



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 NSW Government in response to the consultation paper:

'NSW Government consultation in relation to the civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse'

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, 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, counselling, casework, records searching and publishing Care Leaver's stories.

CLAN would like to thank the NSW Government for giving us the opportunity to comment on your current discussion paper. We applaud the NSW Government for abolishing the statute of limitations and for also recognising that there is further need for reform to better support Care Leavers and other child abuse victims. Currently, the civil litigation system is a minefield for Care Leavers and desperately needs to undergo changes before it becomes more accessible.

Non – Delegable Duty

CLAN wholeheartedly supports the imposition of a new non-delegable duty on institutions who are charged with the care of children. CLAN is astounded that currently institutions do not have this duty and are not held liable for the damage that is caused to children under their care. By instituting a non-delegable duty, organisations will have to start taking the business of caring and providing services to children seriously. The notion that organisations could be funded to provide these services to the most vulnerable in our society and not be made to take every single precaution to prevent abuse is abhorrent. **Unfortunately for many organisations the only way to make them take their duty seriously and therefore to protect children is to impose liability upon them.**

Whilst CLAN are completely supportive of the new non-delegable duty, we are of the belief that it needs to also cover children in foster care. CLAN are unsure as to why the Royal Commission has left foster care out of their recommended list of organisations to whom the duty will be applicable. Whilst we understand that the NSW government has reflected what the Royal Commission has recommended we do not believe that this is a just or fair outcome.

Children in foster care are just as susceptible and vulnerable to abuse if not more so than children in other types of institutions on yours and the Royal Commissions list. There have been many cases recently whereby foster children have been abused and the failures of the systems and organisations and individuals working within it were clearly responsible. Children are placed in foster care via state governments and other organisations to whom the job of case managing and finding a suitable foster home is given. These organisations are provided with government funding and are the very same organisations who currently run or ran residential facilities. Furthermore it must be remembered that foster parents are also paid with taxpayers money to look after foster children. Those organisations engaging in foster care need to be even more careful because they place children in the care of people who are essentially strangers. This means that their policies, procedures and checks all need to be of the highest standard and scrutinised ever so closely to ensure these children are not forgotten – state wards deserve their human rights to be protected too.

It is for this very reason that foster care needs to be included in this non-delegable duty. As you have acknowledged one of the purposes of introducing this duty is deterrence. **We need to ensure that children who are placed in foster care are not made more vulnerable to abuse than they already**

are because the NSW Government has chosen to expressly exclude foster care organisations/institutions.

Whilst on the topic of discussing institutions that should or shouldn't be included, CLAN would also like to acknowledge that we feel that any organisation who deals with children should be subject to this new duty. This includes organisations who also deal with adults like medical professionals and allied health professionals whose practices may not be completely considered a children's service, but have children as their clients none the less.

Lastly, CLAN do not agree that any changes should be prospective. Nothing has changed in terms of what these organisations did or didn't do and their treatment of vulnerable children who are now vulnerable adults. Care Leavers are currently still facing a number of barriers to civil litigation against the institutions who allowed the abuse to occur. These organisations are well aware of these limitations which allows them to make less than reasonable offers to Care Leavers which Care Leavers feel obliged and pressured to take as their cases face too many hurdles to be successful.

Furthermore, CLAN would also like it acknowledged that at the current time of writing this paper the NSW Government has still not made any commitment to taking part in the National Redress Scheme. If the NSW Government do not provide redress to NSW Care Leavers they are left with no other choice but to seek compensation and justice via other means such as civil litigation. If these changes are not made retrospective there is no way they can obtain adequate or deserved amounts of compensation for the ordeals they went through at the hands of both the NSW Government and the private institutions whom they both licensed and funded. **CLAN recommends that the NSW Government promptly commits to the National Redress Scheme and makes any changes to civil litigation retrospective.**

Reversing the Onus of Proof

CLAN endorses the recommendation of reversing the onus of proof to a certain degree. We are glad that it is inclusive of ALL organisations and institutions, therefore not excluding foster care. CLAN are of the belief that it will also help to reduce the number of barriers Care Leavers face when initiating a civil claim. Organisations are therefore made more accountable and have less leverage to bargain with Care Leavers which in the past have resulted in paltry amounts of compensation.

CLAN's main concern is the 'reasonable steps' criteria that is offered to organisations as a complete defence. It is CLAN's view that 'reasonable steps' should not be taken into consideration and instead if Care Leavers and other victims of abuse are able to prove that:

- a) The abuse occurred
- b) The perpetrator is 'associated' with the organisation

Then, it is our recommendation that the NSW government introduce absolute liability for the institution in both vicarious liability and negligence claims. CLAN are of the firm belief that 'reasonable steps' only provide an out for every single organisation who delivers any type of service to children. Most of these organisations would be able to afford better and stronger legal representation than a Care Leaver or other victim, and with the right representation and the right argument these organisations will be able to get out of their duty of care or liability. Whilst this may seem to be a cynical view it is an honest one based on seventeen years of experience dealing with Care Leavers, past providers and other institutions, solicitors and the justice system. What organisations may present on paper as 'reasonable steps' can be completely different to actions

actually carried out, or these policies and procedures actually making their way down to common practice.

