Submissions to the Parliament of Western Australia's *'Inquiry into past forced adoption policies and practices in Western Australia'*

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Submitted by
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31 July 2023

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Dear Committee Members,

Inquiry into past forced adoption policies and practices in Western Australia

We refer to the Standing Committee on Environment and Public Affairs '*Inquiry into past forced adoption policies and practices in Western Australia*' and the call for submissions from interested or effected parties to assist the terms of reference that have been put to the committee.

Slater and Gordon welcomes the opportunity to make a submissions to the Standing Committee on Environment and Public Affairs '*Inquiry into past forced adoption policies and practices in Western Australia'*.

Who we are

Slater and Gordon is a leading Australian consumer law firm. Our mission is to provide access to justice for Australians. The firm provide specialist legal and complementary service in a broad range of areas including;

a. Personal Injury;
b. Superannuation and Insurance;
c. Class Action;
d. Commercial Litigation; and
e. Employment Law.

Slater and Gordon has a long history of acting for survivors of child sexual abuse. For more than 25 years we have acted for thousands of survivors of child sexual abuse, from all over Australia, in both individual claims and group actions. We represented survivors of abuse well prior to the Royal Commission and the removal of applicable limitation periods.

We currently represent survivors of abuse in individual claims for common law damages against the Commonwealth Government, State Governments, various Catholic Church entities, various Anglican Church entities, the Uniting Church, various other miscellaneous entities (including sporting organisations, cults, other churches and children's health schemes) as well as individual perpetrators.

We have a dedicated National Abuse Law team which currently consists of approximately 50 professional and support staff who are dedicated to assisting survivors of abuse. Our staff are on the ground in Perth, Brisbane, Wollongong, Liverpool, Ashfield, Sydney and Melbourne but service all States and Territories across Australia.

The author of this document has experience and expertise in the forced adoption legal field as a Victorian solicitor. She was instrumental in the creation of a forced adoption practice assisting and successfully resolving claims against hospitals, homes, faith-based institutions and adoption agencies. She has previously represented over forty mothers and 15 adoptees who were affected by forced adoption policies and practices in Victoria. She has developed and maintained relationships with various support services and industry leads and has been quoted by various media outlets advocating for her clients and the proposed legislative changes in Victoria. The Author was honoured to receive an invitation to make written submissions to the Standing Committee on Environment and Public Affairs Inquiry into past forced adoption policies and practices in Western Australia.

Language and Terminology

Throughout the Victorian Parliamentary Inquiry into responses to historical forced adoption in Victoria and with dealings with clients, survivors, and other stake-holders it has become evident that there is a contested view about the term 'forced adoption'. It is argued that it does not capture the experience of being forcibly separated from a child and in effect trivialises what actually took place. Some assert it does not reflect their experience of having their child abducted or stolen, its use has been objected to because the 'primary event was an illegal separation between them and their baby—whether or not the baby was subsequently adopted'. [1]

Noting and respecting the above we will echo the approach of the Parliament of Victoria Legal and Social Issues Committee and utilise the term 'forced adoption' in a broad sense as it captures both the forcible separation of mother and baby, regardless of illegality, and the primary objective of the policies and practices, being adoption. [2]

Introduction

On 19 October 2010, this Parliament was the first in Australia to apologise for the removal of children from unmarried mothers. This was a powerful and necessary acknowledgment of the wrong and the life-long suffering these practices caused. However, it is time that the apology finally be accompanied with concrete measures to 'help translate the static message of an apology into an active process of reconciliation and healing.[3]

The right to access justice is a fundamental principle of our legal system and its importance cannot be understated. To seek compensation from those who negligently caused an injury or illness is a right of all Western Australians. The concept of 'being made whole' following an injury is often translated into monetary awards for pain and suffering, economic loss, medical and like expenses.

