

Submission to the Day of General Discussion on children's rights and alternative care

Submitted by the Child Rights International Network - CRIN (www.crin.org), June 2021

For more than two decades, the abuse of children in institutional settings has been recognised as a major social problem in countries across the world. Public inquiries have become an important government response to allegations of systemic abuse and organisational failures.¹ Most have focused on child abuse in residential care settings, such as orphanages and children's homes and cover all forms of abuse. Other jurisdictions have conducted inquiries focusing exclusively on sexual violence against children.² These national inquiries have proved to be powerful mechanisms that have catalysed legal reform, child welfare policy reform and redress to survivors of abuse.

This submission draws on the wealth of experience and expertise developed through national inquiries in addressing systemic institutional abuse and identifies recommendations to secure justice for survivors and prevent future abuse. This submission also addresses the overrepresentation of specific groups of children within residential care and provides recommendations for how to address this issue.

1. What are the national inquiries?

Public inquiries are typically formed in the wake of a scandal or heightened public concern when an issue has become too large, complex or controversial to be resolved through existing mechanisms. They are different from inquiries by national human rights institutions, such as the office of an ombudsperson, and exist only for a set number of years, tasked exclusively with investigating a single issue. Public inquiries into historical institutional child abuse are independent mechanisms, typically concerned with multiple institutions, systemic failures, cover-ups, many victims, and allegations often spanning decades. Inquiries rely heavily on testimony of survivors. For example, in Ireland's Commission to Inquire into Child Abuse, 1,090 people who had been residents as children in state care facilities gave oral evidence in a Confidential Committee.³

Typically, public inquiry recommendations fall under two categories: measures aimed at relieving the impact of past abuse (redress and reparations); and measures to prevent the problem from happening again in the future (legal, policy and practice reforms). The Australian Royal Commission, for example, issued a total of 409 comprehensive

¹ Inquiries have been held in Australia, Belgium, Canada, Denmark, Finland, Germany, Iceland, Ireland, the Netherlands, New Zealand, Scotland and Switzerland. See: The Age of Inquiry, A global mapping of institutional abuse inquiries. Available at:

<https://www.lib.latrobe.edu.au/research/ageofinquiry/index.html>; 'Remaking collective knowledge: An analysis of the complex and multiple effects of inquiries into historical institutional child abuse', Katie Wright, *Child Abuse & Neglect*, Volume 74, December 2017. Available at:

<https://www.sciencedirect.com/science/article/pii/S0145213417303198>.

² Including, Australia, England and Wales, and Germany. See *ibid*.

³ CRIN, *The Third Wave: Justice for survivors of child sexual abuse within the Catholic Church in Latin America*, November 2019, p. 51. Available at:

https://archive.crin.org/sites/default/files/dgd_crpd_equality_and_non-discrimination.pdf

recommendations by the end of its work.⁴ Recent inquiries have led to the creation of redress schemes which offer compensation to survivors of childhood abuse.⁵

2. Overrepresentation of certain groups of children in alternative care

Children in poverty and Indigenous children have been the focus of national inquiries in across jurisdictions. Unfortunately, many national inquiries into abuse in care have not disaggregated data with regards to children with disabilities⁶, LGBT+ or other groups of marginalised children.

Overrepresentation due to poverty.

In 2004, Australia's Senate Inquiry into Children in Institutional Care investigated 334 residential care institutions, between 1895 and 2000, covering an estimated 500,000 children.⁷ It found that in most cases where children have been placed in homes, some sort of crisis or hardship affected a family's ability to care for their children, such as: poverty; lack of assistance to single parents and parents' inability to cope with their children; divorce; mental illness; one or both parents death.⁸ The Commission found a strong correlation between poverty and children living in abusive situations. Poverty was shown to undermine parenting abilities because economic and social stress can lead parents to become less nurturing and more rejecting of their children which in turn leads to a higher incidence of child abuse and neglect. Thus, a parent's lack of finances often underlies the reasons for children being admitted to residential care.⁹

Recommendation: *States must provide timely support, including financial, to struggling families to prevent unnecessary separation. Poverty should never be a cause for a child to be removed from a family, unless they are in danger.*

Overrepresentation of Indigenous children.

