



Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse: Issues Paper 5

Civil Litigation

“No one would believe a low class Ward of the State”

Care Leavers Australia Network (CLAN) is a support, advocacy, research and training organisation for people who grew up in Australia’s orphanages, Children’s Homes, foster care and other institutions. CLAN’s objective is to raise community awareness of our issues, and to campaign for Government assistance to redress them. Being raised without your family has lifelong implications that require lifelong support services. CLAN can provide information, understanding and emotional support and are campaigning for a national independent compensation scheme that ALL past providers of orphanages must make financial contributions to.

Introduction

The current civil litigation system is a totally unreasonable measure for attaining justice for Care Leavers and other victims of child abuse. There are many factors which contribute to this inadequacy and as a whole the odds are stacked against any Care Leaver wishing to pursue this course of action. Firstly, there are certain institutions which are set up in such a way so as to protect them from being sued and having to pay compensation. Secondly, the limitation periods which exist in each state under civil law make it almost impossible for Care Leavers and other victims to sue their abusers. Evidentiary wise, obtaining records and other corroborating evidence is beyond difficult, and establishing causation of the effects of abuse on the Care Leaver is even harder. Due to the trauma most Care Leavers have suffered, many Care Leavers have little resources to afford the costs that civil litigation entails, and if they do find a solicitor who works with 'no win, no fee', they find a large proportion of any compensation they receive is used to pay the solicitor, hardly making it worth pursuing the course of action in the first place. Additionally, under the Medicare Compensation Recovery Program, any treatment that Medicare have reimbursed in the past, associated with the injury is taken out of the compensation amount, leaving them with an even smaller amount than before. Most Care Leavers find these factors too daunting to warrant them taking civil action against their abusers, thus ensuring that at least through the civil litigation system, there is no justice for Care Leavers and other victims of child abuse.

Impediments to Civil Actions against Institutions

Many institutional care providers are charitable or religious institutions who are unincorporated associations. This means that the association itself does not exist under the law. This is a major issue when it comes to Care Leavers suing the institutions which provided 'care' to them, and which they were abused in. As a result, Care Leavers and other victims need to sue individuals rather than the unincorporated association, which can prove very difficult.

Worsening the situation, is what's known as "the Ellis defence". In a Supreme Court ruling in 2005, it was found that the Catholic Church could not be sued because it was an unincorporated association and therefore held no assets as it did not exist legally. Instead, Ellis attempted to sue the Property Trust where the Catholic Church's assets were held. The Supreme Court ruled that the Property Trust could not be sued because they were not responsible for the perpetrator who commits the abuse, they merely just hold the property. Whilst Care Leavers and other victims are free to sue the individual, this is pointless as the majority of clergy do not hold individual assets, and furthermore many do not know the names or identities of the perpetrators/abusers.

This places Care Leavers in an extremely vulnerable position because they are reminded of the obstacles which stand in their way when trying to initiate civil litigation. This often results in Care Leavers accepting token amounts of compensation through schemes such as Towards Healing and from other Professional Standards units, to avoid the difficulties of suing the churches and charities. The laws which allow the church to operate in this way, do nothing to achieve justice for victims of abuse, rather it serves only to safeguard the assets of wealthy organisations such as the Catholic Church.

The many religious and charitable organisations who are unincorporated, benefit from tax exemptions where they do not have to file income tax returns, they do not pay tax on commercial businesses or capital gains tax on sale of assets. This has allowed churches and charities in Australia to generate enormous amounts of wealth. In 2004, churches in Australia turned over almost 23 billion dollars, and charities more than 22.8 billion dollars (2005, Catholics lead rise in charity revenue, SMH). Please see Appendix 1 for an outline of revenue and assets. Allowing these organisations to hide behind their unincorporated status and upholding the ability of property trusts to not be sued only enables these organisations to create more wealth whilst ignoring the needs of Care Leavers and other victims.

Whilst it is not evident that the other religious or charitable organisations have used the Ellis defence in court, the fact remains that they are unincorporated and as such the same issues can apply. The precedent which was set in the Ellis case gives any unincorporated association the potential to use the Ellis defence, effectively putting an end to many Care Leavers and other victims suing the institutions who abused them.

Liability of Institutions and Regulators

ALL past 'care' providers and Governments failed in their duty of care to the children who were placed in the child welfare system. As such, ALL past providers and Governments should be legally liable and held responsible for their actions.

Firstly, all institutions should be held liable for any criminal conduct which occurred under their supervision. The institutions were responsible for hiring employees or volunteers, and first and foremost should have conducted proper checks into their background and employment history. Secondly, the Orphanages/Children's Homes themselves were responsible for supervising their employees and enforcing standards to which their employees needed to act within.

Past 'care' providers did none of this. The abuse which occurred in Institutional care was so widespread that it would have been impossible for the Institutions themselves to not be aware of what was going on. In some cases, the abuse was even part of policy, such as state sanctioned rape. In other cases the providers were well aware of the behaviour of their employees, and if it became too much of a problem in one Institution they were moved to another one, to start fresh with new victims. There have been many documented cases of paedophiles and child abusers shuffled around from one institution to another. These include:

- The recent examples from the Royal Commission Public Hearing into the Salvation Army Homes in Indooroopilly, Riverview, Bexley and Goulburn. Major McIver was a manager at four Salvation Army Homes and Captain Wilson, also a manager was transferred between Salvation Army Homes and NSW Government run Homes. Major McIver was recently given the Salvation Army's Silver Star recognition even after the Salvation Army was aware of the abuse allegations against him. Later on the Salvation Army only conceded that it was wrong to publicise this recognition, not that they shouldn't have given it to him in the first place. Please refer to Appendix 2.
- Gilford was moved from Parramatta Girls Home to Tamworth Boys Home in NSW

- Sedgeman who was moved between Ballarat orphanage, Turana (Royal Park Depot at Parkville) and Blamey House, Kew in Victoria.
- There are many other perpetrators who have been moved from one place to the next and even from one state to another.

When discussing the regulators i.e. State Government's, they should also be held liable for the abuse which Care Leavers endured. Just as the 'care' provider has the duty and responsibility of overlooking their employees, the State Government had the duty of overlooking the 'care' provider. The State Government failed dismally to provide a duty of care and this abhorrent practice was done with the full knowledge of the Director of Child Welfare Departments around Australia, and yet they continued to fund the churches and charities.

With regard to church and charity run Orphanages, Children's Homes, and Institutions, the States were in charge of funding, licensing and inspecting the running of these Homes. More recently the Royal Commission has seen that the NSW Department of Child Welfare licenced a Salvation Army Officer to run a Children's Home even after they themselves described him as being inappropriate to work with children!

