TRANSCRIPT

FAMILY AND COMMUNITY DEVELOPMENT COMMITTEE

Inquiry into the handling of child abuse by religious and other organisations

Melbourne — 12 November 2012

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Witness

Dr J. Wangmann, lecturer, faculty of law, University of Technology, Sydney.

The CHAIR — Good afternoon, everyone. Before we commence today's proceedings there are a few preliminaries I would like to acquaint members of the gallery and media with. In accordance with the guidelines for the hearings I remind members of the public gallery that they cannot participate in any way in the committee's proceedings. Only officers of the Family and Community Development Committee secretariat are to approach committee members. Members of the media are also requested to observe the media guidelines. Please ensure that your mobile phones are switched off.

On behalf of the committee I welcome Dr Jane Wangmann, lecturer, faculty of law, University of Technology, Sydney.

All evidence taken by this committee is taken under the provisions of the Parliamentary Committees Act 2003, attracts parliamentary privilege and is protected from judicial review. Any comments made outside the precincts of the hearings are not protected by parliamentary privilege.

Witnesses may be asked to return at a later stage to give further evidence if required. All evidence given today is being recorded. Witnesses will be provided with proof versions of the transcripts. Please note that today's proceedings are not being broadcast.

Following the presentation, the committee members will ask questions relating to the inquiry. I call on Dr Wangmann now to give a brief presentation, and the remainder of the hearing will be allocated to questions from committee members. Welcome again, and thank you for being with us this afternoon.

Dr WANGMANN — Thank you. First I would like to thank the committee for the opportunity to provide evidence to your inquiry looking at allegations of child abuse in religious and other non-government organisations. My comments today reflect on the impact and consequences of abuse for children in these settings. In particular I focus on questions around redress and compensation mechanisms.

My comments today draw on much earlier research that I conducted with Professor Reg Graycar from the University of Sydney. This research was conducted under an Australian Research Council grant, for which Professor Graycar was the chief investigator.

The research investigated civil legal responses to complex harms — what we called systemic injuries — which we defined as institutional child abuse, the stolen generation, instances of sexual sterilisation of people with disabilities, and so on; so these types of complex harms which our tort system has struggled to deal with effectively. It examined the limitations of the current tort system to adequately address and compensate victims, and in turn we looked to alternative methods of addressing reparations that had been developed, at the time of our research, primarily overseas. When we were researching there had not yet been schemes in Tasmania, Queensland and Western Australia.

Professor Graycar and I made written submissions to the Senate Community Affairs References Committee Inquiry into Children in Institutional Care and in many ways I am relying on the contents of that submission, which is available on the website.

In my evidence today I intend to canvass two main topics. The first is the difficulties that are encountered by victims coming forward in terms of the tort system, and the second is the question of how redress schemes might provide a better and more appropriate form of response for these types of harms. In my oral evidence in particular I will expand on a particular scheme that we examined in Canada known as the Grandview agreement, which was an agreement reached between the Ontario government and survivors of the Grandview Training School for Girls.

A guiding framework for the work of Professor Graycar and myself was the extensive work by the then Law Commission of Canada in 2000. This report is known as *Restoring Dignity — Responding to Child Abuse in Canadian Institutions*. I commend this report to the committee because of its broad-ranging nature. In the report the Law Commission canvassed the ways in which governments may respond to institutional child abuse — for example, having a public inquiry such as this, looking at civil and criminal actions, ex gratia payments, victims' compensation and redress schemes.

In doing this they looked at all these mechanisms and assessed them across key criteria, and the criteria reflected the needs of survivors, so this is where they started. And whilst there are differences between what individual

survivors might need, the Commission found that there was some commonality across the following: the need for respect, engagement and informed choice; that any inquiry process or redress process must have a fact-finding capacity; there must be accountability; fairness; acknowledgement, apology and reconciliation; compensation, counselling and education; that it must pay attention to the needs of families, communities and peoples; and there must be some sort of prevention and public education component.

What the Law Commission of Canada did was say, 'If these are our criteria, we can assess these types of mechanisms across them', and each of them possesses pluses and minuses across each of the different categories. In particular they looked at redress schemes across these categories. In looking at those eight areas it is much more than simply the numerical value of the financial award that we are looking at.

First I wanted to talk a little bit about the tort system and the difficulties encountered by survivors of institutional child abuse when seeking compensation from that system. I am aware from having read some of the submissions on your website that you already have a great deal of information, so I do not intend to go through all of them. I will just list some of them, and then I want to just go through three. The first and often insurmountable one is the operation of statutes of limitations. There are then evidentiary issues frequently connected to the passage of time. So even if you do get over the statute of limitations, many of these claims are relatively old, witnesses have died, documents have been destroyed and so on.

There are problems in attributing responsibility, particularly in terms of vicarious liability. There is the cost, delay and adversarial nature of civil proceedings. Very few of these areas have any sort of legal aid available to them, so the thought that a survivor can necessarily raise a compensation claim as a tort claim is very difficult. There is also the length of time that these types of claims take to be resolved. There are also general questions about the capacity of the legal system to understand the types of harm that we are talking about.

Today I want to talk about three of these in a little bit more detail. The first one is limitation periods. I am aware that the committee has had a number of submissions that talk about statutes of limitations. The first thing I wanted to say was that this is a technical defence. It has nothing at all to do with the merits of the claim, and for that reason some people talk about the fact that if the defence does not raise it, then the claim can keep proceeding, so it is for the defence to choose whether or not it is going to raise it; the court does not raise it on its own.