It has become evident that seeking compensation is often not a priority for survivors of forced adoption practices. There can be no appropriate monetary value attached to the lifelong pain and suffering these policies caused. For many affected people the process of seeking compensation or engaging in a civil claim it is a cathartic process, it is telling their story, putting forward their evidence, standing up and simply stating 'what happened was not right'. The importance being vindicated in the eyes of the law and independently by the institutions and organisations that perpetrated the wrong cannot be understated. For many mothers the driving force behind their legal proceedings is acknowledgement from those that participated in, caused, perpetrated, and allowed the wrong to occur. Compensation could never 'make it right', but it can be an acknowledgment and it can certainly assist those affected in seeking the support, counselling, psychology, and psychiatric services they need.

Therefore, our submission proceeds on the basis that the ability to bring a civil claim must be maintained by removing the barriers to justice that are currently faced by those affected by forced adoption and which are currently hindering their ability to seek acknowledgment and compensation from those responsible for the injuries.

As such, Slater and Gordon's submission will address the following;

1. clear path to justice;
2. removal of the statute of limitations;
3. return of the *Ellis* defence;
4. call for redress.

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[1] Daryl Higgins, Pauline Kenny and Sam Morley, *Forced adoption national practice principles: guidelines and principles for specialist services*, Australian Institute of Family Studies, Melbourne, 2016, p. 6.
[2] Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Responses to historical forced adoption in Victoria* (2021).
[3] Parliament of Australia, Community Affairs References Committee, *Commonwealth contribution to former forced adoption policies and practices*, February 2012, p. 197, originally quoting the Law Commission of Canada

1. Clear path to Justice

Access to justice is paramount. Currently, survivors of forced adoption policies and practise do not have a clear path to access justice in Western Australia. The relevant Act is the *Civil Liability Act* (WA) 2002 ('the CLA') which was enacted to ensure that people who were injured had the ability to seek redress through the Courts.

Part 2 of the CLA relating to the awards of personal injury damages applies only if the personal injury arises out of an incident happening after the commencement date (being 1 January 2003).[4]

Survivors are in the unfortunate position of finally making the brave decision to come forward and disclose their experiences and seeking legal advice, only to be told there are no legal pathways available to them.

2. Statute of Limitations

The Statute of Limitations legislation affects the Court's ability to hear and decide on these cases and poses a significant barrier to justice. Various Defendant's to these claims including homes, hospitals, faith-based institutions and adoption agencies are defending claims on the basis that they are statute barred due to the operation of the *Limitations of Actions Act 1958 (Vic)*.

Statutory limitation periods determine the time within which a claim for damages must be commenced. They are intended to prevent Plaintiffs from taking an unreasonable length of time to commence proceedings. At present the *Limitation Act 2005* of Western Australia provides that a claim for personal injury must be commenced within three years of the cause of action arising, or in the case of a child, by their twenty-first birthday.

When the subject incident occurred prior to 15 November 2005, the *Limitation Act 1935* of Western Australia will apply which allowed six years for a person to commence a claim for personal injuries damages. Given the committee is inquiring into the past adoptive policies and practices of the twentieth century, notably the years between 1939 and 1980, it is obvious that most survivors of forced adoption are unable to take legal action for damages and are barred from prosecuting proceedings in relation to their injuries.

At the time of the subject incident occurring many mothers were under the age of majority, shunned by their immediate families and criticised for the circumstances of their pregnancy. Some mothers have instructed that at the time they were sheltered, marginalised, with lower socio-economic means, little to no financial support and minimal education. The ability to seek legal advice at the time of the forced adoption was next to impossible.