Furthermore, for the abuse and exploitation to be as pervasive as it was, obviously the inspections were not carried out thoroughly, may not have been carried out at all, or conditions were blatantly ignored amounting to acquiescence by Government officials. Therefore, the individual child welfare inspectors also failed miserably in their duty of care to the children they were required to protect. CLAN have heard numerous stories of children who did report their abuse to the child welfare inspectors but were either ignored or punished. A CLAN member Judy has recounted her experience with the child welfare inspector, where after disclosing her abuse she was basically told to be grateful that she had a roof over her head.

According to Penglase (2005) in New South Wales inspections were meant to be unannounced and unpredictable. However, from all the Care Leaver testimony CLAN has seen, wherever inspections were spoken of they were always prepared for the visits. For example David Mead in submission 211 to the Senate Committee describes inspections taking place at the foster home he was in, in Kempsey "The officer would notify Mr Saul he was coming and I was scrubbed up and threatened not to say anything about my treatment or I would get a hiding when he left". There are a number of reports from Care Leavers who say they remember the child welfare inspectors (which the Home/institution etc were well prepared for as they were aware of when the inspection was going to take place) but they do not remember the inspectors ever talking to the children or asking them any questions about the conditions or their treatment.

There were no safeguards in place to prevent abuse and exploitation occurring, nor were there any processes put in place which allowed confidential reporting from children or workers about the conditions of the Home etc. Ms Donella Jaggs a retired welfare worker and inspector of institutions at the Victorian Children's Welfare Department conceded that even though many Homes were state registered, the Victorian Government did not set minimum standards of care (Ryle and Hughes, 1997). Similarly, in an article from 1929, a Labor Party Member made the comments that "there was a shocking lack of supervision of foster homes both by departmental inspectors and by medical officers." (1929, The Register News Pictorial Boarding Out State Wards Becoming Baby Farming). This did not improve as the years progressed, and it has been admitted that this was not a priority. Peter Quinn, a forty year veteran of the NSW Child Welfare Department told the Senate Inquiry that with regard to the 'care' of children in NSW **"the priority for both politicians and officials was not the wellbeing of children but cost cutting and the economy"** (Penglase, 2005).

According to Mr Quinn, this view was taken because children were deemed to be of a 'delinquent class' and unworthy of spending money on.

Not only did the state Government fail in its duty as a regulator to overlook the Institutions but in some cases it was complicit in the abuse. The courts not only placed children in State run institutions but also in church or charity run Orphanages/Homes/Institutions. It appears that the Courts picked specific Homes for punishment like 'Training Farm's' for boys and laundries for girls. Children who absconded from these church and charity run Homes would be picked up by the Police and taken back just the same as if they were in a State run Institution. They were never asked why they ran away, but were simply taken back.

The NSW Government was very aware of sexual abuse in the Gosford Boys Home as illustrated by the following story from an article from the Sydney Morning Herald (2nd February 1944). When the young boy was charged in the children's court with absconding he disclosed "*that sexual malpractices were rife.*" Please refer to Appendix 3 for the complete article.

Lastly, By the Commonwealth Government providing child endowment in the form of a monetary contribution to all of these Homes (Penglase, 2005) and not ensuring the wellbeing of the children in the Institutions, the Commonwealth Government is just as complicit in the abuse as State Governments. The Australian Government failed to ensure that the Orphanages and Homes operations were transparent, and that there was a system of checks and balances in place which made them accountable as well as safeguarded and protected children from neglect and abuse. The Australian Government placed too much trust in the state governments, churches and charities to do the ethical thing in caring for disadvantaged Australian children. This has unfortunately created the legacy of traumatised Care Leavers that we see today. Therefore the Commonwealth Government should also be held liable for the abuse Care Leavers suffered in Institutions as a breach of their fiduciary duty.

Limitation Periods

The Australian civil litigation system's approach to limitation periods is archaic and unrealistic. Personal injury limitation periods are predicated on a victim suffering physical and not psychological damage (Matthews, 2003). This is evident in the unbelievably short periods of time in which Australian law expects Care Leavers and other victims of abuse to firstly be aware of the extent of psychological damage that has been inflicted upon them, and secondly to address this damage to the point that they feel emotionally strong enough and capable enough to confront their abuser in a civil court, if they are aware of who the abuser is and if the abuser is still alive.

In most states the limitation period for personal injury is generally **three years** from the date the abuse occurred, or from the date they realised a serious injury was inflicted as a result of the abuse. In QLD, the law is harsher not even allowing for the discoverability of the injury, rather the limitation period starts as soon as the 'action'/ abuse occurs (Walsh, Dubrow, Hobill et al, 2010). In NSW, Tasmania, and Victoria, there is also a long stop limitation period of 12 years in which an action can't be brought after this time. Similarly in SA and NT there is an ultimate bar of 30 years after which an action cannot be brought.

When abuse is inflicted on children, as we are discussing here the limitation periods border on ridiculous. In NSW, VIC, and TAS if a child has a parent or guardian, the limitation period continues to operate as it is expected the parent or guardian will bring a civil action on behalf of the child. In NSW and TAS, children have the same three year limitation period as their adult counterparts, and in

Victoria they have six years. In most other states the limitation period is suspended until the child reaches 18 years of age, however, each state does have different variations of this. In WA if a child is abused prior to them turning 15, then they have six years to bring a civil action. If they were abused between the ages of 15 and 18, they have until they turn 21 years of age to bring an action. In SA a child must give notice of intention to bring a civil action within six years of being abused. In QLD abused children must commence court proceedings before their 21st birthday. These provisions do not seem to take into account children who are raised in care, where the state is their guardian. Will the state take a civil action against themselves or an individual employee on the child's behalf?

There are provisions to these limitation periods which provide at the courts discretion the opportunity to extend the various time limitations. These provisions however have proved difficult to satisfy (Matthews, 2003) and place an unfair onus on abuse victims to prove something that may not be within their understanding. In the case of *Carter v Corporation of the Sisters of Mercy of the Diocese of Rockhampton & Ors* [2001] Helen Carter who grew up in Nudgee Orphanage and was sexually abused there, was denied an appeal to bring an action against the state and the perpetrator. According to McPherson JA part of the reason this was dismissed was "the prospect of prejudice to the third defendant through the delay in bringing the action", the third defendant being the state of QLD. McPherson JA also stated in regards to the perpetrator "she could have sued him at any time for damages for assaulting and raping her". Whilst one of the judges in this case Atkinson J had the common sense to acknowledge the "inability of a victim of childhood sexual abuse to recognise the true nature of the abuse and the damage caused by the it is well documented, as is the difficulty for the victim in complaining of the abuse", the other two were completely inept at understanding the nature and limitations of psychological injuries, ultimately resulting in the dismissal of the appeal. Absurdly, the criminal system prosecuted the perpetrator in this case for rape and other offences.