There then becomes a tension between agencies who have apologised but when litigation starts they use absolutely every possible defence they can in order to stop the claim going forward. So there is tension between apologising on one hand and then using a technical defence such as the statute of limitations on the other.

I want to give an example of a case from Canada that illustrates some of these. It is the case of Leilani Muir in Alberta. It is a 1996 case. Leilani Muir was a young woman who was sexually sterilised on the basis of her mental incapacity when she was institutionalised in a school there. In the early 1990s she commenced to sue the Alberta government, and in that case she was eventually awarded damages of over $625 000 Canadian. She also claimed punitive damages. I want to quote the court, as the court refused to give punitive damages on the basis that the Alberta government did not raise the statute of limitations. I quote from the decision. They basically say that:

> Punitive damages … would certainly have been ordered had it not been for the fact that the government allowed Ms Muir to bring this action. It could have put an end to her claim; her claim was made too late, and the government could have used this delay as a complete answer to all of Ms Muir's claims. This deliberate abandonment of a complete defence is in the nature of an apology. Indeed, it is more than an apology: it is an amendment — a real effort to make things right. As a matter of public policy, this and other governments should be encouraged to recognise historical wrongs and to make fair amends for them.

In addition, not only did they let Ms Muir's claim run and be successful on its merits, but following the success of that case they then set up a redress scheme. So they did not let every other claim that also fell under the Sexual Sterilisation Act — they set up a redress scheme saying, 'We won't make each claimant argue their case on each individual basis'.

It is of course possible to seek an extension of time, and this is usually connected to the justice of the case, but again this can be difficult for certain claimants. It is important to note that some jurisdictions have abolished limitation periods in relation to institutional child sexual abuse entirely, or they have introduced moratoriums for a particular period of time.

The second thing I wanted to talk about was this question of who to sue. For children who have been abused in institutional settings — I use that term broadly, not just to refer to a school or residential institution but any sort of institution, and I think you could include the church as having some sort of institutional capacity even if it is not considered that way in a legal sense — deciding who to sue becomes very, very difficult. There is of course the individual perpetrator, but in many circumstances that perpetrator has died, or they simply do not have the funds to support a compensation claim. So people are interested in suing an organisation or a state or an institution that has some sort of insurance capacity.

I should also add that it is not simply about whether or not the institution has a monetary capacity to pay compensation. I would also suggest that if we put ourselves in the shoes of these children, they actually see the organisation as having some responsibility for the type of abuse that took place — they did not necessarily see a disconnection between the actions of the perpetrator and the institution in which it took place.

Vicarious liability is one of the ways in which we do this sort of institutional ability to sue an employer. So vicarious liability is basically the liability of an employer for the tort of an employee that has taken place in the course or scope of employment. Usually what we talk about when we talk about the course or scope of employment is what is known as the Salmond test. That is where the wrongful act is either authorised by the employer or is a wrongful and unauthorised mode of doing what the employer asks you to do. Courts have recognised intentional torts in this capacity, and they have recognised criminal acts in this capacity, but it does seem that when we start to talk about sexual abuse in particular, the courts, particularly in Australia, have struggled to see this as a component of vicarious liability.

The leading case on this in Australia at present is the case of *Lepore*, and I understand you have a copy of my article. That case concerned an action from New South Wales and two cases from Queensland. In that case the claimants had argued on the basis of a non-delegable duty of care, which is a particular special duty of care that relies on a special relationship between the parties to take care. It is a duty that you cannot delegate to someone else. Even if you have delegated the responsibility, the responsibility actually lies with you. It has been recognised in circumstances of employer-employee, hospital and patient, and school and pupil.

In *Lepore* the High Court decided that a non-delegable duty of care was not the right way in which to deal with sexual abuse in a school setting. Most of the court decided that vicarious liability was the best way in which to do this. There was of course a very close division in the court and very different ways in which they articulated vicarious liability. My article suggests that I think it would be very difficult to be successful on a vicarious liability claim if it was not a residential institution, simply because of the ways in which the judges talked about vicarious liability.

I think it stands in stark contrast to the way in which the unanimous judgment in the Canadian case of *Bazley v. Curry* talked about vicarious liability, and here I want to refer the committee to the decision, led by Justice McLachlin, where she basically says courts need to be really open about what they are doing, and vicarious liability is largely a policy consideration about whether or not they are going to put liability against an employer.

There are a number of factors that Justice McLachlin says we need to look at in terms of unauthorised and intentional wrongdoing, but near the end, in paragraphs (3)(a), (b), (c), (d) and (e) (see *Bazley* [1992] 2 SCR 534, 559-60), she particularly talks about the 'opportunity the enterprise afforded the employee to abuse his or her power'; 'the extent to which the wrongful act may have furthered the employer's aims'; 'the extent to which the wrongful act was related to friction, confrontation and intimacy inherent in the employer's enterprise'; 'the extent of power conferred upon the employee in relation to the victim'; and the 'vulnerability of potential victims to wrongful exercise of the employee's powers'. I suggest that Justice McLachlin in this decision was very much putting herself in the shoes of the victims in relation to how they saw the employee relationship and not simply defining it in relation to the employer and the employee. I would suggest that this is a very progressive decision in terms of thinking about vicarious liability in this context, and it is not something we have seen in Australia to date.

