WHY AN APOLOGY IS NOT ENOUGH[1]

Although Kevin Rudd has apologised to members of the Stolen Generation, he has ruled out setting up a compensation fund. In the absence of compensation, the question must be asked: "What does an apology mean?"

The hollow words offered to 90,000 Victorians – including members of the Stolen Generation - who spent time in state care in the last century are an example of what the Rudd Government must avoid.

In August 2006, the then Premier of Victoria, Steve Bracks, issued a public apology "about some of the past practices in the provision of home care services in Victoria". By the time Mr. Bracks made his apology, his Government had cynically passed legislation stating that an apology did not constitute an admission of liability.[2] Bracks's apology was too little, too late and simply added insult to injury. This is the risk the Rudd Government runs by apologising whilst refusing to compensate the victims

After three harrowing reports on the lives of children in care, including Bringing Them Home dealing with the Stolen Generation[3], the Child Migrant report Lost Innocents: Righting The Record[4] and the institutional abuse report Forgotten Australians[5], some state governments have seen the light.

The late Jim Bacon, former Premier of Tasmania, set up the first redress fund for former wards of the state in 2004. In 2007, the then Premier Mr. Lennon announced the first (and only) compensation fund for members of the Stolen Generation.

The Queensland Government announced ex gratia payments for abused wards in 2007 as did Western Australia which set up Australia's most generous redress fund for children abused in state care, which specifically includes members of the Stolen Generation. The WA scheme allows ex gratia payments of up to $80,000.00, compared to up to $60,000 in Tasmania and $40,000 under the Queensland system.

In South Australia, the Mullighan Report[6] was recently handed down after three years of hearings and at a cost of several million dollars. Not surprisingly, Mr. Mullighan found that children in care in South Australia had suffered horrific sexual abuse and that there was a

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[1] "An Apology in Not Enough Mr Bracks" Wayne Chamley "The Age" 9h August 2006

[2] *Wrongs Act 1958* (Vic) s14J.

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

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

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

[6] Commissioner Ted Mullighan, *Commission of Inquiry Report – Children in State Care*, Government of South Australia Website, <http://www.service.sa.gov.au/ContentPages/sagovt/mullighaninquiry_cisc.aspx>.

continuing failure of the state to protect the children in its care. The South Australian Government has now apologised to the children abused in its care and is now looking at models for redress.

WHY DO WE NEED REDRESS FUNDS?

Limitation Periods.

One of the major barriers to successfully suing in these cases is the Statute of Limitations. The nature of the injuries suffered by potential claimants is that even though the victims are clearly aware of the abuse, it often takes decades before survivors of abuse have the psychological fortitude to deal with their trauma.

Often, those most severely damaged have spent years self medicating, dealing with their distress by turning to drugs and/or alcohol. Others spend years in denial and often there will be a critical event which will cause them to take action eg a child of their own reaching the age when they were first abused.

The problem is of course that limitation periods in Australia generally start to run from the time the claimant became "aware" that they had suffered an "injury."

Extension of time applications are unpredictable and costly to run. The case of Stingel v Clark is a case in point.[7] Even though Ms. Stingel was not a ward of the state, similar issues apply. Ms. Stingel alleged she was raped by Mr. Clark in about 1981. Ms. Stingel's claim took seven years to litigate with a number of appeals, including to the High Court, and ultimately a retrial in the County Court of Victoria where she was awarded $20,000 by a Jury. The legal costs incurred by both sides however would have been in the hundreds of thousands.

In Victoria, a number of factors must be considered before leave can be granted to issue proceedings out of time. These factors include the reasons for the delay, the prejudice that the Defendant has suffered by the delay (eg the destruction of documents or the loss of witnesses) and the merit of the substantive claim.[8]

The reality is that in most of these claims, given that the last of the Orphanages or Children's Homes closed in the early 80's, Defendants will have little difficulty in showing prejudice.

Proving Injury and Liability.

Even if an extension of time is granted, claims for damages face other significant impediments.

In cases of sheer neglect ie a failure to adequately feed, clothe, nurture, educate or lack of support services on release, it is often difficult to formulate a cause of action recognised by our tort law.

In other cases, where negligence and breach of duty can be proved, there are causation issues. For example, Defendants often argue that it is not the abuse that occurred whilst

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[7] *Stingel v Clark* [2006] HCA 37, *Clark v Stingel* [2007] VSCA 292.
[8] *Limitation of Actions Act (Vic)* 1958 s23A.

claimants were wards of the state which has caused the injury. Inevitably most children were removed because they came from dysfunctional or abusive families. Many went on to lead dysfunctional or abusive lives after their release from wardship.

