



## **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.**

April 2018

“Response to the NSW Department of Justice, regarding the Report on proposed responses to the Royal Commission’s civil litigation recommendations.”

CLAN - Care Leavers Australasia Network is the national, independent, peak membership body which represents and advocates for Care Leavers who were raised in Australia's and New Zealand's Orphanages, Children's Homes, other Institutions and Foster Care. The Senate Inquiry estimates there were more than 500 000 children in Australia who grew up in 900 plus orphanages, children's homes, training schools, institutions and foster care. 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, support at the Royal Commission, the Senate Inquiry, searching for family, counselling, casework, records, and publishing Care Leaver's stories in the national newsletter.

CLAN would like to thank the Department of Justice for giving us the opportunity to provide our input and recommendations regarding the proposed legislative reforms to expand the civil liability of institutions for child abuse, and to remove barriers faced by survivors.

CLAN has been operating for nearly 18 years and within this time frame we have been privy to many Care Leavers who have pursued civil claims for the abuse they suffer whilst in 'Care'. Through these claims, many have faced severe emotional distress, roadblocks, injustices and have felt re-abused, yet again at the hands of our Government, Church and Charity systems. CLAN is highly engaged and committed in ensuring Care Leavers achieve justice, in the least invasive possible way.

Following the release of the Royal Commission's civil litigation recommendations, CLAN has felt the direction of these propositions do encompass and understand Care Leaver's needs for justice and recognition for the abuse and neglect they endured. However, whilst CLAN also noted many discrepancies within these recommendations, we are pleased to see the NSW Government has conducted an extensive consultation process to review and reform some of these discrepancies.

Generally, CLAN is supportive of the proposed reforms as its direction is to enable survivors to pursue civil claims for compensation in NSW. CLAN also feels however, that amendments should be made within these reforms to ensure Care Leavers have the best chance at receiving justice, recognition and compensation.

## Non-Delegable Duty

CLAN is overall supportive of the amendments made by the NSW Government to the Royal Commission's recommendations regarding non-delegable duty, by implementing the introduction of legislation amending the common law of vicarious liability.

It is vital that vicarious liability of institutions be extended to child abuse that is committed by people with relationships that are akin to employment. This is inclusive of Foster Carers, Volunteers and the like. For CLAN, many of our members were abused by foster carers or religious officers who affiliated themselves with the specified organisation. By implementing this suggested legislation, it will result in an increase the likelihood that organisations will be more attentive to those who come through their doors, as they understand that any abuse occurring within the organisation, they will be held accountable for. Fundamentally it will encourage organisations to closely monitor those in roles akin to employment by implementing further checking measures, and be stringent with their Working with Children Checks and Police Checks. CLAN also feels strongly about mandatory reporting for all organisations involving children.

Overall CLAN is supportive of the legislation, inclusive of the statutory test that will measure the organisations involvement and responsibility. CLAN's concerns for the statutory test however, is that it needs to be accurately measured in way that disallows loop holes for organisations to refuse accountability.

## Reverse Onus of Proof

CLAN acknowledges to date that Victoria is the only jurisdiction that have acted upon the reverse onus recommendation put forward by the Royal Commission. CLAN is highly supportive of this approach, as it ensures that the duty of care towards children's safety in any institution is paramount. The Victorian legislation ensures that where an organisation is presumed to have breached the duty of care, without implementing reasonable precautions they are held accountable. However, CLAN has concerns in the execution of this legislation, due to the broad definitions of 'associated individuals' and determining 'reasonable precautions'.

The proposed reform suggested by the NSW government, encompasses these two - issues. CLAN agrees with the suggested reforms, as the inclusion of a non-exhausted list of 'associated individuals' can reduce the loop holes created when determining

liability. CLANs main concerns surround the efficacy of noting the relevant considerations when determining liability, as from our 18 years of working closely with Care Leavers, it is evident that they truly fear being disbelieved, and abandoned when disclosing their abuse. For survivors of abuse, the relevant considerations suggested in the proposed reform must be detailed and understanding in nature. Aspects such as a survivor's previous disclosure, counselling and attendance to the Royal Commission would be useful in making a determination, as being interrogated and questioned by the defence in regard to the likelihood of an event occurring is highly invasive and distressing.

### Proper Defendant and access to assets

CLAN is highly supportive of a legislation which requires associations to nominate a proper defendant with sufficient assets in order for the victim to carry out a claim. However, we find that this legislation necessitates further law reforms, prior to reaching the suggested legislation proposed by the NSW Government.

CLAN continues to stand unwilling to compromise on our position of Incorporation. We feel the legislation being implemented by the NSW Government could be avoided if Incorporation of ALL services and associations working with children is mandatory. CLAN is aware that the NSW Government now only funds incorporated organisations, however this is not a national approach, nor does this effect those who do not require funding.

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 or services involving children should still be required to incorporate by law.