The final point I want to make around the tort system is just a brief discussion around the harms that our legal system understands. Our legal system has had difficulty appreciating harms of the kind that are coming before your committee. Tort is largely structured around individual, one-off, no-relationship-between-the-parties types of actions. It becomes much more difficult when you are talking about events that are defined by groups. So it

has often happened to more than one child within a setting, it is often cumulative, it extends over long periods of time and often has dimensions of race, gender and socioeconomic background all intertwined.

It becomes difficult to recognise harms of physical, sexual and psychological nature, and this experience is shared across the world in terms of the way in which various legal systems are attempting to grapple with it. I suggest that the courts need to start to complicate harm and start to talk about harms in different ways. Here I was thinking about analogies to my other work. My main area of research is around domestic violence, and you can see that specific legal responses have been designed to address domestic and family violence. We have protection orders specifically designed for this particular type of harm because we have found that the criminal legal system was not providing an adequate response. I suggest that the same can be said for institutional child sexual assault. We need to sometimes look at amending the way in which the tort system operates, setting up specific redress schemes in order to address the limitations that we know are inherent within the tort system we have.

Related to this is also the questions about how we might describe these events as historical or past. I acknowledge that many of the cases presented to your committee are actually fairly recent, and so this idea that they are historical is not quite the same. I think we need to ask ourselves some questions about in whose terms we are saying they are past and historical anyhow? I would suggest that for the survivors of these cases they are not historical at all. They have very real, present, living impacts, and we need to think about the way in which we define these terms in saying that they no longer have a current impact — they do. We need to start to think about redressing those terms.

Finally, in relation to the tort system I think we need to think about its emphasis on settlement. Most of these claims settle. So even if you do manage to get a lawyer that will represent you and start off, many of the claims settle. This means that we do not have any precedent. So one claim will settle and the next individual claimant has to start again, proving all their cases and so on. So the lack of transparency around settlement impacts the ability for other claimants who have similar arguments around negligence and intentional torts and vicarious liability and so on to not have anything to base their claim around.

This leads me to talk about our research on redress schemes. Here I am talking specifically about redress beyond simply financial compensation, although this is clearly an important component of packages. I think it is important to think about the way in which we tend to compartmentalise these actions. So Australia, in particular, has been very good at having inquiries at one stage, having an apology at another stage and talking about compensation at another stage. For survivors these are all integrated, and each time there is a gap between each stage it dilutes the importance of each mechanism. So we need to think about the way in which all of these components work together to provide an effective mechanism around reparation. So I do not think you can talk about reparation separately to an inquiry or a fact-finding process and separate from an apology.

Most of the research that Professor Graycar and I did was around the Canadian redress schemes because at the stage of our research these were the most fully developed, and most of our work has been informed by the work of the Law Commission of Canada. The schemes in Canada are incredibly variable. At some point you might talk about some of them being very alternative, and others are really an out-of-court settlement that they have called a redress scheme, and really they do not look particularly different, so I think in many ways we need to be careful about the language we use. We have schemes set up in Australia that are called redress schemes, but perhaps we need to talk about what we are really talking about when we label something 'redress'. In particular there have been some criticisms of some of the Canadian schemes that have referred to themselves as 'healing' when it is not really the scheme or the government or the institution's role in saying what this mechanism will do; it is for the survivors to say how useful this might be to them. So I think we need to be careful about the language we use.

As I said, some schemes have been much more limited. The Grandview Agreement that I will talk a bit about today has been identified as one of the schemes that stands out as being particularly alternative, and it is particularly a scheme that could be labelled as 'redress'. It is a very small redress scheme, and perhaps in many ways that meant that it could be more creative than others.

It was a scheme that was established in 1994. The key feature of the Grandview Agreement that makes it stand out as a truly alternative model was the active involvement of victims in defining their harms and the nature and form of redress that they wanted. So this redress scheme was not imposed on the victim survivors; it was

actually defined by them. What they did was they set up a Grandview Survivors Support Group, they hired a lawyer and they sat down and they talked about what they wanted before they even approached the government. What happened was that there were a number of criminal investigations that took place; unsurprisingly, very few convictions resulted from the criminal investigations that did take place. But the government here was prepared to sit down and negotiate. There was no civil litigation that had yet started. So some schemes do set up under the shadow of litigation and others simply set up under the shadow of the possibility. So there had not yet been any.

The lawyer in this case really sat down and said to them, 'You tell me what the harms are, and I'll give you some advice about the law'. So she took a very creative position rather than imposing the legal categories in relation to the victims. You can see some of the ways in which the victims were active in relation to their claims in terms of the types of harms that were compensated for. One of the things that the adjudicator has mentioned was the fact that one of the key components of the redress scheme was the removal of tattoos. As one of the adjudicators said, 'We would never have thought of that as something that would be compensated for', yet for the women survivors this was critical to them. They had been institutionalised, it was a way in which they marked themselves as part of that institution, and every time they saw their self-inflicted tattoos it reminded them of the institution. Laser removal was one of those very effective mechanisms that they could give to every single survivor of this institution.