Children often came out of these Homes at the age of 15 or 16 with little more than the clothes on their back. They were released without friends or family, support networks, welfare payments or a place to go. They had no concept of money which meant they had no idea how to shop, how to cook or care for themselves on even the most basic level. They struggled to read and write. Many had no idea how to apply for a job or do a job interview. Most of these children had no idea how to use public transport.

Many experienced trauma on the outside which was nearly as bad as what they experienced in the institutions. Homelessness and sexual exploitation by paedophiles taking advantage of vulnerable young people was common place.[9]

Often drug addiction, crime and suicide attempts followed.[10] Many achieved great things despite the disadvantage they suffered but even those who appear "successful" tell of terrible and crippling anxiety. Many feel that they are "impostors" and that one day they will be recognised for the people they really are i.e. that little child who no one wanted and who was constantly told they would never be good enough.

How then do you "unscramble the eggs" and identify the cause of any ongoing symptoms, psychological injury, loss or damage.

Trevorrow's Case[11]

In Trevorrow v State of South Australia, which was heard by a Judge alone, the Judge did feel able to unscramble the eggs.

"The application of the common sense test of causation leads to the result that the breaches of duty by the State have caused damage and loss to the Plaintiff. He developed an anxiety state and depression as a child as a consequence of his removal from his natural family and placement in a non indigenous family. All causes of action had at their genesis the Plaintiff's removal and the severing of the attachment between mother and child. This from a common sense point of view was a material cause of serious lifelong depression and its sequelae. His depression has led to feelings of inadequacy and worthlessness, difficulties with alcohol and difficulty with coping with the exigencies of life."[12]

Medical records and Mr. Trevorrow's wardship file tracked his descent into mental illness and developing trauma. The fact that Mr. Trevorrow spent many years in torment, was not surprising given the story that unfolded whilst he was in care.

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[9] National Youth Commission, *Australia's Homeless Youth:* A Report of the National Youth Commission Inquiry into Youth Homelessness, 2008, p. 125 and and Child Wise, Speaking *For Themselves: Voices of Young People Involved in Commercial Sexual Activity,* August 2004, p.15 and Bruce, R., *Prostitution and State Care*: Experiences of Residential Care as Contributing to Young People's Involvement in Prostitution - An Exploratory Study, 2007, (Unpublished) and Marian, C. *Where Are They Now: who knows, who cares?* What becomes of young women post - release from protective care? November, 1994. (unpublished).

[10] Chamberlain, C, Johnson, G, & Theobald, J. '*Homelessness in Melbourne: Confronting the Challenge',* Centre for Applied Social Research, RMIT University, February, 2007.

[11] *Trevorrow v State of South Australia* (No 5) [2007] SASC 285.

[12] *Id* at [1139].

Mr. Trevorrow was awarded $525,000, including punitive damages, which went up to $775,000 with interest. Whilst the Trevorrow case was a great win, it is a case which was ultimately decided on its facts and made possible by the admissions contained in Mr. Tevorrow's wardship file that the South Australian Government had no power to remove him.

Mr. Trevorrow's case is now subject to appeal by the South Australian Government, even though Mr. Trevorrow is now dead and the SA government have said that they do not want the money back. Certainly, the award in this case puts the payments available through compensation funds into context.

Unlike in Mr. Trevorrow's case, most wardship files document opinions offered as facts which are a litany of blaming the victim and ignoring the truth, for to acknowledge the truth would have meant that those who ran the Childrens' Welfare Departments and the Institutions, would have had to admit their monumental failures.

Vicarious Liability

Where injury and breach of duty can be established, the argument will then centre around whether notwithstanding the abuse, the entity in whose care the child was placed can be held legally liable for the conduct of its agents or employees.

An organization does not rape a child. Individuals perpetrate the abuse. Accordingly, when these claims are brought the organization will most likely argue that it did not know that the conduct was occurring and will simply seek to blame the individual abuser.

Given that many of these claims are brought years after the event, it is often extremely difficult to show that the entity that owed the duty of care either knew or should have known that the abuse was occurring.

Often the abuse will relate to illegal conduct, particularly in cases of 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.

In 2003, the High Court considered the extent to which authorities could be liable in negligence where there was no allegation of fault by the authority but where injury had occurred as a result of the misconduct of an employee.

