

# Alliance for Forgotten Australians

Patron: Jack Thompson

1 July 2014

## *Issues Paper No 7 Statutory Victims of Crime Compensation Schemes*

### **Introduction**

The Alliance for Forgotten Australians (AFA) welcomes the release by the Royal Commission of Issues Paper 7 on Statutory Victims of Crime Compensation Schemes and the opportunity to provide a submission on this subject.

The submission addresses several key questions raised in the Issues Paper that are of specific concern to the situation of Forgotten Australians, but are also relevant to the concerns of any victim of childhood sexual abuse or a claimant under one of the Statutory Schemes.

AFA's submission refers to the views and recommendations expressed in AFA's submissions to the Royal Commission's previous Issues papers on Civil Litigation and Redress Schemes.

### **Summary**

Forgotten Australians face considerable barriers to justice when attempting to access the Australian criminal and civil justice systems<sup>1</sup>. Forgotten Australians have some experience with accessing Statutory Victims of Crime Schemes although they have more experience with other redress and compensation schemes established by government and private organisations that ran childhood institutions during the twentieth century. The views expressed in this submission reflect their experience and also address more general concerns about redress and compensation schemes.

AFA makes the following recommendations to the Royal Commission.

*Recommendation 1: AFA recommends the abolishment of the time limits that currently apply under Victims of Crime Schemes so that claims can be made for crimes committed at any time in the past, including where crimes of abuse took place in the childhood institutions that were operated in Australia up to and including the 1980's.*

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<sup>1</sup> These barriers and obstacles to the successful prosecution of offenders or fair compensation and redress for past wrongs were set out in AFA's submissions to the Royal Commission's Issues Papers on Civil Litigation and also on Redress Schemes.

*Recommendation 2: AFA recommends a nationally consistent framework for Statutory Victims of Crime Schemes in all jurisdictions be developed.*

*Recommendation 3: AFA recommends that support services, including counselling and other supports, are available to claimants at all stages of the assessment of their claim.*

*Recommendation 4: AFA recommends that the Royal Commission advise that Victims of Crime Schemes should be amended to ensure that they contained a wide discretion to enable claimants to receive benefits through payments to supplement the social and health supports they need or to assist them with other needs such as legal, financial or other advice.*

*Recommendation 5: AFA recommends that the Royal Commission recommend that there be further development of new and more flexible avenues for the compensation for historic crimes against children and young people, and that these new avenues be widely publicised to ensure that the many Forgotten Australians in the community are aware that they may be eligible to access the appropriate statutory Victims of Crime Scheme.*

## **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 century<sup>2</sup>. Many were abused and neglected – including criminal sexual and physical assaults.

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.

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<sup>2</sup> 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).

## 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 and failures to provide a duty of care of their past treatment.

### **Responses to Questions Raised in the issues paper**

#### *Introduction*

This submission will provide exemplars to promote a better understanding of the obstacles Forgotten Australians have faced in dealing with the legal system.

All Australian states and territories have legislation which established victims' compensation schemes. In some jurisdictions, such as Queensland and South Australia, these schemes were established in broader legislation that also encompassed other measures to support victims, such as the inclusion of fundamental principles of justice underlying the treatment of victims or the establishment of a levy upon offenders for the purposes of compensating victims. In other jurisdictions, such as Victoria, the legislation is concerned primarily with the establishment of a compensation scheme.<sup>3</sup>

AFA notes that the time limits that apply to these statutory schemes are usually very restrictive, although they have been revised and increased in some jurisdictions to provide more time for victims to report crimes. However we are aware that time limits have been relaxed where individuals were victims of sexual abuse as children, and this has enabled some Forgotten Australians to receive a financial payment through a Victims of Crime Scheme in the jurisdiction where they were resident, whether in a state church, or private childhood institution.

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<sup>3</sup> Australian Law Reform Commission Report No 114, , Family Violence: A National Legal Response, accessed at [http://www.alrc.gov.au/publications/4.%20Purposes%20of%20Laws%20Relevant%20to%20Family%20Violence/victims%E2%80%99-compensation#\\_ftn202](http://www.alrc.gov.au/publications/4.%20Purposes%20of%20Laws%20Relevant%20to%20Family%20Violence/victims%E2%80%99-compensation#_ftn202)

As many commentators have indicated, a crime is a crime at whatever time it is committed, and for this reason no time limits for application for compensation is appropriate. The imposition of time limits also encourages the public perception that the abuse of the past cannot be rectified legally or morally.