So why are these limitation periods unreasonable for Care Leavers and other victims of childhood abuse? First and foremost, the psychological impact of child abuse is severe, chronic and multifaceted. The abused child's ability to trust is destroyed, and the genuine fear for their lives instilled in them by the perpetrator prevents many child abuse victims from seeking help. For older Care Leavers this wasn't even a possibility, they couldn't leave the orphanage or Children's Home to go to a police station, and the majority of time there was no one else to tell. It is well known by now, that those entrusted to care for children in Institutions were most commonly the perpetrators, and the others in positions of power did nothing more than punish children who complained, and protected the perpetrator of abuse. In environments such as these, children quickly learn about self-preservation. Care Leavers had no one to turn to, and had been reinforced all their lives that no one would believe them anyway.

In 2013, CLAN conducted a survey of its members regarding sexual abuse and disclosure. Please see the following link for a full copy of this interim report

<http://www.clan.org.au/images/report%20for%20APRIL%20NL%20V2.pdf>.

It was evident that many Care Leavers were not aware of what constituted criminal behaviour or sexual abuse, to understand that a crime actually had been committed against them. Many thought it was just part and parcel of growing up in an orphanage/institution. CLAN's survey also found that 72% of respondents had not reported their abuse to the authorities. The main reasons listed for this were fear, intimidation by the abusers, concern they would not be believed, as well as a lack of understanding of how to report abuse. One respondent stated that they **"were so scared – all my life of the outcome. I was told no one would believe a low class ward of the state"**. Other respondents spoke about feeling too ashamed to speak about it, and another one said "I felt guilty and thought it was my fault".

Furthermore, most Care Leavers left care hoping to move on with their lives, and forget the horrendous abuse which they endured. Some turned to self-destructive behaviour such as drugs and alcohol leaving them impaired to a large degree, others tried to start a family and busied themselves with children, while some others became workaholics and distracted themselves with work. Whichever path they chose, the thing most had in common was avoidance. Most Care Leavers by this stage would have had a diagnosable psychological condition such as Post Traumatic Stress Disorder, or depression, and as such like most others who suffer from conditions would have tried to avoid any situation or stimuli that triggered memories of their abuse. Considering these factors can it really be expected that a child abuse victim initiates legal action within a) three years of being abused, b) three years of turning 18 or c) even 12 years of being abused!

This Royal Commission has seen adults who were abused even up to seventy or eighty years ago, and in doing this CLAN is sure you have witnessed the intense pain and difficulty for them to speak about it. CLAN is also certain that you have witnessed the psychological impairments up to seventy and eighty years later which cause many of these Care Leavers to still avoid certain triggers. In understanding this it is beyond comprehension why Australian Law thinks it reasonable for these time limitations to be in place.

Why then are these limitations in place? According to Matthews (2003) McHugh J discussed the reasons underpinning limitation periods in the case *Brisbane South Regional Health Authority V Taylor*. McHugh J outlined the idea that statutory time limits developed from the idea that justice deteriorates where there is delay, and the outcome of the case will be decided 'on less evidence than was available to the parties at the time that cause of action arose'. In this vein, if a defendant can prove that they will not be able to fairly defend themselves due to elapsed time, then this overrides the plaintiff's claim to justice. Matthews (2003) outlines other reasons such as the defendants right to proceed with their life unencumbered by delayed claims, that plaintiffs should not sleep on their rights, as well as the public interest to settle disputes quickly.

None of these reasons for limitations to exist, are proper justifications to denying victims of child abuse compensation, redress and above all else justice. In terms of cases being decided on less evidence, it is amazing that in the criminal system where the burden of proof is to a higher standard, there is NO limitation period for prosecuting child sexual abuse. Why is it then that a defendant's rights are held more sacred in a civil court? In response to defendant's being able to move on with their lives, and the public interest to settle disputes quickly, surely obtaining justice for child abuse victims overrides this? Why should paedophiles and child abusers be able to move on with their lives, when the child they harmed is scarred forever? And surely the public's best interest is served when paedophiles and child abusers are held accountable for their actions. As quoted by Atkinson J, the Supreme Court of Canada stated "there is no corresponding public benefit in protecting individuals who perpetrate incest from the consequences of their wrongful actions. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer, clearly militates against any guarantee of repose." CLAN completely agrees with this sentiment and would extend this to ANY paedophile or child abuser.

It is CLAN's firm belief that the limitation periods for personal injury should be abolished for those abused as children. There have been other jurisdictions around the world which have opted for

abolishment, such as British Columbia and some American jurisdictions (Matthews, 2003). Limitations laws need to be reviewed and redrafted in the interest of justice. As Matthews (2004) concludes, limitations laws need to be reviewed because of a child's "unwillingness to disclose abusive events, whether this is produced by fear, shame, guilt, self-blame, secrecy, failure to appreciate the acts were wrongful, or PTSD." CLAN's survey (2013) found all of these reasons as contributors for adult Care Leavers to still not want to disclose child abuse. With so many factors working against Care Leavers and other victims of child abuse it is necessary that limitation periods are overhauled and abolished so there is some, albeit, minimal access for Care Leavers to ascertain justice.

Many Care Leavers have a total lack of trust in people in authority e.g.: police officers, lawyers, judges, doctors, Government officials. Many of these people in authority are totally unaware of the long term effects of sexual and child abuse on the individual. Justice McClellan bravely acknowledged that he was himself unaware of the long term effects. The question begs to be asked *"how many other judges in Australia have this lack of knowledge and awareness?"*

CLAN's recommendation is for consistency for removal of the statute of limitations in all states.

Difficulties with records, evidence, and establishing causation

As the Royal Commission may now be aware, there are minimal records which exist or which are provided to Care Leavers. Record keeping throughout the last century has been abysmal, both in the actual practice of taking notes as well as the storage of files. There are continuing barriers for Care Leavers who request their files. Many church and charity run Orphanages, Children's Homes and Institutions provide nothing more than a name and date of admission and discharge, which serves little purpose to corroborate their story. Sometimes state ward records are more comprehensive, but in NSW it can take longer than a year for Care Leavers to receive their file. Furthermore, state ward records are routinely censored, veiled in privacy laws Care Leavers are denied access to their own information. This censorship has to be questioned as to whose best interests it actually serves in removing this information. Some Care Leavers have applied for their files twice and have actually received a different amount of information each time. Many past providers also claim that files have been destroyed in various floods, fires etc. The extent to which past providers have actually destroyed information and documents themselves to cover up their complicity and liability in many child abuse cases will now never be known. Nevertheless, all of these factors work together to exacerbate a Care Leaver's experience within the civil litigation system, as their records do little to help provide evidence for their ordeal.