The High Court found that a non delegable duty of care did not extend to illegal conduct or conduct where an employee was pursuing a "frolic of their own".[13]

Further, in cases of clerical abuse, Churches may argue that a priest, brother or nun was not even an employee and therefore they cannot be held vicariously liable.[14]

Religious Institutions

[13] *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* [2003]HCA 4.
[14] *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8.

Many Wards of the State were placed in the care of churches and religious institutions in circumstances where it is clear that the state governments who were the legal guardians of these children essentially abdicated all responsibility.

The Catholic Church and it's religious orders, the Presbyterian & Methodist (now Uniting) Church, the Anglican Church and the Salvation Army ran many such institutions as did other religious and philanthropic organizations.

It may be that successive Governments mistakenly thought that having placed the children in the "best" possible care ie in the hands of God, it was not necessary to inquire further. The fact is that there were no adequate systems for the independent auditing or inspection of these facilities or where there were systems, they were ignored.

Many Churches have however managed to avoid liability in these types of claims by organising their affairs in such a way that they are legally incorporated for the sole purpose of owning and disposing of property (and some would say the amassing of wealth) but otherwise argue that there is no legal entity that can be sued.

In the United States, the Pope recently apologised to victims of sexual abuse at the hands of Catholic Priests. This is following payouts of more than $2b and the bankrupting of 6 Parishes of the Catholic Church who have been sued in relation to these complaints.

The Pope has also apologised to Australian victims of clerical sexual abuse. However, the Catholic Church in this country is cynically hiding behind a corporate veil that in effect has resulted in immunity from many actions relating to historical sexual abuse.

In a case heard by the Court of Appeal of the Supreme Court of NSW[15] the Church argued that there was no legal entity that could be sued by Mr. Ellis in relation to his alleged sexual abuse at the hands of a Priest.

This claim was originally brought by a Mr. Ellis against the Trustees of the Roman Catholic Church and against His Eminence Cardinal George Pell Archbishop of Sydney. Mr. Ellis alleged that he was sexually assaulted by an assistant priest at Bass Hill Parish in Sydney between 1974 and 1979. The trial Judge found that the Trustees of the Roman Catholic Church could be sued and granted an extension of time to Mr. Ellis to allow him to pursue his claim.

This decision was appealed by the Trustees of the Roman Catholic Church. Even though the Church conceded on appeal that the evidence filed by the Plaintiff established an arguable case, it nevertheless argued that the claim should be dismissed on the basis that there was no legal entity that could be sued.

Whilst Archbishops can be sued and arguably constitute a "corporation sole", in cases of historical sexual abuse, the relevant archbishop has often passed away. The Catholic Church has organized it's affairs so that the only other legal entity that exists is the Roman Catholic Church Property Trust. The church's argument was that as this legal entity played no role in the oversight or appointment of priests, it could not be sued in a claim for clerical sexual abuse. The Church also argued that as there was no other legal entity that could be sued, Mr. Ellis's claim should be dismissed. This argument was upheld by the Court of Appeal.

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[15] *The Trustees of the Roman Catholic Church v Ellis and Anor* [2007] NSWCA 117.

On appeal to the High Court, Mr. Ellis' counsel put the following to the court:

"If the Court of Appeal's decision is correct, then the Roman Catholic Church in NSW has so structured itself as to be immune from suit other than in respect of strictly property matters for all claims of abuse, neglect or negligence, including claims against teachers in parochial schools…….. That immunity, they say, extends to the present day in respect of the parochial duties of priests. We say such an immunity would be an outrage to any reasonable sense of justice and we say it is wrong in law."[16]

In November of last year, the High Court agreed with the Catholic Church and refused special leave to appeal. This means that the legal position is now clear and the Catholic Church in NSW (and by extension in all Australian states where Churches have organized their affairs in a similar manner) is immune from litigation in many cases of past sexual abuse even in circumstances where it is clear that the church knew or should have known that children in its care were being abused and failed to act.[17]

There was a public outcry when James Hardie sought to dispose of claims by incorporating offshore. Why then has the Catholic Church escaped criticism for conduct which is surely even more morally reprehensible coming as it does from a religious organization which professes such high moral standards?

The Cost of Litigation

The other significant impediment faced by potential claimants is the cost of litigation. These cases are incredibly risky because of the issues outlined above. In addition, the Churches' and Government lawyers often play hard ball, so the decision to issue is a very hard one.

