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The Family and Community Development Committee
Parliament of Victoria
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Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations

Dear Committee Members

Thank you for the opportunity to make a submission to your inquiry. I draw on extensive experience first as a ward of state from 1940 to 1953 and second as a long-standing active member of self-help organisations dealing with institutionalised child abuse and neglect, notably the national advocacy and support group Care Leavers Australia Network (CLAN) and the earlier Victorian advocacy groups Lives of State Shame (LOSS) and ForWards. I have also been a member of the national Alliance for Forgotten Australians. I do not claim to represent the views of those organisations in this submission.

In particular, in my years as a Committee member of CLAN and its sometime editor, I have heard scores of personal accounts of rape and sexual assault of children and have read many more such accounts. As a child in so-called 'care' I witnessed these appalling events on a regular basis.

For the record, I was a ward of the state of Victoria from the age of 2 until the age of 15. In that time I was incarcerated in three different children Homes - one government-run, one run by a church and one run by a non-government agency. I was also placed in three different foster families for short periods of time.

You will note my use of the term 'rape and sexual assault' instead of 'sexual abuse'. Along with many survivors I believe my preferred terminology is both more honest and accurate.

I would be pleased to attend any hearing to provide clarification or elaboration of any points.

Yours sincerely

Frank Golding

SUBMISSION TO THE FAMILY AND COMMUNITY DEVELOPMENT COMMITTEE: INQUIRY INTO HANDLING OF CHILD ABUSE BY RELIGIOUS AND OTHER NON-GOVERNMENT ORGANISATIONS

FRANK GOLDING

A. INTRODUCTORY

1. Countless survivors of rape and sexual assault in children's institutions have been making their needs known for years; and governments and other agencies have obstinately turned a deaf ear despite their persistence. In essence their needs may be summarised in three sentences.

(a) They need to tell the story of their childhood to someone in authority who will hear them with respect and empathy.

(b) They want their allegations investigated and the perpetrators brought to justice.

(c) They want to be compensated for the damage that was inflicted upon them so that they can begin to re-build their lives and reconnect with family and community.

2. Fine words of the kind found in the apology issued by the then Premier Steve Bracks in the Victorian Parliament in August 2006 have not been backed up by action.

3. It was clearly perceived at the time that something more than a public apology was required.

Mr BAILLIEU (Leader of the Opposition) — The Senate report of August 2004, Forgotten Australians, concluded unanimously that many children who spent their childhood in state care in Victoria were the subject of significant abuse. The opposition is appalled by the abuse of children — anywhere, any time. The abuse of a child — whether it is physical, mental or sexual — is abhorrent to us all.

When such abuse takes place under the care of the state or organisations acting on behalf of the state, it is even more shocking.

...

We openly recognise the trauma and ongoing emotional torment of these events, and we deplore the actions of those who misused their positions of trust.

Their actions were unacceptable and unforgivable. All criminal activities involving the abuse of children must be fully investigated and perpetrators brought to justice — regardless of when that abuse took place. (Hansard, Wednesday, 9 August 2006 ASSEMBLY 2672; emphasis added.)

4. And this view was supported and extended by the Hon. Peter Ryan (Leader of the Nationals).

However, I must say we think the job is only part done [with an apology]. We think the issue of compensation to these people must also be explored. The fact is that in other nations across the world — in Ireland and Canada in particular — steps have been taken within those jurisdictions to have appropriate regard to the issue of compensation. In the state of Tasmania ex gratia payments have been extended under a scheme which has been developed in that state. The statute law in South Australia has been amended to change the statute of limitations to enable claims of this nature to be investigated. We believe, therefore, that if we are going to deliver dignity and integrity to the people who have been subjected to this appalling treatment, the state of Victoria is also obliged to investigate a scheme or schemes which would deliver that justice to those people. (Hansard, Wednesday, 9 August 2006 ASSEMBLY 2673)

B. IT DEFIES COMMON SENSE TO EXCLUDE FROM THIS INQUIRY RAPE AND SEXUAL ASSAULT IN STATE-RUN INSTITUTIONS

5. My history of multi-placement institutionalisation is typical; a majority of wards experienced multiple placements (CLAN Survey 2011). Some of the most vulnerable children were those who were frequently transferred from home to home. The Terms of Reference of this inquiry appear to exclude state-run institutions. This means that the Committee will be required to overlook a significant body of evidence that will be relevant to child rape and sexual abuse in Victoria.