Similarly, to child sexual abuse matters "these statutory time limits place adult survivors of abuse in an invidious position, because most will simply and quite normally be incapable of bringing their action within the time."[5]

Forced adoption practices can cause significant and complex psychological and emotional trauma which last throughout a lifetime. Research demonstrates that children and family members involved in forced adoptions can exhibit a range of responses associated with complex trauma, such as depression, anxiety and post-traumatic stress disorder[6], thoughts of suicide, and with many people also experiencing difficulties with identity, interpersonal relationships, grief and loss.[7]

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[4] Civil Liability Act (WA) 2002; section 6(4).
[5] Dr Ben Mathews '*Limitation periods and child sexual abuse cases: Law, psychology, time and justice'* (2003) 11 (3) Torts Law Journal
[6] Submissions by The Royal Australian & New Zealand College of Psychiatrists to the Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Responses to historical forced adoption in Victoria* (2021) 30 January 2020
[7] Submissions by Australian Psychological Society to the Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Responses to historical forced adoption in Victoria* (2021) 31 January 2020

The long-term effects of forced adoption practices cannot be understated. A 2012 study found a higher than average likelihood of these mothers suffering from a mental health disorder compared to the general population, with close to one-third of the mothers showing a likelihood of having a severe mental disorder at the time of the study. [8]

Affected people have described a range of areas relating to their experiences that continue to affect them now and their ability to seek justice including;

- a sense of betrayal by those in authoritative positions thought to have their best interest (parents, family, religious leaders, matrons, social workers, hospital staff);
- experiences of abuse or negligence by those in authoritative positions;
- overall mistrust of the legal system and advice provided;
- administrations of high level of drugs to the mother in the perinatal period impaired their capacity;
- lack of information to their rights both legal and medical;
- lack of ability to give or revoke consent;
- not being listened to or being ignored about their preferences over their own body and the babies;
- being made to feel unworthy or incapable of parenting;
- experiences of threat, pressure, duress and force to sign legal documents;
- emotions such as grief, loss, shame and secrecy surrounding their experiences; and
- misconception of 'nothing can be done' being shared among the community.

Many affected mothers have experienced shame, embarrassment, blame and guilt which have all delayed the connection between their injury and illness and the experience suffered. Further, some mothers note that their trauma did not manifest until later in life or after significant life events (giving birth to further children, having grandchildren, death of children or grandchildren, marriage breakdowns, death of parents, hospital visits).

It is often decades after the subject event has occurred before individuals have the psychological fortitude to pursue these claims.[9] This is further hindered by the lack of support, counselling, psychology and psychiatry services available to those impacted. The *National Research Study of the Service Response to Past Adoption Practices* found 'that there were not enough services, and when they were available, the professionals were often not knowledgeable about specific issues. Furthermore, many clients were not aware of the services available, and those who were aware often found that the cost of the services made long-term involvement prohibitive.'[10]

It is the combination of the above factors that have affected survivors' ability to seek justice outside of the 'forced adoption era'.

Often a limitation period can be extended by a Courts exercise of discretion, however this can create lengthy and costly litigation about whether or not the claim can be brought in the first instance, without consideration of the merits of the case.[11] The process of overcoming such argument is costly, time-consuming and often always subjects the claimant to re-traumatising scrutiny. It should not be possible for a Defendant to eliminate a claimant's rights on this basis alone.

In terms of case precedent, the matter of *Arthur v State of Queensland [2004]* WSC 456 is most significant and was examined by the *Victorian Parliament's Inquiry into Historical Forced Adoption* in its consideration of the statute of limitation. In this case, an application for extension was dismissed as the Plaintiff's 'recollections were distorted by time, emotions and a preoccupation with retribution.' It highlights the

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[8] Kenny P, Higgins D, Soloff C, Sweid R. *Past adoption experiences: National research study on the service response to past adoption practices*. Melbourne: Australian Institute of Family Studies. 2012

[9] Dr Ben Mathews *'Limitation periods and child sexual abuse cases: Law, psychology, time and justice'* (2003) 11 (3) Torts Law Journal

[10] Kenny P, Higgins D, Soloff C, Sweid R. *'Past adoption experiences: National research study on the service response to past adoption practices.'* Melbourne: Australian Institute of Family Studies. 2012

[11] Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report'* September 2015.

barriers that mothers have encountered in establishing claims seeking to overcome the statute of limitations. [12]

Similarly, in the matter of *Cooke v State of NSW* [2006] NSWSC 655 the Court found it could not extend the limitation period. Despite a plethora of medical and court records being available, it found that 'the plaintiff's recollection of events is unreliable'[13] and that the Defendants would not be given an acceptably fair trial. These precedents confirm that the judiciary provides no relief for survivors of forced adoption.