So the package involved multiple elements. The tattoo removal was a group benefit. So there were particular benefits that were available to the group. They did not need to prove anything; they just needed to say that they went to the school and they would have their records. They had a 24-hour telephone counselling line. That was open for 12 months, which I would suggest is not a very long period of time, and that is one area that you could talk about having a greater extent. There were individual benefits, so each claimant could then claim for individual harms around psychological, physical and sexual abuse. The maximum award was up to $60 000 Canadian, which is not a terribly large amount of money, which is another area in which the package could be criticised.

There was also something referred to as community benefits. The survivors of the group were very conscious of the fact that sexual abuse of children in institutions is not an isolated incident. I think that partly we grapple with the idea of wanting to think that this does not happen, but I am certainly sure you are aware of all the submissions you have received. But as much as we would like to think this is isolated, in fact it happens on quite a regular basis, and at some point our society needs to appreciate that it takes place and then actually encounter the point around redress.

So the community benefits were targeted around education, amendments to their statute of limitations and so on. That would have a benefit for any victim of sexual abuse. The compensation was awarded on an individual basis of $3000 Canadian to $60 000 Canadian. It was determined on the basis of a matrix, which can also be criticised for the way in which it compartmentalises harms. It was a very simple process. You filled in a form, you did need to provide some supporting documentation like psychological evidence, doctors' reports and so on. The government itself had investigators who would put together the documentary evidence from the institution. It was a very informal hearing, where there would be one adjudicator and usually just the survivor giving evidence around what had taken place. They were allowed to present their evidence in a narrative format or question-and-answer format depending on what made them comfortable.

It is important to note that the adjudicators were trained in dealing with survivors of institutional child sexual assault and physical assault, so they were told about issues around mental health disorders, drug and alcohol issues — some of the women were in prison when they were interviewed in terms of the adjudication process. So the adjudicators were well prepared in order to deal with these sorts of things. The test was on the balance of probabilities, so the civil standard of proof. It is worth noting that some other schemes have had an even lesser standard of proof, particularly around some institutions that were structured for children with disabilities.

Sometimes the adjudicators were well aware that some of the victims were unable to give evidence about some of the things that happened to them: they simply could not go through the difficult process of talking about it in full detail. The adjudicators would attempt to ask some more questions, and often the survivor would say, 'I simply can't go there', and they would know that their award would often be reduced in relation to that. But we must remember that no matter how informal and no matter how sensitive any of these processes will be, they are always going to be difficult for the survivors to go through. What we are attempting to do is to make them

the least traumatic as possible. We must remember that the civil legal system is a much more traumatic process where the credibility of the applicant is tested to its absolute full.

There was a level of attention paid to the people employed. I have talked a bit about the adjudicators themselves being trained. All the administrative staff were trained as well, so every time a survivor rang up to see where their claim was going and they spoke to one of the administrative staff, that administrative staff person was trained in this issue. One of the things that some of the survivors said was, 'No-one ever said to me, "I know what you're going through"', and they talked about how important that was to them, because no-one ever could. If you have not been in one of those institutional settings and you have not been physically, sexually and psychologically abused, you could not. This was very important in terms of the message that they were told. You could have just given written evidence, but most did in fact give oral evidence in a range of settings. Sometimes it was in people's homes, sometimes it was in an office or this type of setting, and, as I mentioned, some of them were taking place in prisons.

The adjudicators wrote two decisions: one for the government in order to talk about the validation and the award that was made, so it went through the strict legal requirements. They then wrote a second, more lengthy decision, which the government also got a copy of, but it was specifically designed for the survivor who gave the evidence. In that decision they very personally spoke about the evidence that they heard, what they had believed and what had been validated. They acknowledged some of the harms that were not compensable under the scheme — it did not compensate everything — but it was a very important record of what had taken place. In the evaluation of the scheme a number of the survivors spoke about how important this written statement was to them, that somebody had actually heard, believed and validated their story — something that you do not often get in settlements that happen in an out-of-court process.

What I would like to emphasise around the Grandview agreement is the attention that was paid to process. Very few people go through a redress scheme and talk about the money as the ultimate component of the award. What is much more important is the process it takes to get there. The fact that the victims were involved in designing the process, the fact that they were heard on every single level of the process, that they were given an individual apology and a written decision for them and so on gave the financial award some meaning. It was a small award — and no award can ever compensate for the harm — but it was given meaning within the context. I think, despite having criticised the tort system, one of the things the tort system does do well if you get a judgment is the judge actually writes a decision saying why you got the compensation that you did. Often those judges go through that process of saying, 'I acknowledge that this can never compensate'. We need to make sure that any redress scheme that does this actually does some work around what the meaning is that is associated with the actual financial component.

Once the financial award was given to the survivors, they were then eligible for education and training. There was a financial component that went to assisting them in upgrading their education and training because many of the survivors talked about the fact that one of the things they missed out on at the Grandview school was any education. They also had access to an additional fund around medical and dental assistance. A number of the survivors in Australia talk about the health implications and the fact that some of their health has been damaged in relation to those sorts of things, so it was much more than simply the financial reward. Some survivors have mentioned the fact that they would have preferred to be able to give the education component to their children because it was too late for them. Sometimes I think we need to think about the flexibility around the way in which awards might be able to have components that go to family members.

