vigorously. One submission noted that where proceedings are issued both the State Governments and the Churches 'brief lawyers from the top end of town who spend a fortune in strike out applications and other devices to delay a claim and to increase costs'.³¹

8.43 Broken Rites noted that with respect to the Catholic Church:

Where a civil claim is initiated outside of the Church's own process(es), the game plan appears to be one of protecting the church's estate and assets at

26 *Submissions* 51, p.6 (Professor Graycar); 295, p.5 (Ms Sdrinis).

27 *Submission* 295, p.5 (Ms Sdrinis). See also *Submission* 164, p.4 (Whistleblowers Action Group).

28 *Submissions* 51, p.6 (Professor Graycar); 159, p.8 (Board of Advice of the Forde Foundation).

29 *Submission* 144, p.1.

30 *Submission* 116, p.1.

31 *Submission* 295, p.5 (Ms Sdrinis).

any cost. Broken Rites is aware of a number of cases where the church has been prepared to pay massive legal costs in order to prevent the case ever going to judgement, rather than meet the genuine needs of victims in a realistic way.³²

8.44 Broken Rites stated that no claimant who has sought financial compensation for psycho-social damage resulting from abuse by a member of the clergy or religious of the Catholic Church has ever had his or her case go to judgement in any court in Australia.³³

8.45 In respect of the Catholic Church in the United States a number of large settlements have been concluded with abuse victims. In 2003 the Archdiocese of Boston agreed to pay US\$85 million to settle more than 500 lawsuits from people who claimed they were sexually abused by Catholic priests in the past. The settlement was the largest publicly disclosed payout by an American diocese to settle molestation charges. A series of new claims were reported against the archdiocese in 2004. Numerous other Catholic dioceses have also concluded settlements with claimants alleging sexual abuse charges, for example, the Seattle Archdiocese agreed to pay US\$8 million to settle charges against a former priest in 2003.³⁴

8.46 The criticism of the action of the churches is not restricted to the Catholic Church. CLAN voiced a similar criticism of the Salvation Army:

We watched the *Four Corners* program "The Homies" in which the Salvation Army were terribly regretful about what happened to the children in their homes and we also know from first-hand experience through our members that they fight tooth and nail through the courts using every measure they can to deny justice to those same people that they say they have damaged and that they regret so strongly.³⁵

8.47 In addition to having to fund one's own legal case there is also the risk, if the plaintiff loses, that they may be required to pay some, or all of the defendant's costs, and this may well be an effective deterrent in pursuing a civil action. Due to the socially deprived backgrounds of most of the claimants, many are significantly disadvantaged financially and do not have the resources to fight these cases.

8.48 There are also significant 'non-monetary' costs to consider. There are often emotional costs involved in pursuing this type of litigation, even if cases are successful. The emotional costs of being unsuccessful, where this decision is likely to result from the limitation period or the effects of the passage of time on the court

32 *Submission 79*, p.17 (Broken Rites).

33 *Submission 79*, p.18 (Broken Rites).

34 'Abuse settlement reached' *ABC News*, 9.9.03; 'Seattle archdiocese to pay \$8 million', *MSNBC News Service*, 11.9.03.

35 *Committee Hansard 4.2.04*, p.41 (CLAN).

being unable to determine what took place and who is responsible, is also likely to be considerable. The experience of one care leaver graphically illustrates this point.

The lodging of claims, appeals and counter appeals in interstate jurisdictions has since appeared to have represented the focus of Owen's life ...These have intensified his sense of victimisation and caused him to assume he is either not believed or "fobbed off". In turn he has single mindedly dedicated himself to battling legal systems and proving his assertions without the assistance of clear family and Government welfare institutional records and supports....For legal officers to suggest he was not really a victim...because he asked to be assaulted, seems to be beyond Owen's comprehension and in turn makes his sense of victimisation worse. (Sub 162)

Whistleblowing

8.49 The Committee is of the view that reporting wrongdoing should be encouraged, and that highly vulnerable whistleblowers who are well-placed to expose crime, fraud, mismanagement or corruption should be protected. There is anecdotal and other evidence that persons in religious and charitable organisations are even more vulnerable than private or public sector employees when it comes to challenging authority in their organisations, because of almost absolute financial and employment dependence. Their livelihood and old age care may be entirely reliant on the organisation concerned. As it stands, the fear of intimidation and reprisals for speaking out, through for example the withdrawal of financial support in retirement, would be a strong deterrent.³⁶

8.50 The Committee considers that whistle-blower protection is required for those religious and lay people wishing to disclose crime and wrong-doing in their organisations, and especially the perpetrators of abuse and assault.

8.51 A number of commissions and committees of inquiry into whistleblowing have been held since the late 1980s.³⁷ Most of these inquiries were directed to the needs of the public sector, but apply with equal force to the profit and not-for-profit private sectors.

8.52 In the last two decades public sector whistleblowing schemes or Acts have been established by all governments in Australia. Existing informal schemes for private sector whistleblowing have recently been reinforced by statute for the private sector for the first time. In June 2004 amendments to the Corporations Act and to the Workplace Relations Act advanced whistleblowing protection in the private sector.

36 See for example *Committee Hansard* 12.11.03, pp. 9-11 (Dr Coldrey).

37 For a summary of these inquiries, and a background to the development of whistleblowing legislation in Australia, see Senate Finance and Public Administration Legislation Committee, Report on the Public Interest Disclosure Bill 2001 [2002], Appendix 5, p95, September 2002.

8.53 The new private sector whistleblowing legislation is neither ambitious nor comprehensive, and the limitations of the new legislation have been remarked upon by a parliamentary committee.³⁸ Nevertheless employees who would otherwise remain silent for fear of losing their jobs can now blow the whistle on corruption, crime and unlawful activity in the private sector. A compensation and protection regime now exists to safeguard their welfare.

8.54 The Committee strongly believes that what appears to be the embedded practice of complicity in some churches, (or more accurately, some parts of some churches), in concealing crimes against children, must be addressed through extending whistleblowing legislation to unincorporated associations and the not-for-profit sector. In this way, the religious, lay and other employees could be an invaluable tool in bringing offenders to account.

8.55 How to 'cover the field' is the question. Religious and charitable organisations are not necessarily homogeneous or unitary, and may be diverse in structure with many independent and autonomous units.

8.56 Churches and religious associations can become extremely complex entities with many sub-structures. Such structures were explored by the Committee.³⁹ A good example of this intricacy is perhaps the Catholic Church. In its 'Submission to Board of Taxation on the Definition of a Charity' the Church stated that 'the structure of the Catholic Church is complex and comprises of many entities' so that:

As a consequence the Church comprises a wide range of different legal entities: bodies corporate established by Act of Parliament, corporations sole, companies limited by guarantee, companies limited by shares, incorporated associations, trusts, funds, foundations, unincorporated associations, bodies of persons.⁴⁰

8.57 The complexity is similar in churches of other denominations; however, it is possible to identify three predominant corporate structures within churches and religious associations. Most of the churches and religious associations in Australia are organised as:

- unincorporated associations;
- incorporated associations;⁴¹ or

38 Parliamentary Joint Committee on Corporations and Financial Services, Report on the CLERP (Audit Reform and Corporate Disclosure) Bill 2003, Part 1 – 'Enforcement, executive remuneration, continuous disclosure, shareholder participation and related matters', June 2004.

39 *Committee Hansard* 9.12.03, pp. 36-7 (Mercy Community Services).

40 Catholic Church in Australia, Submission to the Board of Taxation on the Definition of a Charity, October 2003, p.5.

41 Note that some entities may choose incorporation as a company limited by guarantee in which case the Corporations Law would become applicable. They would presumably therefore be subject to the new whistleblower provisions in the Act.

- charities.⁴²

This complexity means that introducing whistleblower protection that would cover the field for the not-for-profit, religious and charitable sectors is not easy.

8.58 The main source of law governing unincorporated associations is the common law. Hence, it will be difficult to establish a whistleblower protection scheme utilising existing statutes. Whether whistleblower protection can be achieved for an individual entity will depend primarily upon the legal form the entity takes, not the question of whether the entity is a not-for-profit or a charitable entity.

8.59 On a State level, the most promising approach would seem to be targeting legislation dealing with charities, trusts and the Associations Incorporation legislation. On a Federal level, the best target seems to be taxation legislation, for example, the Income Tax legislation. It would seem that any legislation attempting to cover the field should contain a clause that puts it beyond doubt that the Commonwealth has the intention to cover the field to the exclusion of any State legislation.

8.60 The Committee considers that the desirability and feasibility of introducing whistleblower legislation for the not-for-profit religious and charitable sectors should be examined by the Commonwealth. The intention of such legislation would not only provide protection and certainty for those wishing to disclose contemporary matters but also for those who have wanted to disclose past events and actions but have felt uncertain or threatened in coming forward.

Conclusion

8.61 Evidence to the Committee indicates that there are considerable legal and other barriers faced by people who have suffered institutional child abuse in successfully pursuing compensation claims through the civil court system, or in having criminal action taken by the DPP.

8.62 The statutes of limitations have, in particular been cited as a major obstacle to pursuing claims. Some submissions have argued that statutes of limitation legislation should be amended to allow legal proceedings at any time for victims of child sexual and/or physical abuse and neglect.⁴³

8.63 The Committee shares the concerns expressed in evidence concerning the obstacles imposed by the statutes of limitations. It firmly believes that alleged perpetrators of sexual and/or physical abuse should not continue to evade prosecution by hiding behind the limitations of actions provisions.

42 The question of whether a particular entity qualifies as a charity is a separate issue to the entity's corporate structure.

43 *Submissions* 22, p.34 (CLAN); 300, p.ii (Dr Mathews). See also *Submissions* 70, p.5 (National Children's & Youth Law Centre); 277, p. 8 (Office of the Commissioner for Children Tasmania).

8.64 The Committee commends in the strongest possible terms the South Australian Government for removing the statutory limitation period in relation to the prosecution of certain sexual offences. The Committee believes that the South Australian example is a very positive development in that it has opened the way for the possible criminal prosecution of perpetrators of sexual offences in that State. It shows that effective action can be taken to remove a major impediment to bringing perpetrators of child abuse to justice. The Committee strongly urges that all States remove statutes of limitations for not only sexual offences, but also for cases of physical abuse and neglect.

8.65 The Committee notes that the Commonwealth Government has recently urged the States to review their statutes of limitations legislation in relation to child sexual abuse offences. Senator Ellison, the Minister for Justice and Customs, stated that:

In relation to the common-law reform and the civil jurisdiction, that of course is squarely within the state jurisdiction. In relation to offences, we have made it very clear to the states and territories that we believe that nothing should act as a bar to the prosecution of anyone for a child sex offence. We will continue to maintain that position and influence the states and territories in every possible way...we will continue to impress upon them [the States] that we all have to address this in a whole-of-governments – that is, federal, state and territory – approach to the issue of child sex offenders.⁴⁴

8.66 The Committee is concerned at the difficulties that applicants have in taking civil action against unincorporated religious or charitable organisations, and that this may be a device for deliberately avoiding legal liability and accountability. The Committee considers that the possibility of making federal tax concessions dependent on or linked to incorporation is worthy of examination as a possible solution to this problem.

Recommendation 3

8.67 That State Governments review the effectiveness of the South Australian law and consider amending their own statutes of limitation legislation to achieve the positive outcomes for conducting legal proceedings that have resulted from the amendments in the South Australian jurisdiction.

Recommendation 4

8.68 That in recognising the difficulty that applicants have in taking civil action against unincorporated religious or charitable organisations, the Government examine whether it would be either an appropriate or a feasible incentive to incorporation, to make the availability of federal tax concessions to charitable, religious and not-for-profit organisations dependent on, or

44 *Senate Hansard*, 21.6.04, p.24056.

alternatively linked to, them being incorporated under the corporations act or under state incorporated associations statutes.

