



CARE LEAVERS AUSTRALASIA NETWORK

CLAN is a National, Independent, Peak Membership Body which supports, represents and advocates for people who were raised in Australian Orphanages, Children's Homes, Foster Care & Other Institutions.

Submission to the Victorian State Government in response to the external consultation paper:

'Betrayal of Trust Recommendation 26.1'

CLAN - Care Leavers Australasia Network is a national, independent, peak membership body which represents and advocates for those who were raised in Australia's and New Zealand's Orphanages, Children's Homes, other Institutions and Foster Care. There were more than 500 000 children in Australia who grew up in 900 plus institutions. CLAN's main objective is to assist and support Care Leavers and their families through the wide variety of work we do including, but not limited to, advocacy for a National Redress Scheme, counselling, casework, records searching and publishing Care Leaver's stories.

CLAN would like to thank the Victorian State Government for giving us the opportunity to provide our input on your current discussion paper. We applaud the VIC Government for the consideration that non-government organisations are to be incorporated and insured where they are provided with funding or tax exemptions, and other entitlements.

CLAN feels however, that whilst this is a great step in the right direction, there should be some further considerations in the implementation of this recommendation before being finalised.

Incorporation

CLAN is in general agreeance with the concept that Government policy would require organisations to be incorporated in order to receive funding. Whilst CLAN endorses the notion that any organisation providing services to children should be incorporated, we also feel this should extended to ALL services that the government provides funds to. By broadening this policy, it enables any individuals who are subject to mistreatment or abuse to adequately seek justice.

However for the purpose of this discussion paper and the focus on incorporation on child based services, we see a substantial gap. Our concerns lie with the proposed risk assessment approach. CLAN firmly believes that if funding is provided for the purpose of delivering services to children, it is imperative that ALL child based services are required to incorporate. It should not matter the size of the organisation or whether the interaction with children is minimal or large; ALL organisations receiving funding for services involving children should still be required to incorporate and hold appropriate insurances in order to receive government funding.

We also note that within your proposal, the specifications required for an organisation to receive government funding as an incorporated body, states that it must be for the purposes of *directly* delivering services to children. Many gaps are formed within this proposed scope. Organisations that provide minimal or indirect services to children do not limit the likelihood of abuse occurring, and therefore should also be incorporated.

CLAN strongly believes that despite the level of interaction with children, all organisations should be incorporated, and not determined by low or high risk. By conducting a risk assessment, this could mean that many organisations are not deemed required to be incorporated, and slip through the gaps, once again limiting justice for victims of child abuse. Therefore CLAN does not agree with idea that the requirement for incorporation be dependent on risk assessment. Furthermore CLAN would once again like to reiterate that with the Victorian government considering taking the positive measure of incorporation forward, we do not understand why it isn't proposed as an all-encompassing measure i.e. ALL government funded organisations, regardless of their function, size, or risk assessment should be required to incorporate. If the Victorian government are serious about addressing gaps and ensuring victims, especially Care Leavers and other child abuse victims have some sort of recourse through civil litigation it would be wise to make incorporation a blanket rule instead of creating another issue to remedy in the years to come.

Insurance

CLAN endorses the requirement that a funded organisation who provides services to children needs to be insured, and this insurance must be appropriately suited to child abuse. CLAN reinforces our beliefs that despite a 'risk assessment', there still remains a potential possibility of a child being abused and therefore asserts that ALL funded organisations are to be appropriately insured.

By limiting the requirement for small organisations who are 'lower risk' and are not insured, this creates another concerning gap, as they will have no assets and will fall through when no proper defendant can be identified in a legal proceeding. This has been a common issue for many Care Leavers who have attempted to sue uninsured and unincorporated organisations.

CLAN is adamant that all funded organisations working with children need to have insurance, without the excuse of claiming unaffordability. CLAN does not believe that funding should be provided to organisations that are not insured. The child's best

interests are always the priority and need to be held to the utmost standard. An organisations affordability or viability only comes second to this. It is imperative that all organisations who support and provide services to children uphold their duty of care to the child by ensuring they have appropriate insurance.