Furthermore this may mean that children or adults who were abused as children are needed to counteract the organisations version of events causing them not only to relive their abuse and be retraumatised but it opens them up to be attacked by the defence for common things like difficulty with memory because they were a child at the time of events.

CLAN would also like to point out what we feel is glaringly obvious, but if a child is abused while under the care of an institution than obviously not ALL steps have been taken to prevent child abuse. This is something of the utmost importance, and using the reasoning that some things fall through the cracks is not good enough. If there is a 'crack' for something to fall through in the first place that means that there is something that needs to be fixed. If something needs to be fixed then it is our view that not all steps have been taken to prevent child abuse occurring in the first place.

CLAN would like to also reiterate that if 'reasonable steps' are used as a complete defence we believe it contradicts the reason for reversing the onus of proof. Using reasonable steps only provides these organisations with the means to rebut any claim brought forward, whether they have actually done everything in their power or not. Once again CLAN also advocates for all recommendations in this paper to be made retrospectively.

Persons Associated with an Institution

Once again CLAN endorse the recommendation that in all civil litigation claims regarding child abuse against an institution the liability should be extended to the actions of '*all persons associated with the institution*'. **However the lists that are provided are not exhaustive and do not take into account the number of other services and individuals children may come into contact with whilst in the care of an institution.**

Whilst this may seem a lot more straightforward for some scenarios, children in institutional care (both residential and foster care at this present time) and Orphanages, Children's Homes and foster care of the past generations were subjected to abuse from a vast variety of perpetrators. Whilst some of these perpetrators are on the list you have published it does not cover them all. There should not be a prescriptive list of who can be a 'person associated with' an organisation as there will be too many holes that perpetrators fall through, once again limiting Care Leavers chances in civil litigation and providing institutions with another out.

CLAN believes that in this case it may be more just to acknowledge each case and the connection between the perpetrator and the organisation on its own merits rather than it being able to be excluded from the get go because it is not on a 'list'. Perhaps if the perpetrator is not closely connected with an institution/organisation than the liability needs to lie with whichever institution had the duty of care over that child to begin with.

For example, we have had Care Leavers who were abused by medical professionals' external to the Home they were in whilst under the care of the Home. This also included NSW Care Leavers who were routinely given internal examinations on entry to the Child Welfare Department and after each instance a child who absconded returned. These doctors were employed by the state government and Joanna Penglase, the cofounder of CLAN has labelled this practice as '**State Sanctioned Rape**' in her book Orphans of the Living. This practice was invasive, unnecessary and should be classified as sexual abuse. In this scenario if the medical professional or their service could not be held

responsible (which they should be able to with the current reforms you are suggesting) liability should go back to institution. After all they chose the medical professional, engaged their services, but did not provide adequate supervision of the child to ensure that they were not harmed. In another example there were many 'holiday hosts' essentially foster carers, who took children for short periods of time and then returned them to the Home. Care Leavers who were abused by holiday hosts should be able to hold the institution liable as the Home's were the ones who engaged their services and once again either did not carry out any checks or failed to provide adequate training or supervision which then enabled abuse to occur. Thus, it should not matter where the abuse occurred, only the relationship of the perpetrator to the institution. CLAN believes it has established the ability of child abuse to occur anywhere, and as long as the institution had a duty of care the child at the time the location should be irrelevant.

Lastly, it is also important to acknowledge that the institution should be liable for ANY abuse that occurred, not just sexual but physical and emotional/psychological as well. This also extends to ANY perpetrator, adults and other children alike. CLAN requests that it should extend more so to other children as the institution also has a duty of care to that child who is a perpetrator too. In residential settings it means that supervision needs to be increased and that the children may not be receiving the help or the treatment that they need. Regardless of the reasons for their offending behaviour, the institutions shouldn't be any less responsible.

Nominating a Proper Defendant

CLAN agree completely with the Royal Commission and NSW Governments recommendation to ensure each and every Care Leaver and other victim of institutional child abuse legally has someone to sue. Unfortunately CLAN have heard it too many times that our members and other Care Leavers cannot take up a case due to the 'Ellis defence'. Past providers especially the churches have time and time again used the Ellis defence to strong arm Care Leavers into accepting payments through their professional standards units that are not only substandard but are beyond insulting.

For too long unincorporated associations have been able to shy away from deserved liability. Any organisation who willingly accepts government funds and taxpayers money as well as tax concessions, needs to be held liable for their actions. These organisations are willingly engaging in services involving children. They receive government funding to carry out these services. As a result **it is CLAN's firm belief that ALL organisations who receive government funding need to be incorporated. Organisations who refuse to incorporate should have their funding revoked and have any current tenders removed. If all of these organisations had been incorporated from the start, the issue of naming a proper defendant would be a moot one.**

When dealing with the current situation at hand, CLAN completely agree that if there is a property trust it should be utilised as the fall back option if an organisation fails to nominate a proper defendant. We are all well aware of the magnitude of the assets that many of these churches hold in property trusts. These property trusts have been used strategically to build wealth, to shelter their wealth and to avoid liability – up until now. These organisations should not be allowed this privilege anymore.