By the same token, available evidence for crimes that were committed so long ago is minimal. This must also be understood in the way that it is true for the nature of the crimes committed against Care Leaver's in institutional settings. That is to say, by its very nature, the crimes were committed in an environment which facilitated the abuse of children. Most adults who were in a position of authority were aware of the abuse and refused to listen or believe children's complaints. Complaints were almost never documented or spoken about and everything was swept under the carpet to

protect the individuals who worked in these Institutions. Most employees were complicit in one way or another in the abuse of children, and thus could never give evidence without revealing their own guilt and damaging the organisations reputation. Similarly, the psychological condition created by the abuse of children, places children in the position where they feel they cannot speak about their experiences as discussed earlier. The simple act of witnessing other children being abused can be terribly traumatic and this also prevents many Care Leavers from later giving evidence in support of another.

Additionally, the actual act of a Care Leaver or other victim of child abuse having to give evidence is extremely difficult. Having to openly speak about, and address the nature of their abuse in as much detail as possible is an enormous task required of someone who has been through this. Not only would this trigger PTSD symptoms and impact upon their daily functioning, but for many Care Leavers and other abuse victims, they may have shut out, dissociated, or never formed a proper memory of the traumatic event/s. For some, the possibility of them coming forward and being able to give evidence is diminutive.

Another issue which exists for Care Leavers is the difficulty in establishing causation. For many Care Leavers, being abused in institutional care is not only an experience it is a risk factor. Many Care Leavers came from unstable family backgrounds because of war, poverty, lack of family support, mental health issues and many after their time in 'care' went on to other traumatic events such as homelessness, mental health etc. because of the abuse and neglect they suffered in their childhood as they were move vulnerable when they left 'care'. For many Care Leavers abuse continued after they left 'care' whether it be carried out by strangers, friends, or later in the family environment. For many Care Leavers, this makes the task of establishing exactly what caused their psychological pain and suffering a difficult prospect. For many defence representatives this provides an opportunity to attack the victim's lives and blame everybody else but the defendant for the victim's psychological and or physical issues. This can be seen in the case of a CLAN member who is now deceased. Anthony Sheedy was involved in a case against the Christian Brothers and the Professional Standards Unit in Victoria and was seen by a psychiatrist paid for by the Christian Brothers. This psychiatrist had the hide to say Mr Sheedy's psychological state was mostly due to family issues prior to him being in care and not the repeated rapes and other sexual use and abuse that the Christian Brothers inflicted on him. He did this by attributing an arbitrary percentage, 55% of Mr Sheedy's psychiatric issues to 'family matters'. By the way, Mr Sheedy was placed in 'care' when he was 2 years old and did not live with his parents after that. Please refer to Appendix 4 for a copy of this report.

It can be evidenced that this is a very complicated issue to navigate and must be seen for what it truly is. The immense wrongs committed against children in institutional care were not only traumatic experiences but it can be argued it caused them to be even more vulnerable to abuse by others outside of the institutions, and for this, the perpetrators should also be held liable.

Recently on 19th March 2014, our sister organisation the Care Leaver Association of the UK have reported that UK Care Leavers are able to apply for personal information held in care records by the Data Protection Act. In this way, there is a Government commitment to produce statutory guidance for local authorities clearly setting out their obligations to provide comprehensive information and support. The Children and Families Bill demands that any redactions must be fully explained and that the applicant's needs are kept at the heart of the request.

CLAN recommends that there be a national and consistent legislation in all States in regards to access to records and that there is a clear explanation on all redactions in a State Ward file or Home records.

CLAN also recommends that the State Governments give Care Leavers free access to their birth certificates, parent's marriage and death certificates and access to child endowment records as Care Leavers need these records in order to form an identity and for confirmation of being in 'care' in order to get the limited state-based services available to them.

Costs of Litigation

A sometimes insurmountable obstacle for Care Leavers to overcome is the cost of litigation. Due to their traumatic histories many Care Leavers are not financially capable of affording a solicitor to take a civil action against anybody and many are not aware of their right to do this. This may seem moot considering a lot of lawyers practice for 'no win, no fee', however it then becomes a case of balancing the pros and cons. There are many issues which work against Care Leavers in the civil litigation system. This serves to help the defendant coerce the plaintiff into often accepting paltry amounts of compensation that make any action almost worthless. Once this miniscule amount of compensation has been accepted, the lawyer will then take a significant chunk to pay for their costs and fees.

Once this is done the Commonwealth Government also joins in and enforces the Medicare Compensation Recovery Program. Under this legislation, Medicare has the right to claim back from any compensation amount above \$5000 any costs they believe they reimbursed that are related to the injury being recompensed. This once again highlights the issue of causation as Medicare routinely tries to take any cost it can into account. For example, if you saw a psychiatrist for your issues surrounding a divorce, Medicare will still attempt to claim this money back from your compensation as they believe it must in some way have been related to your abuse. Please refer to Appendix 5 for a copy of the Medicare Compensation Recovery Program fact sheet. The Medicare Compensation Recovery Program in relation to Care Leavers is absolutely despicable. The Government is also liable for abuse which was perpetrated on Care Leavers in Institutional 'care'. The Commonwealth Government have thus far refused to compensate or redress Care Leavers and in the same breath is also taking what compensation is given to Care Leavers to reimburse their own costs. The only help the Government has ever given many Care Leavers is in the form of Medicare, and this is an entitlement of every Australian citizen. Why then take it away, when they too should be addressing the pain and the suffering they themselves have caused? Many Care Leavers were not given proper medical attention or treatment in the Orphanages and Children's Homes and then feel they are punished for seeking medical treatment as adults. In order for Care Leavers to have any access to justice through the civil litigation system, this needs to be overhauled, and the Government need to accept responsibility for their role in a Care Leaver's experience.

Moreover, CLAN would like to take this opportunity to comment on the level of compensation paid through the civil litigation system. It is clear that Care Leavers are at a distinct disadvantage when it

comes to compensation amounts, and this has been well demonstrated through a number of cases in the last 15 years:

Immigration Detention:

- In 2004 Cornelia Rau was wrongfully detained by the Immigration Department for 10 months after she discharged herself from Manly hospital and was suffering from a mental illness. In 2005 Rau was compensated \$2.6 million by the Commonwealth Government for her wrongful detention and to compensate her for ongoing mental health problems that went untreated during her detention. It was reported that "The payment not only compensates her, but also is sufficiently large to provide for her for the rest of her life". The Commonwealth also paid Ms Rau's legal costs (*Sydney Morning Herald*, 7 March, 2008).
- On 30 November 2006, Vivien Solon, an Australian citizen wrongly detained and deported from Australia, was awarded a compensation payout reported to be \$4.5 million (*The Age*, 30 November 2006).