Whilst the Catholic Church and other Religious Institutions have set up compensation panels or informal processes to settle these claims, money is always paid with a denial of liability. Apologies are extremely general. Until the Churches were shamed into not doing so, confidentiality was invariably required as a term of settlement which left claimants feeling demeaned and that all they'd received was "hush money".

Many claimants find that these panels are not about redress but are more about damage control and protecting the brand name of the institution. Claimants find the process like being in care all over again ie they feel powerless and abused and as if they once again have to go "cap in hand" seeking a handout which they are made to feel they do not really deserve.

Class Actions.

Class or group actions would seem to be the best vehicle for pursuing these claims and certainly, there is much to recommend a class action if it was viable.

There are multiple claimants and a handful of Defendants against whom these claims could be brought. A class action would also reduce the unit costs of each claim and would be less stressful for the individual claimants.

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[16] *Ellis v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] HCATrans 697.
[17] *Id.*

However, in Victoria at least, the class action rules require that the claims of all the persons in the class are in respect of, or arise out of, the same, similar or related circumstances and give rise to a substantial common question of law or fact.[18]

Given the very complex and varied factual situations between members of the class or group, it is very unlikely that a class action for all wards of the state abused in care could be maintained. Even if attempts were made to introduce sub classes which related to specific institutions over specific periods of time, the varying facts and circumstances of each individual claimant would be such that it would be very difficult to argue that there were substantial common questions of fact.

In addition, as virtually all of these claims are prima facie statute barred, given that any application to extend time must be based on the criteria referred to above which will vary depending on the individual circumstances of the claimant, it would be virtually impossible to bring a collective application to extend time for all members of the class.

A number of cases highlight the difficulties in bringing class actions except in cases where the "class" is very limited.[19]

Complaints to the United Nations Human Rights Committee and/or the Committee against Torture

Another possibility is to seek to refer complaints to the United Nations Human Rights Committee and/or the Committee Against Torture for breaches of the International Covenant on Civil and Political Rights (ICCPR) and breaches of the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT).

Complaints can only be referred under the ICCPR and the CAT once all domestic remedies have been exhausted, save where the remedies are unreasonably prolonged.[20] In addition, complaints may only be submitted against States that have ratified the Optional Protocols and the conduct complained of having occurred after ratification.[21]

Australia ratified the Optional Protocol to the ICCPR on 25th September 1991 and signed Article 22 of the CAT on 28th January 1993. Australia is yet to sign the Optional Protocol of the CAT, which John Howard refused to sign in 2004 although Rudd has now indicated that he will do so.

Whilst the events complained of pre-dated Australia signing the Conventions, there is precedent to say that if the effects of the breaches are continuing, then the complaint can be heard.[22] However, as with extension of time applications in our local courts, these issues would very much be decided on the facts of each individual claim.

Article 1(1)of the CAT states that "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person …..when such

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[18] *Supreme Court Act 1986* (Vic) s33C(1).
[19] *O'Sullivan v Challenger Managed Investments Ltd* (2007) NSW SC 383.
[20] Sarah Joseph et.al., *Seeking Remedies for Torture Victims* (OMCT Handbook Series, Vol.4, Geneva, 2006), 64.
[21] *Ibid.,* 58-59.
[22] see *Konye v Konye v Hungary (520/92)* in Sarah Joseph et.al., *Seeking Remedies for Torture Victims* (OMCT Handbook Series, Vol.4, Geneva, 2006), 59.

pain or suffering is inflicted by or at the instigation of or with the consent of a public official or any other person acting in an official capacity.[23]

Children in care were subjected to electric shocks, public and private beatings, rape and solitary confinement. Solitary confinement was commonplace for periods of up to a week. Many claimants describe being placed in cells with no light, their clothes removed, no toileting facilities and sometimes no bedding. During periods of solitary confinement many claimants allege that they were brutally beaten and/or sexually abused, sometimes on multiple occasions during periods of incarceration.

Article 7 of the ICCPR states that "No one shall be subjected to torture, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.[24]

Children in Victorian Orphanages were subjected to illegal drug trials. These drug trials were reported in the Australian Medical Journal and CSL and the Walter & Eliza Hall Institute have confirmed that they used experimental drugs.[25] Children deemed "uncontrollable' were often drugged using inappropriate medications, in some cases for years at a time. Children were also subjected to degrading treatment eg forced to eat their vomit and had their faces rubbed in urine soaked sheets or other excrement etc.