6. Rape and sexual assault occurred in a wide range of institutions whether run by the state, by churches or by non-denominational charities. And it occurred in foster situations. Some children were raped in more than one institution. Some were raped or assaulted in all three types of institutions and/or in foster ‘care’. In some instances, those still traumatised by their horrific childhood experiences can no longer state with any certainty where the crimes against them were committed. In the confused memory of their traumatic childhood, they can no longer pin-point the location of their exploitation. Many have not yet been able to tell their story to a creditable authority.

7. Be that as it may, it is a matter of serious concern to many of those who were raped or assaulted in government-run institutions that such crimes are not part of the current inquiry’s Terms of Reference. My direct conversations with a number of survivors is that their trauma has been revived and renewed by this curious omission and they are now under increased acute stress.

8. Mr Baillieu was right in 2006, and he is right now: *“All criminal activities involving the abuse of children must be fully investigated and perpetrators brought to justice — regardless of when that abuse took place.”* He made no distinction between children raped or assaulted by clergy and children raped and assaulted by other adults. He specifically referenced children who were abused while in state ‘care’: *“When such abuse*

takes place under the care of the state or organisations acting on behalf of the state, it is even more shocking.”

9. Children’s institutions run by churches and other non-government agencies in Victoria were funded largely, or in part, by government. A very large number of children were assigned to these institutions by the state which then failed to monitor what happened to them. In this respect, there is a shared liability and an obligation in respect of accountability. The state had an overarching duty of care no matter what agency had the day-to-day responsibility of running the institution. That was and remains both a legal obligation and a moral question. In respect of state wards the state acted *in loco parentis*.

10. CLAN has compiled a list of nearly 20 Victorian government-run Homes which will be excluded from this inquiry, yet it knows from members who were residents that rape and sexual assault occurred in some at least of those Homes. If the Committee adheres strictly to the existing Terms of Reference, it will be hearing only one part of the story.

Recommendation 1: If the Committee finds it is not able to widen the Terms of Reference of this inquiry, it should report to the Parliament that a further inquiry into child rape and sexual assault in state-run institutions is essential. This should be a Royal Commission to ensure that all witnesses are obliged to appear and all relevant evidence is made available.

C. SUCCESSIVE VICTORIAN GOVERNMENTS HAVE FAILED TO EXERCISE CARE AND TO TAKE ALLEGATIONS SERIOUSLY

11. Successive Victorian governments have failed to institute a systematic investigation of claims of sexual, physical and psychological by former residents of children’s Homes and foster care despite having overwhelming evidence that rape and sexual assault was rampant.

12. On the government’s own admission, the acknowledged failure to exercise supervision where it was so desperately needed was based on false assumptions about children in out-of-home ‘care’.

The system, until the 1950s, was based on the flawed assumption that state wards would be placed in foster care and that charitable children's homes would only accommodate children placed voluntarily by their parents. As a result, there was no Departmental supervision of these institutions... (Submission by the Government of Victoria to the Senate Inquiry into Children in Institutional Care No. 173, July 2003)

13. This admission is astonishing. It shows that the Department falsely assumed

- (a) that children would not be abused in foster care and
- (b) that children in institutions who had parents required no further protection.

14. In its guarded submission to the Senate's original *Forgotten Australians* Inquiry (2003-04), the then Victorian government revealed a reluctance to make any concession to the universally accepted principal that rape and child sexual assault are crimes that warrant the most serious action by relevant authorities. It shamefully muddled criminal acts against children with a proposition that it was all a matter of the circumstances of the time.

In the past, some children were abused and neglected while in care, and a larger number of children were subjected to standards of care which would not be considered adequate by today's standards. However, it is also important to recognise that the people who cared for children in the past, either in children's homes or in their own homes, generally did so as well as they could in the circumstances of the times, [sic] and that auspice organisations for children's homes and foster care programs generally sought to provide the type of care which they believed to be best (Government of Victoria Submission, July 2003).

