



Alliance for Forgotten Australians

Patron: Jack Thompson

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Issues Paper No 5 Civil Litigation

Introduction

The Alliance for Forgotten Australians (AFA) welcomes the release of Issues Paper 5, by the Royal Commission and the opportunity to provide a submission on this subject.

Summary

Forgotten Australians face considerable barriers in order to access the current civil litigation system and to succeed in their civil actions against past providers of 'care'¹ that may have been responsible for sexual and other abuses of the children they were responsibility for the 'care' and protection of then as children.

The nature and extent of the impediments to justice have been widely identified through the findings of numerous Senate and State Government inquiries, submissions to government by individuals and organisations representing those brought up in institutions and other forms of Out of Home Care (OOHC), and by advocacy groups including AFA. The key barriers to justice for Forgotten Australians are set out in this submission.

This submission also provides brief background on the advocacy work of AFA and provides information concerning the importance of the body of lived experience knowledge available from Forgotten Australians on civil litigation matters. They have a unique and highly relevant perspective on the matters identified by the Royal Commission in this Issues Paper. The Attachment to this submission references AFA submissions to government inquiries into the history and needs of Forgotten Australians and which address such matters as litigation, redress and forms that justice may take.

Recommendations

AFA recommends that the Royal Commission:

¹ AFA uses 'care' and capitalises Home when referring to placement in institutional or other forms of Out of Home Care; in recognition that many Forgotten Australians experiences harm, not care.

1. Advise the Australian Government that a comprehensive review of the evidentiary rules associated with the provision of testimony on child sexual abuse cases brought by those in childhood institutional 'care' is needed.
2. The review should focus on ways to improve the capacity to bring relevant material to the notice of the court and for the courts to consider the problems of obtaining evidence in case of child sexual abuse with greater sympathy and appreciation.
3. Recommend to the Australia Government and appropriate judicial bodies, that the existence of silence clauses also known as confidentiality agreements should not as a general rule prevent a claimant raised in an institution from seeking redress through the courts.
4. Examine the evidence from the major redress and compensation schemes that have operated in a number of jurisdictions to provide redress for those in Out-of-Home Care in order to improve the operation of future redress policies.
5. Examine ways to address the legal obstacles arising from problems of identifying 'the proper defendant' in civil litigation claims against past providers of care especially in regard to the ability of plaintiffs to bring actions against church bodies.
6. Recommend to the Australian Government expansion of 'special needs categories' for Forgotten Australians in selected Australian, State and Territory government health, housing and other social 'care' programs, as a form of government redress for past maltreatment in institutional or other form of 'care'.

Background

The Forgotten Australians were the subject of the Australian Senate's Community Affairs References Committee inquiry and report, *Forgotten Australians: A Report on Australians who experienced institutional or out-of-home-care as children*, August 2004 (the Forgotten Australians Report). It centred on Australian-born children including Indigenous Australians but in estimating numbers of Forgotten Australians, it also included former British child migrants from the United Kingdom and Malta.

Government inquiries and reports since 1997 reveal that upwards of and possibly more than 500,000 children experienced life in an orphanage, Home or other form of OOHC last century². Many were abused and neglected – including criminal sexual and physical assaults.

² Relevant reports include: HREOC, 'Bringing them Home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (1997); Australian Senate Community Affairs References Committee reports: 'Lost innocents: righting the record report on child migration' (2001); 'Forgotten Australians: a report on Australians who experienced institutional or out-of-home care as children' (first report, 2004); 'Protecting vulnerable children: a national challenge' (2005); Australian Government response to the Committee's reports: Forgotten Australians: 'A report on Australians who experienced institutional or out-of-home care as children', and 'Protecting vulnerable children: a national challenge.' The second report on the inquiry into children in institutional or out of home care (2005); and Lost innocents and forgotten Australians revisited, report on the progress with the implementation of the recommendations of the Lost Innocents and Forgotten Australians reports (June 2009).

With few life skills and poor life chances, many have endured homelessness, welfare dependency, substance abuse, relationship and mental health problems across the life span. Premature deaths, often from suicide, are also not uncommon amongst Forgotten Australians. Indeed, the enduring legacy of their institutional 'care' can only be described as tragic. Some Forgotten Australians have explored the possibilities of redress and justice through the courts system and have rarely been successful in their civil actions, due to the barriers to justice identified in this submission.