As for the question of insurance, it is CLAN's position that any organisation working with children need to have appropriate insurance. If these reforms are passed then inevitably there will be a new class of insurance that these organisations will need to take out to cover their liability for child abuse situations. **Once again CLAN recommends that the government not provide any funding to**

organisations who are not appropriately insured. This is common practice as many funding agreements are dependent on the organisation abiding by certain terms and conditions and holding the proper insurances. This should not be any different for churches and charitable organisations.

Other Recommendations

With regard to other issues that arise concerning Civil Litigation, CLAN recommends that a Care Leaver Legal Service is established. This legal service would operate similarly to the Aboriginal Legal Service, and would be put in place to ensure that all Care Leavers are adequately aware of their rights and their options by trained professionals. At the moment, many Care Leavers have either been taken advantage of, or are at risk of being taken advantage of. Unfortunately, there are still some unscrupulous professionals out there who do not have the best interests of Care Leavers at heart. Care Leavers unique mental health issues, trauma, and for many literacy issues make Care Leavers the perfect candidates to be taken advantage of in compensation cases. Many Care Leavers also have limited funds and come from low socioeconomic backgrounds making them the perfect candidates for no-win no fee. Unfortunately, this also leaves many with little compensation left after solicitors fees and Medicare recovery is taken out, and this is something they usually are not aware of. Having a Care Leavers legal service for this vulnerable population would enable them to make the best choices for themselves.

CLAN also requests that civil cases involving FACS stop using state wards as pawns. Recently, in the latest development in the William Tyrell case it was acknowledged that he was a state ward, and FACS fought to stop this knowledge and the identity of his biological parents being released. The reason they cited this was because of the shame and stigma that is created for the child. **FAC's need to stop propagating that a child's status as a foster child or state ward immediately means they have something to be ashamed of. This is the exact myth that created generations of Care Leavers who did not come forward about their abuse, who did not tell their husbands or wives, close family or friends how they were brought up.** State wards and other Care Leavers should not feel ashamed, they should be proud that they got through and survived such a tumultuous time, something that was no fault of their own. We do not want this myth propagated by FAC's and demand that they stop immediately.

Finally, CLAN would like to reinforce the importance of Care Leavers records in civil litigation. When Care Leavers request their records, they are given partial copies with information heavily redacted. Cases can be made or broken based upon what is in these files, and Care Leavers can also make the decision to pursue a case or not based upon their files. Moreover, the information in these files is about the Care Leaver, it is about their childhood, and it contains information pertinent to them. It is their information and should be readily available to access without redactions. The 'third party information' that is so often redacted are the names of perpetrators who are still getting away with their crimes hiding behind freedom of information laws. Erasing and denying Care Leavers access to their childhood information is more than unjust, it is denying them a basic human right. Currently the QLD government are proposing a bill which involves releasing information to a Care Leaver about third parties. According to the explanatory notes of the Child Protection Reform Amendment Bill 2017, the QLD Government feels:

"This amendment is necessary to enable the department to provide information to people about their personal history and to reduce adverse effects on their identity and sense of self that can

result from being in out-of-home care and having information about their care, family history and circumstances withheld”.

We urge the NSW government to follow in the lead of the QLD government and give Care Leavers unredacted access to their files. Not only will this assist in the process of civil litigation but mentally and emotionally it will give Care Leavers a greater sense of self identity if they can know their personal history.

Summary of CLAN’s Recommendations

- Institute a non-delegable duty for ALL organisations dealing with children including FOSTER CARE.
- Institute absolute liability along with reversing the onus of proof.
- Do not subscribe to a list of ‘persons associated with an institution’
- Examine each case on its own merits to establish the association between the perpetrator and the institution.
- Liability should be extended to the institution regardless of who the perpetrator is – adult or child.
- ALL organisations receiving government funding to carry out services dealing with children need to be incorporated and hold appropriate insurances.
- If organisations refuse to name a proper defendant their property trust should be the fall back option.
- Establish a Care Leaver Legal Service.
- FACS to stop perpetuating shame and stigma as something State wards and Care Leavers should feel.
- NSW Care Leaver to be given un restricted/unredacted access to their records.

CLAN would like to thank you once again for considering the reforms that the Royal Commission has suggested on civil litigation. You as the NSW government have been entrusted with the utmost responsibility of ensuring the safety of our most vulnerable members – children. Please do everything in your power to keep the children of today and the future safe, as well as to obtain justice for the children of the past. **Do not forget, the NSW Government and its Department of Child Welfare, YACS, Department of Community Services, and FACS, was and is the legal parent/guardian of Care Leavers and children currently in care today.** It is your responsibility to look after these children, to deter perpetrators and prevent organisations facilitating abuse, and most importantly to ensure that when the system does fail these children/adults they are treated respectfully, with dignity and are compensated accordingly.