



## **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.**

**PO Box 164, Georges Hall, NSW, 2198**

**Comments on the NSW Government's  
draft bill:**

**Civil Liability Amendment (Child Abuse  
Settlements) Bill 2020**

CLAN - Care Leavers Australasia Network is a national, independent, peak membership body which represents and advocates for those who were raised in Australia and New Zealand's Orphanages, Children's Homes, Missions and Foster Care. There were more than 500 000 children in Australia who grew up in 900 plus Orphanages, Children's Home, Missions 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, counselling, casework, records searching and publishing Care Leavers' stories.

CLAN would like to thank the NSW State Government for taking on board stakeholder feedback in the creation of this Bill. Care Leavers as a cohort have repeatedly had their rights infringed upon by past providers of care including the State Government, churches and charities who were responsible for the crimes committed upon Care Leavers as children. It is time that the legal impediments allowing these past providers to act immorally and unethically, forcing Care Leavers to accept unjust settlements were recognised and the ability to overturn these settlements was given to the courts. Care Leavers were not only abused as children, but they were abused once again as adults by the justice system which allowed them to be treated so poorly and unjustly that they were retraumatised once again. CLAN commends the NSW State Government for finally recognising this and giving the courts the ability to overturn these unjust payments.

### **The Definition of Child Abuse**

CLAN applauds the NSW State Government's use of a broader definition of 'child abuse' including sexual, physical, and other connected abuse. Since both the Royal Commission and the National Redress Scheme has only examined sexual abuse it is refreshing to see that the NSW Government has adopted a broader definition child abuse.

CLAN are strong believers that there is more than one way to harm a child and we bear witness to that every day in our work to support and advocate for Care Leavers. For many Care Leavers, the sexual abuse they endured was just the tip of the iceberg when compared to their overall experience.

Furthermore, many of the unjust settlements concerning Care Leavers are not just those involving sexual abuse, many of these are for physical abuse, psychological abuse, neglect and malnutrition, and child slave labour. Additionally, we are glad that those who have not been sexually abused and are ineligible for redress will be able to have their unjust past settlements overturned and can pursue a fairer settlement in today's climate.

### **Affected Agreements**

CLAN are pleased to see that affected agreements consider both the Statute of Limitations and the Proper Defendant legislation which prohibited many Care Leavers from bringing a proper claim against their abusers/perpetrators. It was due to this archaic legislation that many Care Leavers were faced with no other option than to accept paltry settlements purposely designed to take advantage of these legal obstacles.

Considering these Acts have now been amended giving Care Leavers the ability to bring an action, it is only fair and just that those who accepted unjust settlements in the past can have these settlements reviewed on these grounds.

### **Process for Setting Aside an Affected Agreement**

CLAN are completely supportive of the fact that money, other consideration, legal costs etc cannot be recovered from the person. Whilst it is fair that the courts may consider what a person was paid in a past agreement it is just to not recover this amount. CLAN are aware of different ways in which the Federal Government attempts to recover compensation through both Medicare and the indexation of prior payments in the National Redress Scheme. We applaud the NSW State Government for pursuing the fairer and more just path.

### **National Redress Scheme**

CLAN would like to preface our response by saying we understand that due to the National Redress Scheme being created under Commonwealth legislation, NSW courts have no discretion or jurisdiction in this matter.

We do however have the opinion that ALL settlements should be able to be addressed and the courts discretion applied to review ALL settlements that are unjust. Whilst we understand it is not possible for the NSW courts to do this we are of the strong belief that Federal courts should. No agreement should be beyond the review and discretion of the law, especially NRS agreements. It needs to be acknowledged that the NRS is far from beyond reproach and in the vast amount of cases justice is not being done for those going down this pathway.

CLAN would also like to remind the NSW state Government, that although it is a Federal run scheme, the State Governments and institutions are the ones funding the payments to Care Leavers and other victims. Therefore, the contract, whilst it is under Redress is no more than a formalised process between the individual parties, some being state Governments. Due to this fact surely, there is some ability to allow judicial discretion over these settlements. The NSW State Government cannot wash their hands of NSW Care Leavers just because they have monetarily contributed to the redress scheme.

### **Other Feedback**

It is encouraging to see that the Draft Bill does not allow for cross-claims and indemnities between defendants. Only allowing survivors and their representatives to bring a claim ensures that this legislation is kept for the parties it is meant to be benefiting and not inadvertently allowing defendants to take advantage of survivor focused legislation.

### **Conclusion**

CLAN commends the NSW State Government on this Draft Bill. CLAN hopes that these reforms will now allow Care Leavers who were treated unjustly and unfairly in the past the ability to have their settlements overturned.

Churches, charities and the NSW State Government have all leveraged the barriers and difficulties of the civil system over Care Leavers coercing and intimidating them into taking the measly settlement amounts offered. We hope for the sake of those NSW Care Leavers who have made the decision to pursue their case civilly, their unjust and unfair settlements can be overturned to allow maximum compensation to be achieved.

Whilst CLAN understands the jurisdictional difficulties, CLAN also sincerely hopes that the NSW State Government reconsiders their position concerning the National Redress Scheme. If the National

Redress Scheme exercised procedural fairness, equality and produced just outcomes then CLAN would have no issue in excluding it from review. However, unfortunately this is not the case and the NSW State Government is party to this as are the churches and charities. It is all well and good for these past providers of care to give their money to the Commonwealth Government but they need to be aware of what is being done with that money and if it is being used appropriately, justly and fairly. When Care Leavers run the risk of having any redress payment reduced if they choose to have it reviewed, this cannot be considered a viable option that they will take up. Therefore, CLAN feel the matter is more complicated than is explored in your discussion paper and we once again urge you to read our submission to the Joint Select Committee on Implementation of the National Redress Scheme.

Thank you for giving CLAN the opportunity to provide feedback on your Draft Bill, we now look forward a more fair and just civil litigation system for NSW Care Leavers. After all, the NSW State Government was the legal guardian to NSW state wards and needs to be held responsible and liable for the crimes committed against them. We are pleased with the introduction of this Bill but also believe that the NSW State Government should be doing everything in their power to provide justice to NSW Care Leavers, not just overturning past settlements that were unjust but also by reviewing their interaction with the National Redress Scheme and how these payments can be reviewed also.