Arguments will be made that any delay in bringing proceedings will unfairly prejudice a Defendant's ability to a fair trial. It is our position that the legal system possesses adequate means to deal with this through the usual procedures of the civil process. The Plaintiff retains the onus of proving their case. "Moreover, it is the courts' duty to make judgments based on the credibility of witnesses and the import of any other evidence, and courts perform these judgments on a daily basis. It is the legal system's duty to provide access to the justice system to deserving plaintiffs. It is most unlikely that a fraudulent plaintiff could withstand the rigours of the normal testing of evidence."[14]

In 2018, this Parliament enacted the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions*) *Act 2018* (WA) which removed limitation periods for all child sexual abuse actions, both retrospectively and prospectively. It is our position that the analysis and reasoning given to this legislative change can and should be applied to the forced adoption matters. The question becomes, is society best served by barring this type of action? And the answer must be no.

Emeritus Professor Shurlee Swain in her submission to the Victorian Parliament Inquiry into Forced Adoption Practices stated; "*The royal commission on sexual abuse has done the hard work on this. We know from that, and it has been recognised from that, that people are not necessarily in a position to take legal action within that time, that the damage comes around later or it comes back in another form later. And who are we protecting with the statute of limitations? Not the people who have been impacted. We are protecting the people who did the deeds, knowingly or unknowingly, the people who did it."*[15]

There are various public interest arguments to be made. Which include ensuring that perpetrators and institutions are not permitted to avoid civil consequences, making civil redress available to survivors, publicising the experiences of survivors, encouraging more survivors to come forward, and importantly, maintaining public confidence in the legal system. [16]

We submit that these interests outweigh any argument regarding the Defendant's right to a fair trial, which can be sufficiently protected despite delay. [17] Forced adoption matters were little known (or acknowledged), much less envisaged, when limitation rationales were formulated and when limitation statutes were designed. As summarised by Dr Ben Matthews, " *Statutory time principles are, for the most part, predicated on the plaintiff suffering physical, not psychological damage; on immediate, not insidious injury; on a plaintiff who knows of their damage, not one who is ignorant of it; on an adult plaintiff, not a child; on a plaintiff psychologically unimpeded from bringing proceedings, not one who is so affected by the psychological sequelae that to confront it is their worst fear."*

The barrier to justice that Statute of Limitation imposes was addressed by the Senate and the Community Affairs Reference Committee for the *Commonwealth Contribution to Former Forced Adoption Policies and Practices* in 2012 which made the following recommendation:

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[12] *Arthur v State of Queensland [2004]* WSC 456
[13] *Cooke v State of NSW* [2006] NSWSC 655 at [97]
[14] Dr Ben Mathews *'Limitation periods and child sexual abuse cases: Law, psychology, time and* justice' (2003) 11 (3) Torts Law Journal
[15] Submissions by Emeritus Professor Shurlee Swain to Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Responses to historical forced adoption in Victoria*, Hearing, East Geelong, 31 March 2021, Transcript of evidence, p. 9.
[16] Dr Ben Mathews Limitation periods and child sexual abuse cases: Law, psychology, time and justice' (2003) 11 (3) Torts Law Journal 218-243
[17] Dr Ben Mathews '*Limitation periods and child sexual abuse cases: Law, psychology, time and justice'* (2003) 11 (3) Torts Law Journal 218-243

> 'The committee urges all states and territories to examine the limitations for infringements of adoption legislation to ensure that they do not act as a barrier to litigation by individuals who were not made aware of their legal rights at the time that offences may have been committed. The committee does not want people who have been damaged by their experience of forced adoption to be damaged further by having to endure a long and bruising legal journey that may ultimately be unsuccessful due to a legal technicality'.