Injury while in gaol:

- Since 2005 nineteen NSW prison inmates have won public liability compensation from the NSW Government amounting to \$7.025 million for injuries such as being hit with a cupboard and fights inside prison leading to injuries. Care Leavers are aghast at reports of outrageous cases including a convicted paedophile, Peter Andrew Bujdoso, who avoided giving his victims any of a \$175 000 compensation payout. (News.com.au 8 September, 2008).
- A convicted drug dealer who won about \$300 000 in compensation for injuries he sustained in jail has been forced to share \$100 000 with his three victims. The case was the first success arising out of 2005 legislation that provides for victims to be informed within 28 days, and a public notice published in the *Government Gazette*, when an inmate gets a compensation win so victims can start their own action in the Supreme Court to obtain a share of it (*The Daily Telegraph*, 28 March, 2008).

Wrongful imprisonment

- Andrew Mallard was awarded a \$3.25 million dollar payout by the Western Australian Government after he was wrongfully jailed for twelve years for the murder of a Perth woman in 1994 (*news.com.au*, 5 May 2009).

Stolen Generations

- Bruce Trevorrow, an Aboriginal man, was awarded \$525 000 (plus \$250 000 interest) by the SA Government for being taken from his family more than fifty years ago (*Adelaide Advertiser*, 2 August, 2007). Proceedings in this case were initiated in 1997. The SA Government seriously damaged its reputation with its belligerent behaviour following the outcome of the case - even after Mr Trevorrow's early death (*The Australian*, 22 March, 2010).

Bullying in schools

- A Victorian secondary school student was awarded \$290 000 from the state Government after being bullied on a daily basis. The teenager suffers from depression, agoraphobia, panic disorder, insomnia, and an eating disorder as a result of the abuse (*AAP*, 11 March 2010).

- A victim of a schoolyard bully in NSW was awarded almost \$1 million in damages from the state Government because the state education system failed in its duty of care (*SmartCompany.com.au*, 22 May 2007).

- A man who was consistently bullied by his peers whilst at a boarding school in Tamworth received a compensation payment totalling \$468 736. Mr Gregory was awarded \$247 500 for non-economic loss, \$196 378 for future loss due to his reduced earning capacity and \$24 858 for future superannuation loss.

Corporal Punishment in Schools:

- Dr Paul Hogan was awarded 2.5million dollars in 2001 for receiving eight straps to the hand whilst a student at St John's College Lakemba, NSW. Dr Hogan claimed damages for physical and emotional effects, loss of income, medical costs, and loss of enjoyment of life. Please see Appendix 6.

Child Welfare

- A Care Leaver from NSW has received \$281 461 after the Department of Youth and Community services failed in its duty of care to prevent foreseeable risk of injury. As a result this woman was sexually abused by her foster father from a very young age, and then when she was taken back to her father, whom she barely knew, he sexually abused her, which resulted in her giving birth to two of his children. As a result of this she was in and out of involuntary psychiatric care for a number of disorders.

Discrimination and harassment

- In 2005 a NSW woman was awarded almost \$340 000 in compensation due to her supervisor failing his duty of care (http://www.beyondbullying.com.au/bb_case.html, accessed 25 May 2010).

- In 2007 the NSW Court of Appeal upheld a decision to award an employee almost \$2 million for extreme bullying and harassment by the Company's Fire and Safety Officer. The Court ruled that the perpetrator's conduct was so brutal that it was likely to cause psychiatric injury (www.austlii.edu.au/au/cases/nsw/NSWCA/2007/377.html accessed 25 May 2010).

CLAN does not argue that these payments should not have been made. Nor does it challenge the size of the awards. On the contrary, these cases show what a high premium is placed on personal liberty and human rights.

We struggle to understand the distinction in principle between the circumstances leading to these compensation payments and the circumstances of the many vulnerable children who were owed a duty of care and whose trust was violated. Many children were incarcerated in institutions for most of their childhood years because of their supposed need for 'care and protection'; but in fact they were neither cared for nor protected from sexual assaults, vicious beatings, emotional abuse, neglect and deprivation of access to their parents and siblings. A clear duty of care was owed by the states and churches and charities who failed to discharge that duty of care. In contrast to the sums paid in cases such as those cited above, the small number of payments that have been made to Care Leavers have been minuscule.

Other Issues Surrounding Care Leavers and the Civil Litigation System

More recently, a class action by former Child Migrants who were in 'care' at Fairbridge Farm Home Molong has been given the go ahead to sue both State and Federal Governments. This is definitely an advancement in the civil litigation system as it has allowed those abused in 'care' many decades ago the opportunity to seek recompense from those who owed them a duty of care. Class actions also allow the courts and the abusers to see the sheer number of Care Leavers who were all treated in the same manner, lending credence to their claims. It was also deemed by Justice Peter Garling that the class action was the most "efficient and cost effective method of disposition of these claims..." (2014, Hall, SMH). Nevertheless, as the plaintiff's lawyers in this case also discuss, the easier way of dealing with this is to take it out of the courts and for the Government's to create a compensation scheme to acknowledge the pain and suffering of Care Leavers. Please see Appendix 7.

This also highlights the inadequacy of mediation and early dispute resolution. The success of these mechanisms, rely on the civil litigation system working effectively to ensure all parties start on an even playing field. This is not the case for Care Leavers and as such this leaves mediation and early dispute resolution to work ineffectively and unjustly. Due to the many obstacles Care Leavers and other historical abuse victims incur, the likelihood of their success in a civil case is limited. Due to these limitations it leaves the door open for the defendant's representatives to make ridiculously low offers. Care Leaver's representatives knowing the likelihood of success for their client will on many occasions advise their client to accept these offers. For example, many who try to sue the Catholic Church are advised of the Ellis Defence and the difficulties they will encounter. Then through mediation processes or the Towards Healing scheme, they are offered paltry amounts, which they accept knowing they may get nothing if they go through the civil litigation system. This same issue applies to many cases, and ALL past providers as Care Leavers often cannot overcome the biggest obstacle in front of them, the civil limitation period. Knowing this many churches, charities and the Governments may offer token amounts that Care Leavers are almost forced to take with the impending threat of receiving nothing.

Other Forms of Redress

It is not just monetary compensation that Care Leavers want. In many cases they need more practical support and access to services. They require priority access to Housing and better understanding and support within the social welfare system, especially Centrelink. This understanding is vital for Centrelink to be able to help those who have been in 'care' to access Government support payments, especially the Disability Support Pension which is increasingly hard to get.

Care Leavers also suffer from a multitude of health issues, and therefore better access to the health system and medical services is necessary. Many Care Leavers speak about wanting a card similar to those that war veterans are entitled to. This type of service will not only help Care Leavers with the costs of medical treatment but also with instant recognition and understanding by service providers of their experience without them have to constantly repeat their story.

In the same regard, Care Leavers require more access to the mental health system. The current availability of 5 Medicare reimbursed sessions with an allied health professional a year is ludicrous. The type of psychological support that many Care Leavers need far exceeds 5 sessions a year. This also creates the need for further funding and ongoing financial support of Care Leaver agencies such as CLAN who aim to fill the gaps in support services that currently exist. Care Leavers are able to access free counselling through our service and are able to receive the emotional support as well as advocacy to access other services that are necessary.

