

# Towards Healing: Issues Paper 2

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## **Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse**

**13 September 2013**

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## Acknowledgements

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## Executive Summary

1. The Law Council has considered the Towards Healing process with careful regard to the serious nature, and the scale of the abuse suffered by children while in the care of the Catholic Church (the Church), as well as the ongoing trauma for victims and their families.
2. The Law Council's submission identifies a number of significant concerns about the Towards Healing process. These include concerns regarding:
  - (a) the reported experiences of victims under the process;
  - (b) the need to ensure that relevant persons understand the full range of criminal offences which may arise in cases of abuse, so that allegations of criminal conduct are appropriately referred to the criminal justice system;
  - (c) the extent to which principles of procedural fairness are applied, particularly in relation to the independence of decision-making;
  - (d) the extent to which the privilege against self-incrimination and the accused's right to silence are respected;
  - (e) the lack of clearly defined standards of proof against which decisions are made, and the potential for inconsistent outcomes to occur as a result;
  - (f) the lack of specific references to the complainant accessing independent legal advice at all stages of the process;
  - (g) the limitations on accountability and transparency with respect to the decisions taken, and the outcomes involved;
  - (h) the extent to which Towards Healing provides for independent review of the decision, and the process by which review is undertaken; and
  - (i) the relationship between participation in the Towards Healing process and the rights of victims to access the civil and criminal justice systems in Australia.
3. The Law Council notes that there is a need to amend and strengthen the Towards Healing process in a manner which specifically addresses each of these concerns. It makes a number of recommendations throughout this submission in this regard.
4. In particular, the Law Council refers to the recommendations by one of its constituent bodies, the Law Institute of Victoria (LIV) for an external independent statutory body which would provide an external review mechanism for internal response processes of religious and other non-government organisations, based on principles of restorative justice.
5. The Law Council also refers to another of its constituent bodies, the Law Society of South Australia's (LSSA's) recommendation that the Royal Commission should itself consider offering a separate "truth and reconciliation" forum for victims of institutional child abuse, in order to support the process of acknowledgment, apology and healing.
6. Finally, the Law Council has also highlighted the importance of the Royal Commission separately investigating the barriers to civil and criminal justice for children who have suffered institutional sexual abuse in a further Issues Paper.

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## Introduction

7. The Law Council is pleased to provide this submission in response to *Issues Paper 2: Towards Healing* (the Issues Paper), which was released on 9 July 2013 by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission).
8. The Law Council strongly supports the establishment of the Royal Commission, which provides an important opportunity for Australians to better understand:
  - (a) the experiences of people who have been affected by child sexual abuse within institutional contexts;
  - (b) what should be done by institutions and governments to better protect children against such abuse in the future;
  - (c) what should be done to respond appropriately to child sexual abuse in institutional contexts; and
  - (d) what institutions and governments should do to address or alleviate the impact of past and future child sexual abuse in institutional contexts.
9. The Law Council previously made submissions regarding:
  - (a) the Australian Government's consultation regarding the Royal Commission's establishment on 28 November 2012;<sup>1</sup>
  - (b) the Royal Commission's Draft Practice Guidelines on 19 April 2013;<sup>2</sup> and
  - (c) the Royal Commission's Issues Paper 1: Working with Children Checks on 12 August 2013.
10. The Law Council represents around 60,000 Australian lawyers through its constituent bodies: the State and Territory Law Societies and Bar Associations, as well as the Large Law Firm Group. The Law Council also has a number of specialist sections consisting of individual members of the legal profession with a particular interest in specific areas of law or legal practice. These sections are the Business Law Section, the Family Law Section, the Federal Litigation Section, the International Law Section and the Legal Practice Section. Further details of the Law Council's structure and aims are included at Attachment A.