15. Criminal acts against children were wrong then; they are wrong now; they will be wrong in the future. There can be no amnesty or moratorium on crimes against children placed in the care of the State and it is no excuse that it happened a long time ago. Until we acknowledge the ugliness of the past we will not learn from the mistakes. We know from various reports that rape and sexual assault continues in out-of-home care today.¹

16. In 2009 the Senate Committee revisited its *Forgotten Australians* Report (of 2004) to assess progress on the implementation of its 39 recommendations. The Victorian government – alone among the state governments – declined the invitation to make a submission. One can only assume it had little or nothing to report in the way of action or did not think it important enough to deserve the effort. Indeed, the Victorian government had taken five years for to make a public response to the 2004 Report – and that was posted without notice on an obscure section of a DHS website. That Victorian response can best be described as puerile.

17. A pertinent example is the Victorian government's response to Recommendation 7 of the *Forgotten Australians* Report (2004) - see the full text at the end of this submission. In summary, this complex and thoughtful recommendation dealt with internal church and agency-related allegations of abuse and covered:

¹ For example, In his *Own motion investigation into Child Protection – out of home care* (May 2010) the Ombudsman reported:

19. My investigation has found instances of children who have:

- been physically and sexually assaulted by foster and kinship carers
- had limbs broken or been knocked unconscious by residential carers
- been physically assaulted or raped by other children
- been placed with adult 'friends' who have then engaged them in sexual acts
- engaged in prostitution while in care
- reported their carers selling drugs to other children.

20. The sexual exploitation of young people in the out of home care system has also been identified as a significant issue, with incident reports identifying a group of children in out of home care who are involved in prostitution and sexual exploitation.

- *informal, reconciliation-type processes;*
- *independent input into the appointment of personnel operating the schemes;*
- *support and other services as part of compensation/reparation packages;*
- *the abolition of confidentiality clauses;*
- *internal review procedures; and*
- *the dissemination of information on complaints procedures.*

18. To this vital recommendation, the Victorian government's response was dismissive and insulting:

This is a matter for Churches and agencies to consider. Several Community Service Organisations in Victoria have established a range of services to provide support and assistance to people who grew up in their care.

Recommendation 2: That the Victorian government's response to recommendation 7 of the Forgotten Australians Report (2004) be withdrawn forthwith and replaced with a statement of strong endorsement of the thrust of that recommendation.

D. THE HUMAN COSTS AS WELL AS THE ECONOMIC COSTS OF THE CURRENT SYSTEM OF DEALING WITH RAPE AND SEXUAL ASSAULT IN CHILDHOOD ARE UNACCEPTABLY HIGH

19. Sexual crimes against children are an appalling breach of trust and a gross violation of the rights of the child – a point made eloquently at the time of the Victorian apology in 2006. The Hon Andrea Coote (Monash) spoke in the Legislative Council about her reaction to reading in the *Forgotten Australians Report (2004)*:

...some very gruelling personal stories about the sexual abuse which was rampant throughout the churches and church-run facilities...I think we must recognise that these allegations of sexual abuse by the people these children were supposed to be able to trust are really quite horrifying.

She quoted one story that stood out:

I can't get some of the terrible things he did to me out of my head, they loom in the shadows of my life and haunt me. This man took my virginity, my innocence, my development, my potential. (Hansard 23 August 2006 COUNCIL, 3080)

20. If you have been raped or sexually assaulted as a child, as the above account illustrates, you carry the psychological costs for a lifetime. Many of the victims and survivors are now elderly, and still live a life of shame, humiliation and social exclusion. The Committee will find abundant evidence of links between childhood rape and sexual assault and risk behaviours such as self-harming, substance abuse and chronic poor health, an inability to trust others and ongoing problems in maintaining positive intimate relationships, not to mention suicide. These problems are exacerbated when the

allegations have not been properly investigated and when perpetrators have not been brought to justice.