In 1997, Australia's Human Rights Commission investigated the forced removal of Aboriginal and Torres Strait islander children from their families between 1910 and 1970. While in the past the dominating force of family separation was the assimilation policy, Aboriginal children are still being removed from their families at an unacceptable rate, by the child welfare and criminal justice systems.

Among the most common reasons for removal of Aboriginal children from families are: parental alcohol and substance abuse, problems with health, housing, employment or income, all associated with marginalisation and lack of access to services. The Inquiry

⁴ *Ibid*, p 48.

⁵ *Ibid*, p. 44.

⁶ Although inquiries into violations of rights of people with disability exist, they don't focus specifically on children.

⁷ 'Australia: Care leavers fight for redress for historical abuse,' 7 June 2018, CRIN. Available at: <https://archive.crin.org/en/library/publications/australia-care-leavers-fight-redress-historical-abuse.html>

⁸ Australia's Inquiry into Children in Institutional Care (2004), Chapter 3, para 3.1. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2004-07/inst_care/report/c03

⁹ *Ibid*, para 3.36.

identified the reasons for the overrepresentation of Aboriginal children in care, which continues today:

Family and cultural relations.¹⁰ Cultural differences, particularly different family structures, can lead to adverse decisions by juvenile justice, welfare and other agencies, particularly where cultural difference is not understood or does not inform policy development and implementation. Interpretation of extended familial responsibility through kinship system and the wider community is often seen as 'abandonment' or 'inadequate supervision', while differences in the level of freedom and responsibility accorded to Indigenous children interpreted as 'lack of supervision' or 'lack of control' over children.

Intergenerational effects and later removal.¹¹ The effects of separation on past generations can contribute to further separation of children from their parents today. A process of second generation removal occurred in more than one in three cases, the Inquiry noted. Removal and institutionalisation had a number of effects including lack of good models of relationships and parenting, mental health issues and difficulty dealing with institutions such as schools, police and welfare departments. There is a direct association between removal and the likelihood of criminalisation and further instances of removal.

Recommendations:

Self-determination for Indigenous peoples provides the key to reversing the over-representation of Indigenous children in the child welfare and criminal justice systems.

States must ensure that:

- *Indigenous children are not removed from family and community unless they pose a danger to the community;*¹²
- *Any placement is done with a member of the child's family (as defined by local custom and practice) or community. Adoption should remain a last resort;*¹³
- *Accredited Indigenous organisations are involved in all protection matters concerning welfare of an Indigenous child;*¹⁴
- *Child welfare policies and juvenile justice law reflect structural disadvantage and intergenerational effects of past removals;*¹⁵

¹⁰ Australia's National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997), Chapter 25. Available at:

<https://humanrights.gov.au/our-work/bringing-them-home-chapter-25>

¹¹ *Ibid.*

¹² Australia's National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997), Recommendations, Standard 3. Available at:

<https://humanrights.gov.au/our-work/bringing-them-home-appendix-9-recommendations>

¹³ *Ibid*, Standard 5 and 6.

¹⁴ *Ibid*, Standard 4.

¹⁵ Australia's National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997), Chapter 25, Discussion and Recommendation. Available at:

<https://humanrights.gov.au/our-work/bringing-them-home-chapter-25>

- *Relevant authorities and services develop and implement a social justice package for Indigenous families and children with the right of Indigenous people to self-determination at its core.*¹⁶

3. Redress and reparations for past abuse

While public inquiries identify the types and scope of abuse experienced, the State must also assume responsibility for the violations by assessing the extent of the harm and its lasting impacts, and establish fair compensation for survivors. This is done through initiatives such as redress schemes, which are usually inquiries' key recommendations.

Monetary redress.

In many countries where public inquiries into childhood abuse have been conducted, large-scale compensation programmes for survivors are now replacing traditional avenues of reparations, such as civil or criminal litigation, which can be costly, lengthy and traumatic. The first government redress scheme for institutional abuse of children began in 1993 in Canada, and since then, at least 36 government redress schemes have been concluded, are underway, or have been proposed across fourteen jurisdictions.¹⁷ Redress schemes offer a simplified and expedited way to obtain compensation by requiring lower standards of evidence from survivors, typically a "reasonable likelihood".