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<sup>1</sup> Law Council of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse: Consultation Paper: Submission to the Secretariat, Royal Commission into Child Sexual Abuse*, 28 November 2012, available at <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2600-2699/2664%20-%20Royal%20Commission%20into%20Institutional%20Responses%20to%20Child%20Sexual%20Abuse%20-%20Consultation%20Paper.pdf>

<sup>2</sup> Law Council of Australia, *Royal Commission into Institutional Responses to Child Sexual Abuse: Submission regarding Draft Practice Guidelines*, 19 April 2013, available at: <http://www1.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2700-/2713%20-%20Draft%20Practice%20Guidelines.pdf>

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## Background

### Issues Paper

11. The Issues Paper notes that the *Towards Healing: Principles and Procedures in Responding to Complaints of Sexual Abuse against Personnel of the Catholic Church in Australia* (Towards Healing) document was adopted by the Australian Catholic Bishops Conference and Catholic Religious Australia in 1996.<sup>3</sup> It is used by all Catholic dioceses and religious orders in Australia excluding the Melbourne Archdiocese, which has adopted the *Melbourne Response* (the Melbourne Response).<sup>4</sup>
12. The *Melbourne Response* was introduced in 1996, prior to the introduction of Towards Healing and reflects the principles that are set out in Towards Healing.
13. The Issues Paper notes that the Royal Commission is interested in hearing from people who have engaged in the Towards Healing process, particularly in:
  - (a) the experience of victims who have engaged in the Towards Healing process;
  - (b) the principles and procedures of Towards Healing as instructions for the Church authorities dealing with complaints and redress regarding victims of child sexual abuse;
  - (c) the principles and procedures of Towards Healing relating to the accused and particularly the responses and outcomes available;
  - (d) the engagement and accountability of institutions and responsible authorities of the Church in the Towards Healing process;
  - (e) the selection criteria, if any, which should be used to employ or engage personnel including assessors and facilitators involved in Towards Healing, and their selection, appointment and engagement and manner in which conflicts of interest are dealt with;
  - (f) the relationship between participation in the Towards Healing process and the rights of victims to access the civil and criminal justice systems in Australia;
  - (g) the conduct of investigations, including the engagement with the victims, the accused and the institution or responsible authority;
  - (h) the application of confidentiality to any aspect of the Towards Healing process and the persons subject to any applicable confidentiality;
  - (i) the standard of proof applied during the Towards Healing process;
  - (j) the role and participation of lawyers, insurers and other third parties in the Towards Healing procedure and whether such involvement assists or hinders the process;

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<sup>3</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing: Principles and Procedures in Responding to Complaints of Abuse against Personnel of the Catholic Church in Australia*, 2010

<sup>4</sup> Information about the Melbourne Response, which has been established by the Catholic Archdiocese of Melbourne, is available at: <http://www.cam.org.au/Melbourne-Response/Melbourne-Response>

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- (k) the sufficiency of the guidelines in relation to referral of matters to police;
  - (l) the role of canon law in Towards Healing;
  - (m) the options for redress under Towards Healing, in particular:
    - i) The circumstances in which financial assistance may be paid;
    - ii) The level of monetary payments and how they are determined;
    - iii) Other forms of financial support;
    - iv) The apologies or acknowledgements which are provided to victims; and
    - v) The conditions imposed including any confidentiality agreements;
  - (n) the nature and extent of the review process available; and
  - (o) does Towards Healing assist in the prevention of child sexual abuse within institutions of the Church?

14. The Law Council's submission responds to several of these questions. In particular, it draws upon the work of one of its constituent bodies, the Law Institute of Victoria (LIV), in responding to the recent Victorian Parliament Family and Community Development Committee's *Inquiry into the handling of child abuse by religious and other organisations* (the Victorian Inquiry),<sup>5</sup> which is due to report on 15 November 2013. This inquiry followed the *Protecting Victoria's Vulnerable Children Inquiry* (the Cummins Inquiry), which reported to the Victorian Government on 27 January 2012.<sup>6</sup> In its submission to the Victorian Inquiry,<sup>7</sup> the LIV has noted the relevant experience of its legal practitioner members, including acting as representatives in matters relating to criminal abuse of children by personnel in religious and other non-government organisations.<sup>8</sup>

#### Key aspects of Towards Healing

15. In addressing the Issues Paper, the Law Council makes the following observations about key aspects of Towards Healing.