21. Not to detract in any way from the unremitting trauma of the direct victims, it should be said that there are others who suffer too. In my book, *An Orphan's Escape: Memories of a lost childhood* (Lothian 2005, p.22), I describe the effect of sexual molestation on a whole cohort of children. We knew it was happening, and dreaded that we would be next.

None of us felt entirely safe. Maybe it would happen to me next time. I counted myself lucky at the end of the day I remained a mere spectator of these encounters. Others didn't have my luck. Yet whenever sexual abuse happened, I felt grubby because there seemed no good reason it wasn't me. Others shared this reaction. For days afterwards, a subdued menace hung silent over the playground. It seems selfish to be pleased to have steered clear when others couldn't, but with power so heavily balanced against the inmates, survival was an individual matter, deeply personal, every boy for himself.

These childhood fears are remembered for a lifetime. The memories are not optional.

21. The costs to survivors are bad enough. But the material costs to the community cannot be ignored. They are counted in massive extra government spending – taxpayers dollars - on health and mental health services, crime, homelessness, chronic unemployment and so on. It is not difficult to calculate the financial cost of child abuse and neglect in Australia – it runs into the billions of dollars every year. See for example, the report by Taylor, P., Moore, P., Pezzullo, L., Tucci, J., Goddard, C. and De Bortoli, L., *The Cost of Child Abuse in Australia - The Access Economics Report*, Australian Childhood Foundation and Child Abuse Prevention, 2008. Much of that ongoing expenditure is preventable of course, but much of it arises because of the failure to put right the wrongs of the past: *the terrible things that loom in the shadows of your life and haunt you*. We can save money in the long-term by attending to the unfinished business that is the focus of this Committee's inquiry.

E. 'IN-HOUSE' SYSTEMS ARE BLATANTLY SKEWED IN FAVOUR OF THOSE WITH THE MOST POWER AND RESOURCES - AND OFFENDERS ARE PROTECTED AT THE EXPENSE OF VICTIMS

22. In Victoria, it is widely known in care leaver circles that a number of churches and charities, as well as the Victorian Government, have made individual compensation payments to an unknown number of survivors. Confidentiality clauses attached to these settlements prevents care leaver organisations getting a clear picture of the extent and nature of redress offered in Victoria. In turn, they prevent others from

(a) learning what principles were applied; and

(b) assessing potential claims against the merits of claims that have succeeded.

Confidentiality clauses are often dressed up as a means of protecting the privacy of victims; but in the view of many, confidentiality requirements are designed to shield the

organisation from wider scrutiny and to discourage further similar claims.

Recommendation 3: That organisations be required to revoke any and all orders that have required survivors to be silent, and undertake not to require silence in future cases.

23. By contrast, we know that some churches tell claimants that they do not need independent legal advice. They then ask claimants to sign complex legal documents waiving their rights, to sign deeds of release and to accept settlement sums without recourse to any knowledge of other settlements in similar cases. In short, victims are bluffed or intimidated into signing settlements that may not be in their best interests.

24. Current processes have been put together with the advice of paid legal counsel with significant input from their insurance companies. Survivors have not had a say in how matters should be handled and many perceive the processes to be designed to protect and maximise the interests of the church or agency at the expense of complainants.²

25. ‘In-house’ handling of allegation of rape or sexual assault is framed conceptually as a transgression rather than as a crime. More often than not, churches fail in their first duty - to care for and support the vulnerable. The churches spend a considerable amount of money defending their clergy and other employees. It is reported, for example, that the Christian Brothers spent \$1.6 million on defending the paedophile Brother Best but they spent next to nothing on assisting the victims of Brother Best.

26. In treating crimes against children ‘in-house’, church leaders fail to call in the police when crimes come to their attention. Intentionally or otherwise, churches conceal rape and sexual assault on children in the vain belief that they knew best how to handle these crimes. In this system, crimes are institutionally hidden, and offenders too often get off scot-free. To quote Mr Baillieu again: “All criminal activities involving the abuse of children must be fully investigated and perpetrators brought to justice — regardless of when that abuse took place” (Victorian House of Assembly, 9 August 2006).