Recommendation 5

8.69 That the Commonwealth Government examine the desirability and feasibility of introducing whistleblower legislation for the not-for-profit religious and charitable sectors.

8.70 Given the difficulties associated with pursuing civil actions for damages for institutional child abuse and neglect, as described above, evidence to the Committee argued that other approaches are required. Alternative redress arrangements, through compensation schemes; internal Church and agency-sponsored redress arrangements; and victims compensation tribunals are now discussed. The Committee considers that these redress mechanisms should be used in conjunction with legal remedies already available. In addition, the need for a Royal Commission to inquire into a number of specific and disturbing aspects of institutional abuse that came to light during the inquiry is also considered.

Reparations – theory and overseas developments

8.71 There is increasing interest throughout the world on the issue of reparations for past injustices and the role that such reparations can play in reconciling particular aggrieved groups within nations with the larger society. The issue of reparations however raises a number of fundamental questions. What harms warrant reparations? How far back in history should one go? Do reparations require a known victim and perpetrator, or can the present economic and social conditions of a recognised group be causally linked to the activities of an earlier dominant group or previous government? Even where a past injustice has been recognised, how should reparations be effected? Should loss be compensated in monetary terms, or some other form of restitution?

8.72 The Law Commission of Canada proposed a number of criteria by which redress processes/packages may be assessed. These include:

- Respect, engagement and informed choice – does the process satisfy the values of respect and engagement? Does it offer the information necessary for survivors to make an informed choice about participating in the process?
- Fact-finding – can the process uncover all the important facts to validate whether abuse took place?
- Accountability – do those administering the process have the authority to hold people and organisations to account for their conduct?
- Fairness – is the process fair to all the parties affected by it?
- Acknowledgment and reconciliation – does the process promote acknowledgment, apology and reconciliation in cases where abuse has occurred?

-
- Compensation, counselling and education – can the process lead to outcomes that address the needs of survivors for financial compensation, counselling, therapy and education?
 - Needs of families and communities – can the process meet the needs of the families of those who were abused as children as well as the needs of communities?
 - Prevention and public education – does the process promote public education about institutional child abuse and contribute to prevention?⁴⁵

8.73 While reparations schemes vary they usually contain a number of components including the provision of apologies/acknowledgment of the harm done, counselling, education programs, access to records and assistance in reunifying families. A common feature of redress schemes is also the implementation of financial compensation schemes. While the design of the schemes vary they have as a common goal the need to respond to survivors of institutional child abuse in a way that is more comprehensive, more flexible and less formal than existing legal processes.

International law and reparations

8.74 The right to reparations for wrongful acts has long been recognised as a fundamental principle of law essential to the functioning of legal systems. The obligation to provide reparations for human rights abuses, especially gross violations of human rights, has more recently been recognised under international treaty and customary law, decisions of international bodies such as the United Nations Human Rights Committee and the Inter-American Court of Human Rights, national laws and practices and municipal courts and tribunals.⁴⁶

8.75 In 1989 the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities commissioned Professor Theo van Boven to undertake a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. A final report, including proposed basic principles and guidelines, was submitted in 1993. A revised set of basic principles and guidelines was submitted in 1996.

8.76 The Van Boven report examined relevant existing international human rights norms and decisions of international courts and other human rights organs. The report concluded that every state 'has a duty to make reparation in case of a breach of the obligation under international law to respect and to ensure respect for human rights and fundamental freedoms'. Van Boven states that:

In accordance with international law, States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective

45 Cited in *Submission 51*, pp.9-10 (Professor Graycar).

46 Buti A, 'International Law Obligations to Provide Reparations for Human Rights Abuses' at www.murdoch.edu.au, pp.2-4.

reparations. Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage.⁴⁷

8.77 Van Boven synthesised the content of reparations to include restitution, compensation, rehabilitation and, satisfaction and guarantees of non-repetition. Restitution refers to measures such as restoration of liberty, family life, citizenship, return to one's place of residence and, return of property. These measures seek to re-establish the situation that existed prior to the violations of human rights and humanitarian law. Compensation relates to monetary compensation for any economically assessable damage resulting from violations of human rights and humanitarian law. Rehabilitation includes medical and psychological care as well as legal and social services. Satisfaction and guarantees of non-repetition includes an apology, including public acknowledgment of the facts and acceptance of responsibility, and measures to prevent recurrence of the violations.

8.78 A number of significant international human rights treaties create a general duty to make appropriate reparations for violations of human rights. These include the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Rights of the Child, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

8.79 A number of overseas countries, such as Germany, Chile, Argentina and South Africa, have implemented reparations schemes in recognition of the rights of victims, especially in relation to gross violations of human rights.

Redress/reparations schemes in overseas countries

8.80 A number of redress or reparations schemes have been implemented in several overseas countries including Canada and Ireland and these are discussed below.

Redress packages in Canada

8.81 In Canada, several provincial governments and the federal government have established compensation schemes in response to situations where children were abused and neglected in state-funded and state-operated institutions.⁴⁸ The schemes are a mix of provincially-based arrangements, which sometimes involve the relevant Churches and federally-based schemes in the case of Indian residential schools, which also involve the Churches.

47 Cited in Buti, pp.2-3.

48 The information on Canadian redress schemes is largely drawn from *Submission 51*, pp.10-13 (Professor Graycar); and *Committee Hansard 4.2.04*, pp.88-89 (Ms Wangmann).

8.82 The schemes include the Ontario Grandview Agreement, the British Columbia Jericho Individual Compensation Program, the Ontario Helpline Reconciliation Agreement and a redress scheme established in relation to Indian children in residential schools. A number of official Canadian reports and inquiries highlighted serious physical, sexual and emotional abuse at many institutions over many decades in Canada.

8.83 The Grandview Agreement was a compensation agreement negotiated with the Province of Ontario in 1994 by a group of survivors of physical and sexual abuse in a girls' detention centre – the Grandview School for Girls. That agreement led to the creation of a process specifically designed by the victim/survivors to deal with those claims of abuse.

8.84 As part of the Grandview process, those who signed the agreement waived their right to sue at common law and were able to claim an amount of up to CAN\$60 000 depending on the types of injury they had sustained. This is significantly less than the amount they might have received had they sued successfully at common law. In addition to this limited financial compensation, the Grandview survivors were eligible for services such as counselling and other assistance such as tattoo removal (it was common in the institution for the girls to tattoo themselves and each other). The adjudication process was designed by the survivors' group, in consultation with their lawyers, and all adjudications were undertaken by women sensitive to issues related to sexual assault matters. An evaluation of the Grandview Agreement found that most women who went through the process found that it was helpful and supportive.

8.85 Another redress package – the Jericho Individual Compensation Program (JICP) – was established by the Government of British Columbia in 1995 to compensate Deaf and/or visually impaired children who attended the Jericho Hill School for the Deaf. The compensation program was established following an Ombudsman's report that detailed the abuse (including sexual abuse) experienced by children at the School. While the parameters of the program, including the levels of compensation and what harms would be compensated, were devised by the government, the terms of reference for the program were devised in consultation with the Deaf community and measures were put in place to ensure that personnel working on the program were sensitive to, and aware of, the different cultural needs and requirements of the Deaf community.

8.86 Compensation payments under the JICP ranged from CAN\$3 000 to \$60 000 (the average payment was CAN\$35 000). In determining claims the Panel had to be satisfied that there was a 'reasonable likelihood' that the claimant was sexually abused at Jericho Hill School (a lesser standard than the more common civil standard – on the balance of probabilities). The JICP received 365 claims for compensation, of which 359 claims were validated. Ninety-five per cent of the people who had their claims validated by the JICP accepted the settlement. A review of the Program noted that many of the people who went through the Program found it 'therapeutic' in that it gave them an opportunity to tell their story and have it validated. A number of the residents at Jericho Hill School opted out of this compensation program and have instead

elected to proceed through the courts. This litigation is proceeding as a class action and has not yet been finalised.

8.87 Another redress package was the Helpline Reconciliation Agreement. This Agreement was devised as a 'reconciliation model' to 'heal the impact' of the physical and sexual abuse experienced by former students at St Joseph's Training School for Boys and St John's Training School for Boys in Ontario. The agreement, established in 1993, was made between the Government of Ontario and the Catholic Church authorities. It included an apology; a system of submitting and validating claims; the creation of a fund to provide a variety of support, medical and educational assistance to validated claimants; a contribution to lost wages; a counselling service; a public record; and a commitment of behalf of the participants in the Agreement to prevent child abuse.

8.88 In relation to the experiences of Indian children in the Canadian residential school system, the Canadian Government is implementing an alternative dispute resolution (ADR) process. In 1998-1999 the Government, the churches and Aboriginal leaders commenced a process of investigating non-adversarial dispute resolution processes as a way of dealing with claims concerning the residential schools. As a result, a national dialogue was conducted across Canada and 10 pilot projects were established. It was intended that the ADR projects would offer victims of the residential school system a more sensitive and timely response to the claims than is afforded by litigation.

8.89 A review of the projects found some dissatisfaction by survivors involved in the pilot projects – the 'standards of the day' requirement which survivors found 'difficult to understand'; objections to the application of Western, 'white' standards to resolving residential schools' abuse cases; and the limitation of compensation to recognised causes of action, effectively meaning that claims for language and culture loss would not be compensated under the ADR projects.

8.90 The Canadian Government has recently introduced a two-model dispute resolution scheme for Indian residential schools. The first model deals with more serious claims of physical or sexual abuse over an extended period. Under this model, award payments are comparable to what people would receive in court settlements. The second model deals with less serious claims. The approach under this model is less formal– claimants are not required to lodge documents, and are not subject to the same sort of questioning about their claims as under the first model. The amount of compensation is also less – with the maximum amount set at CAN\$3 500.

Ireland

8.91 In response to allegations of abuse in orphanages, industrial schools and other institutions the Irish Government has introduced a number of measures to address the issue, including the establishment of the Commission to Inquire into Child Abuse (the Laffoy Commission). Approximately 150 000 children went through residential institutions in Ireland between the 1920s and the 1980s. It is estimated that as many as

100 000 of those have left Ireland, mainly for the United Kingdom, United States and Australia.⁴⁹

8.92 In 2001 the Government agreed to the introduction of a compensatory scheme for victims of institutional abuse. The *Residential Institutions Redress Act 2002* established this compensation scheme. It is a no fault scheme for compensation for people who experienced child abuse, which is very widely defined, when they were a resident in an industrial school, reformatory, children's home or similar institution. Eligible applicants must have suffered sexual, physical or emotional abuse while in an institution and have suffered physical, psychiatric or other injury consistent with that abuse.⁵⁰

8.93 The Act establishes a Residential Institutions Redress Board (RIRB) that receives and assesses claims. The Act requires that the processes adopted by the RIRB be as informal as possible. An applicant lodges a written claim which provides evidence of his/her identity; proof that he/she was a resident in a particular institution as a child; and evidence of the injury that was suffered in that institution consistent with the alleged abuse. These are the three criteria that must be met before the RIRB can make an award. To receive compensation under the scheme, the person must not have received compensation from a court or settlement. The alleged perpetrator does not have to be criminally convicted. An application form must be completed and submitted to the Board. Applications are processed within 14 weeks – this is the minimum timeframe and dependent on the Board receiving all the necessary documentation. The Board will obtain evidence from any person or institution named in an application. Applications must be made to the Board by 15 December 2005.