CLAN's Recommendations

- Amend the Roman Catholic Church Trust Property Act 1936 to allow Care Leavers and other abuse victims to sue the church and seek compensation from the Property Trusts, in effect overturning the Ellis defence.
- Review the unincorporated status of all the Churches and Charities which can hinder Care Leavers and other abuse victims suing them.
- Abolish Limitation Periods for child abuse victims wishing to sue for Personal Injury.
- Allow Care Leavers to obtain unaltered, uncensored copies of their state ward records and other personal 'care' files for free of charge and all redactions must be explained in plain, easy English.
- Provide a free legal service to all Care Leavers similar to Knowmore or the Aboriginal Legal Service that will exist once the Royal Commission has ceased.
- Establish more equitable standards for compensation payments to bring Care Leaver compensation in line with other forms of personal injury.
- Legislate for easier Care Leaver access to health services and social services.
- Ensure ongoing funding for Care Leaver support services.
- Establishment of a National Redress Scheme contributed to by ALL churches, charities, and Governments. This takes it out of the hands of individual past providers who use the limitations of the civil litigation system to their advantage and who currently determine the amounts of compensation to Care Leavers. CLAN is aware of the disparity of compensation to abuse victims paid out by the two different Territories of the Salvation Army being the Southern and Eastern Territories. Some of our members in the Southern Territory received compensation of \$36,000 while others in the Eastern Territory received amounts over \$100,000. Until a national independent redress/compensation scheme is enacted, there will be loopholes, and inadequacies that past providers will use to minimise the damages paid to Care Leavers.
- Ongoing delays for justice only exacerbate the sense of injustice for a severely disadvantaged group of Australian citizens. Australia rides on the myth that it is a lucky country but this is not so for Australian Care Leavers.

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Appendix 1:

Catholics lead rise in charity revenue

Sydney Morning Herald
March 23, 2005

Australia's charity and not-for-profit sector may be worth more than twice the Tax Office's estimate of \$30 billion a year, research shows.

Churches generated almost \$23 billion in 2004, with the Catholic Church turning over almost two-thirds of that, an investigation by *BRW* magazine found. It estimates the not-for-profit sector is worth \$70 billion a year.

The *BRW* list of 200 charities adds up to an estimated \$22.8 billion, not including clubs (at least another \$8.8 billion) and health funds (\$7.5 billion).

The Catholic Church is almost five times larger than any other church and dominates the top 20 charities, the magazine says. It estimated the Catholic Church's gross revenue at \$15 billion in 2004. The next largest was the Uniting Church with \$3.1 billion.

The Catholic Education offices in NSW, Victoria and Queensland made up three of the top four charities. Several Catholic hospitals

were in the top 20. *BRW* estimates the Catholic Church owns property and other assets worth more than \$100 billion.

Brian Lucas, general secretary of the Australian Catholic Bishops Conference, said churches had different aims and philosophies from businesses and should not be viewed the same way.

"Churches through their activities in health, social welfare, aged care and education are large providers of essential community services," he said. "I think outside Government, the Catholic Church would be the largest of them, and we're not ashamed of being a large provider of services ...

"There is no profit because there are no shareholders in the church and no investors in the church, and whatever comes in goes out in the provision of those services."

The three largest Pentecostal churches - Hillsong Church, Paradise Community Church and Christian City Church - together brought in \$83.3 million in 2004.

RSL Care was the largest community group and the ninth largest charity, with total revenue of \$600 million.

The Australian Red Cross could only make 17th place on the table with revenue of \$374.5 million, while World Vision Australia was 28th with \$234.4 million.

Accused Salvo awarded

Salvation Army officer Major John McIver, accused of abusing dozens of boys at a southern Sydney home, was given the army's Silver Star award in December despite the allegations against him.

The Salvation Army published the award in a national magazine on the eve of royal commission hearings detailing the claims.

Care Leavers Australia Network head Leonie Sheedy said: "It is incomprehensible to me how they could give someone an award who they knew had so many allegations of cruel and brutal treatment of children against him."

The Salvation Army acknowledged that publicising the award was inappropriate.

BOYS' HOME EVILS

Gosford Boys' Home has been much in the public eye over the last two years, due to the record number of abscondings over that period. In the inaugural C. T. Wood lecture in Child Welfare given at the Sydney University, I pointed out, among other things, that our institutions were unpleasant places from which anyone would wish to escape, and stated that if public opinion were as vocal and enlightened as it should be, it would demand an immediate investigation into the institutions by a person qualified by training and experience to make it.

A lad who enters one of our institutions with a knowledge of one or two delinquent techniques invariably emerges with a greatly increased repertoire. I urged then that every absconder should, on recapture, be investigated by a Child Guidance Clinic to find out why he absconded, as valuable information both on the absconder and the institution from which he absconded would thus be obtained.

In urging such an investigation I knew that certain deplorable facts would be brought to light. For example, an absconder, aged 15, of superior intelligence, was brought before the Children's Court after his recapture. He had been sent to Gosford some weeks previously on serious charges of breaking and entering. It was his first appearance before a Court, but no proper attempt was made to find out why he should suddenly thus become a law-breaker, and he was sentenced to Gosford for a specified term. When charged with absconding, he disclosed that sexual malpractices were rife, that he had been ill-treated by other boys because he would not take part in them, that he was afraid of further ill-treatment, and so had run away.

Appendix 5:



Australian Government
Medicare Australia

Compensation Recovery Program



Important information

What is a compensation payment?

A compensation payment is a sum of money paid to the compensable person for an injury or illness suffered as a result of the negligence or lack of care by another person. The payment is usually made by an insurance company but can be made by an individual or a company.

Who advises Medicare Australia about my compensation claim?

By law, the compensation payer (usually the insurance company) must tell Medicare Australia when a claim for compensation reaches judgment or settlement and if the value of that judgment or settlement is set at more than \$5000 (including all costs).

Medicare Australia is not required to be notified of claims that are set at less than or equal to \$5000 (including all costs).

Why is Medicare Australia involved?

When you suffer an injury or illness, you are usually entitled to Medicare benefits, nursing home benefits and residential care subsidies. However, when your injury or illness is the subject of a compensation claim and you subsequently receive compensation, the compensation payout should cover the full cost of your treatment.

To make sure that no 'double dipping' occurs, the Australian Government is entitled to recover the cost of benefits and subsidies it has paid in relation to your injury or illness under the *Health and Other Services (Compensation) Act 1995* (the Act).

'Double dipping' is when a person has received Medicare benefits, nursing home benefits or residential care subsidies paid by the Australian Government in relation to an injury or illness, and also receives compensation for that same injury or illness—in effect being paid twice for the injury or illness.