27. In his book, *The Case of the Pope: Vatican accountability for human rights abuse* (Penguin Books, 2010), Geoffrey Robertson QC offers the following strong advice to the hierarchy of the Roman Catholic Church but in some respects there would be wider application and should be seen by this inquiry to have considerable merit.

- The church must abandon its claim to judge paedophile priests under church law.
- All credible allegations must be put into the hands of the police on the spot.
- Every priest convicted of rape or sexual assault must be defrocked.
- The Church must show more respect for victims and their families and help the healing of those who are damaged.

² See e.g. a case where the Catholic Church abused a complainant’s privacy by forwarding his complaint to Melbourne Response against his explicit wishes. The Church used a ‘small business’ loophole in the *Privacy Act* to exempt itself from the abuse of privacy complaint: <http://www.theage.com.au/victoria/abuse-agency-clear-on-loophole-20120312-1uwl5.html>

- All priests must have a duty to blow the whistle when they know of an offence by a fellow priest and such whistle-blowers must be congratulated and supported rather than treated as traitors to the Church.
- The Church should suspend judgment until a court had decided the matter but then help any defrocked priest who seeks redemption.
- Opportunities for priests to succumb to temptation must be reduced.

Recommendation 4: That churches acknowledge and admit their culpability in knowingly transferring paedophile priests and other employees to other positions giving them access to vulnerable children resulting in additional abuse.

Recommendation 5: That churches work with survivor advocacy groups to introduce just, honourable and transparent processes for handling allegations of rape and sexual abuse.

Recommendation 6: That the Victorian government take whatever steps are necessary to establish at law and in practice that crimes against children are not private matters for churches and CSOs to deal with as they see fit and that there should be no discretionary power available to these bodies to enable them to indulge themselves in this manner.

F. THE LEGALISTIC CASE-BY-CASE BASIS FOR RIGHTING THE WRONGS IS NOT WORKING

28. Successive Victorian governments have told claimants to prosecute their claims through the courts on a case-by-case basis. (See Hansard 10 August 2006 ASSEMBLY, 2770.) This position is callous and cynical. Governments know that there are massive impediments and disincentives confronting anyone trying to get their complaints heard in the courts. Some of these are discussed below.

29. Government agencies, CSOs and churches say they tell victims of childhood rape and sexual assault to go to the police. But the reality is that it takes a great deal of courage, resourcefulness and support for a person to be able to decide to go through that very difficult process and into the courts. Some survivors report that they get as far as the police station but pull back at the last minute because of their fear of authority and their doubts that they will be believed. Moreover, there are many anecdotal reports that police sometimes do not take complaints seriously or consider the prospects of a conviction almost impossible and therefore not worth their time.

30. It also took a great deal of courage for children – more than some possessed at the time - to raise allegations of sexual crimes against a member of the clergy or any other person in a position of power and authority. A study of allegations in the Anglican Church of Australia (Patrick Parkinson, Kim Oates and Amanda Jayakody, ‘Breaking the

long silence: Reports of child sexual abuse in the Anglican Church of Australia', August 2010: <http://ssrn.com/abstract=1666566>) revealed that

On average, it took men 25 years to bring forward a complaint, compared with 18 years for women. Males were also less likely than females to report the abuse during childhood. Likely reasons for delay in reporting included threats made at the time, and lack of family support for the complainant, particularly boys.

31. We also know from consistent evidence from survivors' accounts that children who were raped or assaulted while in institutions were denounced as liars and were often severely punished for raising the matter. As children, they were powerless to take their complaint to the police. This usually means that long periods of time go by before allegations are raised. In these circumstances, it is totally unreasonable to apply normal limitations on victims when it is patently obvious that it can take a survivor many years before they are psychologically strong enough to take action.

32. As adults intent upon being heard and having their stories believed, survivors are usually put through a distressful grilling aimed not at finding the truth but finding holes in their claims. They are obliged to relive the total experience and are often re-traumatised by bearing the onus of meeting exacting demands for documentary evidence, despite the fact that the legal responsibility for managing the records that were kept on their childhood rests with government, churches and other non-government organisations. The aggression of defence teams adds unwanted and unwarranted stress to the initial and ongoing trauma.