8.94 The scheme is primarily funded by the State, however the Catholic Church has agreed to provide €128 million [\$A218m] into the compensation fund – in return the Church received indemnity for future claims about past child abuse claims. The contribution by the Church has been criticised as being too small, since the total amount disbursed under the scheme could be close to €1 billion. The Irish Auditor-General has estimated that the amount of compensation awarded could be in the order of €864 million [\$A1 475m] (based on an estimated 10 800 claims with each payment averaging €80 000 [\$A136 000]).⁵¹ The total value of awards (to December 2003) was €42.4 million.⁵²

8.95 If the Board rules that an applicant is entitled to redress, it may make an offer of settlement which the applicant can accept or reject. If accepted, no further action is necessary; but the applicant cannot seek other compensation through the courts. If

49 *Submission 22*, Supplementary Information, 9.7.04 (CLAN).

50 Information on the Irish scheme was drawn largely from RIRB, *Annual Report 2003*; and *Submissions 51*, pp.13-14 (Professor Graycar); 300, pp.42-43 (Dr Mathews).

51 *Submissions 300*, p.43 (Dr Mathews); 51, p.14 (Professor Graycar).

52 Residential Institutions Redress Board, *Annual Report 2003*, p.18.

rejected, the application will then be heard by the Board at a hearing. Hearings, which are informal, are closed to the public and are conducted by a panel of 2-3 Board members. Persons and institutions named in the application can participate in the hearing.

8.96 If an applicant is not satisfied with the RIRB's determination of the claim or the amount of the award, it is possible to appeal to the Residential Institutions Redress Review Committee, which can uphold, increase or decrease the Board's award.

8.97 There are four heads of compensation: severity of abuse and injury; additional redress; medical expenses; and other costs and expenses. Awards of compensation by the RIRB are determined according to two scales. The first scale, to assess the severity of the abuse, requires the RIRB to assess four 'constitutive elements of redress' – the severity of the abuse; and the three measures of injury resulting from the abuse; medically verified physical/psychiatric illness; psycho-social sequelae; and loss of opportunity. After determining the scaling for the severity of the abuse, the RIRB then turns to the second scale. This scale provides for five levels of compensation: (1) up to €50 000 [\$A85 000]; (2) €50 000 - €100 000; (3) €100 000 - €150 000; (4) €150 000 - €200 000; and (5) €200 000 - €300 000 [\$A513 000] – for the most severe cases of abuse. It is also possible for an applicant to claim aggravated damages. The RIRB has made it clear that aggravated damages will only be awarded in the most 'oppressive or outrageous' of cases. The award may be paid in either a lump sum or instalments. The payments that have been made to date have ranged from €10 000 [\$A17 000] to €270 000 [\$A461 000], with the average value of €80 000 [\$A136 000].⁵³

8.98 As noted above, an applicant who accepts the award determined by the RIRB (or Review Committee) must then waive their rights to pursue civil action against the same institutions or persons alleged to have caused the child abuse that was the subject of the redress application. Potential applicants who have already sought civil relief for the harm that they suffered in a residential institution are not permitted to make a claim under the Act – however, if the civil claim was rejected in an interlocutory proceeding or on the basis of the statute of limitation – then those people may still make an application to the RIRB.

8.99 The Board has received 3 900 applications (as at July 2004).⁵⁴ In its 2003 Annual Report the Board reported that it had received 2573 applications and 587 applications have been determined (as at December 2003). Of these 587 cases, 535 compensation payments were made (see Table 8.1) and 52 were refused because they did not fall within the framework of the Act. The Board has received

53 RIRB Annual Report, pp.10,18.

54 'Abuse claims double original estimate', *RTE News*, 8.7.04 at www.rte.ie

100 applications from victims of abuse in residential institutions in Ireland who are now resident in Australia.⁵⁵

Table 8.1: Compensation Payments

Redress Band	Total Weightings for Severity of Abuse and Injury/Effects of Abuse	Award Payable by way of Redress	Number	Percentage
V	70 or more	€ 200 000 – € 300 000	6	1.12
IV	55-69	€ 150 000 – € 200 000	19	3.55
III	40-54	€ 100 000 – € 150 000	101	18.88
II	25-39	€ 50 000 – € 100 000	325	60.75
I	Less than 25	Up to € 50 000	84	15.70
Total			535	100

Source: Residential Institutions Redress Board, *Annual Report 2003*, p.20.

8.100 Evidence to the inquiry indicated that the scheme is generally viewed favourably by victims of abuse. One submission noted that:

The experience of claimants so far has been extremely positive. Most importantly victims have been able to tell their stories in a non threatening environment. The process is quick and it is fair.⁵⁶

8.101 Criticisms have, however, been made recently by some victims in relation to the level of the awards made and the process itself – some victims felt traumatised by the process and some felt they were not 'believed' by the Board.⁵⁷ One witness to the inquiry also noted that 'there is...perceived inadequacy about the awards that are

55 *Submission 22*, Supplementary Information, 9.7.04 (CLAN). A local call number – 1300 308 478 – has been established in Australia for abuse survivors who wish to make claims under the scheme. People contacting the number will then be contacted by an Irish-based legal team who will provide advice in the application process.

56 *Submission 295*, p.7 (Ms Sdrinis).

57 'Victim protests over redress board hearing', *The Irish Times*, 16.4.04.

available under the scheme compared to some of the litigation. There have been some recent cases where some claimants have received large court amounts'.⁵⁸

Redress packages in Australia

8.102 A number of redress packages, including Government and Church-related schemes have been implemented in Australia.

Tasmania

8.103 As noted in chapter 1, in August 2003 the Tasmanian Government announced a compensation package in response to an investigation by the State Ombudsman into past abuse of children while in State care.

8.104 Under the Tasmanian scheme, claims must first be made to the Ombudsman. A review team investigates the claim, which includes record checking and interviews. Part of the interview process involves determining what the claimant wants from the process. Desired outcomes can include an apology issued on behalf of the Department of Health and Human Services (DHHS), official acknowledgment that the abuse occurred; assistance tracking lost family members; access to their departmental files; professional counselling; payment of medical expenses; or compensation. Completed files for each claimant are referred to DHHS for further action if recommended. An Independent Assessor of claims of child abuse has been appointed. The Assessor's role is to record settlements reached between DHHS and claimants against the referrals made to the Department by the Ombudsman; and to receive referrals from the Department on all matters which have not reached settlement, in which case he will undertake a review and, where appropriate, an assessment of an ex-gratia payment. While the maximum amount for individual payments is \$60 000 the Assessor can recommend that the government pay a greater sum in exceptional circumstances.⁵⁹

8.105 The DHHS has conducted some 246 interviews (as at June 2004) to determine if there is sufficient evidence to support a claim of abuse. No compensation claims/ex-gratia payments have been paid to date by the Independent Assessor – the first claims are expected to be paid by the end of 2004; however 25 claims have been referred to police for investigation.⁶⁰

Queensland

8.106 In response to the Commission of Inquiry into Abuse of Children in Queensland Institutions (Forde Inquiry), the Queensland Government established a package of measures to assist former residents of Queensland institutions. This

58 *Committee Hansard* 4.2.04, pp.88-89 (Ms Wangmann).

59 Premier of Tasmania, the Hon J Bacon MHA, Additional Information, 11.11.03; *Submission* 300, pp.43-45 (Dr Mathews).

60 Tasmanian Government, Additional Information, 29.6.04.

included the establishment of the Forde Foundation in 1999. The Foundation, which is a charitable trust, distributes monies to former residents of these institutions. The trust provides assistance for education, health, family reunions and the basic necessities of life. Funding is also provided for counselling services and a range of support services. Other measures included action to improve access to records and the issuing of a formal apology in conjunction with the responsible Churches. Further details of these measures are discussed in chapters 7, 9 and 10.

8.107 During the inquiry there was considerable criticism of the Queensland Government's reluctance to provide monetary compensation to victims of institutional abuse.⁶¹ Victims of abuse in Queensland institutions have presented the Queensland Government with a Charter for Redress calling on the government to deliver 'justice and dignity' to victims of institutional abuse, including monetary compensation and restitution.⁶² The Charter for Redress calls on the Queensland Government to:

- accept its moral and legal responsibility for the pain and suffering of people who have experienced abuse;
- acknowledge that abuse victims should be treated with compassion and dignity, and are thus entitled to prompt redress;
- explore models of redress suitable in the Queensland context, including redress models in Tasmania and overseas;
- establish guiding principles to enable abuse victims, the government and the Churches to work together;
- amend judicial and administrative arrangements to enable victims to obtain redress including financial compensation;
- acknowledge that redress includes rights to reparations, compensation and restitution; and
- respect the rights of individuals to their own pathways for healing.⁶³

8.108 The Forde Inquiry recommended that the Queensland Government and responsible religious authorities 'establish principles of compensation in dialogue with victims of institutional abuse and strike a balance between individual monetary compensation and provision of services' (recommendation 39).

8.109 The Queensland Government's position is that the establishment of the Forde Foundation and the provision of counselling and other support services provides this 'balance' in that services are provided 'to support former residents in rebuilding their

61 *Submissions* 219, p.6; 78, p.1. See also *Committee Hansard* 12.3.04, pp.3-29 (Historical Abuse Network/Esther Centre).

62 'Forde Inquiry victims call for compo', *AAP*, 2.6.04.

63 Historical Abuse Network, *Charter for Redress*, Additional Information, 12.3.04.

lives'. The Government argued that any claims for monetary compensation 'would need to proceed through normal legal processes'.⁶⁴

8.110 The Forde Foundation noted, however, that there is common expectation among ex-residents that compensation should be provided by the Foundation.

...in the absence of any other form of redress, there is a misperception that the Foundation offers compensation. The amounts able to be disbursed by the Foundation fall a long way short of any form of fair compensation. This is confusing and in some cases humiliating for applicants, who believe that they are receiving compensation. There is a sense of, "Is that all I get?"⁶⁵

8.111 The 2001 report of the Forde Implementation Monitoring Committee also argued the need for the government to provide compensation. The report stated that:

The existence of the Fund does not address the principle of *compensation* underlying recommendation 39. The Forde Foundation was *not* established to pay compensation to former residents. It was intended to provide support to them...In this sense the Fund's role – while valuable – is in truth more concerned with the provision of services as required in recommendation 40, than it is with the compensatory spirit of recommendation 39.⁶⁶

The Churches/agencies

8.112 A number of Churches and agencies have implemented redress packages in relation to victims of abuse in institutional care and other settings, such as parishes. These redress schemes usually involve the issuing of apologies, the provision of counselling and other support services and, in some cases, compensation payments. Further details are addressed later in this chapter.

Other packages

8.113 In 2003 the Catholic Archdiocese of Adelaide provided an unconditional \$2.1 million compensation package to 34 families of intellectually disabled boys who were sexually abused by a bus driver at a Catholic school for the intellectually disabled. The compensation package ranged from \$50 000 to \$100 000. The package does not contain confidentiality clauses and recipients do not have to waive their rights to take civil legal action against the Church for compensation. The Church's payment would, however, be offset against any damages awarded in any future successful civil action.⁶⁷

64 Queensland Government, *Response to Recommendations of the Commission of Inquiry into Abuse of Children in Queensland Institutions*, August 1999, p.43.

65 *Committee Hansard* 12.3.04, p.90 (Board of Advice of the Forde Foundation).

66 Cited in *Submission* 159, p.6 (Board of Advice of the Forde Foundation).

67 'Catholics offer \$2.1 million over child abuse', *The Age*, 25.9.03.

Monetary compensation – the Australian context

8.114 As noted above, the Tasmanian Government has recently introduced a compensation scheme for victims of abuse while in State care. Several Churches and agencies also provide monetary compensation as part of their redress packages. In relation to the Stolen Generations, the *Bringing them home* report recommended that the Council of Australian Governments (COAG) establish a joint national compensation fund to provide monetary compensation for the victims of the removal policies involving indigenous children. The report argued that a Board should be established to administer the fund and that compensation procedures adopted should be non-confrontational and non-threatening. The report argued that the major church organisations which played a role in this process should also be 'encouraged' to contribute to the fund.⁶⁸ Monetary compensation has not, however, been provided by governments in the case of the Stolen Generations nor in the case of former child migrants.