The legislation imposes that a proper defendant be nominated in the circumstance of dealing with an unincorporated entity. By requiring all organisations to be incorporated, we eliminate this need for nominating defendants, or approaching associated trusts as an incorporated entity CAN be sued. CLAN admits to having limited legal knowledge, however we still feel the legal loopholes are far too substantial when nominating a trust or trying to identify one that holds sufficient assets.

In the instance where the law is not capable of requiring organisations to be incorporated, CLAN will agree with the proposed reforms, with the hope for changes in the future. We agree that the association can put fourth a trust as a proper defendant. We are however questioning the efficacy of this approach in regard to

the time frames in which an association can nominate a trust. Victoria currently require 120 days for an association to nominate a proper defendant. We feel NSW should not adopt this time frame, and instead should shorten it. Within the proposed reform, there is no specification on what the time frame will be. In most cases, Care Leavers find their civil cases take 2 years at a minimum. CLAN would like to see these cases progress faster as they are highly distressing for the survivor and cause a great deal of anxiety. By allowing a 3-month nomination period we are again extending the life of a civil claims case.

Furthermore, the organisation may nominate an associated property trust that does not have an amount considered sufficient to the victim who is suing the entity. They are then limited to what the maximum amount is that they could be entitled to. If in the circumstance where a court is to nominate a proper defendant, we are then dependent on the deciding judge to make a reasonable choice.

Overall CLAN is adamant that the best solution is to force incorporation. If the NSW government and other States and Territories are serious about addressing gaps and ensuring 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.

By broadening this policy, it enables any individuals who are subject to mistreatment or abuse to adequately seek justice.

## Insurance

The recommendations put forth by the Royal Commission coincide closely with CLAN's beliefs as to what would be suitable for organisations, rather than the proposed reforms of the NSW government.

CLAN endorses the requirement that an organisation who provides services to children needs to be insured, and this insurance must be appropriately suited to child abuse. Despite high or low interactions with children, there remains a potential possibility of a child being abused.

CLAN is adamant that ALL organisations working with children need to have insurance, without the excuse of claiming unaffordability. The child's best interests are always the priority and need to be held to the utmost standard. An organisation's 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.

Perhaps the government could also enforce regulation on the insurance industry. Again CLAN resorts to the conclusion that organisations should be under a compulsory obligation to be incorporated in order to work with children; so in the instance that a child has been abused and a civil case is instigated, they are able to then nominate a proper defendant, rather than rely on insurances.

## The definition of child abuse

CLAN has advocated and supported Care Leavers since it began in 2000. At no point we have differentiated or put more emphasis on the impact and suffering of each different type of abuse. Whilst we have been incredibly supportive and thankful for the introduction of the Royal Commission, we wish to see recognition for survivors of ALL forms of abuse and neglect.

For this reason, we feel that the proposed reforms of the NSW Government in defining child abuse is not substantial nor accurate.

We feel that without the Governments acknowledging ALL forms of abuse and neglect, they then truly have not understood the horrific impact these crimes have had on children.

This reform must be amended, as the impact of sexual, physical, emotional, cultural and psychological abuse is all intertwined, and just as damaging as the other.

The reform draws on the fact that liability is only on what is already actionable under existing law. If we don't make changes now to existing laws, we will be continually revisiting this topic. We acknowledge the reform is also based on the Royal Commission, and is outside of the scope of the governments response, but we must start to extend these barriers, and untested liabilities, to ensure no children ever endure or suffer the way Care Leavers once did. The NSW Justice paper refers to a category of liability of content and parameters that are uncertain and untested when considering other forms of abuse. We must start to think differently, and challenge these parameters, and acknowledge child abuse for what it is; sexual, physical, psychological, emotional or cultural.

## Miscellaneous

CLAN also strongly supports the position of creating a legislation that prevents convicted paedophiles from changing their names as a means of avoiding scrutiny when they attempt to work with children. Many can change their names by default, and avoid detection in the future in different locations to enable them to work with children.

- A convicted paedophile in Britain has changed his name on two occasions, enabling him to then work in schools in Thailand surrounding children.
- In Victoria, Australia, violent criminals and sex offenders can pay \$58.80 and change their name by deed poll.
- A Melbourne Christian Brother who after changing his name by deed poll, plead guilty to 33 counts of indecently assaulting boys under the age of 16 and one count of gross indecency between 1971 and 1986 involving 20 victims.
- A convicted paedophile in NSW reportedly changed his name without having to notify authorities, and tried to adopt children.
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No matter how many checks are applied to these individuals they will slip through the cracks. We need to start making law reforms in these highly important areas.

Long overdue -

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.

## References

Royal Commission (2017) *Final Report Recommendations*, Commonwealth of Australia

<http://www.news.com.au/news/criminals-allowed-to-hide-behind-fake-names/news-story/64cd69dda00107da0fa1a784e0b9ebdc>

<https://www.sbs.com.au/news/name-change-loop-hole-sparks-police-anger>

<https://www.yomyomf.com/convicted-british-pedophile-changed-his-names-several-times-to-teach-in-thailand/>

<https://www.thecourier.com.au/story/2871669/paedophile-awaits-sentence/>