



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

**Submission to the NSW Government:
Setting aside Settlement Agreements for
Past Child Abuse Claims.**

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 the necessary steps to allow child abuse victims to have their unjust settlements reviewed. CLAN felt it necessary to comment on your discussion paper as this reform would affect a great many NSW Care Leavers. Care Leavers as a cohort have fallen through the cracks of the legal system, and the impediments that were in place prior to the Royal Commission into Institutional Responses to Child Sexual Abuse, prevented Care Leavers from receiving fair and just settlements from the State Government, churches and charities, responsible for their abuse.

The legal obstacles which impeded Care Leavers from further pursuing civil action prior to the Royal Commission, allowed the State Government, churches and charities to manipulate Care Leavers into settling for paltry amounts. Care Leavers and other abuse victims were constantly reminded that they had no legal standing due to the Statue of Limitations, the issue of having a proper defendant and historical issues in general of having little to no proof. The fact that these organisations used these barriers as leverage is reprehensible. Care Leavers were left with little to no choice but to take whatever settlement was being offered.

It must also be remembered that for many Care Leavers, literacy can be an issue as they had little to no formal schooling in many cases. At the same time, many Care leavers are also hesitant about reporting any crimes to the police, or even disclosing their abuse to others in general whether it be a professional or their family. Due to these factors many Care Leavers had no idea about what their rights were when it came to any sort of compensation, and many just accepted whatever they were given without making a fuss, in turn signing their rights away.

Take for example a Care Leaver who cannot read or write. He approached Towards Healing to tell his story, unaware exactly how Towards Healing actually worked. He made his complaint and had a mediation session with a friend present who also had literacy difficulties. His support persons ability read and write was not checked or discussed. He was asked if he would like a computer to which he replied yes, and was also given \$3000 compensation. He and his support person were then asked to sign something which they both did, not understanding what they had just signed. It was a deed of release. This Care Leaver had been both physically and sexually abused in [REDACTED].

CLAN are sure that those working on these reforms have read the large magnitude of material out there about why this is the necessary next step in giving some justice back to Care Leavers and other victims. We encourage you to read CLAN's submissions to the Royal Commission's Issues Papers regarding Towards Healing and Civil Litigation, along with our response to their Consultation Paper regarding Redress and Civil Litigation.

The Definition of Child Abuse

CLAN are encouraged to see that the NSW Government is keen to explore which definition of child abuse to use and is not defaulting to only using sexual abuse as the Royal Commission did and the National Redress Scheme has.

CLAN are strong believers that there is more than one way to harm a child. Care Leavers were first and foremostly taken from their families as they were deemed unfit to care for them, and were then placed in Orphanages, Children's Home, foster care, Missions, and other Institutions only to be neglected, deprived, abused in every which way and used for slave labour.

CLAN are aware of many Care Leavers who were abused in other ways aside from sexual abuse and have received payments and signed deeds of release from various professional standards units as well as the NSW State Government. Many Orphanages and Children's Homes used the children to operate services for profit. Many girls homes ran commercial laundries where little girls were forced to work from the time they could stand and hold an iron. For boys, the Homes often ran farms and were called 'training homes', this back breaking labour at the expense of a childhood and an education was more than abuse, it was torture. Punishments involved physical assaults often for the most minor things, children were malnourished, force fed, and were often punished in the most depraved of ways for minor infringements or for things like bed wetting that they had no control over.

For many Care Leavers, the sexual abuse they endured was just the tip of the iceberg when compared to their overall experience, and this is the same sort of story we hear every day. The psychological and physical damage that this has caused is tremendous and comes at an enormous price, not only for the Care Leaver and their families but for the health system which is now treating them and Commonwealth who are paying various pensions because many cannot work.

It is for this reason that CLAN believe it is in Care Leavers, and other victims of child abuse best interests that the broadest definition of child abuse is used covering sexual abuse, physical abuse, and other connected abuse.

It must also be remembered that many of the unjust settlements concerning Care Leavers aren't just those involving sexual abuse, many of these are for physical abuse, psychological abuse, neglect and malnutrition, and child slave labour. Furthermore, those who have not been sexually abused and are ineligible for redress deserve to have their unjust past settlements overturned, and have the opportunity to pursue a fairer settlement in today's climate.

What Should the Courts Discretion Allow for?