Finally, in relation to my oral presentation at the beginning, I think the way in which we need to look at process is important. The factors included being treated with respect, being actively involved in all stages of the process, it being timely, that there is support — support filling in the forms, support giving evidence, legal support and advice, as well as being able to be accompanied by a support person when you do give evidence — and being kept informed at all stages of the process. One of the problems with delay within the court system is that often people do not know where their process is up to, and information can go a very long way, even if it does take two years. And the nature of the decision making being transparent. One of the issues with the various church settlement processes is an absence of transparency around how those decisions are reached and what those decisions might mean for other people.

The importance of consistency of response. One of the issues with some of the Australian schemes has been the fact that there have been changes to financial awards made midstream. So when you are asking people to

engage with the system and you start — I am talking particularly about Western Australia here — with the possibility of an $80 000 award and halfway through it is reduced to $45 000, that obviously means that there is a lack of trust in relation to the process.

Finally, I just wanted to emphasise that all this goes to the point that if we establish compensation schemes and if we call them redress or alternative dispute resolution processes or whatever, we need to be clear that it is about more than simply a mechanism to provide money to applicants. By saying this I do not mean to suggest that financial awards are not important; this is in fact the way our legal system operates, the way the community in which we sit operates. But we need to be aware that it is much more than simply the numerical value, it is about how the process is put together and the other benefits that are put together in the package. I think it is insufficient for governments to say, 'We have Medicare over here, and we have a healing mechanism over here'. If they are not put together as a reparation strategy, then people lose the message and the meaning that goes together with those types of mechanisms.

The CHAIR — Thank you very much, Dr Wangmann, for your presentation. I ask Mr McGuire to ask the first question of you.

Mr McGUIRE — Thank you, Dr Wangmann, for the detail and for some of these responses from other countries that we can have a look at. I want to ask you please to elaborate on a couple of points. If you can explain to us what are the legal difficulties associated with attribution of responsibility in a civil claim arising from abuse perpetrated by a member of an organisation. Then if you can actually also detail to us whether you see a necessity for legislative intervention to deal with liability for organisations.

Dr WANGMANN — I should preface this by saying I am not an expert in relation to the way in which the church operates and its particular — I appreciate the *Ellis* decision and so on around the particular difficulties that are faced in relation to the church. Just looking at an individual claim, *Lepore* is a good example in that he attended a state school and attempted to sue the state government in relation to its responsibility for the school that they operated, so here you have vicarious liability. In relation to religious institutions, there are very clear issues about whether or not there is even an employer-employee relationship. Even to get to the question of vicarious liability, which I have explained has been problematic, you cannot necessarily get to that stage.

I understand from looking at the Victorian law society's submission that there have been some progressive decisions in the UK which have argued that there should be something akin to an employer-employee relationship in relation to the church, but that has not taken place here. I understand that there is draft legislation being discussed by Shoebridge in New South Wales. I have not myself looked at that. I am happy to take that question on notice and have a look at the way in which that might amend some of those issues in relation to the church.

Mr McGUIRE — If you could do that and report back to us, we would be most grateful. Thank you.

Dr WANGMANN — Certainly.

Mrs COOTE — Dr Wangmann, thank you very much indeed for your written submission, because I personally found it extremely interesting, and also for the presentation you have given us today. I am particularly interested in the Grandview scenario and its relationship with what we could do here in Victoria. We have had a lot of submissions here dealing specifically with the Catholic Church, although we are looking into other organisations as well. The Catholic Church here in Victoria has come up with two programs: Towards Healing and the Melbourne Response. I am wondering how this redress system could operate or how you feel that it could work in parallel and whether it is an opportunity or not, with specific reference to the matrix versus the flat rate process. I think that is something that is very important. Although you say reparation is not what everybody wants, when we ask people, 'What do you believe justice is for you?', we get people saying that some sort of remuneration is what they are expecting. Could you elaborate on how you believe that experience from Canada would work here with what we are dealing with?

Dr WANGMANN — To start with Canada, we have pointed to the Grandview agreement because of its various components. The women that attended the Grandview school for girls decided — they themselves decided — on a matrix. From a number of the discussions that I have had with the Care Leavers Australia Network, that is certainly not necessarily the view of everybody. Partly it is around doing those sorts of things. I suggest perhaps the Grandview agreement is also positioned within its time; it was 1994. I would suggest that a

matrix tended to be the way in which we thought about claims at that time, so if you compare it to criminal injuries compensation and so on.

Perhaps a more interesting model for the committee to consider is what has happened in relation to Indian residential schools in Canada. I am not sure how much you know about that agreement. There were a number of false steps in relation to this, but the final agreement that has just closed in relation to Canada — which is equivalent to our stolen generations — is that they set up something called a common experience payment, where you have that flat rate. If you attended one of the Indian residential schools, you were awarded $10 000 Canadian and then another $3000 Canadian for each additional year that you were in one of the schools. So that was the flat rate.

You can see that that would be a component where you would simply have a form — who attended the school — and they could validate that process. You could then choose to go through an independent assessment process where you claimed a greater amount of compensation if you suffered particular types of harms. So they included psychological, physical and sexual. Here you needed to have much greater evidence in order to support your claim, but you can see the way in which that particular package traverses both the group and individual dimensions of the claims. On one hand you could choose to go down the easy path and just have your common experience payment, or you could choose to add to that the individual assessment process.