Medicare Australia administers the Compensation Recovery Program under the Act and is responsible for recovering the medical benefits and subsidies paid to a claimant on behalf of the Australian Government.

Can I claim from Medicare Australia if I have a compensation claim?

Yes. If you have been injured, for example, at work, in a car accident or as a result of the negligence of another person, you can claim Medicare benefits for the treatment of your injury or illness. Your doctors can bulk bill you or give you an account to take to a Medicare office.

Will my compensation payment affect my future claims for Medicare benefits?

No. After your claim has been finalised you will have the same entitlement to claim Medicare benefits as you had before your injury or illness.

What if the insurer accepts liability?

If a compensation payer accepts liability for your injury or illness and agrees to pay your medical expenses, all medical accounts should be directed to the compensation payer for payment.

What should I do before I settle my claim for compensation?

We suggest you identify the amount of Medicare benefits or subsidies to be repaid before you accept a settlement, as the amount due to the Australian Government will be deducted from your compensation payment.

Compensation Recovery Program

How do I know how much I may need to repay to the Australian Government once my claim settles?

If you would like to know the amount to be repaid before your case reaches judgment or settlement, you, your solicitor or the compensation payer should request a *Medicare claims history statement* from Medicare Australia. Your *Medicare claims history statement* lists the services that a Medicare benefit has been paid since the date of your injury or illness. From this list you can identify the services that relate to the injury, and we will determine the amount, if any, that you will need to repay the Australian Government.

To request a copy of your *Medicare claims history statement*, you will need to fill in a *Request for a Medicare history statement* form. For a copy of the form go to www.medicareaustralia.gov.au then For individuals and families > Forms and brochures > Other programs and Services

Note: no matter who requests your *Medicare claims history statement*, it will be sent directly to you (unless you authorise, in writing, Medicare Australia to send it to a third party, for example your solicitor).

Once you have received your *Medicare claims history statement* you will need to identify each service that relates to your injury or illness. You will also receive a statutory declaration with your *Medicare claims history statement* asking you to declare if you received nursing home benefits and residential care subsidies relating to your injury. Once you have completed the *Medicare claims history statement* and signed the statutory declaration, you must return them to Medicare Australia in the supplied reply paid envelope within 28 days.

Medicare Australia will assess your returned *Medicare claims history statement* and, if satisfied that the identified services relate to your injury or illness, we will send a *Notice of past benefits* to the compensation payer and yourself.

The *Notice of past benefits* will identify the amount, if any, that is required to be repaid to Medicare Australia upon judgment or settlement of your claim. The *Notice of past benefits* is valid for six months.

What if I need more time to identify and return my Medicare claims history statement?

If you need more time to identify services relating to your injury or illness and to return your *Medicare claims history statement*, you can apply for an extension of time by calling 132 127*.

However, if your claim reaches judgment or settlement before you are able to return your *Medicare claims history statement*, Medicare Australia is unable to grant an extension.

What if Medicare Australia does not agree with my returned Medicare claims history statement?

Medicare Australia will review your submitted *Medicare claims history statement* to make sure that the correct services relating to your injury or illness have been identified. If Medicare Australia considers the services identified as not being substantially correct, we will return the *Medicare claims history statement* for you to review further.

If Medicare Australia does not receive an amended *Medicare claims history statement* by the due date, or it believes services relating to your injury or illness have still not been identified, then all services on the *Medicare claims history statement* will be deemed as relating to the injury.

What does 'deemed' mean?

If you do not return your completed *Medicare history claims statement* and statutory declaration to Medicare Australia by the due date and you have not been granted an extension, then all services listed on your *Medicare claims history statement* will be taken as relating to your injury or illness. This is known as being 'deemed'.

If your *Medicare claims history statement* has been deemed, the amount listed on the *Notice of past benefits* will be the total value of all services listed and is the amount that must be repaid upon settlement.

What happens when my claim has reached judgment or settlement?

If your claim is finalised by way of judgment or settlement during the six-month period your *Notice of past benefits* is valid, the compensation payer will:

- send the amount to be repaid to Medicare Australia from the amount of compensation set
- send the balance to you.

If your claim is finalised and your *Notice of past benefits* is no longer valid, you can either:

- request a new *Medicare claims history statement* so you can identify the services paid since the last *Notice of past benefits* was issued. Medicare Australia will then issue a new *Notice of past benefits* to the compensation payer, or

Compensation Recovery Program

- if no benefits have been paid since the last *Notice of past benefits* was issued, you can submit the statutory declaration, attached to the statement, confirming this.

Note: the compensation payer cannot send you any of the judgment or settlement amount until the Australian Government has been repaid for any past benefits or subsidies.

What if Medicare Australia isn't notified of the claim until after judgment or settlement has been reached?

If the amount to be repaid is unknown at the time of judgment or settlement and Medicare Australia has not issued a *Notice of past benefits*, there are two options you, your solicitor or the insurer can take:

- request that Medicare Australia issue a *Medicare claims history statement* so that you can identify the amount payable, before you are paid compensation, or
- the compensation payer can choose to make an advance payment to Medicare Australia.

What is the Advance Payment Option?

The Advance Payment Option (APO) is a payment made by the compensation payer which is equal to 10 per cent of the total amount of compensation set under judgment or settlement. This is sent to Medicare Australia within 28 days of judgment or settlement, before the amount of past benefits or subsidies previously paid in relation to your injury or illness is known.

By using the APO, the compensation payer is able to pay the balance of the compensation to you before knowing the amount of your past benefits or subsidies. The compensation payer can make an advance payment when:

- the amount of compensation is set at more than \$5000 (including all costs)
- there is no valid *Notice of past benefits* in place.

If the amount due to the Australian Government is less than the advance payment amount, Medicare Australia will refund the balance to you within three months of receipt of the advance payment and completed documents from the compensation payer.

If the amount due to the Australian Government is more than the advance payment made by the compensation payer, you are responsible for and must pay the difference to Medicare Australia.

Example:

- you have been awarded \$10 000 in compensation
- the compensation payer sends Medicare Australia an amount of \$1000 by way of the 10 per cent APO
- you receive the remaining \$9000
- you are sent your *Medicare claims history statement* to complete
- you complete and return your *Medicare claims history statement* to Medicare Australia
- if Medicare Australia assesses the amount owed to the Australian Government is \$650, Medicare Australia refunds the balance of \$350 (\$1000 - \$650 = \$350 refund) to you, or
- if Medicare Australia assesses the amount owed to the Australian Government is \$1420, Medicare Australia will retain the \$1000 advanced payment and ask you to pay an additional \$420 (\$1000 - \$1420 = \$420 debt).

For more information

Online www.medicareaustralia.gov.au

Email NSW.comp.mgr@medicareaustralia.gov.au
QLD.comp.mgr@medicareaustralia.gov.au

Call 132 127*

TTY 1800 552 152** (Hearing and speech impaired)

TIS 131 450* (Translating and Interpreting Service)

If you need help translating this information call the TIS on 131 450*.