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<sup>5</sup> Parliament of Victoria, Family and Community Development Committee, *Inquiry into the handling of child abuse by religious and other organisations*, referred 17 April 2012, information available at: <http://www.parliament.vic.gov.au/fcdc/article/1788>

<sup>6</sup> The Honourable Philip Cummins (Chair), Emeritus Professor Dorothy Scott OAM and Mr Bill Scales AO, *Report of the Protecting Victoria's Vulnerable Children Inquiry*, 17 January 2012, available at: [http://www.childprotectioninquiry.vic.gov.au/images/stories/inquiry/volume1/cpi%207649%20web-pdf%20volume%201%20protecting%20victoria\\_s%20vulnerable%20children\\_%20inquiry\\_bm.2.pdf](http://www.childprotectioninquiry.vic.gov.au/images/stories/inquiry/volume1/cpi%207649%20web-pdf%20volume%201%20protecting%20victoria_s%20vulnerable%20children_%20inquiry_bm.2.pdf)

<sup>7</sup> Law Institute of Victoria, *Submission to the Parliament of Victoria, Family and Community Development Committee regarding its Inquiry into the Processes by which Religious and other Non-Government Organisations Respond to the Criminal Abuse of Children by Personnel within their Organisations*, 21 September 2012, and Supplementary Submission, 28 February 2013, both available at: <http://www.parliament.vic.gov.au/fcdc/article/1789>

<sup>8</sup> The LIV emphasises that its members may have been constrained from providing details relevant to the terms of reference due to strict confidentiality agreements they have been required to sign when settlement has been obtained through an internal complaints process of a given religious organisation or in a civil law action. The comments provided in relation to private complaints processes cannot therefore be directly attributed to the Towards Healing or the Melbourne Response, and unless specified, form a reflection on the operation of internal complaints processes generally.

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16. Firstly, Towards Healing sets out the principles that must form the basis of the Church's response to complaints of abuse (the Principles).
17. The kinds of "abuse"<sup>9</sup> to which it applies are broader than the scope of the behaviour being investigated by the Royal Commission, which is concerned with institutional responses to the sexual abuse of children. Towards Healing applies to:
- (a) the physical and emotional abuse towards a child or a young person by clergy, religious and other Church personnel in positions of pastoral care;<sup>10</sup> and
  - (b) the sexual abuse of people in pastoral care.<sup>11</sup> The Law Council notes that this could clearly apply to victims who are adults at the time of the abuse, as well as children.
18. The Principles emphasise the vulnerable position of victims, and the effects of abuse, as well as the context in which offences may have occurred. They commit the Church to strive for seven things in particular:
- (a) truth;
  - (b) humility;
  - (c) healing for victims;
  - (d) assistance to other persons affected;
  - (e) a just response to those accused;
  - (f) an effective response to those who are guilty of abuse, and
  - (g) the prevention of abuse.<sup>12</sup>
19. Secondly, Towards Healing sets out the procedures to be followed in responding to all individual complaints of abuse by Church personnel (the Procedures).
20. The Procedures address each stage of the complaints process, including:
- (a) receiving a complaint;
  - (b) responding to a complaint;
  - (c) selecting the appropriate process for investigating the complaint;
  - (d) assessment;
  - (e) determining outcomes relating to the victim (which may include an apology, counselling services or counselling costs, and financial assistance or reparation);
  - (f) determining outcomes relating to the accused;
  - (g) conducting reviews of the process and findings; and

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<sup>9</sup> The definition of "abuse" in Towards Healing is discussed further below.

<sup>10</sup> Towards Healing, clause 5

<sup>11</sup> *Ibid.* clauses 1-4

<sup>12</sup> *Ibid.* clauses 13-33



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- (h) implementing preventative strategies.