8.115 The issue of monetary compensation remains a contentious, and possibly the most contentious issue, of all the possible reparation measures. A number of different approaches may be taken in awarding monetary compensation. Awards can either be based on an individual, needs-based approach – this may be done on a case-by-case basis, or based on various scales and categories of harms experienced – or on a predetermined award per person that offers general compensation to all members of an aggrieved group. Individually-based awards may exclude certain categories of individuals who are unable to prove or explain their situation and forces victims to endure further pain through the requirement to prove the severity of their past experiences.

8.116 An alternative approach is to establish a predetermined single amount of compensation, inclusive of all harms suffered regardless of the individual degree of harm and need. This approach acknowledges the injustices of the experiences suffered, and offers justice and relief to victims collectively. Such an approach is likely to limit the time, costs and administration involved in claims and payments and is a model likely to reach all victims, at least to some extent.

8.117 Ideally, the funding of monetary compensation schemes should be provided by all responsible parties, including individual perpetrators if still alive. Dr Buti of the Murdoch University School of Law has noted, however, that governments and other parties 'are reticent in saying yes to reparation funding because of concern over the quantum of funding required'.⁶⁹ Dr Buti suggested, however, that this concern may be lessened if liability is spread over the various responsible parties. In the context of the Stolen Generations the responsible parties would be the State Governments and the churches, who administered most of the missions and homes and the Commonwealth Government, which had a role in the removal policies. Individual perpetrators should

68 *Bringing them home*, pp.302-313.

69 Buti A, 'Bridge Over Troubled Australian Waters' at www.murdoch.edu.au, p.13.

also contribute to the scheme. Dr Buti argued that individual, governmental and organisational liabilities should be assessed, and based on their proportionate liability, the responsible parties would incur varying costs.

In creating a comprehensive reparations scheme, party contributions must be assessed with respect to liability and responsibility; ability to pay and funding available; amounts already contributed; services provided; and whether public acknowledgment and apology has been made. Liability of parties should be negotiated and determined during establishment of a reparations scheme. All responsible parties should contribute funds to a scheme or part thereof based upon their responsibility and surrounding factors.⁷⁰

8.118 Dr Buti suggested that the advantage of including all the various parties in a comprehensive reparations scheme is that it has a greater chance of achieving a positive outcome by reducing the individual financial strain on each party. It may also have a psychological effect by spreading the 'blame' across the board rather than targeting one party. In addition, with a greater number of contributors there is a greater potential funding pool, which increases the chances of obtaining adequate funding for a comprehensive reparations scheme.⁷¹

Conclusion

8.119 The Committee believes that the Commonwealth Government should establish a national reparations fund for victims of institutional and out-of-home care abuse. The Committee believes that, while no amount of money can adequately compensate victims for the pain and suffering experienced while in institutions and other forms of care, monetary compensation can go some way towards acknowledging past abuse and affording a sense of justice and closure for many victims.

8.120 The Committee acknowledges that while monetary compensation can compensate victims to some extent it is unlikely to achieve healing for many care leavers, so other forms of redress, especially counselling is important. The Committee addresses counselling and the provision of other services in chapter 10.

8.121 The Committee does not have a definitive view as to the amount of reparations that should be payable under the scheme, but believes that the reparations should be capped at an appropriate level. As noted previously, a maximum amount of \$60 000 per claimant is payable under the Tasmanian Government's scheme, and similar amounts are payable under several schemes operating in Canada. Under the Irish Government's scheme the payments that have been made to date have ranged widely with an average value of €80 000 [\$A136 000].

70 Buti, *Bridge Over*, p.13.

71 Buti, *Bridge Over*, p.13.

8.122 The Committee believes that the scheme should be funded by contributions by the Commonwealth and State Governments and the Churches and agencies directly involved in the implementation and administration of institutional and out-of-home care arrangements. The Committee considers that, while the Commonwealth did not have a direct role in administering institutional care arrangements, it should contribute to the scheme as an act of recompense on behalf of the nation as a whole. The Committee believes that State Governments should contribute as they were directly involved in the administration of institutional care arrangements. The Committee also firmly believes that the Churches and agencies should contribute to the scheme to share the cost burden and as a form of acknowledgment of their collective role in the failure of their duty of care.

8.123 The relative contribution of the various parties to the scheme should be based on their proportionate liability which, as discussed previously in this chapter, should take into account such factors as the relative roles of the respective groups in the provision of institutional care; their ability to pay; and the degree to which they are already providing compensation or funding services for care leavers.

8.124 The Committee believes that a board should be established to administer the scheme and that processes to establish claims should be non-adversarial and informal with the aim being to settle claims as expeditiously as possible. The Committee considers that in determining claims the board should be satisfied that there was a 'reasonable likelihood' that the claimant was abused – a lesser standard than the more common civil standard – on the balance of probabilities. The Committee considers that the introduction of this scheme should not preclude victims from pursuing civil claims through the courts as an alternative.

Recommendation 6

8.125 That the Commonwealth Government establish and manage a national reparations fund for victims of institutional abuse in institutions and out-of-home care settings and that:

- **the scheme be funded by contributions from the Commonwealth and State Governments and the Churches and agencies proportionately;**
- **the Commonwealth have regard to the schemes already in operation in Canada, Ireland and Tasmania in the design and implementation of the above scheme;**
- **a board be established to administer the scheme, consider claims and award monetary compensation;**
- **the board, in determining claims, be satisfied that there was a 'reasonable likelihood' that the abuse occurred;**
- **the board should have regard to whether legal redress has been pursued;**
- **the processes established in assessing claims be non-adversarial and informal; and**

- **compensation be provided for individuals who have suffered physical, sexual or emotional abuse while residing in these institutions or out-of-home care settings.**

Internal Church redress processes

8.126 A number of churches have established internal redress-type mechanisms to provide assistance and support to victims of institutional abuse and other forms of abuse by church personnel. These processes provide an alternative avenue of redress to civil litigation for people alleging neglect or abuse in church-run institutions. Many former residents will not, however, use these processes because of past negative experiences as children in the institutions operated by the various Churches.

8.127 Some data on the numbers of abuse allegations – albeit incomplete in many cases – dealt with by the Churches and agencies are available. Under the Catholic Church's *Towards Healing* protocol some 1 000 cases of abuse have been received since 1996 when the scheme was introduced. This figure includes all cases of abuse, not limited to cases of abuse in institutional care.⁷² The Committee was advised by the National Committee for Professional Standards, which oversees the *Towards Healing* protocol, that overall numbers of abuse complaints from ex-residents of institutions are not available as they are not collected nationally. The Professional Standards Committee is establishing a system that would provide that data on a national basis and it is expected to be in place by the end of 2004.⁷³ The Archdiocese of Melbourne, which operates a separate scheme, has had only 'one or two' complaints relating to abuse within institutions in the archdiocese. The religious Orders that operated homes in the archdiocese deal with complaints through the *Towards Healing* protocol.⁷⁴

8.128 The Salvation Army stated that 19 former residents reported sexual abuse by three officers and four employees and a further 24 ex-residents reported physical abuse during the period 1950 to 1979.⁷⁵

8.129 UnitingCare Burnside stated that in the last 10 years it has received five formal complaints about the care experienced; 10-15 requests for counselling as a direct result of individuals' experiences of care; and one request for an investigation to be initiated in relation to allegations of harm that occurred while in care.⁷⁶ Wesley Dalmar stated in the last 18 months, 35 clients have contacted Dalmar to see their

72 'Church watchdog reviews *Towards Healing* protocol', *Catholic Weekly*, 13.7.03.

73 National Committee for Professional Standards, personal communication, 3.8.04.

74 Archdiocese of Melbourne, personal communication, 27.7.04. The Archdiocese has received a total of 115 complaints since 1996 (as at December 2001). These complaints mainly involve clergy in parish settings. See 'US campaigner calls church to account', *The Age*, 9.7.04.

75 *Submission* 46, Supplementary Information, 8.6.04 (Salvation Army).

76 *Submission* 59, p.9 (UnitingCare Burnside).

files. Of these 35 clients, 13 have alleged abuse or unduly harsh treatment during their time with Dalmar.⁷⁷

8.130 The United Protestant Association (UPA) stated that seven allegations of sexual abuse had been raised, either directly or indirectly with UPA, over the last eight years. Three of these allegations have been referred to the police; two were raised by third parties citing only general information, and two were received from people who have not provided sufficient detail which might be referred to the police.⁷⁸

8.131 Barnardos indicated that they had received about eight complaints from ex-residents – six related to the 1950s and two related to the 1960s.⁷⁹ Barnardos drew attention to a case in the 1980s when it was made aware of sexual abuse allegations by a house-father, Mr Victor Holyoake, in one of its group homes during the 1960s. Holyoake was later charged and subsequently jailed.⁸⁰ Mofflyn stated that a case was reported in 1996 where there were allegations made against a male worker in a children's residential unit. Western Australian police investigated the matter but subsequently decided not to proceed with charges of indecent dealing or sexual assault due to insufficient evidence.⁸¹

8.132 As noted above, the number of complaints received by the different Churches varies. Data indicates that the Catholic Church has received the largest number of complaints overall. Recent publicity concerning abuse allegations in the Salvation Army and Anglican Churches and indeed the number of references made in submissions suggests that these and other churches may witness increasing numbers of abuse complaints in the future. It is therefore essential that complaints handling procedures across all Churches are effective and transparent, especially in the light of criticisms of Catholic Church processes in particular (as discussed below).

The Catholic Church

8.133 The Catholic Church's *Towards Healing* protocol provides an example of that Church's attempt to address situations of abuse in Catholic institutions. The protocol operates for all Catholic dioceses, except the Archdiocese of Melbourne, which has separate procedures in place, and for all religious orders. The Jesuit Order recently adopted the *Towards Healing* protocols, replacing their existing protocols for dealing with abuse claims. The Jesuit Provincial stated that their former protocols fostered a legalistic approach to claims of sexual abuse that had the result of harassing victims

77 *Submission* 178, p.12 (Wesley Mission).

78 *Submission* 30, pp.1-2 (UPA).

79 Barnardos, personal communication, 29.7.04.

80 *Submission* 37, p.4 (Barnardos).

81 *Submission* 160, p.6 (Mofflyn).

and working against reconciliation.⁸² Since 1996 the Melbourne archdiocese has used an independent commissioner to investigate abuse complaints.

8.134 Under the *Towards Healing* protocol the bishops and leaders of religious institutes in each State appoint a Director of Professional Standards to manage the process in relation to specific complaints. The Director is responsible for appointing assessors to investigate complaints; facilitators to determine processes by which agreements can be reached to assist victims and determine what the Church authorities can do to assist victims; and reviewers who conduct reviews, as required, of the process. Reviewers are required to be independent and not have close associations with either the complainant or the church authority responsible for dealing with the complaint.

8.135 A Professional Standards Resource Group is also appointed by the bishops and leaders of religious institutes. This group acts as an advisory group on matters concerning professional standards, and its membership comprises one priest and one religious and other people (up to 10) with expertise in areas such as child protection, social sciences and civil and Church law.

8.136 *Towards Healing* provides that assessors investigate the evidence regarding a complaint and provide a written report to the church authority, such as the religious Order the subject of the complaint, and the Director of Professional Standards. The church authority then makes a determination on the facts as presented as to what further action is required. Responses may include an apology on behalf of the Church, the provision of counselling services or the payment of counselling costs. Financial assistance or reparation may also be paid to victims of a criminal offence or civil wrong. Reparation payments are not subject to a monetary ceiling. A facilitator is appointed by the church authority and the victim to moderate a settlement and determine the ongoing needs of the victim.