*Recommendation 1: AFA recommends the abolishment of the time limits that currently apply under Victims of Crime Schemes so that claims can be made for crimes committed at any time in the past, including where crimes of abuse took place in the childhood institutions that were operated in Australia up to and including the 1980's.*

*Question: What are the advantages and disadvantages of statutory victims of crime compensation schemes? What changes should be made to address the elements of statutory victims of crime compensation schemes that raise particular difficulties for claims by people who suffer child sexual abuse in institutional contexts?*

AFA considers that the lack of consistency and coordination between jurisdictions may create uncertainty and concerns for applicants under these schemes. Inconsistencies between the legal frameworks in different jurisdictions, including statutory time limits for bringing legal claims is a disadvantage for claimants. Such inconsistencies have disadvantaged Forgotten Australians who reside in one jurisdiction but have been offended against in another jurisdiction because it results in an unequal access to justice as a result of residence alone.

AFA has recommended that a nationally consistent framework for redress scheme is needed and we consider that efforts to provide a more consistent national framework for statutory victims of crime schemes is an essential element of this approach.

National consistency is important because as some jurisdictions reform their schemes, others may be left behind. For instance, the NSW government has introduced important amendments to the *Victims' Rights and Support Act 2013 NSW*, but this may reinforce the differences with other schemes in other jurisdictions that do not amend their schemes in a similar way.

*Recommendation 2: AFA recommends a nationally consistent framework for Victims of Crime Schemes in all jurisdictions be developed.*

*Question: What features are important for making statutory victims of crime compensation schemes effective for claimants?*

#### Support Services and Information

Most state schemes have reasonable provisions for support services for those wishing to access the schemes. However these services can always be improved by examining the experience of claimants and the records relating to each scheme. In this regard the experience of Forgotten Australians is important. AFA's submissions to government, including previous submissions to the Royal Commission, have addressed the

weaknesses of many compensation and redress schemes and made suggestions for improvement<sup>4</sup>.

An important feature of any statutory scheme must be to ensure that claimants are supported across their entire journey from their first contact with officials through to the final decision about their claim. Such support needs to be consistent and broadly based including facilitation of appropriate legal support and counselling services. We note that detailed guides to assist victims of crime are now available and provide important information on support services. The development of support information should be an ongoing process and informed by the experience of victims of crime, including the experience of those Forgotten Australians who were subjected to criminal abuse in childhood institution.

Recommendation 3: AFA recommends that support services, including counselling and other appropriate supports are available to claimants at all stages of the assessment of their claim.

In regard to the provision of flexible forms of assistance to victims of crime, it is relevant to note that payments from a Victims of Crime Fund can be utilised for related purposes to assist victims of crime who may be subject to other redress schemes. One example of the use of a scheme in a way that benefited Forgotten Australians occurred in 2009 when the South Australian government decided to make ex-gratia payments to those who suffered sexual abuse as a child while in state care. A Deed of Release indemnifying the state from further claims had to be signed by applicants for these payments. Those victims that sought legal advice in relation to the Deed were eligible for a capped payment from the state Victims of Crime fund<sup>5</sup>.

The availability of this payment, which was of benefit to those raised in childhood institutions, was possible because the South Australian *Victims of Crime Act 2001* provided that the Attorney-General had an absolute, non-reviewable discretion to make payments from the Victims of Crime Fund to assist victims to recover from the effects of crime or advance their interests in other ways.

The adoption of a wide discretion of this nature provides an ideal framework for providing social support services to men and women who experienced criminal abuse and neglect while living in institutions.

Recommendation 4: AFA recommends that the Royal Commission advise that Victims of Crime Schemes should be amended to ensure that they contained a wide discretion to enable claimants to receive benefits through payments to supplement the social and health supports they need or to assist them with other needs such as legal, financial or other advice.

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<sup>4</sup> The Royal Commission has been provided previously with copies of submissions made by AFA to government inquiries including in response to Issues Paper No 6 on Redress Schemes. AFA's 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, provided recommendations on appropriate compensation reforms and other matters and is available on the AFA website [www.forgottenaustralians.org.au](http://www.forgottenaustralians.org.au)

<sup>5</sup> The operation of this Scheme was described in the Report of the Senate, Legal and Constitutional Affairs References Committee, Review of Government Compensation Payments, December 2010, page 13.