Here you actually have a package that it is giving much more choice around the way in which applicants might engage with a package. Certainly I would suggest that given the age of some of those claimants, many of them would simply have chosen the common experience payment. I think you very actively need to talk to the survivors about what type of package they would prefer. Some people would strongly prefer to have some sort of flat-rate ex gratia payment. Others would prefer to have some sort of acknowledgement of different levels of harm. Of course here you get into some questions around the fact that some people are more resilient than others, and that creates a greater disparity, but certainly the experts in this area — the survivors themselves — about what type of mechanism they would want.

I would suggest that the common experience payment gives you some of that flexibility of a flat payment with some acknowledgement for how long you were there and the different types of institutional settings you might have been in. Does that — —

Mrs COOTE — The element that you actually did not touch upon was the Towards Healing and the Melbourne Response part of my question, which in fact — given that Grandview school and the Canadian government had already come to the party, virtually. They had already come and said, 'Well, yes, we agree there needs to be a system put in place'. How do you think that equates to what we are dealing with here?

Dr WANGMANN — I mean you could say that Towards Healing and the Melbourne Response is some form of — I would prefer to call it — an out-of-court settlement, but, you know, you could see that it sits within an alternative dispute resolution process. If you were to test it against the criteria that the Law Commission of Canada asked, you can see that it completely lacks transparency. So it needs some sort of independent nature.

There are other examples, and I am happy to leave you with a document. It is a background paper for the Canadian law commission report, where they basically canvass a number of redress programs. There are examples of church-based redress programs in here that were much more transparent. An example is the helpline agreement that involved St John's and St Joseph's institutions for boys, again in Ontario, where the church and the state put up money together in order to run this scheme; and largely the state engaged with that process because it had been involved in sending children to the institution, so it had some sort of responsibility.

Again I think the key thing that has been lacking, from what I understand, from the church response in Australia is there is a complete lack of transparency around the way in which claims are being assessed. Partly one of the benefits of Grandview is to sit before an adjudicator. They start to get a picture. They have a hundred girls come before them. There is consistency in these stories, and they are prepared to validate them in circumstances where there is not necessarily evidence because of the way in which they come forward. I am not sure — does that answer?

Mrs COOTE — Yes, that is perfect, and I would be very happy — if we could have a copy of that report, it would be excellent. Thank you very much indeed.

Dr WANGMANN — Certainly.

Ms HALFPENNY — Following on, again from the alternative resolution to the systems, as I understand there are three ways, and you talk about them in your paper. There is the civil torts approach to try to get some compensation, there is the criminal justice system and there is the redress packages. Is the redress package in your view, only worth considering because, say, laws around things like vicarious liability are not good enough, or there is no legal aid? So if there was legal aid, it might be better to go a different way? Also, of course, there is probably some criticism from people that the criminal justice system punishes people who do these things, and should we not be looking more at that? Or are they not mutually exclusive?

Dr WANGMANN — Particularly in relation to the criminal justice system, they are not mutually exclusive. The criminal law operates in a particular way to punish offenders. Tort and redress schemes operate to assist the survivor in recognising the harm that they would suffer, so they are certainly not mutually exclusive. You do have some examples in Canada of redress schemes where some people have opted not to be involved in them. With the Jericho Hill school for deaf and blind children, there was a package. Some people involved themselves in that package, another group commenced a class action. In relation to the tort system, it is not merely around statute of limitations and vicarious liability. They tend to be the main hurdles, but there are difficulties around the fact that our legal system does not quite appreciate the way in which these harms impact on people, so credibility becomes a major issue.

For a number of people their experience in institutional settings has meant that they have gone on to live lives where they have found it difficult to engage in long-term employment, difficult to form relationships, drug and alcohol issues; some people have ended up in prison. These are markers of credibility that our legal system make sound as though you are not being truthful. The difference in relation to Grandview was the adjudicators in Grandview said, 'These are all parts of your experience and they are going to be parts of the way in which we assess your compensation', rather than a way in which to say, 'You won't be compensated'. It is a completely different way of thinking about credibility.

Ms HALFPENNY — And just in terms of talking about the examples you have given where governments have put up the compensation, our inquiry is looking at non-government organisations and religious organisations. Could you see a similar way, or how would it be? Would the government have a role, or how would you see the non-government and religious organisations if they were forced to do this sort of thing? How would that sort of work?

Dr WANGMANN — You can find examples. Ireland is another example where the state set up the redress scheme. It is a much more lucrative model, and one I am sure other people have referred you to. They asked the church to contribute a certain amount of funds to that, but they basically carried most of the burden, and indeed the Irish government was criticised for the extent to which they left themselves exposed.

I guess the point around compensation is that in the end it is a political choice. We either decide that some harms are worth compensating or they are not. And they are largely political decisions, so even if it is not directly the state's responsibility, sometimes the state bears the burden anyhow around health and education and longstanding care arrangements. Sometimes it is merely a moral and ethical position.

There are questions around the church amending its processes around Towards Healing and the Melbourne Response. Although having read Patrick Parkinson's submission, it would seem that some of those mechanisms are beyond simple tinkering and that there needs to be something greater done by the government in terms of transparency. Maybe the way is to team up with some sort of compensation scheme, but it has proved difficult. So in the example I gave of the Helpline agreement, they had two Christian Brothers groups come together, and after they had signed it off one of the Christian Brothers groups withdrew from it, and so the state continued with one. Again the state had to make up the shortfall in relation to that claim.