The Alliance for Forgotten Australians

AFA is a national alliance of Forgotten Australians and supporters, who work in partnership to advocate for and promote, national policies and services to meet the needs and interests of Forgotten Australians.

AFA's vision is for recognition and healing for Forgotten Australians and encourages their active engagement in, and the development of, policy and services which are person-centred and strengths-based and which create opportunities and pathways to improve the lives of Forgotten Australians. AFA strongly encourages the inclusion of Forgotten Australians in service planning and delivery. In addition, AFA delegates seek to improve outcomes for all children and young people affected by current child protection systems and policies.

Through advocacy and awareness raising, AFA values and strives for equity, equality, justice, resources and affirmation for all Forgotten Australians and their families. AFA considers that the issues raised in the Royal Commission's current Issues paper on Civil Litigation are of considerable interest to all Forgotten Australians and for this reason the submission will focus on the lived experience of Forgotten Australians who have chosen to pursue legal remedies for the injustices of their past treatment. This will provide exemplars to promote a better understanding of the obstacles Forgotten Australians have faced in dealing with the legal system.

Issues Covered in this submission

The Royal Commission asks how effective the civil litigation systems are, as they currently operate, in resolving claims for damages for child sexual abuse in institutional contexts and seeks submissions on possible reforms to improve the effectiveness of the civil litigation systems.

Question 1 concerns the elements of the civil litigation systems, as they currently operate, which raise issues for the conduct of litigation brought by people who suffered child sexual abuse in institutional contexts.

There are considerable barriers to access to justice for Forgotten Australians. These barriers have been identified and addressed through many sources including individual submissions, documentation and reports provided by non-government bodies; as well as by advocacy groups including AFA. AFA submissions are detailed in Attachment A.

The lived experience of many AFA members, and the understandings they have gained about their own and other Forgotten Australian's experiences in seeking justice and redress for their treatment in state, church and private institutions, provides a unique perspective from which to inform the Royal Commission on a number of questions posed in the Issues Paper.

Many of the specific examples listed in Question 1 are familiar to Forgotten Australians and the members of AFA who have endeavoured to bring forward the required evidence to bring civil suits against individuals and institutions in which they spent many years of their childhood. AFA has also provided comprehensive submissions to government on these issues and provided evidence from their own experience both while in 'care' and since in their attempts to access the legal system to press their claims³.

AFA's views and experience on these matters forms the basis of this submission. The key barriers to accessing the civil litigation system identified are set out below together with suggestions for reform.

Obstacles to Justice: The Effect of Statutory Limitations

As per Recommendation 1 above, we recommend that the Royal Commission address the current restrictions imposed by both legislation and common law on plaintiffs seeking redress through the civil jurisdiction process. In doing so we note that the Royal Commission has found similarities in the accounts and experiences of survivors of institutional abuse including a generally stated dissatisfaction with the criminal justice system and the anguish felt by many victims that, despite attempts to disclose the abuse at the time it occurred, they were not believed or supported to make such complaints.

The Forgotten Australians Report (2004) found that some 'care' leavers indicated a clear desire to pursue civil actions for damages for institutional child abuse, and the Report commented on the possible advantages of pursuing civil litigation, as well as indicating the history of major civil litigation cases and redress schemes⁴.

However a major obstacle to successful civil claims identified in the Forgotten Australians Report was the fact that the Statute of Limitations has prevented many claims being accepted. This is because limitation periods generally start to run from the time the claimant became 'aware' that they had suffered an injury which may be many years after the limitations period expired.

³ See Alliance for Forgotten Australians submission to Senate Community Affairs References Committee Inquiry into the Implementation of the Recommendations of the Lost Innocents and Forgotten Australians Reports, 18 May 2010 and related references at the Attachment to this submission.

⁴ Australian Senate Community Affairs References Committee. (2004.) 'Forgotten Australians: a report on Australians who experienced institutional or out-of-home care as children' (first report, 2004). Canberra: Senate, Parliament of Australia pp. 199-200.

Although some jurisdictions have moved slowly to reform this area, including removing some previous statutory bars to pursuing claims, obstacles remain because legal representatives of Governments in many jurisdictions continue to rely on statutory limitation periods to argue against civil suits brought by Forgotten Australians who claim to have been sexually abused while in childhood institutional care. In AFA's view this practice is inconsistent with the expectations of government that it will act as a model litigant.