CLAN firmly advocates for the courts to be given the discretion to set aside settlement agreements in relation to historical abuse claims. As we have indicated we believe that this is the right and just thing to do to allow for settlements to accurately reflect a Care Leaver's experience as well as the liability of the organisation. The fact that these institutions used the barriers facing Care Leaver's or used their lack of knowledge or understanding of the law and their rights against them is a disgusting practice and needs to be remedied.

Whilst Care Leavers who were sexually abused have the option of applying to the National Redress Scheme (despite its many failings) those who were not sexually abused have no recourse for the unjust minimal payments they received. This is why CLAN proposes that the courts be given the maximum amount of discretion to not only allow for settlements that were statute barred and where

there was no proper defendant for a claim to be set aside, but also in other circumstances where the settlement was unjust and unfair. Considering that organisations not only used these legal barriers as leverage but in other cases also played on Care Leavers vulnerabilities and literacy difficulties, we believe it is only by doing this that the maximum amount of justice can be served.

CLAN also feel that in order to continue providing checks and balances and to be able to remedy the injustices of past providers, there should be no date implemented from which the discretion can be applied. CLAN believe that this discretion should apply prospectively as we know that the churches, charities and state government will still have the ability to exploit the vulnerable and their weaknesses despite legal barriers or not. Child abuse is a complex trauma which can make it difficult for Care Leavers and other victims to have their cases dealt with effectively and justly without their weaknesses being used against them.

CLAN are not legal experts and can't comment on the precise legalities and terminology used in this paper. However when considering a test to use, CLAN believe that the decision should be made in order to determine what is the fairest and what gives the most Care Leavers and other victims the chance to have their unjust settlements overturned.

Concerning criteria in deciding what can be set aside or in utilising the tests mentioned above, CLAN believe that the broadest criteria, allowing for the courts discretion on what is just and fair. There are a number of criteria mentioned regarding the NSW Supreme Court and the Contracts Review Act. CLAN feel that these are all valid criteria and cover a vast range of circumstances into which Care Leavers have entered into unjust settlements.

The findings of the Royal Commission regarding why Care Leavers signed certain agreements also cover important points. CLAN feel it is important for the courts to use all these examples as guidelines, but probably best not to provide a prescribed list as other circumstances may arise that are not covered but obviously unjust.

CLAN were privy to a letter from a prison inmate who described how he had been in contact with Towards Healing. At the time the [REDACTED] redress scheme was also running which he was eligible for. Towards Healing informed him that they would help with compensation, counselling, and housing and therefore he had no need for the [REDACTED] redress scheme. He then met with Towards Healing whilst in prison, they sat with him for six hours and took a statement. At the end of this meeting he received an apology from a Towards Healing representative and he was required to sign a contract which sounded like a non-disclosure agreement or a deed-of release. After this meeting he never heard from towards Healing again despite repeatedly trying to contact them. By this time the [REDACTED] redress scheme had closed and as a result of Towards Healing's manipulation he received no compensation or redress from any source.

Similarly, each case and the amount to set aside should also be left to the courts discretion if the payment has included other causes of action. It would be unfair to each Care Leaver and other child abuse victims, if everyone's case was considered the same with regard to percentages to set aside. Each case should be examined on its own merits and the amounts decided upon by the judge/court presiding over individual cases.

CLAN also believe that the courts discretion should extend to setting aside orders, judgments and other contracts or agreements that will give effect to setting aside the unjust settlement agreement.

National Redress Scheme

CLAN would like to preface our response in this section by saying again that we are not legal experts and cannot comment on the legalities of certain processes. 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.

It seems as though the National Redress Scheme (aside from any legal issues that may make reviewing these settlements difficult) is viewed as beyond reproach, and thus any settlement that comes from this is fair, just and not in need of review. If this is the NSW State Governments view (and any other state who have instituted these reforms minus the National Redress Scheme) you would be completely wrong.

There are a number of issues currently concerning CLAN that we have just recently spoken, and submitted to the **Joint Select Committee on Implementation of the National Redress Scheme**. We are not alone with our concern over these issues. We have attached our submission to the **Joint Select Committee on Implementation of the National Redress Scheme** so you can see the issues for yourselves revealing procedural unfairness resulting in unjust payments for many Care Leavers.