21. The structures and personnel which oversee Towards Healing are as follows:

- (a) a National Committee for Professional Standards (the National Committee), which is jointly established by the Australian Catholic Bishops Conference (ACBC) and Catholic Religious Australia (CRA), oversees the development of policy, principles and procedures in responding to complaints of abuse;<sup>13</sup>
- (b) a Professional Standards Resource Group (Resource Group) is appointed in each State and the Northern Territory by the bishops and leaders of the Church's religious institutes. It consists of up to ten persons of diverse backgrounds and faith traditions, and must include at least one priest or religious. The Resource Group has an advisory role in matters concerning professional standards to all Church bodies in the States or Territory. It also appoints contact persons to receive complaints. Such contact persons may also act as support persons for complainants. It also maintains lists of persons who may act as assessors and facilitators (see below);<sup>14</sup>
- (c) a Director of Professional Standards (the Director) in each State and Territory with key responsibility for managing specific complaints and for appointing assessors. This person is jointly selected by the bishops and leaders of religious institutes and is employed by the Church;<sup>15</sup>
- (d) the Director appoints assessors drawn from a list maintained by the Resource Group.<sup>16</sup> Their role is to investigate and provide a report and recommendations to the Church Authority and the Director. They must be independent of the Church Authority, the complainant and the accused. The ultimate discretion rests with the Church Authority as to whether it is satisfied with the truth of the complaint, and how it will respond to the needs of the victim;
- (e) a facilitator assists the Church Authority and the victim to agree on the Authority's response to the victim. The facilitator is drawn from the panel maintained by the relevant Resource Group or is a qualified mediator. The Church Authority and the victim must agree on who the facilitator should be. If they cannot agree, the National Committee's CEO appoints the facilitator;<sup>17</sup>
- (f) A Consultative Panel is also constituted for each diocesan bishop and religious leader to advise and assist him or her at significant stages during the Procedures.<sup>18</sup> It consist of at least five members who provide necessary expertise, experience and impartiality and must be consulted when a priest or religious is charged with a criminal offence; when any decision is made concerning whether a person constitutes an "unacceptable risk" to children, young people and vulnerable persons; and at the conclusion of the facilitation process in relation to outcomes for the victim and the accused; and
- (g) a National Review Panel is appointed to conduct independent reviews of the process undertaken by the facilitator and the findings of the assessors. It is

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<sup>13</sup> *Ibid.* clause 35.1

<sup>14</sup> *Ibid.* clause 35.2

<sup>15</sup> *Ibid.* clause 35.3

<sup>16</sup> *Ibid.* clause 40.1

<sup>17</sup> *Ibid.* clauses 35.5 and 41

<sup>18</sup> *Ibid.* clause 35.8

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drawn from the wider Australian community and is appointed by the National Committee.<sup>19</sup>

22. Towards Healing provides that the complainant is the person who has alleged abuse against Church personnel. In most, but not all cases, the complainant will also be the "victim" and this is to be understood in the document unless the context suggests otherwise.<sup>20</sup>
23. The Procedures include certain requirements which are designed to support victims, and to respect both the victims' and the accused persons' rights. These include access to support persons, procedural fairness requirements, and mechanisms to ensure that an accused person is presumed innocent until proven guilty. Several of these requirements are discussed in more detail below.
24. Towards Healing provides that the Procedures apply where a complainant seeks a response from the Church regarding alleged abuse by present or former Church personnel. The complainant must choose to use the Procedures. If the complainant chooses to be represented by a lawyer in seeking compensation from the Church and is not seeking any form of pastoral support or other engagement with the Church, then the matter proceeds outside of Towards Healing by the normal means appropriate to the resolution of civil claims.<sup>21</sup>
25. When a complaint is made, the Procedures require that consideration be given upfront to whether it concerns an alleged crime, as follows:
- (a) After receiving a complaint, the Director or contact person must determine whether it concerns an alleged crime. Where an alleged crime is involved, the Director or contact person must explain to the complainant that the Church has a strong preference that the allegation should be referred to the police and must also explain any mandatory reporting requirements;<sup>22</sup>
  - (b) If the complainant takes the matter to the police, the Director may make recommendations to the Church Authority concerning the funding of counselling or other such assistance for the complainant pending the outcome of the criminal justice process. The complainant must then be advised that he or she may approach the Church again under Towards Healing when the criminal justice process has been concluded;<sup>23</sup>
  - (c) If reporting is not mandatory and the complainant does not wish to go to the police, the matter should not proceed to assessment under Towards Healing unless the complainant's intention not to go to the police has been recorded and the complainant has signed the record<sup>24</sup> Church personnel are also required to pass relevant details of an alleged criminal offence to the police other than those identifying the complainant. They are also required to comply with any statutory obligations relating to mandatory reporting and knowledge of criminal offences;<sup>25</sup>

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<sup>19</sup> *Ibid.* clause 35.9

<sup>20</sup> *Ibid.* page 4

<sup>21</sup> Towards Healing emphasises that the Church Authority must endeavour to act with a concern for the wellbeing of the complainant in seeking to resolve the civil claim.