It is important that redress schemes account for the full range of negative consequences to survivors' lives, such as: damage caused by all forms of violence; cognitive impairment; psychiatric disorders and mental health issues; problems with family attachment; substance abuse; lack of education; chronic inability to retain employment or inability to progress in a career; racial discrimination; arbitrary deprivation of liberty and disruption of family life; and loss of cultural and native title rights.¹⁸

¹⁶ Australia's National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997), Recommendation 42. Available at:

<https://humanrights.gov.au/our-work/bringing-them-home-appendix-9-recommendations>

¹⁷ 'Inequalities of Redress: Australia's National Redress Scheme for Institutional Abuse of Children,' 2018, Kathleen Daly, *Journal of Australian Studies*: 42:2, p.204. Available at:

<https://doi.org/10.1080/14443058.2018.1459783>

¹⁸ Ireland's redress scheme, the Residential Institutions Redress Board, paid out survivors of institutional abuse a total of €1.5 billion to 15,579 people, each receiving on average €62,250. Claims were assessed according to the severity of abuse and the severity of the harm resulting from the abuse. Acts of abuse contributed 25% of the total settlement value and included sexual, physical, emotional abuse and wrongful neglect. Emotional abuse included both the experience of sustained fear and verbal abuse and 'depersonalisation' – damaging the survivor's family relations by, for example, lying to them about their birth names or about their siblings or parents. Medical evidence of injurious damage contributed 60% of the total settlement value. This damage component had two subdivisions, physical/psychiatric illness and psycho-social sequelae. Illness includes both physical damage to health, as well as psychiatric disorders such as depression or post-traumatic stress disorder. Examples of injurious psycho-social sequelae included problems with family attachment, cognitive impairment and substance abuse. The final 15% of the total settlement value was 'Loss of Opportunity'. It encompassed a failure by the institution to provide the survivor with the legal minimum of education. Secondly, loss of opportunity encompassed any chronic inability to retain employment, or, if applicants were employed, how miseducation affected their ability to progress in a career.

Australia's Human Rights Commission ruled for the monetary compensation be provided to Aboriginals affected by forcible removal similar to Ireland but also included such grounds as: racial discrimination, arbitrary deprivation of liberty, disruption of family life, loss of cultural rights and loss of

Non-monetary redress.

Non-monetary redress often includes an official apology by the State to the victims and guarantees against repetition of violations, as well as recognition of harms of institutional care through memorials and exhibitions. In addition, redress schemes often provide other measures to survivors, such as rehabilitation, medical benefits, housing and educational support, counselling and psychiatric services, improved records access, assistance with family tracing and reunions.¹⁹ For Indigenous and non-Indigenous communities it could also include education about the history and effects of forcible removal from families.²⁰

Recommendations:

- *States with a history of institutional and residential care should conduct large-scale investigations into systemic failures of care systems spanning over a number of years. These could take the form of national inquiries if jurisdictions allow such measures. These investigations should also look into various groups of children who tend to be overrepresented in care;*
- *States should implement redress schemes for survivors of institutional abuse to include monetary and non-monetary reparations;*
- *States should provide an official apology to survivors of institutional abuse.*

4. Barriers to access to justice in care settings

Effective complaint reporting mechanisms are essential to ensuring that abuse in institutional settings is identified, halted, that perpetrators are held to account and children able to access remedies. In 2015, the Australian Senate conducted an Inquiry into the violence, abuse and neglect against adults and children with disabilities in institutional and residential settings.²¹ The results found persistent structural barriers contributing to cover ups and non-reporting of violence and abuse. Here is a snapshot of its findings:

native title rights. Sources: 'Redressing historic abuse in New Zealand: a comparative critique,' 2018, Stephen Winter, *Political Science*: 70:1, pp. 1-25. Available at:

<https://www.tandfonline.com/eprint/U4FRyvd65i6hKKS2E49ef/full262>; Australia's National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997), Recommendation 14. Available at:

<https://humanrights.gov.au/our-work/bringing-them-home-appendix-9-recommendations>

¹⁹ 'When the State Doesn't Care: A guide to accessing justice for violations of children's rights in care institutions in Eastern and Southeastern Europe and the Caucasus', 2017, CRIN, p.10. Available at:

https://archive.crin.org/sites/default/files/guide_download/when_the_state_doesnt_care_0.pdf; 'Child sexual abuse in the Catholic Church in Ireland', 2019, CRIN. Available at:

<https://home.crin.org/issues/sexual-violence/ireland-case-study-clergy-abuse>

²⁰ Australia's National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997), para 30b (9). Available at:

<https://humanrights.gov.au/our-work/bringing-them-home-appendix-9-recommendations>

²¹ Parliament of Australia Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability (2015). Available at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report

Weak safeguards. Hotlines usually operate without any legislative base and therefore have no statutory functions, powers and immunities.²² Hotlines are also limited by the agencies to which they can refer complaints to, and often refer callers back to the government organisation for an internal investigation.

Lack of independent reporting and oversight mechanisms. One of the causes for the lack of reporting is the perceived 'conflict of interest' of internal self-reporting as some institutions are reluctant to report allegations of abuse due to possible negative publicity.²³ Complaining to staff may lead to retributions and punishment of the residents. Even when the complaints of violence are submitted to overseeing agencies, there is a widespread problem of 'whistleblowers' being bullied, harassed, persecuted, intimidated, deployed to other positions, and sacked.²⁴

Lack of human rights-based framework. A key problem with the current complaints reporting and investigation systems, is that they generally approach their complaints handling functions as a dispute resolution process, which is inadequate and inappropriate response to complaints of violence and abuse, which, in fact, constitute crimes.²⁵

Beyond complaint mechanisms, CRIN's own research²⁶ has identified further structural barriers that have often rendered it nearly impossible for children in residential settings to access justice:

Lack of legal standing: children's legal capacity to file a case is limited on the basis of their age, which means that children cannot file a case independently, but may only do so through a parent, legal guardian or other representative. In the case of a child in state care, where the institution is also the child's legal guardian, there is an inherent conflict of interest.

Child plaintiffs and evidence-gathering: Documenting violations is crucial to provide strong evidence for litigation, however gathering evidence of abuse in residential settings poses immense challenges and usually can't be done by children themselves. Even if evidence of abuse provided by children is collected, it is often disregarded by law enforcement bodies and courts as insufficient, especially for children with disabilities.²⁷ Thus it is unsurprising that only the most grave cases of human rights violations in residential care end up in courts. Most cases in Eastern Europe to have reached the European Court of Human Rights have emerged through independent monitoring mechanisms, which have proved to be the most effective means to uncover and bring justice to victims of abuse and neglect in orphanages.²⁸

²² Parliament of Australia Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability (2015), Chapter 5, para 5.38. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report

²³ *Ibid*, Chapter 5, para 5.18-5.21.

²⁴ *Ibid*, Chapter 5, para 5.25.

²⁵ *Ibid*, Chapter 10, para 10.13.

²⁶ 'When the State Doesn't Care: A guide to accessing justice for violations of children's rights in care institutions in Eastern and Southeastern Europe and the Caucasus', 2017, CRIN.

²⁷ *Ibid*, p. 15-16.

²⁸ *Ibid*, p. 28-29.

Time limitations: Too many cases of abuse are not prosecuted because they are timed out by various limitations periods.²⁹ It may take up to 20 years for survivors of childhood sexual abuse to seek justice, barring many children from making complaints. In some countries, like Bulgaria and Moldova, limitation periods for children do not start to run until they reach the age of 18, however individuals are still restricted by time limitations when filing a court case.³⁰

Costs: While in many countries of Eastern Europe children are entitled to free legal aid, it is often of poor quality; in most cases plaintiffs are reliant on legal pro bono services.³¹

Recommendations:

- *States must improve systemic barriers to justice for children, including legal capacity and standing in civil criminal and administrative settings; remove all time limitations (retroactively); provide free quality legal aid to children; ensure independent rights-based monitoring of residential care that goes beyond health or quality of care or other formal inspection regimes.*

5. Preventing children’s rights violations in the current systems of alternative care and facilitating their access to justice

National inquiries have also produced forward looking recommendations to the States to prevent future abuse. These commonly include reforms to criminal law and reporting mechanisms, as well as a range of preventative measures aimed at improving child safety. The recommendations³² set out vital reforms to prevent abuse in alternative care that are relevant to all jurisdictions:

Legal reform:

- Remove all limitation periods for child offences (retroactively), to allow persons to report human rights violations they suffered as children in care to bring their complaints before the courts;³³
- Introduce national legislation to protect whistleblowers wishing to report abuse in residential care;³⁴

²⁹ *Ibid*, p. 16.