8.137 A review of process of the procedures is available (but not a review of outcomes) if the complainant (or the accused person or persons) is not satisfied with the response of the Church authority. The Director appoints the reviewer to conduct an independent evaluation.⁸³

8.138 Submissions to the inquiry expressed a numbers of criticisms of the *Towards Healing* process. Submissions from several complainants who have used the process provided detailed documentary accounts of alleged neglect and abuse that were provided to Church authorities during the process only to have the assessor find that – the alleged abusing nun or brother denied the allegations; was too old, senile or had died; no evidence existed of the particular form of abuse or neglect occurring; or no corroborating evidence was found for the allegations. Complainants then received virtual pro forma letters from the relevant Order stating that the matters raised had not

82 'Church watchdog reviews Towards Healing protocol', *The Catholic Weekly*, 13.7.03.

83 Australian Catholic Bishops Conference, *Towards Healing*, June 2003 at www.catholic.org.au

been substantiated and that the Order could not take the matter of the complaint further.⁸⁴ One submission stated 'I think it [the process] is rigged so the church always comes out looking good'.⁸⁵

8.139 Evidence to the inquiry also noted that the structured nature of the *Towards Healing* processes means that it is difficult to initiate more informal processes with the Church authorities that would facilitate face-to-face meetings between victims and the relevant Church authorities and/or perpetrators of past abuse. Victims often desire reconciliation and healing before other more material needs. One witness noted that:

...the churches are not being proactive enough in listening to the stories of the people who have been through the system, listening to their needs and trying to work with them to meet those needs.⁸⁶

8.140 The witnesses pointed to the South African Truth and Reconciliation Commission as a possible model.

There needs to be some type of truth and reconciliation commission – that is what I think needs to be done – where they [the Churches] come and listen...some substantial time to actually listen to the people and their needs and to work towards meeting those needs.⁸⁷

8.141 Another witness noted that their support group [Jobe's Trust] has been trying to work within the *Towards Healing* processes to make the Church accountable and to reconcile with victims but to no avail.

...we have also campaigned with the chairperson of Towards Healing to acknowledge the abuse and to reconcile and compensate these victims; and we have come up against brick walls all the way around...We have put to the church our grievances about how difficult it has been for us to get them to the table, but they just refuse to budge. I am sorry, but this is a fact: Towards Healing is a farce.⁸⁸

8.142 Complainants were previously subject to a confidentiality clause as a condition of an agreement with the Church but this is now not a requirement. One submission noted that the inclusion of a confidentiality clause left claimants 'feeling demeaned and that all they'd received was "hush money"'.⁸⁹

8.143 The *Towards Healing* protocol was also criticised by some victims as being an 'in-house' procedure not subject to effective checks and balances and one that lacked transparency and openness. One submission argued that there was a need to

84 *Submissions* 216, pp.1-12; 348, pp.1-15.

85 *Submission* 93, p.1. See also *Submission* 249, pp.1-2.

86 *Committee Hansard* 12.3.04, p.47 (Fr Dethlefs).

87 *Committee Hansard* 12.3.04, p.48 (Fr Dethlefs).

88 *Committee Hansard* 12.3.04, p.108.

89 *Submission* 295, p.5 (Ms Sdrinis).

'review this Program and report on its fairness to both sides, in particular who acts as judge'.⁹⁰

8.144 Dr Altobelli of the Law School at the University of Western Sydney, in a study of the *Towards Healing* protocol, proposed a number of changes to the procedures. He noted that as the Director, who plays a pivotal role in the whole process, is appointed by the Church, there is the risk that complainants and the public generally may perceive the appointment as lacking sufficient independence from the Church. He suggested that the Professional Standards Resource Group could appoint or have a role in the appointment of the Director. Appointment procedures to this body would, however, need to change as currently its membership is appointed by the Church. He suggested that external appointments could be made to this body through government, Non-Government Organisations or community organisations involvement. For example, the relevant Minister with responsibility for child welfare matters could nominate members of the Resource Group.

8.145 The study also argued that procedures could be made more transparent by outsourcing specific aspects of the process, for example, the investigation process – 'this simple measure has the potential to enhance transparency and improve public confidence in the system'.⁹¹ In addition, the study proposed that there should be a mechanism for implementing an independent review of decisions of the Director. This could be undertaken by the Resource Group, if independent members were appointed to that body (as discussed above) or through the establishment of an independent body (see below) which would also act as a review mechanism.

8.146 In addition, Dr Altobelli proposed the establishment of an external review mechanism, such as an independently appointed ombudsman, who would have the power to review any institutional processes. He envisaged this office operating like an industry ombudsman, for example, similar to the Private Health Insurance Ombudsman in the health area, with extensive powers of investigation and review and whose greatest regulatory power would be to publish its review findings in the public arena. It could, however, go further and facilitate community education about awareness, prevention and management of institutional abuse.⁹²

8.147 Broken Rites also argued that the issue of financial compensation in the *Towards Healing* process 'has turned out to be a lottery and persons who enter the process can encounter major problems'. Broken Rites added that:

Some Bishops and Heads of Religious Orders have refused to comply with the process; some victims have been coerced and intimidated by aggressive lawyers representing the church authority; church authorities have

90 *Submission* 93, p.5.

91 Altobelli T, 'Institutional processes for dealing with allegations of child sexual abuse', Paper presented at the Australian Institute of Criminology Conference, May 2003, p.11; and Supplementary Information, 4.6.04.

92 Altobelli, pp.9, 11-12; and Supplementary Information, 4.6.04.

approached it as a legal process rather than a mediation and critical information about the victim has not been shared with the victim. In case after case, victims were required to sign confidentiality agreements until this was exposed on the TV program "60 Minutes".⁹³

8.148 One submission noted that he felt pressured into accepting a payout for a claim against a religious Order – 'I found that I had niggling doubts about the offer that was made to me and the injustice of my being virtually forced to accept what the church had offered. I came to see that the payout to me was unfair'.⁹⁴

Other Churches/agencies

8.149 Other churches have also instituted similar internal complaints processes. The Salvation Army and Barnardos have uniform procedures in place. Uniting Church agencies have separate procedures, but in NSW and the ACT there are moves towards uniform processes across agencies in those jurisdictions. The Anglican Church has no national procedures but is moving towards a standardised approach across all dioceses. The complaints procedures outlined below apply to both past and current abuse allegations.

Salvation Army

8.150 Under the Salvation Army's protocol for sexual and other abuse the complainant is directed to an 'independent contact person', who is a local, impartial person experienced in handling complaints, independent of the Salvation Army. A report on the complaint is provided by the contact person to the Chief Secretary (Salvation Army's Chief Executive Officer (CEO)) and/or his delegate. On receipt of this report, the Chief Secretary or his delegate determines how the complaint is to be dealt with, including the scope of any investigation required. The way a complaint is dealt with depends on a number of factors including the nature of the alleged misconduct; the confidentiality required by the complainant; and whether the alleged offender is or is not still a Salvationist, living or working in the Salvation Army's jurisdiction. With the agreement of all parties concerned, mediation which involves the establishment of a panel of outside professionals, such as a psychologist, lawyer and/or minister from another church may be used to resolve the dispute. Both parties generally agree to abide by the decisions of the mediation panel. The panel also serves as a mechanism for review of outcomes if claimants are dissatisfied with the process. However, the Salvation Army will not automatically assume liability for the costs of the mediation unless special arrangements are made – however, the Salvation Army noted that in most cases it agrees to pay these costs.

8.151 The outcome of a complaint may include reporting the complaint to the police or other authorities; a written response to the complainant; a written apology from the

93 *Submission 79*, p.17 (Broken Rites).

94 *Submission 144*, p.2.

alleged offender; counselling for the complainant or other assistance; counselling for the alleged offender; and/or warning, suspension or termination of the alleged offender; or no further action. In cases where monetary payments are made, no confidentiality clauses are imposed on complainants.⁹⁵

8.152 Many critical comments were received during the inquiry about the lack of support offered by the Salvation Army to ex-residents. One care leaver noted that:

Over the last few years I was humiliated and offended by the Salvation Army as on many occasions I have asked for counselling for this problem and been denied access to this unless I was alcoholic or drug addicted...At another time another [Salvation Army] officer said after begging for help "yes it is awful we have to admit even through we have caused the problem we can't help you". (Sub 266)

8.153 Another care leaver argued that the Salvation Army should offer more support to ex-residents, asking rhetorically 'what can the Salvation Army and the Government do to assist me now and in the future?'.⁹⁶

Barnardos

8.154 Under Barnardos complaints policy the CEO or the Senior Manager, Youth Services and Aftercare, contacts the complainant to ascertain the facts from the ex-client's perspective. Advice is given to the complainant on referring the matter to the police, seeking legal advice, obtaining professional counselling, and/or seeking peer support, through an organisation such as CLAN. For some complainants, ongoing counselling is provided and for others, Barnardos have offered, and paid, compensation.⁹⁷

Uniting Church

8.155 Agencies of the Uniting Church, such as UnitingCare Burnside and Wesley Dalmar, have separate complaints procedures. The NSW Uniting Church is currently developing uniform procedures for dealing with complaints from ex-residents of institutional care in NSW and the ACT. The Uniting Church noted that this will provide a 'consistent response' to allegations of abuse and will include the type and amount of counselling to be provided, the circumstances under which compensation payments would be considered appropriate and the format of any agreement relating to compensation.⁹⁸

95 Salvation Army, *Procedures for Complaints of Sexual and Other Abuse Against Salvationists and Workers*, November 1996.

96 *Submission 336*, p.7. See also *Submission 286*, Additional Information, 13.8.04.

97 *Submission 37*, Supplementary Information, 17.6.04 (Barnardos).

98 NSW Uniting Church, Additional Information, 1.7.04.

8.156 Under the draft policy, which is yet to be implemented, formal investigation of abuse allegations will be undertaken by a person(s) independent of the agency and of the Uniting Church. The independent investigator will report to the head of the agency outlining the outcomes of the process and recommend an appropriate response. The head of the agency will take the report to the Board of Management with his/her recommendations. The Board will then determine the course of action – it may either implement, modify or reject the recommendations of the investigator. The complainant has the right to a review of process. The review will be undertaken by a person appointed by the Moderator of the NSW Synod of the Uniting Church.

8.157 Outcomes of the process may include a formal expression of regret or apology. Where a settlement or some other form of reparation is recommended and accepted by the Board, the Board will take advice from the Uniting Church as to the appropriate quantum and terms of settlement. The Board will not offer a financial settlement as compensation for past wrongs but may make an offer of contribution or settlement to assist the person in their current circumstances. An amount of \$50 000 is proposed as the upper limit for financial settlements. No complainant will be required to give an undertaking that imposes on them an obligation of silence concerning the circumstances which led them to make a complaint, as a condition of an agreement.⁹⁹

8.158 Under the current UnitingCare Burnside complaints policy all complaints are accepted without prejudice and complaints are addressed within the shortest possible time and usually completed within a 3-month period. A person, or persons independent of the agency, and of the Uniting Church, will undertake any investigation into allegations under the policy. Criminal and/or civil proceedings are sought where appropriate. Other outcomes include an apology; counselling; access to the Aftercare program, and, in extreme circumstances, financial payments. There are no undertakings imposing an obligation of silence on those bringing a complaint. There is no formal review process for complainants dissatisfied with the process, but Burnside indicated that they work towards resolution of disputes with complainants.¹⁰⁰

8.159 Wesley Dalmar complaints procedures provide for an After Care Worker or caseworker to interview the complainant and identify his/her needs. A resource kit is supplied to each client which contains information on CLAN, the Aftercare Resource Centre (a DoCS funded service) and information on other support services. Types of assistance available include access to personal files; talking about the Dalmar experience; revisiting Dalmar; and access to support, which includes counselling; access to other services provided by Dalmar such as life skills training; or referral to other outside service providers.¹⁰¹

99 NSW Uniting Church, Additional Information, 5.7.04.

100 *Submission* 59, pp.21-22 (UnitingCare Burnside).