For instance we note the critical importance of the plaintiff's knowledge of the alleged abuse and the exact time the plaintiff may have become aware of such knowledge. On this matter we note that there is some case law where the judgement has involved the consideration the personal circumstances of the plaintiff when judicially considering whether to allow an action⁵.

Such personal circumstances have been found by the court to include matter such as leaving the matter in the hands of a solicitor, that a hope of recovery from injury can justify a delay. AFA strongly supports the emphasis in these decisions on flexibility and personal circumstances when those who have suffered abuse have come to the courts for justice and may not have complied with statutory limitations.

Due to the psychological effects of childhood sexual abuse, adult survivors of abuse are often unable to institute proceedings within statutory time limits, and case law demonstrates significant difficulties in obtaining extensions of time in which to proceed⁶. Together these issues deny legal remedies for plaintiffs.

In particular the use of the Statute of Limitations requirements as a defence in legal cases concerning child sexual abuse has discouraged many Forgotten Australians from bringing legal actions, and, even where cases have been brought into the civil courts, the court has found that limitation periods have barred further consideration of claims.

The Forgotten Australians Report indicated that a number of submissions to the Senate Committee argued that Statute of Limitation legislation should be amended to allow legal proceedings at any time for victims of child sexual and/or physical abuse and neglect.

The Senate Committee agreed that that alleged perpetrators of sexual and/or physical abuse should not continue to evade prosecution by hiding behind the limitations of actions provisions.⁷ Accordingly, they recommended that governments review their jurisdictions Statute of Limitations laws and require the incorporation of religious or charitable organisations before they may receive tax concessions (so they can be subject to litigation effectively). They also encouraged the development of whistle-blower legislation to encourage reporting of offences.

⁵ For instance in *Piper v Nominal Defendant* [2003] QCA 55 the court will indicated that it will consider all the circumstances involved in including, the claimant's personal characteristics, the nature of the injury sustained, and the likelihood of prejudice. Other key decisions on reasonable delay of claims include *Thomas v Transpacific Industries* [2002] QCA 160; *Hodges v Advil* [2003] QDC 347; *Chapman v Body Corporate* [2005] QDC 018.

⁶ Persuasive legal research in this field includes the following: Mathews B 2003, 'Limitation periods and child sexual abuse case: law, psychology, time and justice', *Torts Law Journal*, Vol. 11 (3), pp. 218-243, and Mathews B 2004, 'Judicial Considerations of Reasonable Conduct by Survivors of Child Sexual Abuse' *University of NSW Law Journal*, Vole 27 (3), pp 631-666.

⁷ *The Forgotten Australians Report*, 2004, page 212.

In their response to the Committee Report, the then Government indicated that Statute of Limitation provisions were a matter for State and Territory jurisdictions and did not support the requirement for charities to be incorporated in order to receive tax concessions. The Government did agree to examine the desirability and viability of introducing whistle-blower legislation.

However, there are other important factors that often prevent Forgotten Australians who were raised in OOHC from bringing civil claims. These include the emotional difficulties that many face in bringing actions, including a false belief in responsibility for the adult's actions or feeling of shame about the events. Others lack information about their legal rights and are reluctant to share their stories with the professionals who can help them with their claims, including lawyers and psychologists. Others are discouraged by the costs of legal action and the financial risks they run in bringing an action as well as the general adversarial nature of the court experience and the stresses it can create for them when recounting explicit details of their past abuse in a court setting.

Obstacles to Justice: Evidentiary Issues Prevent Many Claims from Coming to Court

Evidentiary problems including the difficulty of verifiable testimony and clear identification of alleged abusers has also been a bar to the resolution of claims. For example records are often unreliable or have disappeared. AFA has been active in supporting Forgotten Australians to find records of their time in institutions to enable them to seek redress if they wish to. However the availability of records remains a significant evidentiary issue.

AFA considers a reform of the evidentiary requirements in this area are needed to improve the capacity to bring relevant material to the notice of the court and for the courts to consider the problems of obtaining evidence in case of child sexual abuse with greater sympathy to, and appreciation of, issues of causation in relation to claims of negligence and breach of duty.

We would also like to add that similar evidentiary issues and problems have arisen in relation to the testimony provided by survivors of physical and emotional abuse and neglect. For this reason, reform initiatives in relation to evidentiary problems should be as broad as possible.

It is also true that many of those raised in institutional 'care' are concerned about coming forward and speaking of their experience for fear of intimidation and harassment. We understand that this was why special legislation was enacted for this Royal Commission to allow individuals to come forward in private sessions and speak out, knowing that their identity was protected. This legislative protection is not as a rule available in ordinary courts of law and remains an impediment to access to justice for Forgotten Australians.