<sup>22</sup> *Ibid.* clause 37.1

<sup>23</sup> *Ibid.* clause 37.2

<sup>24</sup> *Ibid.* clause 37.3

<sup>25</sup> *Ibid.* clause 37.3

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- (d) Where the complaint does not concern a criminal matter, or where the complainant has chosen not to report the matter to the police or other civil authority and wants to proceed under Towards Healing, or the civil authorities have decided not to take further action under the criminal law or child protection legislation,<sup>26</sup> the Director then determines whether the complaint concerns conduct which could reasonably be considered to fall within the definition of “abuse” set out in Towards Healing;<sup>27</sup>
- (e) In cases where the behaviour complained of could reasonably be considered to fall within the definition of abuse, but was not an alleged criminal offence; does not represent a serious breach of pastoral ethics; and can properly be dealt with by correction and apology, the Director shall refer the matter to the Church Authority to be dealt with by counselling, voluntary mediation with the person against whom the complaint is made, or such other process as is appropriate to address the issue;<sup>28</sup>
- (f) If the complainant chooses to use the Towards Healing process, the complaint process commences and involves assessment of the complaint.<sup>29</sup> However, if in the course of an assessment, allegations emerge for the first time, which indicate that a criminal offence may have been committed, the Church procedure should cease immediately and the matter should be dealt with in accordance with specified procedures, including the procedures in subparagraphs (a) to (c) above.<sup>30</sup>

26. The complainant is assisted by a contact person who explains the Procedures and ensures that the complainant consents to use them. The contact person may also assist the complainant to write down and sign the complaint, which is a requirement of the Procedures.<sup>31</sup> The contact person may be a member of the relevant Resource Group or a person outside the Resource Group. After the written, signed complaint is made, the Director appoints two independent assessors to investigate the facts alleged in the complaint.<sup>32</sup> The assessors interview the complainant and the accused separately, and where feasible, other persons who may be of assistance.

27. The assessors invite the complainant to have a support person present at his or her interview.<sup>33</sup> The Procedures do not specify whether this support person may be a legal practitioner or not. The assessors should also invite the accused to have a support person or a legal adviser present during his or her interview.<sup>34</sup> The latter reference to a legal adviser seems to indicate that a legal practitioner may not be a support person in the assessment process. However, this is not clear.

28. The assessors make findings on the balance of probabilities and must provide reasons for their findings. They provide a report to the Director and the Church Authority.<sup>35</sup> If

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<sup>26</sup> *Ibid.* clause 38.1

<sup>27</sup> *Ibid.* clause 38.2

<sup>28</sup> *Ibid.* clause 38.3

<sup>29</sup> The appropriate selection process may include being dealt with under employment law or canon law (*Ibid.* clause 39.1 or clause 39.2 respectively).

<sup>30</sup> *Ibid.* clause 39.4

<sup>31</sup> *Ibid.* clauses 35.4 and 36.3

<sup>32</sup> *Ibid.* clause 40.1

<sup>33</sup> *Ibid.* clause 40.3.2

<sup>34</sup> *Ibid.* clause 40.5

<sup>35</sup> *Ibid.* clause 40

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the complaint is sustained, the Church Authority must consider action under the Procedures, through the process involving a facilitator or mediator.<sup>36</sup>

29. The victim may have a support person or adviser for the facilitation or mediation between the Church Authority and the victim.<sup>37</sup> The Procedures seem to anticipate that the victim may have a legal practitioner as his or her support person or adviser as they provide that if the victim is not legally represented at any meeting for this purpose, the Church Authority should not be legally represented either.<sup>38</sup>
30. The Procedures provide that the Church Authority may respond to the victim as a result of the facilitation or mediation process by way of an apology; by providing counselling; by meeting counselling costs; and/ or by paying financial assistance or monetary reparation even if not legally liable.<sup>39</sup> However, if issues regarding monetary reparation other than counselling costs or costs for other needs of the victim cannot be resolved, they should be dealt with outside of the facilitation process.<sup>40</sup>
31. The facilitator records areas of agreement and disagreement and informs the Director of the outcome.<sup>41</sup> The Church Authority bears all the reasonable costs of the facilitation.<sup>42</sup> The Church Authority should not require the victim to sign a Deed of Release unless the complainant has had independent legal advice, or has indicated in writing that he or she declines to seek legal advice.<sup>43</sup> The Church Authority will pay the costs involved in seeking such legal advice.<sup>44</sup>
32. However, the Procedures do not require the complainant to be provided with independent legal advice when making his or her choice to use the Procedures or during the assessment process. In contrast, when the accused person is informed of the complaint, he or she must be advised of his or her right to obtain independent legal advice.<sup>45</sup> The advice shall normally be at the accused's expense, although the Church authority may make loans available or reimburse an accused for reasonable legal expenses if he or she is unable to afford legal assistance. The accused person is also invited to have a legal adviser or a support person present at his or her interview during the assessment process.<sup>46</sup>

## Comments

### Overarching comments

33. The Law Council notes that the integrity of the justice system may be circumvented or compromised by private and partial processes which are internal to organisations and that access to justice, including appropriate remedies, is a fundamental requirement of the justice system which must always be respected.