Recommendation 7: That organisations defending allegations of child rape and assault should immediately stop aggressive and intimidatory 'hard ball' tactics.

33. As if the psychological pain of running sensitive and often harrowing details of the story in an 'hard ball' adversarial environment is not enough, there is also the burden of fear of the costs and legal fees. Invariably the people CLAN has supported in these matters are in the lowest-income bracket and can't afford to run a case.

34. A particular impediment to legal action is placed in front of claimants by churches that use or threaten to use

(a) the Ellis defence which rules that the church is not a legal entity capable of being sued; and

(b) the claim that clergy are not employees of the church and that therefore the church carries no vicarious liability for the sexual abuse of its clergy or other officers.³

35. Another serious impediment is the difficulty of proving injury and liability through causation given the passage of time where witnesses (where they existed in what was

³ This position has recently been successfully challenged in the UK where a Court of Appeal has confirmed that the church can be held liable for the negligent acts of a priest it has appointed. JEG v The Trustees of the Portsmouth Roman Catholic Diocesan [2012] EWCA Civ 938

overwhelmingly a secretive offence) are difficult to locate and memories are inconsistent. In almost all instances, the only witnesses to rape or assault are the offender and the victim. On all the evidence, Parkinson, Oates and Jayakody (2010: 24) conclude that “Contrary to widespread belief, children rarely make false accusations of sexual abuse.”

36. The difficulty of proving a case is exacerbated by the problems of accessing documentary evidence when discovery of documents is denied for a variety of stated reasons including claims that documents have been lost or destroyed or simply do not exist. (I add further comment on this issue below.)

37. The need for a compensation fund has been acknowledged elsewhere overseas (in Ireland, Canada and parts of the US) and in Australia (in Queensland, Tasmania and Western Australia, with a more limited arrangement in South Australia). In a letter to Ms Angela Sdrinis of Ryan Carlisle Thomas dated 21 May 2007, Mr Peter Ryan (Leader of the Nationals) wrote:

Establishing an appropriate compensation fund for former state wards is the just, honourable and equitable thing for the Victorian government to do. (Quoted in Hansard, 9 November 2011 COUNCIL, 4398)

‘Just, honourable and equitable’. Why do we use such words if we then take no action?

Recommendation 8: That the Victorian government abandon its policy of treating allegations of child rape and sexual assault on a case-by-case basis and, in conjunction with churches and CSOs, develop a comprehensive non-adversarial redress scheme.

Recommendation 9: That laws related to reporting suspected child rape and sexual assault be applied without exception and that churches and CSOs be given no discretionary powers to avoid mandatory reporting of all allegations.

F. THERE ARE MAJOR PROBLEMS IN GAINING ACCESS TO THE RECORDS NECESSARY IN THE PURSUIT OF LITIGATION

38. The recent report by the Ombudsman on his *Own motion investigation into the management and storage of ward records by the Department of Human Services* (February 2012) showed that poor record keeping impedes both FOI and legal discovery. It is commonly believed by survivors that the loss or destruction of records, or the withholding of the records, is deliberate although the Ombudsman did not go that far.

39. In his report (2012) the Ombudsman said that government agencies had been provided with advice in 2007 on the ‘*Crimes (Document Destruction) Act 2006 – Implications for government recordkeeping*’ (PROA 06/18, April 2007). The Keeper of Public Records stated:

[L]egal discovery should not be impeded by poor document organisation making things hard to find. Documents should not become unavailable by virtue of being “lost in the system”.

40. A recent report by the Victorian Auditor-General (2012) gave an illustration of the problem:

For many years records relating to a particular boys' home, where some wards of the state were housed, could not be found at DHS's records storage facility. DHS believed these records were no longer in existence. Consequently, while applicants received their ward files, no additional records regarding this boys' home were able to be provided. Recently, a number of records relating specifically to this boys' home were located at DHS's records storage facility. FIND has since received a number of requests for these records, which have subsequently been provided to these applicants (Freedom of Information, April 2012, Section 4.6.2).