CLAN's major concerns with regard to the actual payments and how they are decided are as follows:

- The application form is extremely difficult for Care Leavers to fill out. It is long, arduous, the descriptions of what is needed is not clear. This is resulting in many Care Leavers submitting inadequate explanations of their abuse and half-filled forms which are not necessarily followed up on and then payments are decided based solely upon this information. Whilst support services are there to assist in the process of filling in forms, it is not a requirement for those who feel they can do it themselves, or the many who just do not want to disclose to a stranger decide it is easier to do it themselves also.
- There is only one Independent Decision maker for each application so the amounts being given to Care Leavers thus far have been completely inconsistent when compared across the board. CLAN also has some questions about the actual Independence and potential bias of certain Independent Decision Makers.
- There seems to be an institutional gender bias when looking at the amounts given when a female is the perpetrator. These amounts seem significantly less than when there is a male perpetrator.
- Whilst reviews are possible for payments deemed unfair, applicants run the risk of having their payment reduced. This instils a great deal of fear and anxiety into already traumatised Care Leavers. Thus, whilst it is an option, it is one that is not taken up due to fear and the risk of loss.
- The significant delays in processing redress applications and the fact that many institutions still have not joined or took an age to join has meant that those prior payments you casually mention are indexed at a much higher rate than they ever should have been. Care Leavers are paying more and more out of their original prior payments because the National Redress Scheme is incapable of moving quickly and efficiently, and because the institutions are slow to join or haven't yet joined.
- Lastly, CLAN also believe that the maximum amount of \$150 000 is unjust in itself. It should have at a minimum been at least \$200000, as the Royal Commission recommended. The crimes committed against Care Leavers by those who were meant to be caring for them would warrant a much higher amount if Care Leavers had the psychological and emotional ability to go through the civil system and weren't impeded by large Institutions who

demonised them. This \$150000, should be considered unfair in itself and be reviewed! It shows a lack of respect for the Royal Commission.

As an example of the inconsistency of the National Redress Scheme, CLAN are aware of the cases of two brothers who were both abused. These brothers were both NSW state wards although residing in a Catholic Orphanage. Although the NSW Government had a duty of care to look after their state wards, regardless of their placement, the Independent Decision Maker in one of these brother's cases, found it acceptable to not apportion any responsibility to the NSW Government. In the other [REDACTED] case the NSW Government was held responsible. **How is it possible for the NSW Government to be held responsible in one case and not the other when they were in the exact same Orphanage?** If these men were never made state wards as children and were never placed in that particular Home they would not have been abused by their perpetrators. The fact that the NSW Government did not exercise their proper duty of care surely makes them partly accountable? Not according to the Independent Decision Maker. If it was not for CLAN advocating for these Care Leavers at the time and bringing it to the attention of Gareth Ward, the state of NSW would not have known of this injustice.

There are of course many, many other procedural issues which render the National Redress Scheme ineffective, unfair and unjust, these are just the main ones affecting payments that we believe are relevant in your decision whether to review National Redress Scheme Payments or not. We hope you will read our submission to the Joint Select Committee on Implementation of the National Redress Scheme to get a more comprehensive understanding of all the issues burdening the scheme at this present time.

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.

Who can apply to have a settlement agreement set aside?

CLAN recommend that a Care Leavers family should have the ability to have their loved ones settlement agreement set aside if it is unjust and unfair. As long as they are aware of the circumstances surrounding the agreements, and have all the relevant information CLAN believe that families, spouses/long term de-facto, should have this right. One of the major concerns of many Care Leavers is that they will have the ability to leave something to their families. The trauma that Care Leavers go through, vicariously effects the lives of all those who are close to them and the emotional and psychological issues that it creates makes them just as deserving of having their loved ones settlements set aside as the Care Leaver themselves.

Conclusion

CLAN commends the NSW State Government on exploring reforms to overturn unjust settlements for child abuse. CLAN hope that these reforms are broad enough to allow the maximum amount of Care Leavers 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.

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 comment on your paper, we look forward to the outcome and a more fair and just civil litigation system for NSW Care Leavers as a result. 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. In doing this, the NSW State Government should be doing everything in their power to provide justice to NSW Care Leavers as adults including overturning past settlements that were unjust and reviewing their interaction with the National Redress Scheme and how these payments can be reviewed also.