Arabic - إذا لاحتجت لمساعدة في ترجمة هذه المعلومات، يمكنك الإتصال بخدمة الترجمة التحريرية والشفوية على الرقم 131 450*

Korean - 본 정보의 이해를 위해 번역사의 도움이 필요하시면, 131 450*번으로 TIS에 전화하십시오

Serbian - Ако вам je potrebna pomoć da prevedete informacije, nazovite TIS na 131 450*

Spanish - Si necesita ayuda para traducir esta información, llame al TIS al 131 450*

Turkish - Bu bilgiyi tercüme etmek için yardıma ihtiyacınız varsa 131 450* numaradan TIS'i arayınız

Vietnamese - Nếu quý vị cần nhờ dịch thông tin này xin gọi cho TIS số 131 450*

* Call charges apply.

** Call charges apply from mobile and pay phones only.

Appendix 6:

The Sydney Morning Herald

Sydney Morning Herald, 15 February 2001

Strapped for cash: man gets \$2.5m for a 1984 caning

By Ellen Connolly

A man has been awarded more than \$2.5 million in damages for the pain and suffering he has endured as a result of receiving the strap at school 17 years ago.

Dr Paul Hogan, 30, of Randwick, cried in the courtroom after the jury of two men and two women returned with the verdict, which in effect awarded him \$316,000 for each of eight straps he had received to the hand.

Last night the Catholic Education Office described the decision as "manifestly excessive."

The amount is vastly more than victims of crime receive as compensation. Accident victims such as quadriplegics in some cases are entitled to a maximum payout of \$375,000.

Dr Hogan sued the Catholic Church and the then master of discipline of St John's College, Lakemba, Mr Denis Fricot, claiming the two sets of strappings he received at school on March 16, 1984, were wrongful acts, leaving him with a permanent hand injury.

Dr Hogan was given three straps in the morning for a uniform violation and five more later in the day for calling Mr Fricot a "black bastard."

During the 13-day hearing, he told the court that for the past 17 years he had suffered continual pain in his hand, arm, neck and head, as well as psychological problems. As a result he cannot pursue his dream of becoming a highly paid project manager at some of Sydney's top engineering firms.

Dr Hogan said the defendants were guilty of assault and negligence. He sought damages for the physical and emotional effects, loss of income, medical costs, and loss of enjoyment of life.

Yesterday at 3.46pm, after almost 2 hours' deliberation, the jury found that the Catholic Church and Mr Fricot, a father of three who now teaches in Queensland, had breached their duty of care.

The jury found that while Mr Fricot had proper cause to strap him the second time for calling him a "black bastard," the blows to the hand with the leather strap were neither moderate nor reasonable.

Following the decision, counsel for the Catholic Church, Mr Ian Harrison, SC, was lost for words.

"In light of the size of the figure ... I don't know how to respond to that figure, Your Honour," Mr Harrison said.

The acting executive director of the Catholic Education Office, Ms Natalie McNamara, described the verdict as manifestly excessive and said an appeal was being considered.

Before the jury retired to consider the verdict, Mr Harrison reminded them that in the months after the 1984 strapping, Dr Hogan underwent bone scans on his hand at Lidcombe Hospital which showed his right hand was "back to normal" and there was no abnormality.

During his four years at university Dr Hogan saw a doctor on 27 occasions, but never in relation to his alleged hand injury.

A rehabilitation specialist, Dr Jill Middleton, told the court Dr Hogan could be "bunning it on".

She diagnosed him as having a chronic pain disorder, but said she had relied on his descriptions of his symptoms and not on any objective testing such as x-rays.

Mr Harrison - If he was bunning it on, you can't say?

Dr Middleton - I couldn't prove that he's not.

A solicitor for Slater and Gordon solicitors, Mr John Park, said that yesterday's verdict, subject to an appeal, had set a precedent.

He expects other victims of corporal punishment to start coming forward.

Appendix 7:

Class action filed against Fairbridge Farm School for alleged physical, sexual abuse

Sydney Morning Herald

Louise Hall

Published: February 22, 2014 - 3:27AM

Former child migrants who were subject to alleged physical and sexual abuse at the Fairbridge Farm School have been given the green light to sue the state and federal government.

The class action has been filed on behalf of more than 60 people who lived at the Molong farm, in the state's Central West, between 1938 and 1974.

Fairbridge Farm School was home to around 1000 children, some as young as four, who had been sent from their homes in England.

Law firm Slater and Gordon is running the class action against the Commonwealth, the State of New South Wales and the Fairbridge Foundation.

In the NSW Supreme Court on Friday, Justice Peter Garling ruled the class action, which commenced in December 2009, can proceed.

"I am satisfied that the most efficient and cost effective method of disposition of these claims is by a representative proceeding as it is presently constituted," he said.

Slater and Gordon said the former residents are claiming the Foundation and the two governments allowed a system of institutional abuse to develop and persist over many decades.

It is alleged in the class action that both governments had a duty of care to the children and that insufficient action was taken to ensure their safety.

"They claim that the defendants are legally liable in damages to them for the harm, physical and psychological, which they suffered from such abuse," Justice Garling said.

Guardianship for the children was given to the Federal Minister for Immigration who in turn transferred custodial responsibilities to the State of NSW Child Welfare Department.

Justice Garling said both levels of government and the Foundation "dispute liability, dispute that they owe duties of the kind pleaded, dispute as a matter of fact that there was any breach of their obligations and advance various positive defences to the claims of the plaintiffs."

Each of the defendants argued the class action should not be allowed to go ahead, including on the grounds that it "would not provide an efficient and effective means of dealing with the claims of the group members."

The named plaintiffs, Geraldine Giles and Vivian Drady, were resident at the Fairbridge Farm - Ms Giles between 1954 and 1964, and Ms Drady between 1959 and 1971. They are representing a further 65 other former residents.

In a statement, Slater and Gordon said several attempts have been made over the past six years to create a compensation scheme.

Slater and Gordon lawyer Roop Sandhu called on the state and federal governments to discuss a resolution with his clients and work towards a settlement.

"The defendants can stop this ongoing court action and acknowledge the suffering and pain of these people," Mr Sandhu said.

"The State and Federal Governments have the power to end this tomorrow – the former Fairbridge residents were children in their care."

Former Fairbridge resident and group advocate, David Hill, welcomed today's judgement and said it was a positive step towards seeking justice.

"As these people get older, it is becoming more critical for a resolution to be determined," Mr Hill said.

"They have gone through enough and they are all just hopeful for a resolution sooner rather than later."

This story was found at: <http://www.smh.com.au/nsw/class-action-filed-against-fairbridge-farm-school-for-alleged-physical-sexual-abuse-20140221-3387h.html>