However, that witnesses in court or in front of Inquiries need to feel secure and understand their legal rights and protections when they give evidence or testimony. There are already a number of legal protections for witnesses in law and in court procedures, and it is important that these protections encompass the variety of circumstances faced by those raised in institutional 'care'.

Obstacles to Justice: There may not be an ability to Sue the Right Defendant

As the Royal Commission would be aware, there are difficult matters concerning finding the right defendant in claims of childhood sexual abuse in many cases. For instance, it has proved difficult to sue church bodies because of the structure and organisation of churches. Reform is needed to enable the proper defendants to be more easily identified and be subject to legal proceedings. We note the recent developments in this area and comments by Cardinal Pell concerning the ability of the Roman Catholic Church to respond to legal claims against it for past abuse. We welcome this initiative as long as the legal entities so created are sufficiently large and resourced for claims against them to be adequately managed.

Obstacles to Justice: Silence Agreements should be overridden in some circumstances

Survivors of institutionalised child abuse who have been awarded compensation on the proviso that they sign a silence clause preventing them from any subsequent disclosure of their childhood abuse must be afforded access to legal systems when and if existing legal impediments to justice are removed. These survivors should have the opportunity to share their experiences if they so wish despite their having hitherto signed a silence clause.

Obstacles to Justice: The Costs of Litigation

In regard to the costs involved in bringing legal actions for victims seeking justice for child abuse, we note that the Productivity Commission is currently conducting an inquiry into Access to Justice. In their Issues Paper, the Productivity Commission notes that:

The ability of parties to access appropriate, timely and efficient dispute resolution pathways is important from both an individual and societal perspective. The direct benefits of accessing justice accrue to individuals by enabling them to effectively and fairly resolve their disputes and enforce their legal rights⁸.

The Productivity Commission also noted that some Australians may experience particular challenges in accessing justice as a result of their socioeconomic circumstances, language, cultural background, mental and physical wellbeing, or poor literacy and education. Forgotten Australians are heavily represented in such groups and experience barriers to justice that derive from their childhood institutionalisation and abuse, as well as current legal issues.

Other Forms of Redress

The Royal Commission's Issues Paper asks: do people who suffer child sexual abuse in institutional contexts want forms of redress in addition to, or instead of, damages or

⁸ Productivity Commission of Australia, Issues Paper *Access to Justice Arrangements*, Sept 2013, page 3.

financial compensation, and can these other forms of redress be obtained through civil litigation?

We address this question as follows. Some Forgotten Australians have expressed a desire for both financial compensation and redress and these views have been expressed in submissions to government⁹. Others say that an acknowledgment of their treatment and the apologies that the Government has delivered are sufficient. In this regard the National Apology to the Forgotten Australians, delivered by the then Prime Minister the Hon Kevin Rudd MP and then leader of the Opposition the Hon Malcolm Turnbull MP, as well as a number of other apologies and statements in other jurisdictions have satisfied many people. Others have benefited from redress and compensation schemes in some jurisdictions and these schemes have benefited individuals who have been unable to access the civil courts to pursue damages for the reasons outlined earlier in this submission.

AFA considers that the redress schemes that have been put in place by some state jurisdictions and organisations have partially met the requirements for financial compensation although more needs to be done. Some of these schemes had a number of disadvantages including the use of 'silence agreement' referred to above.

As per Recommendation 4, AFA commends that the Royal Commission examine the evidence from the major redress schemes that have operated in a number of jurisdictions in Australia and Ireland, in order to improve the operation of future redress policies.

Overcoming barriers to Accessing Services through 'Special Needs Recognition' for Forgotten Australians

Forgotten Australians are hampered by significant barriers to access services. These barriers have complex causes and researchers working with Forgotten Australians have reported that the key access to service barriers may be psychological, physical and a lack of awareness of the services that may be available¹⁰.

As an emerging community with high support requirements, more needs to be done to provide Forgotten Australians with equitable access and options to a range of services

⁹ AFA views on compensation arrangements and recommendations for other practical means of redress are set out in the following submission: Submission by the Alliance for Forgotten Australians, Senate Legal & Constitutional Committee inquiry into the 'administration and effectiveness of current mechanisms used by governments to provide discretionary payments in special circumstances', 11 June 2010. See also, Committee Hansard, Senate Legal and & Constitutional Committee inquiry into the 'administration and effectiveness of current mechanisms used by governments to provide discretionary payments in special circumstances', 3 November 2010 (Uncorrected Proof of Evidence) for statements of personal experience and the limitations of redress and compensation arrangements.