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<sup>36</sup> *Ibid.* clause 41

<sup>37</sup> *Ibid.* clause 41.4.2

<sup>38</sup> *Ibid.* footnote 3, page 25

<sup>39</sup> *Ibid.* clause 41.1

<sup>40</sup> *Ibid.* clause 41.4.3

<sup>41</sup> *Ibid.* clauses 41.4.6 and 41.4.7

<sup>42</sup> *Ibid.* clause 41.4.8

<sup>43</sup> *Ibid.* clauses 41.4.9 and 41.4.10

<sup>44</sup> Towards Healing also states that the Church Authority shall pay a contribution towards the reasonable costs of "other professional advice or assistance that has been incurred in the process of reaching an agreement." However, this does not appear to include legal advice.

<sup>45</sup> *Ibid.* clause 38.6

<sup>46</sup> *Ibid.* clause 40.5

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*Desirability of internal complaints processes*

34. As noted by the LIV, private internal complaints processes, such as Towards Healing and the Melbourne Response, operate in addition to the criminal and civil justice systems. Religious organisations are arguably required by law to establish these processes – for example, to satisfy a duty of care for the purpose of defending a negligence claim – but the processes are not regulated by government. In the absence of any clear legal requirement to establish internal complaints processes, religious organisations may justify such processes in terms of risk management, reputation and good pastoral practice.
35. Internal complaints processes can lead to a confidential settlement and may include an undertaking by the victim not to bring civil proceedings against the perpetrator or the religious organisation. In theory, they can also lead to an apology, and the removal of the perpetrator from the service of the organisation, as well as internal changes to prevent abuse occurring in the future.
36. These processes may be categorised as a form of alternative dispute resolution and are often designed to settle claims and avoid civil litigation. Internal response processes may also be characterised as complaint-handling mechanisms, and often have investigatory functions.
37. The LIV has noted that, for some victims of child abuse by religious personnel, an internal complaints process may be their preferred course for resolving their claims. They may have determined on the basis of independent and informed advice that other avenues are not available to them, for example because of legal impediments to their claims. They may also consider that an internal process will help to reconnect or maintain their relationship with their faith community. For others, exploring external avenues for recourse could be perceived as compromising their privacy and their future relationship with their faith community.
38. However, concerns have been raised about the integrity of such internal complaints processes, on the basis that “no organisation should be investigating itself”.<sup>47</sup> In the context of the Victorian Inquiry, some submissions called for the dissolution of such internal complaints processes on the basis that they are inherently flawed.<sup>48</sup> Some submissions suggested that some internal complaints processes undermine the criminal justice system.<sup>49</sup>
39. The LIV has noted that the State should not legislate to prohibit internal complaints processes. However, it has suggested a mechanism by which concerns about the Towards Healing and other internal complaints processes could be better addressed. This recommendation is discussed below, following the Law Council’s responses to several of the Issues Paper’s specific questions.

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<sup>47</sup> Ms Judy Courtin, *Sex Crimes and the Catholic Church: Will a Parliamentary Inquiry and a Royal Commission deliver justice to victims, survivors and their families?*, paper presented to the Castan Centre for Human Rights Law Conference, 25 July 2013, page 8, available at: <http://www.law.monash.edu.au/castancentre/conference/2013/courtin-paper.pdf>

<sup>48</sup> Professor Desmond Cahill, calling for the Melbourne Response to be dissolved and replaced by a process under the direction of the Office of the Child Safety Commissioner in his *Submission to the Victorian Inquiry*, August 2012, Recommendation (I)(1), p29, available at: [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/Cahill\\_Professor\\_Desmond.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Cahill_Professor_Desmond.pdf)

<sup>49</sup> For example, Victoria Police, *Submission to the Victorian Inquiry*, available at [http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/Victoria\\_Police2.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Victoria_Police2.pdf)

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## Specific comments

### The experience of victims who have engaged in the Towards Healing process

40. The Law Council notes preliminary findings reported by Ms Judy Courtin, PhD Candidate at Monash University Law School, at the recent Castan Centre for Human Rights Law Conference regarding the experiences of victims under the Towards Healing and Melbourne Response, as well as under the criminal and civil justice system.<sup>50</sup>
41. While Ms Courtin's research is yet to be finalised and is based on a limited number of interviews in Victoria and New South Wales (including 23 primary victims),<sup>51</sup> she reported that a number of victims had reported feeling re-traumatised, disempowered and isolated as a result of these processes. Some of the reasons cited by Ms Courtin are discussed in greater detail below.