41. The Auditor-General reported that in the period January 2008 to December 2010, some 21 per cent of DHS's ward of the state hardcopy records could not be located in response to FOI requests. That means that nearly 400 clients were not able to access personal information in that period. And among these would be people who were raped and sexually assaulted as children – and an unknown number who may have been considering legal action.

42. The Ombudsman found that DHS has a large quantity of historical records that it has not inspected or indexed. Despite having had these records in its archives for over 15 years the Department has only indexed and catalogued records relating to 26 of the 150 plus years worth of records relating to wards and institutions it holds. Moreover, some records are held in inadequate storage facilities, subject to flooding and rat infestation.

43. The Ombudsman further found that a collection of 48 boxes, thought to have contained only administration files, were marked for destruction. An inspection of the first six of these boxes revealed 2,744 references to individual wards and seven documents relating to the alleged abuse of wards. Another collection of 100 boxes of records found by DHS in 2008 have not been opened because, it is said, DHS does not have the resources to examine them.

44. The Ombudsman's investigators viewed a sample of records at the Bourke Street repository in December 2011.

Amongst these records were documents relating to the investigation of sexual assault allegations made against a staff member of a former home. The documents contained details of the allegations, police statements of the wards involved, and the response of the relevant home and authorities (para. 70).

45. Lest this be taken to be an aberration, the Ombudsman reported (in the plural) that

My investigators also identified critical incident reports (sexual abuse) from other homes amongst another recently discovered collection of former ward records (para. 72).

46. Under the *Evidence (Document Unavailability) Act 2006* every organisation has a responsibility to have document management systems sufficient to the task of locating and providing evidence in litigation. Under the Act, inadequate document retention policies or document classification does not excuse the unavailability of documents in court. Yet potential litigants are often unable to have their case heard – or are discouraged from doing so - through lack of access to relevant documents.

47. There is also great confusion about how people exercise their right to their personal records especially when they were a client of both DHS and one or more CSOs. In response to a draft of the Ombudsman’s report (2012) DHS stated:

While the department has previously accepted records from closed institutions, records created by external agencies or contractors only become public records when they are received and owned by the department. As such, the department does not have a legal responsibility to manage or retrieve these records, especially where the agencies continue to exist (p.22).

48. In direct contradiction, the Auditor-General pointed out (at 4.5.1) that

DHS mistakenly considers that because it does not create, receive or store its CSOs’ records, these records are not subject to DHS’s obligations under the Act. DHS instructs clients of CSOs who want to access their records to approach the CSO directly...

DHS’s current practice is inappropriate and contrary to the Act, DOJ guidance and its own FOI procedures manual...

49. Despite this clear advice, DHS continues to direct former residents of non-government institutions to apply to CSOs including church organisations for their personal records. For their part, CSOs generally believe they are not bound by FOI law but act only under the *Information Privacy Act 2000*.

50. In some cases, this apparently unlawful position requires people who were raped or sexually assaulted to go back to the place where they were violated to seek their personal records.

Recommendation 10: That as a matter of urgency DHS and CSOs in receipt of government funds, past or present, develop a set of arrangements whereby former wards seeking their record can do so following a single application.

51. In addition, the widespread redaction of information about third parties mentioned in personal files under section 33(1) of the *FOI Act 1982* constitutes a massive barrier to resolving important matters. Former wards often want their records precisely for the purpose of getting information about other people such as the identity of their ‘carers’ who are also sometimes their abusers and other people who came into their lives whilst they were children.

52. In her speech rebutting a motion on redress, Mrs Andrea Coote M.L.C. raised an obvious but very telling question: *Why would the very torturers who were carrying out what was morally indefensible have kept a record of this?* (*Hansard*, 9 November 2011 COUNCIL, 4391).

53. Based on her experience with hundreds of clients and having read nearly 1,000 ward files, Solicitor Angela Sdrinis, a specialist in personal injuries claims, concludes that:

...the biggest complaint of claimants is that the records that are kept are a distortion of the truth, downright lies or a complete failure to document significant events such as abuse and/or complaints of abuse...