## Adopting an Administrative Approach

As indicated above, several states and territories have reviewed their schemes and are reforming the processes and procedures under which the Schemes operate to make those procedures less judicial and legalistic, by moving to an administrative process.

AFA is encouraged by the approach adopted in the ACT which is to move the ACT Victims of Crime scheme from a court-based scheme to an administrative one so it will be more user friendly, timely and predictable; and also take a fairer approach to eligibility for recognition payments which would broaden the range and number of victims eligible for these payments<sup>6</sup> These proposals for change made by the ACT government, together with the relaxation of other restrictions such as time limits, may assist victims of childhood institutionalisation to apply through the scheme.

The processes involved in making a case under Victims of Crime laws are overdue for reform. These processes, like similar processes under civil or criminal law cases are often very intrusive and disconcerting for claimants. Inquisitorial procedures that are disconcerting for claimants should not be necessary. In order to establish the basis of a claim, the process of adducing the evidence by claimant should take place in an appropriate setting conducive to a claimant's dignity and needs. They are the victims of the crime and should not be subject to the confronting forensic procedures of a court setting.

A range of research has identified the deficiencies in the treatment of victims of sexual assault, and in general this research has identified the need to support claimants intensively at various stages of the process. For instance one recent study of how victims of sexual assault experience litigation and compensation proceedings found that before a hearing accurate information was needed about what was required and what they could expect; and during the process it was suggested that the length of time that each process takes needs to be reduced. In the compensation package, financial planning support should be available for those who receive an award. The study suggested that non-monetary support and benefits, as well as benefits in kind, such as direct payments and counselling have an important role to play<sup>7</sup>.

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6 See the proposals for the new ACT scheme at [http://www.justice.act.gov.au/resources/attachments/Proposed\\_Victims\\_of\\_Crime\\_Financial\\_Scheme\\_-\\_request\\_for\\_public\\_comment1.pdf](http://www.justice.act.gov.au/resources/attachments/Proposed_Victims_of_Crime_Financial_Scheme_-_request_for_public_comment1.pdf)

7 Feldthusen, Bruce, Hankivsky, Olena, and Greaves, Lorraine, Therapeutic consequences of civil actions for damages and compensation claims by victims of sexual abuse, Canadian Journal of Women & the Law; 2000, Vol. 12 Issue 1, p66-116.

*Question: Are the levels of verification or proof required under statutory victims of crime compensation schemes appropriate for claims by those who suffer child sexual abuse in institutional contexts?*

The standard of proof and levels of verification required for victims of sexual abuse who bring claims to legal proceedings have been of constant concern to Forgotten Australians. AFA has raised these concerns previously in submissions to government and inquiries including in response to the Royal Commissions Issues paper on Civil Litigation.

The evidentiary requirements under Victims of Crime Schemes appear to be on the balance of probabilities and are similar to the standard required for civil claims. AFA has argued that all compensation schemes should give attention to the specific and well-known evidentiary problems that arise in relation to claims of child sexual abuse.

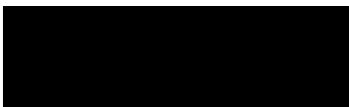
It is necessary to improve the capacity of claimants to bring relevant material to the notice of the court and for the courts to consider the problems of obtaining evidence in case of child sexual abuse with greater sympathy to, and appreciation of, issues of causation in relation to claims of negligence and breach of duty.

It is noteworthy that compensation can be awarded to claimants under the Victorian scheme even though no person has been charged with, found guilty of, or convicted of an offence arising from the act of violence committed<sup>8</sup>. Claims for crimes committed against those in childhood institutions can be dealt with under this category and provide an avenue to justice that has been denied under conventional legal processes.

Recommendation 5: AFA recommends that the Royal Commission recommend that there be further development of new and more flexible avenues for the compensation for historic crimes against children and young people, and that these new avenues be widely publicised to ensure that the many Forgotten Australians in the community are aware that they may be eligible to access the appropriate statutory Victims of Crime Scheme.

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

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<sup>8</sup> The Victorian Scheme's Determination process was accessed at <http://www.vocat.vic.gov.au/determining-application> 13/6/2014.