101 *Submission* 178, Additional Information, 29.6.94 (Wesley Mission).

Anglican Church

8.160 Within the Anglican Church the nature of internal processes is currently left up to individual dioceses, with the different processes varying significantly from diocese to diocese. If a case being investigated involves more than one diocese, the process becomes difficult logistically and legally.¹⁰² An Anglican Church working group found that existing protocols are deficient in many ways with victims often coming back with complaints that their original grievance was not dealt with appropriately. The working group also found that there has been a defensive and legalistic attitude to the protection of Church assets, and secrecy about the handling of issues, creating a perception of 'cover up'.¹⁰³

8.161 The Anglican Church has drafted new guidelines for handling abuse complaints across Australia. The code of conduct, 'Faithfulness in Service', is part of the Church's new approach to abuse procedures, and will be voted on at the General Synod in October 2004.¹⁰⁴ It is envisaged that each diocese would then implement these procedures in their respective jurisdictions.

Conclusion

8.162 The Committee believes that internal Church processes for dealing with allegations of abuse play an important part in the reconciliation process and demonstrate the Churches' commitment to address past grievances.

8.163 The Committee considers that the processes to investigate complaints and offer assistance need to be open, rigorous and accountable. However, the experiences of some victims raise concerns that some processes lack sufficient transparency and accountability. Victims – and the public generally – need to have confidence that complainants will receive a 'fair hearing' and that satisfactory outcomes will be achieved. One agency – UnitingCare Burnside – suggested that governments legislate to ensure that agencies and institutions that have provided institutional care have established policies to ensure responses and investigation in the event of allegations of abuse are provided 'in the most caring and respectful' manner.¹⁰⁵

8.164 The Committee believes that the procedures should provide for informal processes so that complainants can have an opportunity to meet in an informal way with Church officials to discuss grievances and resolve these grievances in a way that

102 *Submission 79*, p.18 (Broken Rites); 'Bishops to play no role in sex abuse inquiries', *Sydney Morning Herald*, 26.3.03.

103 Anglican Church of Australia, Sexual Abuse Working Group, *Work in Progress*, March 2003, p.1 at www.anglican.org.au

104 'Anglican Church drafts new guidelines for dealing with sex offenders', *AM*, 6.8.04; Anglican Church of Australia, *Benchmark Principles and Framework for an Abuse Protocol* at www.anglican.org.au

105 *Submission 59*, p.10 (UnitingCare Burnside).

will promote 'healing' for the victim. This could involve meeting with alleged perpetrators or one-on-one apologies or other forms of redress. The processes should involve *listening* to victims concerning their needs and what *they* wish to obtain from the process and responding compassionately to these concerns.

8.165 The Committee believes that reforms are needed to Church procedures in the interests of transparency and accountability, especially in the composition of personnel on complaints' bodies. In this regard the Committee notes that the Director of Professional Standards, for the Catholic Church's *Towards Healing* protocol, and the Chief Secretary, in the case of the Salvation Army process, play a pivotal role in the respective schemes and both are Church appointees. Reforms are also needed to internal review procedures, and the range of supports and other services offered to complainants.

8.166 The Committee views with dismay that two of the major Churches – the Anglican and Uniting Churches – currently do not have national, uniform complaints procedures in place. While the Catholic Church comes closest to a national approach it excludes the Archdiocese of Melbourne, the largest Catholic diocese in the country. Complainants should have access to, as far as possible, standardised procedures operating within and across the various Churches. The Committee also believes that information on complaints procedures should be more widely disseminated by the churches and agencies, including on their websites.

8.167 During the inquiry it was evident to the Committee that internal complaints review procedures, which function in some Church processes, are, by themselves, inadequate in arbitrating complaints. The Committee considers that an external review mechanism such as an independent ombudsman should be appointed to investigate complaints in relation to procedures by those using Church-sponsored procedures. The Committee envisages that the ombudsman would investigate and mediate the complaint with the relevant Church authority. After the investigation the ombudsman would recommend to the Church authority that a specific course of action be undertaken. In cases where the Church authority rejects the ombudsman's proposed course of action or the complainant remains dissatisfied, the ombudsman would have the option of publicising the complaint as part of his/her report on the overall operation of the Churches' complaints mechanisms.

8.168 The Committee considers that the Commonwealth Government should take a leadership role and establish the proposed external complaints review mechanism under Commonwealth law. It may be that such a mechanism will need to be established under a cooperative legislative scheme with the States and Territories conferring powers on the Commonwealth agency as has been the case with other Commonwealth agencies. The Committee considers that the Commonwealth should explore all legislative avenues to ensure that the proposed external complaints review mechanism is established as soon as practicable.

8.169 The Committee is also concerned at the serious lack of comprehensive and up-to-date information on the numbers of abuse allegations and the quantum of

compensation payments provided by the Churches and agencies. It believes that the Churches and agencies need to be much more transparent in providing this type of information and believes that data relating to these matters should be published annually.

Recommendation 7

8.170 That all internal Church and agency-related processes for handling abuse allegations ensure that:

- **informal, reconciliation-type processes be available whereby complainants can meet with Church officials to discuss complaints and resolve grievances without recourse to more formal processes, the aim being to promote reconciliation and healing;**
- **where possible, there be independent input into the appointment of key personnel operating the schemes;**
- **a full range of support and other services be offered as part of compensation/reparation packages, including monetary compensation;**
- **terms of settlement do not impose confidentiality clauses on complainants;**
- **internal review procedures be improved, including the appointment of external appointees independent of the respective Church or agency to conduct reviews; and**
- **information on complaints procedures is widely disseminated, including on Churches' websites.**

Recommendation 8

8.171 That the Commonwealth establish an external complaints review mechanism, such as a national commissioner for children and young people who would have the power to:

- **investigate and mediate complaints received by complainants dissatisfied with Church processes with the relevant Church authority;**
- **review the operations of Church sponsored complaints mechanisms to enhance transparency and accountability;**
- **report annually to the Parliament on the operation of the Churches' complaints schemes, including data on the number and nature of complaints; and**
- **publicise the existence of Church-sponsored complaints mechanisms widely throughout the community.**

Recommendation 9

8.172 That the Churches and agencies publish comprehensive data on all abuse complaints received to date, and then subsequently on an annual basis, and that this information include:

-
- **numbers of complainants and type of complaints received;**
 - **numbers of Church/agency personnel involved in complaint allegations; and**
 - **amounts of compensation paid to complainants.**

Recommendation 10

8.173 That information on the above matters be provided annually (including any reasons for non-compliance) to the national commissioner for publication in a consolidated form in the commissioner's annual report.

Victims compensation tribunals

8.174 All States and Territories have legislative arrangements for compensation for victims of crime. This provides another avenue for victims of institutional abuse to claim compensation for crimes committed against them whilst in institutions.¹⁰⁶

8.175 These arrangements provide an alternative to the usual adversarial type legal system which many victims find daunting and intimidating, and, as discussed previously, are often not well suited to cases involving institutional abuse. For example, under the Victorian *Victims of Crime Assistance Act 1996* the applicant must have been a primary (that is, victim of an act of violence), secondary or related victim of an 'act of violence', meaning a criminal act or series of related criminal acts that has resulted in injury or death. 'Injury' is defined to include actual physical bodily harm or mental illness or disorder.

8.176 People seeking compensation under these schemes generally need to prove that the relevant crime occurred and that the harm occasioned to them was the result of that crime. There is no prerequisite that a person has been prosecuted or convicted of the crime. The claimant does not need to establish liability. Usually the tribunal relies on police reports of the crime and expert evidence as to the psychological impact of the crime on the claimant.

8.177 Any monies received in the future from other sources in connection with victims compensation is subject to reimbursement if other legal action is successful. For example, the NSW *Victims Support and Rehabilitation Act 1996* provides that if a person receives an award of victims compensation it must be repaid if they receive money from other sources in connection with the injuries, expenses and losses taken into account in the award (section 34(1A)).

8.178 Time limitations apply in all schemes, except in the case of Tasmania where a time limit is not specified in the legislation. Applications for compensation must generally be lodged within two or three years after the date of the offence (12 months

106 Some members of the Stolen Generations in Victoria have successfully made claims under the criminal injuries compensation scheme for sexual assaults and were awarded approximately \$4 000 each. However, not all claims succeed. See *Submission 147*, p.31 (Professor Cunneen).

apply in the case of the ACT and the NT), though all jurisdictions allow for exceptions to the time limit. In the case of NSW, the victims compensation tribunal would normally grant an extension in cases of sexual assault, child abuse and domestic violence, unless there is no good reason to do so.

8.179 The maximum amount of compensation payable varies from \$10 000 in the case of Tasmania to \$75 000 in the case of Queensland. A maximum payment of \$50 000 is payable in NSW, Victoria (\$60 000 for primary victims, \$50 000 for secondary and related victims), South Australia and the ACT.¹⁰⁷

8.180 A number of care leavers have successfully pursued claims through these processes. One care leaver stated that he had received \$40 000 through the NSW Victims Compensation Tribunal.¹⁰⁸

8.181 Some concerns were expressed during the inquiry about the difficulties experienced by some victims awarded payments through victims compensation tribunals. Often people either did not realise or were not adequately informed by their legal representatives of the requirement for the repayment of monies awarded via victims compensation if receiving a settlement from other sources.¹⁰⁹ One person alleged that his legal representatives misled him and other persons about the effect of an award of victims compensation on moneys received in the settlement of civil proceedings.¹¹⁰

8.182 It is important to recognise that many care leavers are very damaged and have low self-esteem so that they will struggle to fully understand the legal and advocacy environment. It is imperative that legal representatives explain their actions and any repercussions in as clear and straightforward terms as possible to their clients to ensure they are fully aware of any obligations arising from legal action

Conclusion

8.183 The Committee believes that compensation through victims compensation tribunals may offer a useful avenue of redress for many victims of institutional abuse. The Committee notes however, that although the burden of proof is lesser than that required under other legal processes, a level of proof is still required to successfully pursue claims.

8.184 The Committee considers that the availability of this avenue of redress to victims of institutional abuse should be widely disseminated to care leavers and support and advocacy groups representing care leavers.

107 *Submission 147*, pp.31-32 (Professor Cunneen); Australian Institute of Criminology, *Victims' Needs, Victims' Rights*, 1999, pp.133-147.

108 *Submission 94*, p.19.

109 *Submission 116*, p.1.

110 *Submission 116*, Additional Information, pp.2-20.