The Victorian Parliament reaffirmed the position of the Senate and recommended an immediate amendment to the Limitations Act to exclude those affected by historical forced adoption from the operation of the limitations period.[18]

We urge this committee to recommend the removal of the Statute of Limitations as a technical defence available to Defendant's in relation to forced adoption claims. This will allow people affected by forced adoption to seek accountability and compensation from the responsible institutions through the Court.

3. Return of the *Ellis* Defence

At present, there are legal difficulties in suing institutions in relation to forced adoption cases, as many of the faith-based institutions involved are, or were at the time, unincorporated. The same difficulty arises in relation to the assets of those institutions, which are often held in a trust, and therefore unavailable in any civil action that survivors bring.

'The Ellis Defence' arose in the case of *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis & Anor [2007]* NSWCA 117. In this case, the Court held that "an unincorporated association cannot (at common law) sue or be sued in its own name because, among other reasons, it does not exist as a juridical entity."[19] The Court held that as the Church was an unincorporated association, with its assets held in a protected trust, it did not legally exist.

The *Royal Commission into Institutional Responses to Child Sexual Abuse* took issue with this legal 'loophole' and recommended that legislation be enacted which provided that unincorporated organisations should nominate a legal entity with sufficient assets for child abuse survivors to sue.

In April 2018, this Parliament enacted the *Civil Liability Legislation Amendment (Child Sexual Abuse Actions*) *Act 2018* (WA) (the Act), which enabled claimants to link an historical unincorporated institution to its current form. Simply, if the current institution and office are substantially the same, the current office may be sued and found liable in place of the historical office holder. Further provisions of the Act grant a claimant access to the assets (including those held in trust) of an unincorporated association, effectively overcoming the "Ellis Defence". It has allowed those affected by historical child sexual abuse to seek compensation from the liable institutions without having to risk the termination of their legal rights on a technical legal point alone.

In Victoria, the Catholic Archdiocese of Melbourne (despite its acknowledgment and apology through CatholicCare) [20] has relied on the principles established by the "Ellis Defence" to curtail survivors access to justice in many forced adoption cases.[21]

Solicitors for the Catholic Archdiocese of Melbourne have asserted that they and their various organisational formats (the Catholic Family Welfare Bureau, the Catholic Social Services Bureau, the Roman Catholic Trust Corporation for the Diocese of Melbourne) are unincorporated entities incapable of being sued. Despite the changes enacted *by Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) (synonymous to those enacted by *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA)) the institutions have claimed that forced adoption matters fall outside of the remit

[18] Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Responses to historical forced adoption in Victoria* (2021).
[19] *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis & Anor* [2007] NSWCA 117 at [47].
[20] CatholiCare Submissions to Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Responses to historical forced adoption in Victoria* (24 April 2020) Netty Horton (Chief Executive Officer, CatholicCare Archdiocese of Melbourne)
[21] Brenda Coughlan v State of Victoria & Ors – Supreme Court of Victoria – need to find case number

of 'sexual abuse' as defined by the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) and have avoided nomination of a proper Defendant in these matters.

This position has caused considerable delay in numerous survivors' pursuit of justice, as well as ongoing traumatisation, unnecessary legal costs and the burden and stress of litigation. We note that *Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018* (WA) intentionally does not define the phrase 'sexual abuse' and instead the Court has latitude to determine its meaning in accordance with the ordinary meaning and common understanding of the term.[22]

We are concerned that the definition as it stands will enable Defendants to again rely on the principles of the 'Ellis Defence' and avoid nominating proper Defendants in these claims. Further, we echo The Royal Commissions position that the 'Ellis Defence' creates impediments to justice for survivors. We therefore urge the Committee to recommend the removal of this legal 'loophole' and enact legislation to allow historical unincorporated institutions to be linked to their current forms and their assets in the same way as it was for survivors of sexual abuse.

4. Call for Redress

We maintain the position that access to justice and the ability to bring a civil claim is paramount.