Legal Identity of Defendants Bill 2017

Many Care Leavers have found themselves victim to the 'Ellis defence' and in a similar predicament. CLAN wishes to see all Care Leavers and other child abuse victims capable of pursuing civil litigation against organisations if child abuse occurs. If an organisation does minimal work with children, and remains unincorporated due to being considered 'low risk', this still leaves potential victims of abuse unable to take action against them unless they are able to legally identify a proper defendant to pursue damages against.

CLAN continues to uphold our view of ensuring all organisations are both incorporated and insured where the government funds them. This will guarantee that an organisation will be capable of being sued in its own name, or through this Bill it will be able to nominate a proper defendant to protect the victim. Whilst CLAN is pleased to see the structure of the Bill is targeting organisations that have legal structures that cause difficulties for plaintiffs, we feel this could be avoided given an organisation is incorporated and appropriately insured. Unfortunately, there would still remain a gap for unincorporated and uninsured organisations and those organisations who do not receive government funding and thus the Victorian government has no domain over to enforce incorporation.

In these difficult cases the current Bill you are proposing should enable most victims of child abuse to take up civil litigation. However there still remains the issue of any organisation who is unincorporated, uninsured and who has no assets to sue like small non-profit organisations. In these sorts of circumstances even if a proper defendant could be identified it would be pointless as the entity would have no assets to cover the costs or award. Of course if these sorts of organisations were government funded and forced to incorporate regardless of their risk assessment this would not be a problem. Nevertheless there is still an unfortunate gap which exists for those organisations who do not receive government funding.

CLAN would also like to discuss the definition of 'Child Abuse' your proposed Bill. The Bill adapts the definition of 'child abuse' used in the Limitations Amendments Act, which refers specifically to sexual and physical abuse. CLAN is adamant that child

abuse is more complex, and sees it essential that other forms of abuse are also included. There is more than one way to harm a child and therefore ALL forms of crimes and abuse, inclusive of neglect, should be incorporated in the definition of child abuse in the Bill. Care Leavers were subjected not just to sexual, physical and psychological abuse but were routinely neglected, malnourished and forced into labour (for no remuneration at very young ages). Many Care Leavers were also deprived of an education, were stripped of their identities and torn away from siblings and any family ties they had. The Bill also refers to psychological abuse that arises out of sexual or physical abuse. In CLAN's years of operation, we have become very conscious that psychological and emotional abuse is not just a by-product of other forms of abuse, but is in fact one the most detrimental and damaging forms of abuse as it is intertwined and caused by a number of factors. CLAN anticipates that psychological/emotional abuse be a core part of the definition of child abuse within the Bill. Furthermore, CLAN recommends that perhaps in forming your definition of child abuse for use within this Bill that the Victorian government refer to the UN Convention on the Rights of the Child.

Generally, CLAN is in favour with the Bill's concept of nominating a proper defendant in a proceeding that is capable of being sued on behalf of the organisation. We are in favour of the notion that the court plays a role in ensuring this, as well as guaranteeing the nominated entity has sufficient assets. We are pleased to see that the Bill requires the defendant will need to prove to the court that there are sufficient assets, and failing to provide this puts responsibility towards the organisation's associated trusts.

Conclusion and recommendations

CLAN is satisfied to see that the Victorian Government is considering the implementation of recommendation 26.1 which requires all funded organisations be incorporated and insured. We feel this is a very positive advancement for those who have been abused, and for possible future child abuse proceedings. CLAN is overall impressed with the proposed direction of this consultation paper, however we would like to see some important changes. CLAN hopes our concerns are addressed regarding the utmost importance of ensuring all organisations are incorporated and insured, including organisations working with individuals other than children. Within the context of this paper however, at a minimum, CLAN is passionate about ensuring ALL organisations working with children are incorporated, despite the level of risk they pose. Furthermore we are pushing for the compulsory requirement that all organisations have insurance regardless of costs and complications.

Finally, CLAN would like to see that ALL forms of abuse are included in the definition of 'child abuse' within the Bill to ensure no gaps are formed.

CLAN would again like to thank the Victorian State Government for inviting us to provide our insight on this important issue. By ensuring all organisations are incorporated and insured, the Victorian Government can play a role in deterring perpetrators and preventing organisations from facilitating abuse. Fundamentally, this will ensure that when a system does fail, Care Leavers as well as other children and adults have dignity and the ability to seek justice accordingly.