³⁰ *Ibid*.

³¹ *Ibid*, p. 17.

³² The recommendations from national inquiries that are most likely to be implemented related to systems, with those most likely to be fully or partially implemented pertaining to legislation. Recommendations least likely to be implemented are those related to staff training in child protection. Reasons provided by governments for partial or non-implementation were varied, but key themes include that recommendations had implications for existing policy that could not easily be resolved, and that the recommendations were beyond the government’s jurisdiction. See: ‘Remaking collective knowledge: An analysis of the complex and multiple effects of inquiries into historical institutional child abuse’, Katie Wright, *Child Abuse & Neglect*, Volume 74, December 2017.

³³ Australia’s Inquiry into Children in Institutional Care (2004), Chapter 7, Recommendation 3.

Available at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2004-07/inst_care/report/b2recs

³⁴ *Ibid*, Recommendation 5.

Guardianship:

- Residential care providers or service delivery organisations should not be the legal guardians of children in their care;³⁵

Independent and mandatory reporting:

- Create an independent national statutory oversight body for reporting, investigating and enforcing instances of violence, abuse and neglect in residential settings. This body should have broad functions with quasi-judicial powers and incorporate mandatory reporting, assessment, community visitors programme and undertake own motion inquiries and investigations into individual cases, organisations and systemic issues of concern;³⁶
- Mandatory reporting of suspected abuse must be carried out by all child protection authorities and professionals working with children;³⁷

National workforce and workplace regulation:

- Create a national training accreditation scheme that must contain mandatory human rights-based training to ensure all residential care workers have the core competency skills to recognise and report abuse and violence, and understand their obligation to report;³⁸
- Develop a culture of respecting and implementing rules and regulations and of observing codes of conduct among those working in residential care;³⁹

Complaints:

- Ensure that a person facing a credible accusation of abuse is removed from contact with children while the complaint is investigated;⁴⁰
- Ensure that where a complaint against a religious minister is substantiated or a perpetrator is convicted, that they are permanently removed from their ministry;⁴¹

Data:

- Agencies running residential care should publish comprehensive data on all abuse complaints received to date, and then subsequently on an annual basis;⁴²

³⁵ Parliament of Australia Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability (2015), Chapter 10, Recommendation 12. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/~media/Committees/clac_ctte/Violence_abuse_neglect/c10.pdf

³⁶ *Ibid*, Recommendation 1.

³⁷ Australian Royal Commission into Institutional Responses to Child Sexual Abuse (2017), Recommendation 7.3-7.6. Available at: https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_recommendations.pdf

³⁸ Parliament of Australia Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings [...], (2015), Chapter 10, Recommendation 2.

³⁹ Ireland's Commission to Inquire into Child Abuse (2009), Chapter 7, Recommendation 7.11. available at: <http://www.childabusecommission.ie/rpt/pdfs/CICA-VOL4-13.PDF>

⁴⁰ Australian Royal Commission into Institutional Responses to Child Sexual Abuse (2017), Recommendation 30.

⁴¹ *Ibid*.

⁴² Australian Royal Commission into Institutional Responses to Child Sexual Abuse (2017), Chapter 7, Recommendation 9.

Child participation:

- Children who have been in childcare facilities should be consulted on a regular basis to identify failings and deficiencies in the system;⁴³

Records:

- The full personal records of children in care must be maintained;⁴⁴

Prevention education:

- Implement mandatory education programmes to increase children's knowledge of and resilience against all forms of violence. This should form part of relationships and sexuality education curricula⁴⁵ that includes programmes to support and educate children with disabilities about what constitutes abuse.

⁴³ Ireland's Commission to Inquire into Child Abuse (2009), Chapter 7, Recommendation 7.18.

⁴⁴ Ireland's Commission to Inquire into Child Abuse (2009), Chapter 7, Recommendation 7.20.

⁴⁵ Australian Royal Commission into Institutional Responses to Child Sexual Abuse (2017), Recommendation 6.2.b.