Unfortunately, because all local remedies have arguably not been exhausted and because these events occurred before Australia became a signatory to the Protocol, it is unlikely that the Human Rights Committee would accept a complaint referred to it.

Criminal Justice

In Victoria, it is currently very difficult for victims of childhood abuse to make complaints to the Police regarding historical sex crimes. The normal procedure is for victims to go to their local police station and make a report.

For many complainants, it is extremely traumatic to walk in to their local police station, approach the counter and tell the police officer on duty that they were sexually or physically abused as a child whilst they were in a children's home, often in circumstances where they have never previously disclosed the abuse. The duty officers often have had no specialist training in dealing with victims of childhood abuse. These difficulties are further exacerbated where complainants live in small, tight-knit, rural and regional areas and have to report at their local police station.

In addition, once this initial approach is made, complainants are then referred to the appropriate Sexual Offences and Child Abuse (SOCA) unit. This means complainants have to tell their story at least twice.

Further, there is no current system for insuring that all complaints, whether proceeded with or not, are reported in a central data base. Currently, many complaints of historical sex crimes are not proceeded with because there is no corroboration and without corroboration the prosecution of these crimes is literally doomed to fail. However, it appears that the possibility of the Police Officer in charge of one such file in a SOCA unit, realising that two

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[23] Sarah Joseph et.al., *Seeking Remedies for Torture Victims* (OMCT Handbook Series, Vol.4, Geneva, 2006), Appendix 3.
[24] *Ibid.,* Appendix 1.
[25] *The Age* 10th June 1997

or more statements have been made in relation to a particular perpetrator is dependant solely on the diligence of that particular officer and his or her capacity to track down other complaints. In other words, there is no guarantee that the police officer investigating a current complaint will be able to obtain information regarding historical complaints which may not have been pursued because of a lack of corroboration.

In short, the current system in Victoria fails to acknowledge the importance of such corroborative evidence.

In contrast, the Tasmanian Government as part of their arrangements for redress for former wards of the state, have set up a system specifically designed to ensure that as far as possible, perpetrators will be tracked down and dealt with in the criminal justice system.

Firstly, if a claimant alleges abuse against a former staff member in one of the Homes and the perpetrator is still working for the Department, the Department of Child Protection is immediately notified. Secondly, when a claimant is interviewed, if the issues that are raised by the claimant are of a criminal nature, the Abuse of Children in State Care Assessment Team ask the claimant if they are prepared to make a notification to police. There is a list of three liaison officers from Tasmania Police, who have been appointed by the Police Commissioner and to whom these claimants are referred. The Tasmanian Redress Scheme, in liaising with Tasmania Police, has created a referral form to assist claimants in this regard.

What is the Alternative?

For the reasons outlined above, redress funds are the only alternative and good models exist both here and overseas eg Redress WA and the fund established in Ireland in 2002.

Under these models, compensation is for pain and suffering only. It does not matter when the abuse occurred. It is not necessary to prove negligence or breach of statutory duty. In Ireland there was no limit on the compensation payable and average payments were in the vicinity of $150,000 AUD.

In Queensland and Western Australia, there are two levels of payments. The first payment ($7,000 in QLD and $10,000 in WA) is available provided that it can be established that abuse occurred. If it can be established that the abuse has resulted in injury, then claimants can access the additional payments to a total payment of up to $40,000 in QLD and $80,000 in WA.

There are also other models which would be relevant to the Australian situation. For example in 2006, the Canadian Government agreed to pay more than 2 billion Canadian dollars to compensate an estimated 80,000 survivors of indigenous background who were forcibly removed and/or placed in care. Further the Canadian Government, with the churches who ran many of the residential institutions, will take other steps to address the legacy of the residential schools.

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

In Australia, any redress model should include a process whereby people can tell their stories and receive a genuine apology, written or otherwise. Also, as outlined above, there should be a process whereby perpetrators are tracked down and brought to account.

Kevin Rudd should seek the States' support through the Council of Australian Governments (COAG) and invite all states to participate in a redress fund to which all stakeholders should contribute.

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

For those states who have already accepted their responsibilities, eg Tasmania, Queensland and Western Australia (and now most likely South Australia) there need only be a nominal involvement and possibly a top up arrangement depending on the maximum payments available through a national fund.

Kevin Rudd's Government has an historic opportunity to show true leadership and redress the wrongs that were done to all of the "Children of the State". He should act now before the divisions created by his apology to only one group of children abused in care causes further damage.

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9.9.08