The need for a Royal Commission

8.185 Many submissions to the inquiry from support and advocacy groups and many individual care leavers called for the establishment of a Royal Commission into institutional care practices.¹¹¹ Several care leavers noted that there have been Royal Commissions into a wide variety of issues yet governments appear reluctant to appoint one into the important issue of children and institutional abuse.¹¹²

8.186 CLAN, in calling for a Royal Commission into past institutional care and fostering practices, argued that:

The issues raised by this [Senate] Inquiry are far-reaching and involve a significant degree of criminal activity which can only be addressed by a Royal Commission. In particular, there were institutions for children across Australia whose practices...were notorious for their inhumanity and criminality and should be exposed to public scrutiny.¹¹³

8.187 Some groups argued that a Royal Commission was needed to look into the broader issue of child protection in Australia. Bravehearts argued that a Royal Commission was needed to inquire into child protection matters including the issue of the protection of children in institutional care and/or those children subject to the statutory intervention of government agencies. The organisation stated that:

It is our contention that in order to properly address any issue, to find a practical and workable solution, you must clearly and precisely understand the problem. In Australia, we can not even agree on what constitutes "child abuse" let alone effectively address the problem....A Royal Commission would clearly articulate the problem not only for our law and policy makers but for the Australian community as a whole and would set the agenda for real resolution of this most pressing and serious of threats against our young.¹¹⁴

8.188 Evidence to the inquiry favoured the establishment of a Commonwealth Royal Commission rather than State-based Royal Commissions. Broken Rites stated that:

We certainly do not need state based royal commissions; we need a national royal commission. Subpoenaing documents held by state agencies will be just as important as subpoenaing documents held by church agencies, and it will be difficult; the Forde inquiry made that clear...I do not think matters would be resolved by having a state royal commission.¹¹⁵

111 *Submissions* 22, p.28 (CLAN); 79, p.18 (Broken Rites). See also *Submissions* 64, p.1; 145, p.3; 249, p.2; 280, p.6.

112 *Submissions* 336, p.7; 385, pp.23-24.

113 *Submission* 22, p.28 (CLAN). See also *Committee Hansard* 12.11.03, p.35 (Broken Rites).

114 *Submission* 176, p.1 (Bravehearts). See also *Committee Hansard* 12.3.04, pp.77-82 (Bravehearts).

115 *Committee Hansard* 12.11.03, p.43 (Broken Rites).

8.189 Bravehearts also argued for a national inquiry and stated – 'This issue [of child abuse] is not confined to Queensland, just like it is not confined to institutions that provide homes for children'.¹¹⁶

The nature and role of Royal Commissions

8.190 Royal Commissions are part of the executive arm of government. They are appointed by governments to conduct inquiries, obtain information and report to government. They may be appointed by the Commonwealth Government or by State Governments.

8.191 Royal Commissions have extensive powers. One study has noted that:

Among inquiries, royal commissions and commissions of inquiry...stand out because of their powers. Reviews, committees, task forces and working parties share many of the characteristics of commissions; they are government established, *ad hoc*, investigatory and advisory bodies. But commissions are armed with powers which give them a capacity for coercion that other inquiries lack. These powers enable commissions to unearth evidence, but also have a significant and sometimes intrusive impact on the affairs of governments and individuals.¹¹⁷

8.192 The Commonwealth's *Royal Commissions Act 1902* includes the following coercive powers:

- power to summons witnesses and take evidence (section 2);
- power to apply to a judge for a search warrant (section 4);
- power to compel a witness to give evidence, even if that evidence is self-incriminating (section 6A);
- authority to issue a warrant for arrest of a witness failing to appear (section 6B); and
- power to protect the Commission and the Commissioner from contempt (section 6O).¹¹⁸

8.193 Royal Commissions are not bound by the rules of evidence and they may, at their discretion, adopt an inquisitorial approach. One study noted that 'commissions may adopt inquisitorial processes aimed at discovering the truth of a situation, rather than adversarial court processes designed to force the prosecution to establish its case.

116 *Committee Hansard* 12.3.04, p.83 (Bravehearts).

117 Ransley J, 'The powers of royal commissions and controls over them', in Weller P, ed. *Royal Commissions and the Making of Public Policy*, CAPSM, 1994, p.22.

118 Parliamentary Library, *Examples of Public Sector Inquiries: Commonwealth Paedophile Inquiry*, Research Paper no.9, 1996-97, p.8.

It is this procedural flexibility which enables commissions to uncover and receive evidence not available in the usual court system'.¹¹⁹

8.194 These coercive powers, however, do not remove the need for a commission of inquiry to observe rules which promote procedural fairness. These rules include the rules of natural justice which require an unbiased Commission and an opportunity for any person named at an inquiry to be heard on any allegation of wrongdoing.

8.195 Royal Commissioners, in the exercise of their duty, have the same protection and immunity as a judge of the High Court. This means that the common law of contempt applies to a Royal Commission as if it were a superior court, as distinct from an inferior court such as a Magistrates Court. The common law of contempt empowers a presiding judge to control behaviour within the court. A judge may determine whether contempt has occurred and impose a penalty. A witness or a legal practitioner appearing before a Royal Commission has the same immunities and protection as if they were appearing in the High Court, for example, in that interference by way of obstruction or threat of such persons would be a contempt.

8.196 Royal Commissions do not lay charges but the recommendations or findings of the Commission may include matters leading to subsequent prosecutions. The reports of Royal Commissions are usually delivered to the Government of the day for tabling in the Parliament.¹²⁰

A Royal Commission into institutional abuse

8.197 The Committee believes that evidence to the inquiry warrants a Royal Commission into the extent of physical and/or sexual assault within institutions and the degree to which criminal practices were concealed by the relevant State and/or Church authorities.

8.198 Dr Chamley of Broken Rites has stated that a Royal Commission would be well suited to examine these matters.

A commission would be encouraged to examine in detail the repeated failure by church hierarchy and government bureaucracies to take responsive and responsible action. It would hear of internal omissions that enabled and allowed abusers to remain concealed and active in their crime. While many of the paedophiles operated individually, in some situations they have worked in groups for decades.¹²¹

8.199 Much evidence to the inquiry indicated knowledge and concealment by the State and Church authorities and by others, such as the police and health personnel, of the actual conditions in institutions including cases of criminal and sexual assault. The

119 Ransley, p.24.

120 Parliamentary Library, pp.8-9.

121 Chamley W, 'Exposing a shameful past', *Courier Mail*, May 2003.

Committee heard similar stories from witnesses outlining cases of abuse, often by the same perpetrators in the same institutions (or other institutions where the perpetrators had been 'moved on'), and were told that various authorities were informed, often over many years, of abusive practices. The Committee considers it is almost beyond belief that the relevant authorities did not know that such practices were occurring at least in several institutions where a consistent pattern of abuse should have appeared evident.

8.200 In relation to institutions operated by the Catholic Church, the example of Neerkol is illustrative of a pattern of concealment and collusion between authorities. It is evident that the Catholic Church and the State Government must have known of the various forms of abuse that occurred in the orphanage. One detailed submission from a number of ex-residents of the orphanage noted that ex-residents made complaints regarding abuse to the Mother Superior of the orphanage; the priest resident at the orphanage; child welfare officers; Rockhampton police (especially those who ran away from the orphanage); families when taken in for the holidays; families in cases where ex-residents went to live on farms; and on leaving the orphanage, the Catholic Bishop of Rockhampton. The submission noted that 'to our knowledge all reports were ignored'.¹²²

8.201 Regarding the Christian Brothers it is apparent that the Christian Brothers authorities must have known of illegal practices. Dr Coldrey refers to a letter from Brother Conlon to the Dublin headquarters of the Order that Brother Keaney had been made aware of an indecency charge against a particular Brother. Conlon writes:

I tried hard to get this Brother transferred from Clontarf during the past six months, but have failed...I know it is a delicate matter to deal with...I do not wish to be critical of the Provincial, as I know only too well his many difficulties. Still, I think he should be more prompt in dealing with offences of this kind.¹²³

8.202 A similar pattern of concealment is evident with respect to orphanages operated by the Salvation Army and the same reluctance of the hierarchy – in this case the Salvation Army – to take action against abusive officers.

Even to this day [Captain] Morton parades around in his Salvation Army uniform...The hierarchy of the Salvation Army were then and still are fully aware of his atrocities against the boys in the orphanages. Letters have been written to the headquarters complaining of his behaviour but nothing has ever been done to make him account for his behaviour...When I got out of the clutches of the Salvation Army, I complained about the orphanage and what I had suffered whilst I was in there and in particular, I complained of Morton and [Captain] Patteson...When I asked if they [Salvation Army] had ever taken action against Morton, the reply was, "You or anyone else cannot do anything; the law will not allow you".

122 *Submission 225*, p.5.

123 Cited in *Submission 40*, p.28 (Dr Coldrey).

I know of one boy, and there were others, a very young boy named Norman Stenning who wrote, and bravely signed the letter, to the Salvation Army headquarters in Sydney and brought to their attention the activities of Captain Stan Morton and asking the senior officers for help. Norman Stenning's letter was returned to the orphanage and to Captain Morton and Captain Patteson. These two officers then set upon this brave young boy and I know that it is a nightmare to him even now, and he is over seventy years of age. So do not accept any denial of knowledge from this organisation. (Sub 282)

...I think that it is a disgrace that those of us who complained years ago were never taken seriously...So can I ask when is justice going to roll – could you please tell me why my complaints all those years ago were ignored?...Can I ask when is the Salvation Army going to ask those officers that it knows committed abuses to apologise? (Sub 286)

8.203 One state ward also noted that 'information has filtered down to me, as indications of a massive cover up of abuse over thirty years by the Salvation Army of knowing of high incidence of child abuse occurring in the Gill Memorial Home for Boys – Goulburn, in which they managed and failed to take appropriate action to constrain, or restrain the nature of this abuse'.¹²⁴

8.204 The familiar pattern of 'cover up' of abusive practices was evident in State-run institutions, as is illustrated below in a care leaver's experience of Parramatta Girls Home and Hay Detention Centre. Neither the staff nor inspectors took action against clearly criminal behaviour inflicted on residents.

Parramatta and Hay – where was the monitoring?

Senator MURRAY – In your written submission and in your verbal submission you have concentrated on the men and the things that were done to you. Where were the women staff in all this?

Ms Robb – The women were around, but they did not do anything. They saw a lot. There were a few nasty women there too—cruel women. I never, ever got hit by a woman. But the men had their places: they had shower blocks, they had isolation, they had their offices. They did it in front of muster. We were made examples of in front of everyone.

Senator MURRAY – In your submission you say:

'I could barely lift my head. I was so sore I was in agony—busted lips, black eyes, bruised, teeth missing'. The women staff would have seen that.

Ms Robb – But that was their job.

Senator MURRAY – What did they do about it?

Ms Robb – Nothing. The odd one felt sorry for you, but that was their job. They knew what happened, but they kept their jobs...

Ms Robb – Yes, they did. But if you look at the photos that were taken at Parramatta, that was all glorified.

Senator MURRAY – Say somebody like you had been bashed and had black eyes and bruised lips and so on, would they hide such a person from the inspector? How was the physical treatment concealed?

Ms Robb – The only time that anyone came in there was when someone was going to Hay. I was in isolation when I got bashed, and I did not see anyone. I saw the officers that came up to me, but I never saw anyone higher than that from outside. Until I tried to abscond, I never saw anyone. I was not ready to go to Hay then. What they put me through was just torture. But they never sent me to Hay after I got my teeth busted. It was not until I tried to abscond, and then they came in. But, no, no-one saw me except the officers, female and male, and some of the girls.

Senator MURRAY – In your submission you record something which I think must come out of your file—some remarks by a consultant psychiatrist. Were you interviewed by a psychiatrist whilst you were there?

Ms Robb – Yes.

Senator MURRAY – And did you report to him or her what was happening?

Ms Robb – The psychiatrist who was there that interviewed us was the criminal who put us on Largactil.

Senator MURRAY – But you mentioned things like being assaulted. What I want to get out of you is whether anybody in authority was ever told by either the girls or the staff about these dreadful things that were happening.

Ms Robb – I could not answer that.

Senator MURRAY – But did you tell anyone?

Ms Robb – No, I did not tell anyone—because they were people who were there all the time. They had to know what was happening; they did know what was happening. Why go and say anything and get a bashing for it?

Committee Hansard 3.2.04, pp.9-10.

8.205 Other submissions from care leavers recorded a pattern of concealment and a lack of action in addressing concerns they raised. These included a failure to address serious concerns when raised with, among others, welfare officers, health personnel and teachers.