¹⁰ Department of Communities, Queensland Government, Snapshot of Consultations with Forgotten Australians, March 2011. The complete reports are available on the Department of Communities' website at www.communities.qld.gov.au

sensitive to their needs as they transition into older age. The adversity they experienced as children has had lifelong consequences which are poorly understood by the services sector. Inadequate and inappropriate responses to them as children and young people while in 'care' in institutions and foster care has left a terrible legacy, including, for many, lack of trust in bureaucracies and service administrators.

Special Needs recognition for Forgotten Australians. Further, that assistance from government and the community is needed to overcome the barriers to services that have been identified through research and through the testimony of Forgotten Australians. AFA has advocated for special needs recognition across all portfolio areas of the Department of Social Services (DSS), including but not limited to the Department of Human Services (Centrelink and Medicare offices).

Some recognition has been achieved under the Personal Helpers and Mentors Scheme PHaMS) a community mental health program funded by DSS. In addition, AFA would like to see other reforms within the abovementioned portfolios, including the development of a Pilot Forgotten Australian Liaison Officer program across the Centrelink network (similar to Grandparent Liaison Officers) and assistance with access issues to DisabilityCare for Forgotten Australians.

As per Recommendation 6, AFA recommends that the Royal Commission support the identification of Forgotten Australians as a special needs group for the receipt of social services and related government programs and benefits. When identified as a special needs group, Forgotten Australians should be provided with access to relevant financial supports, such as disability support pension, reflecting the trauma they experienced in childhood and the lifelong health and welfare needs as a result of that experience.

Thank you again for this opportunity to contribute to the national discussion on such an important issue for Forgotten Australians.

Yours Sincerely



Caroline Carroll OAM
Chair, Alliance for Forgotten Australians

Enclosure: Reference List; Key reports on Forgotten Australians

Reference List of Reports on Forgotten Australians

Alliance for Forgotten Australians Submissions

Alliance for Forgotten Australians Submission to Senate Community Affairs References Committee Inquiry into the Implementation of the Recommendations of the Lost Innocents and Forgotten Australians Reports, 18 May 2010.

Alliance for Forgotten Australians (AFA) presentation to Senate Community Affairs References Committee, Opening Statement, 30 March 2009.

Alliance for Forgotten Australians, Supplementary Submission, , to the Senate Community Affairs References Committee Inquiry into the Implementation of the Recommendations of the Lost Innocents and Forgotten Australians Reports, 11 June 2010.

Alliance for Forgotten Australians, Submission to the Senate Legal & Constitutional Committee inquiry into the 'administration and effectiveness of current mechanisms used by governments to provide discretionary payments in special circumstances', 18 May 2010.

See also, Committee Hansard, Senate Legal and & Constitutional Committee inquiry into the 'administration and effectiveness of current mechanisms used by governments to provide discretionary payments in special circumstances', 3 November 2010 (Uncorrected Proof of Evidence).

Senate Reports

The Senate, Legal and Constitutional Affairs References Committee, Review of Government Compensation Payments, December 2010

Senate Community Affairs References Committee. (2004). 'Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children'. Canberra: Senate, Parliament of Australia. Retrieved from: www.aph.gov.au/senate/committee/clac_ctte/completed_inquiries/2004-07/inst_care/report/index.htm.

Senate Community Affairs References Committee. (2005). 'Protecting vulnerable children: A national challenge. Second report on the Inquiry Into Children in Institutional or Out of Home Care'. Canberra: Senate, Parliament of Australia. Retrieved from: www.aph.gov.au/senate/committee/clac_ctte/completed_inquiries/2004-07/inst_care/report2/report.pdf.

Senate Community Affairs References Committee. (2009). 'Lost Innocents and Forgotten Australians Revisited. Report on the progress with the implementation of the recommendations of the Lost Innocents and Forgotten Australians Reports'. Canberra: Senate, Parliament of Australia. Retrieved from: http://www.aph.gov.au/parliamentary_business/committees/senate_committees?url=clac_ctte/completed_inquiries/2008-10/recs_lost_innocents_forgotten_aust_rpts/report/index.htm.