Submissions made to the Victorian Parliamentary Inquiry into responses to historical forced adoption in Victoria highlighted the importance that compensation can make to the healing process. Financial compensation can act as an acknowledgment of the wrongdoing, a symbolic gesture, a deterrent, a societal change of attitude, recognition of the quantifiable aspects of their injuries (for example medical treatment costs) and the legitimisation of the experience. [23]

Nonetheless, it is apparent from survivor submissions to various inquires that the adversarial nature of court proceedings can create several difficulties which hinders their desire to pursue claims for compensation.

There are various reasons why a survivor may not wish to participate in the legal process or find that the legal process cannot offer any remedy including;

- The loss or destruction of essential evidence (various records relating to admission at homes, hospitals and infant homes, hospital records, court documentation relating to birth and adoption, material witnesses are deceased or unable to be located) meaning the evidentiary burden required to substantiate their case cannot be satisfied.

- The primary injured party is deceased and can longer make their own claim or provide essential evidence for others (i.e. a mother affected by forced adoption has passed and cannot provide evidence for the adoptee's claim).

- The length of litigation can also be a deterrent. With an aging group of potential claimants, the thought of a long and drawn-out process has been described as daunting.

- The cost of a litigation is a significant deterrent for potential claimants. Slater and Gordon are often able to offer legal services on a 'no win no fee' basis, however many potential claimants are pensioners and find the risk of an adverse costs order too great an undertaking.

- The adversarial nature of civil litigation is also cited as a deterrent. Survivors often find the process of medicolegal assessment, testifying and facing cross-examination painful, as it is re-

[22] Western Australia, Parliamentary Debates, Council, 13 March 2018, p557b-558a, Hon. Sue Ellery
[23] Various Submission, Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Responses to historical forced adoption in Victoria* (2021).

traumatising. Survivors have said that they feel as if they are the ones on trial because they are forced to 'prove' what happened to them.[24]

- Further, the nature of litigation, "particularly as compared to redress mechanisms, means that they are an unlikely forum for the promotion of acknowledgement, apology and reconciliation, as it encourages defendants to deny, not acknowledge, responsibility". [25]

If the civil claims process is not a viable option for those affected, it is important to consider what (if any) other options are available to those affected by past policies and practices. We note that currently there is no State or National redress scheme available to those affected by past policies and practices of forced adoption.

For the above reasons, we support the call for the creation of a redress scheme, and we encourage its creation in consultation with those affected by forced adoption policies and practices. We recommend that the redress scheme be broadly applicable to those affected by forced adoption practices (including mothers, fathers, adoptees, natural and adoptive families of those effected).

We strongly recommend that the redress scheme has a low evidentiary threshold to account for circumstances where evidence has been lost or destroyed and has inhibited the claimant from pursuing a civil claim.

Lastly, we strongly recommend that the creation of the redress scheme is prioritised without delay. Potential claimants have suffered for 30, 40, 50 years. The acknowledgment of their pain and suffering should not be delayed further.

We urge the Committee to recommend:

1) A clear pathway to justice;

2) the removal of the Statute of Limitations as a technical defence available to Defendants in relation to 'forced adoption' claims;

3) the removal of the 'legal loophole' known as the 'Ellis Defence' and enact legislation to allow historical unincorporated institutions to be linked to their current form and their assets;

4) the creation of a redress scheme. Further, we encourage its creation in consultation with those affected by forced adoption policies and practices. We recommend that the redress scheme be broadly applicable, have a lower evidentiary threshold and be prioritised without delay.

Slater and Gordon commends the Standing Committee on Environment and Public Affairs for opening an inquiry into past forced adoption policies and practices in Western Australia. We thank you for the opportunity to make submissions and we hope they will be of assistance.

Slater and Gordon is available to assist the Committee in any further capacity that may be required as it considers our submission.

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[24] Senate Community Affairs References Committee*, Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children*, 30 August 2004, p. 208
[25] Professor Reg Graycar and Jane Wangmann, Submission to the Senante Community Affairs References Committee *Inquiry in Children in Institutional Care*, submission 51, p.6