Welfare officials

One lad was belted on the bare buttocks by [Brother] Doyle with a fan belt. He absconded and on being picked up by the Welfare he showed them the black and blue state of his bottom. They enquired of Doyle what caused such damage. His reply, "the boy inflicted such on himself". The lad in question never returned to Clontarf, however the Welfare never stepped in to protect the other kids still at risk from this sadist. (Sub 25)

Health personnel

Ben also spoke of a local Tamworth doctor who visited the centre [Tamworth Boys Home]. Any complaint about mistreatment or injuries received as a result of a beating were responded to by the doctor with the query, "How did you say this happened again?" If the boy replied with the same answer then the doctor would call the guard and state that the boy was gaining too much weight and that a certain number of meals would have to be missed. (Sub 329)

Teachers

The Major...gave me another 12 "cuts" for telling lies. The next day at school the teacher asked me "what is wrong with your hands, why can't you write?" I told him why. He told me to go to the headmaster and I explained to him. All the headmaster said was "GO BACK TO CLASS". Nothing was done. We were all alone. We had no one to turn to. All we could do was suffer and bare it. (Sub 336)

The teachers at South Goulburn Primary School and the teachers at Goulburn High School all knew of the terrible happenings in the [Gill Memorial] orphanage. They saw the damaged boys; they were told of the happenings at the orphanage but they did nothing to help. (Sub 282)

8.206 Police were also informed of abuse occurring in homes yet apparently no action was taken.

...the boys used to abscond or run away from the orphanages and the police would capture them. The police would then give them a hiding and deliver them back to the home. The Salvation Army officers in the home would then give the boys a hiding. That is the way it was. The police knew what was going on up there, but they did absolutely nothing.¹²⁵

I ran away from there when I was 12 years old. I got charged with uncontrollable behaviour at Goulburn Police Station. I reported the sexual assault to the Goulburn Police. I got 6 to 8 months at Doruke Training Centre Windsor. (Sub 312)

8.207 Evidence to the Committee indicated that perpetrators of abuse and paedophiles freely operated in many homes and were often moved between institutions operated by the various Churches.

8.208 Broken Rites claimed a number of paedophiles worked in the two Christian Brothers orphanages in Victoria – St Vincent's, South Melbourne and St Augustine's, Geelong and that these Brothers 'appear to have been able to move between the two locations'.¹²⁶ A state ward resident at St Augustine's, Geelong confirmed that one Brother referred to as the 'red terror' because he carried round a red strap and a

125 *Committee Hansard* 3.2.04, p.91.

126 *Submission* 79, p.6 (Broken Rites).

number of other Brothers at the home 'were also known by the boys to be paedophiles'.¹²⁷

8.209 A similar paedophile ring operated at St Alipius School, Ballarat, which led to criminal prosecutions. The ring was said to involve three Christian Brothers, including the headmaster, and a priest. One of the Brothers died in the 1970s. The two surviving Brothers were tried and in 1996 Brother Dowlan was jailed for nine years (reduced on appeal to six years) and Brother Best received a nine months suspended sentence. The priest involved, Fr Ridsdale, is already serving an 18-years sentence for sex offences, including acts committed at St Alipius, and was not charged again.¹²⁸

8.210 The movement of known offenders did not just occur between diocese and institutions, but between countries. The Committee received evidence that when some St John of God Brothers, who operated Marylands boarding school in Christchurch, New Zealand, were accused of sexual abuse at that school no investigation was made by the Order and the Brothers were transferred back to Australia.¹²⁹

8.211 Currently some 110 men in New Zealand are taking action against the St John of God Brothers in New Zealand over physical and sexual abuse allegations at the Marylands School in Christchurch. The allegations range from 1959 to 1980.¹³⁰ One former student at the school stated that he was abused by a Brother at the school and received a \$82 500 settlement from the Order – 'I was forced to accept what was offered even though I knew it was unfair...I'd like to have the opportunity to put my case to a court with a jury so that a fair decision is made'.¹³¹

8.212 Submissions also claimed that paedophile rings operated in the Christian Brothers orphanages in Western Australia and that paedophiles were transferred between these orphanages. One care leaver noted that:

As with the three other institutions, there were paedophile Christian Brothers on the staff at Tardun from the 1930s through to the 1950s... A lot of the sexual abuse of kids at Tardun was committed by "lay brothers", they were the ones who supervised the farm work as they were not qualified to teach in the classroom. One of the worst molesters in the early 1940s after complaints from lads in Tardun was simply transferred to Castledare, a junior orphanage back in Perth where he happily resided for ten years. That left another three known molesters still on the Tardun staff. (Sub 365)

8.213 Dr Coldrey also refers to the existence of paedophile rings at Bindoon and Castledare operating over a number of years – 'it is clear abusers were known to each

127 *Submission* 385, p.1.

128 *Submission* 40, p.28 (Dr Coldrey).

129 *Submission* 355, p.1 (Male Survivors of Sexual Abuse Trust).

130 *Submission* 355, p.1 (Male Survivors of Sexual Abuse Trust).

131 *Submission* 144, p.2. See also *Submission* 288, p.1.

other, and to some extent operated as a team'. Dr Coldrey refers to 'five Brothers as multiple abusers' and that two of the Brothers 'probably molested some fifty boys each'.¹³² Dr Coldrey noted that the infiltration of the staff of orphanages by committed paedophiles would have been relatively 'easy to do' in the past – often the institutions 'were desperate for staff to fill vacancies rather than just taking applications and sifting through them'.¹³³

8.214 Broken Rites also stated that there was a ring of paedophile Brothers operating at several St John of God homes in Victoria – with the group initially establishing itself within the Cheltenham Home. When a property at Lilydale was acquired some of the paedophiles were transferred to this Home and another younger group of paedophiles was recruited.

The experiences of orphans and boys who never received any visitors at Cheltenham deserve special mention since we believe that they reveal the mindset of the paedophiles. These boys were always quartered in upstairs dormitories and away from any boys who would be visited by family or legal guardians. They speak about being given a red medicine that made them drowsy. Pack rapes took place and boys who resisted or attempted to fight off their attackers were beaten mercilessly. These were boys of 10-13 years up against adult males.¹³⁴

8.215 Dr Coldrey also noted that the Churches' placement of known child molesters as chaplains in institutions needs to be investigated. He argued that the Churches placed these individuals in homes:

...to get them out of the way, with the pious hope that the superintendent of the staff, or the brothers or the sisters, would keep an eye on them. This was explored in the Forde inquiry in Queensland...and the case of Father Stanaway, who was definitely placed in a Brisbane home by the archdiocese to get him out of the way, was documented in full. There was no doubt. I came across a case concerning the brothers' home at South Melbourne, St Vincent's, between 1948 and 1957. There was a chaplain there...about whom there is a strong odour, and there were allegations about him in the media during the 1990s. I know from [the] brothers' internal sources that he was considered extremely unsatisfactory and they could not get rid of him because the diocese would not provide anyone else as chaplain. There is evidence too...that in the 1940s at Fairbridge Pinjarra, in the west, there was a chaplain who seemingly molested boys, was involved in stealing money and committed suicide. The question is whether he was appointed by people knowing some of that in advance to get rid of

132 *Submission 40*, pp.27-28 (Dr Coldrey).

133 *Committee Hansard 12.11.03*, p.2 (Dr Coldrey). See also *Submission 40*, pp.47-50 (Dr Coldrey).

134 *Submission 79*, p.8 (Broken Rites).

him out of the mainstream. It shows an attitude to children and their welfare which was, to say the least, extremely casual at best.¹³⁵

8.216 The Committee believes that these matters, especially the alleged concealment of criminal activities and the operation of paedophile rings in institutions require a thorough investigation that only a Royal Commission would satisfactorily undertake.

8.217 The Committee notes that as discussed previously a number of State Governments have initiated inquiries into abuse in institutional care and related issues. In 1998, a Commission of Inquiry into allegations of abuse and mistreatment of children in Queensland institutions was conducted. More recently in 2003 the Tasmanian Ombudsman, in conjunction with the Department of Health and Human Services, undertook a review of claims of abuse of children in state care. In June 2004 the South Australian Government announced a judicial Commission of Inquiry into any concealment or mishandling of allegations or reports of sexual abuse involving children while under the guardianship of the State.

Conclusion

8.218 The Committee believes that this inquiry has raised a number of extremely serious issues in relation to institutional abuse in State and church-run orphanages and other institutions, especially the concealment of these actions by the relevant State and Church authorities. It became evident during the inquiry that a thorough investigation and resolution of these complex issues go far beyond the powers and scope of a Senate inquiry to inquire into and report upon.

8.219 As a consequence, and mindful of the many representations made to it, the Committee considers that the Commonwealth should establish a Royal Commission into institutional abuse in these institutions, with a specific and strictly limited focus on the nature and extent of physical abuse and/or sexual assault within these institutions, and the role of the State authorities and/or Church organisations in any concealment of past criminal practices. Such a Royal Commission would provide a means of accessing documents and other evidence in the possession of State authorities and the Churches and also provide a means by which individual perpetrators of such abuse could be identified and a process set in train to bring these individuals to justice.

8.220 The Committee is mindful of the cost of Royal Commissions and the often lengthy timeframes over which they are conducted. The Committee therefore reiterates that it is important that the proposed Royal Commission should operate within the narrow and specifically-focussed terms of reference that the Committee proposes and that it report within a reasonable timeframe. The Committee does not favour any broadening of the focus of the proposed Royal Commission on matters related to child protection generally.

135 *Committee Hansard* 12.11.03, p.3 (Dr Coldrey). See also *Submission* 40, pp.50-52 (Dr Coldrey).

8.221 However, the Committee also recognises that decisions to establish Royal Commissions involve a range of conflicting factors upon which governments must deliberate. While strong calls for a Royal Commission were received from many individuals and groups during the inquiry and the Committee's discussion reflects these calls, the Committee also acknowledges that there is a diversity of views over Royal Commissions in the community with many supportive and many opposed. The different views held within the community were reflected within the Committee.

8.222 The Committee has therefore proposed that all those institutions and out-of-home care facilities that provided care of children should demonstrate greater accountability and openness by cooperating with investigative authorities. Should such cooperation not be forthcoming, a process to establish a Royal Commission should be instigated.

Recommendation 11

8.223 That the Commonwealth Government seek a means to require all charitable and church-run institutions and out-of-home care facilities to open their files and premises and provide full cooperation to authorities to investigate the nature and extent within these institutions of criminal physical assault, including assault leading to death, and criminal sexual assault, and to establish and report on concealment of past criminal practices or of persons known, suspected or alleged to have committed crimes against children in their care, by the relevant authorities, charities and/or Church organisations;

And if the requisite full cooperation is not received, and failing full access and investigation as required above being commenced within six months of this Report's tabling, that the Commonwealth Government then, following consultation with state and territory governments, consider establishing a Royal Commission into State, charitable, and church-run institutions and out-of-home care during the last century, provided that the Royal Commission:

- **be of a short duration not exceeding 18 months, and be designed to bring closure to this issue, as far as that is possible; and**
- **be narrowly conceived so as to focus within these institutions, on**
 - **the nature and extent of criminal physical assault of children and young persons, including assault leading to death;**
 - **criminal sexual assault of children and young persons;**
 - **and any concealment of past criminal practices or of persons known, suspected or alleged to have committed crimes against children in their care, by the relevant State authorities, charities and/or Church organisations.**

Senator Humphries expressed reservations about this recommendation. While agreeing that full and effective cooperation by the institutions concerned is vital in addressing the actions and misdeeds of the past, he is concerned that the conducting of a Royal Commission would be a painful experience to many care-leavers and may delay the institutions concerned from fully meeting their obligations to make redress.