*Further, the lack of records and documented information contributes to the difficulties that are faced in litigating claims for damages for people abused in care. This is because it is obviously harder to prove allegations where no documentary evidence exists but also because where documentary evidence does exist, and claimants believe it is either false or does not tell the whole truth, proving the contrary can be virtually impossible to do so many years after the events. In other words, the written word becomes the 'truth' and carries more weight in a court of law, than the claimant's own evidence ('Getting records from the gatekeeper', *IQ: The RIM Quarterly*, Vol. 28, Issue 2, May 2012, pp. 38-40)*

54. These are not matters that we have only just come to understand. We have been warned about these matters for decades, but whether through institutional inertia, lack of care or a failure of will, we seem unable to learn from the mistakes of the past. The *Report of the Committee of Enquiry into Child Care Services in Victoria* (Norgard report) stated as early as 1976 that:

The Social Welfare Department's present provisions for record-keeping and for reviewing the progress of its wards require thorough overhaul. Inefficiency in these fields can result in real - sometimes permanent - harm to individuals.

Recommendation 11: That the Victorian government act without further delay on the recommendations of the Ombudsman and the Auditor-General in respect of historic personal records (see details at the end of this submission).

Recommendation 12: That the Attorney-General institute a sweeping review of the legislative framework around the right of former wards to gain access to their personal records of their time in 'care'.

H. RECOMMENDED ACTION TO IMPROVE THE CURRENT SITUATION AND PREVENT CHILD SEXUAL ABUSE INTO THE FUTURE

55. The one thing we are not short of is sound advice. We are short on action. In addition to the recommendations I have made throughout the text, I draw to the attention of the Committee key recommendations from the body of existing recommendations that should be supported and implemented.

Recommendation 13: That the Victorian government strongly endorse

Recommendation 7 of the Senate Committee's *Forgotten Australians Report* (2004):

That all internal Church and agency-related processes for handling abuse allegations ensure that:

- *informal, reconciliation-type processes be available whereby complainants can meet with Church officials to discuss complaints and resolve grievances without recourse to more formal processes, the aim being to promote reconciliation and healing;*
- *where possible, there be independent input into the appointment of key personnel operating the schemes;*
- *a full range of support and other services be offered as part of compensation/reparation packages, including monetary compensation;*
- *terms of settlement do not impose confidentiality clauses on complainants;*
- *internal review procedures be improved, including the appointment of external appointees independent of the respective Church or agency to conduct reviews; and information on complaints procedures is widely disseminated, including on Churches' websites.*

Recommendation 14: That the Victorian government strongly endorse the following recommendations of the Ombudsman's Investigation into the Storage and Management of Ward Records by the Department of Human Services (March 2012).

1. In consultation with the Keeper of the Public Records and relevant stakeholders, develop a three year plan with specific actions, timelines, measures of progress and funding strategies for the identification, indexing, conservation, storage, management and provision of ready digital access for all records relating to former wards of the State of Victoria.

2. Include within the plan priorities for action where the documents may be at risk and/or may need to be readily accessible for any known, pending civil proceedings and/or are being sought by former wards with foreshortened life expectancy.

3. Communicate the discovery of any further collections of records relating to former wards and institutions, to relevant stakeholders and support groups and via the department's website and the Fin & Connect (formerly Pathways) website.

4. Provide for the relocation of records of wards to specific purpose document archival storage facilities.

5. Negotiate agreements with each non-government agency holding records of former wards of the state in order to either:

- *identify and index all such records and hand them to the department for further conservation and management; or*
- *maintain them and provide assured access under protocols formally*

agreed with the department.

6. Publish the three year plan on its website.

Recommendation 15: That the Victorian government strongly endorse the recommendation from the Auditor-General Victoria, *Freedom of Information*, (April 2012)

The Department of Human Services should:

- *improve its record management practices to minimise loss of documents and enhance access to information*
- *cease its practice of using section 22(6) for clients who have little or no money and are seeking their own records*
- *include community service organisations' records when processing freedom of information applications*
- *improve its method of prioritising freedom of information requests.*