Ms HALFPENNY — What do you mean they withdrew? They had an agreement and just did not pay?

Dr WANGMANN — I cannot remember what stage they withdrew from it.

The CHAIR — Would you like to take that on notice and highlight that issue?

Dr WANGMANN — Yes, I can probably take that on notice.

Mr O'BRIEN — Thank you, Doctor, for your evidence and your work. Following on from Ms Halfpenny and dealing with the issues associated with compensation and where they start in terms of present liability — that is, legal liability that may or may not exist now and future models that as legislators we may consider and ultimately recommend as part of this inquiry's work — part of the complexity in the situation is that, for example, the Catholic Church, and I only say that by way of example, there are other institutions that are also complex, but dealing with the Catholic Church presently is a complex structure in its legal entity. In relation to that, if I could just briefly quote from a passage from Cardinal Pell in response to the New South Wales proposed legislation by Mr Shoebridge, where he says:

> The Catholic Church is not like a corporation with one basic structure for all its activities. It is a large and diverse community consisting of individuals, unincorporated associations and different legal entities. There are parishes, religious orders, lay associations and many different groups providing services in education, health and welfare. There is a variety of structures each with their own areas of activity and responsibility.

There are structures in the legal system, like class actions and other things, that can deal with complex legal liability, and James Hardie is that. What I would be asking is if you could, in terms of addressing compensation, and you may need to take part of this on notice, assist our committee in identifying the benefits of existing legal structures in terms of — as you say, it is good to sometimes obtain a judgment for an independent court to be written out and explain the precise liability, but there also needs mediation for that issue but also where the liability presently falls. So, what the benefits of that are, particularly in relation to compensation, and then moving to future structures, perhaps with the cooperation of the church if that is where the statement that they are prepared to face the truth in this instance now sits, and the role of the government, both as the ultimate sovereign entity in this state, the separate administration of the courts and obviously whatever role the government can have in bringing this together through the Parliament at the end of our committee's process. Could you just take us through some of those issues as best as you can? I understand it is a fundamental question, if you like.

Dr WANGMANN — Yes, and it was quite lengthy. You might need to remind me of the various components in relation to it. Can you just start with the — —

Mr O'BRIEN — Start with the existing legal liability situation. In terms of our present court structures for compensation, can you tell us some of the benefits of that in the Victorian context and how it can handle class actions et cetera if that was a way to go, and what are some of the limitations on compensation?

Dr WANGMANN — The clear benefit of the current tort system is the amount of award you would get is markedly higher than what we are talking about in any redress scheme. I cannot give you an example now, but, you know, it is substantially well into the six-figure range that you would get for some of the claims we are talking about. So there is that. That is clearly a benefit. You also get the articulation from the judge about what that compensation means. You get a public record of the fact that this happened. Everyone can see it; everyone knows it. Usually when there has been an award of that type of nature, it usually has a great deal of influence on an institution to change their structure, otherwise they are going to be exposed to future claims. So you can see why it works in those ways.

The clear disadvantage of it is, as we can see, very few of these claims have been successful. You can look at the stolen generation claims. The only recent one that has been successful is *Trevorrow*, and even there the South Australian government continued to want to appeal it because they do not want the precedent to sit. So they are very difficult, very complex cases to run.

Again, if we think about the benefits, the other lack of benefit is just because one claim has been successful does not mean the next claim is going to be successful. Simply requiring them to each work on an individual basis is itself a problem. Class actions are possible, but they are quite difficult to get certified because of disparity in some of the groups. So, particularly here within your inquiry, I think you are talking to a number of survivors who have been abused in similar ways but in quite different settings, so the ability of some of them to form a class action will be more difficult than others. For some it will be easy for that to take place, and you have seen it happen. The fact then that they can settle means that you lose that sort of public record.

Mr O'BRIEN — And one other problem with the courts, if I could add, is that the present structures that are in place, such as in that passage I read out, rightly or wrongly as a matter of legal liability are where the case will fall. So if you have a situation of a generalised church admitting to some moral culpability now — and we

have not heard from the church, so I need to be careful around that formal evidence, although they have written to us in our submission. But if they are presently demonstrating a willingness to participate with this inquiry's work at least, then you have a moral statement that they wish to redress some of the wrongs that may exist and may also be buried in this myriad of legal structures that have prevented claims, such as in Ellis. Again you may need to take it on notice, but it is a very live issue for this committee. Could you guide us through some of your recommendations from your international research as to how we translate what is effectively present legal liability within the structures of, say, the church and the moral willingness to make a difference, if that exists, into the state's recommendations for future conduct in a redress scheme?

Dr WANGMANN — I might take that question on notice because, as you have noted, the church structure is very complex. In fact they avoid liability in circumstances where other institutions are liable. So I would prefer to take that question on notice and investigate the way in which some of the other structures have been set up where the church has come to the table, if you want, within some of the schemes where the state has also joined.

Mr O'BRIEN — To be fair to them and to understand the issue, they say they accept liability where it falls, but if the legal structures are such that the liability does not fall where moral society says it should, then we may have a problem or an issue that needs addressing in a revised or a more modern approach than we have had since 1996.

Dr WANGMANN — That is right.

Mr O'BRIEN — Particularly with that independence issue, which has been identified by many submitters already.

The CHAIR — If you could take that on notice, Dr Wangmann, that would be appreciated by the committee.

Dr WANGMANN — Certainly.

Mr O'BRIEN — There is also the New South Wales bill that you could consider. Obviously that was tied in with some of the research that had come from Mr Shoebridge's work.

Mr WAKELING — Dr Wangmann, thank you very much for your presentation today. There has been obviously quite a bit of discussion today about alternative dispute resolution processes. I would be interested to know about the structure of such a body. We have talked about some of its powers, but I would be interested in the actual structure and the way in which that operates. Does it have a secretariat? Is it a visible body? Does it have a physical structure? How does it actually look to the general public?

Dr WANGMANN — They are varied. Some will have some sort of statutory structure to them. The Grandview agreement had a written agreement, like an MOU, around how it was structured. They did have a secretariat that supported them, so they set up a unit within the justice department in Ontario that just worked in relation to this scheme. They then had staff that had come from the criminal injuries review board who did the investigation and put the file work together. I use that term 'investigation' in a loose way. They did not investigate the claim, but they did the work around putting the documents together, so the victims/survivors did not necessarily have to do all that work that we would normally expect them to do if they were to run a tort claim. So they were very well supported around the way in which the adjudication process took place in terms of putting the evidence together.

Mr WAKELING — So in your opinion, would that be the model that you are looking at? I know you have used that model as a good example, but if you were setting such a body up, is that the model you would be using? We are looking at best practice here.

Dr WANGMANN — Because the Australian schemes were set up much later than the research that I was involved in — and I have had a bit of a look at them and I have some concerns around both transparency and the change that took place, but again they set themselves up with a structure and a process and so on, so I am prepared to have a look at the way in which those happened. But you certainly cannot set up a redress scheme without an appropriate structure.

With the Grandview, in terms of its attention to process, not only did you have an administrative structure but you also had the fact that they would help people fill in forms. They had a counselling line because they acknowledged the fact that even getting the form was going to be difficult, let alone starting to fill it in. So it is that attention to detail, you know, funding some of the legal advice in order to get to those sorts of stages, thinking about how you communicate with people.

One of the very real problems with these schemes has been the length of time that they have been open. Some people do not read the newspaper, they do not listen to mainstream radio and so on, so how you get the information out about the scheme also becomes an issue. You really need to have thought very carefully about every single stage of the process if you are going to get as many survivors to come forward within the time frame that you have. Again this is one of the areas where there is controversy about whether or not you do have a deadline, but I would suggest that all the Australian schemes have been far too short in their time frames. It takes people a very long time to realise that they are going to make a claim, first up. They often have not told their family of their experiences. They then have to make a decision about whether they are going to go through the process. It becomes difficult to fill in the form, and suddenly the year is up — a year is completely unrealistic to think about in terms of that sort of process.

I am pretty sure that the Western Australian system had independent counselling systems outside so that people felt they were talking to someone not connected to the system but getting support in order to go through the process.

Mr McGUIRE — Just to follow up on a couple of those themes, what advice would you give this inquiry into how we should actually deal with the statutes of limitations issue and the lack of evidence due to the passage of time? What would best practice look like?

Dr WANGMANN — Sadly, I do not think you can do much about the passage of time, but I think we need to be lenient about the fact and recognise that, one, institutions write the documents and so to expect there to be records of harms on institutional documents is another thing. I think we need to be a bit flexible about people's recollections of events. People cannot necessarily recollect — they have done all those studies about whether or not people recognise a witness from yesterday and so on. We need to be realistic about what the passage of time means. That is about just amendments to what we think about credibility.

I do not think the statute of limitations should apply to these types of harms. The policy reasoning behind a statute of limitations is basically that there is a point where they move on, but surely the justice in these cases requires that we should at least hear the case on its merits, that the justice actually sits somewhere else in relation to the policy things that underpin a statute of limitations.

Ms HALFPENNY — Maybe you need to think about this. In 'Liability for institutional child sexual assault — where does Lepore leave Australia?' you talk about how the courts do not look at the whole story. They just look at when did it happen and not the lead-up and the grooming and all those things. Victoria Police have been to see us, and last Friday they talked about how now when they investigate these matters they are looking at the whole story. What do you think about it all? Is there a way of aligning the way the police and investigations are going and the actual court system and how that can be more in tandem or working together in the same way?

Dr WANGMANN — I think there is a difference between what is a criminal and what is a civil process. Indeed the police and the criminal system are working much more around and acknowledging grooming. My point around the context of grooming was particularly in relation to vicarious liability, that when the court gets caught up thinking about the employer and employee relationship they forget that they have put the employee in a position of power as a teacher or a warden or whatever, and they give that person a particular position to be able to groom and so on. What happens to the child is integral to that position.

It was very much about challenging the court to think about vicarious liability in a more contextual way, which is what I would suggest that *Bazley v. Curry* does in Canada, although I do know that their companion decision, *Jacobi v. Griffiths*, went the other way because it was not a residential setting. But I think that you can see that they took a far more contextual approach to understanding. The 4 to 3 decision in *Jacobi v. Griffiths* shows this tension between how much context you read into the situation, and I would of course favour the minority judgment in that decision.

The CHAIR — Dr Wangmann, on behalf of the committee, I thank you very much for your attendance this afternoon. We do appreciate your evidence; it has been most helpful. Thank you again.

Witness withdrew.