### The principles and procedures of Towards Healing as instructions for Church authorities dealing with complaints and redress regarding victims of child sexual abuse

42. Some of the principles which the Law Council considers to be relevant in relation to providing instructions for Church authorities in dealing with complaints and redress regarding victims of child sexual abuse include the principles of ensuring that:
- (a) alleged crimes are investigated and prosecuted through the criminal justice system;
  - (b) procedural fairness and a fair hearing are afforded to both the complainant and the accused person;
  - (c) decision-making is accountable and transparent; and
  - (d) independent review mechanisms are provided.
43. The first two of these principles are addressed in this section, while the second two principles are addressed further below.

### *Investigation and prosecution of crimes by the State*

44. As stated above, a key guiding principle should be that the investigation and prosecution of crimes is properly a matter for the State. Any private system of investigation and redress cannot fulfil the responsibility to investigate and prosecute crime.
45. The Law Council has outlined above the obligations in Towards Healing for determining whether a complaint concerns an alleged crime, and the procedures which must be followed, depending on the result of that determination. These obligations primarily rest on Directors and contact persons, but also rest upon assessors where such allegations emerge during an assessment. The Law Council considers that it is essential that Directors, contact persons and assessors are well placed to determine whether certain conduct may be criminal, or non-criminal in nature.

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<sup>50</sup> Ms Courtin, above at n47, page 11

<sup>51</sup> *Ibid.* Nearly half of the primary victims interviewed had been through the Melbourne Response process, about 35 per cent the Towards Healing process, while just under a fifth had not been through either process.

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46. While Towards Healing provides guidance that sexual behaviour with a child or young person is always criminal behaviour, the Law Council considers that Towards Healing should make specific reference to the need for relevant persons to be trained in understanding the full range of criminal offences which may arise in cases of abuse. For example:
- (a) a person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly;<sup>52</sup>
  - (b) If a person provides assistance after the commission of the offence, he or she may be liable for the offence of being an accessory after the fact or a related offence,<sup>53</sup> and
  - (c) depending on the jurisdiction involved, there are a number of relevant crimes which may capture conduct beyond that of the perpetrator.<sup>54</sup>
47. The Law Council notes that unless the requirement for such comprehensive guidance and training is specified in Towards Healing, key personnel may be likely to make erroneous determinations, particularly with respect to the conduct of individuals other than the perpetrator, and in relation to historic events, with the result that not all relevant referrals are made to the police.
48. The Law Council further considers that a process, in which the decisions of assessors are made subject to external, independent review, may help to ensure confidence in the appropriateness of the necessary determinations (see further discussion below).
49. The Law Council notes that the Director is required to establish a protocol with the police in each relevant State or Territory to ensure that assessments do not compromise any police action.<sup>55</sup> It suggests that the Royal Commission seek police views as to the effectiveness of this protocol, and the extent to which referrals are appropriately made so that police action is triggered.

#### *Procedural fairness*

50. Although internal complaint processes have the potential to settle claims without the need for civil litigation, they should not undermine the fundamental rights to which victims would be entitled, were they to pursue their claims through civil litigation or if criminal proceedings were initiated.
51. A civil hearing includes adherence to the rules of procedural fairness.<sup>56</sup> While the precise requirements of procedural fairness will depend on the circumstances of the particular case, if victims were to pursue their claims through civil litigation, procedural fairness may include the following elements:

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<sup>52</sup> See for example, s.11.2(1) *Criminal Code Act 1995* (Cth)

<sup>53</sup> See for example, s.6 of the *Crimes Act 1914* (Cth)

<sup>54</sup> For example, in Victoria, relevant crimes under the *Crimes Act 1958* (Vic) include: aiding and abetting a crime (s.323); doing, or omitting to do, an act that aids, facilitates or contributes to in any way whatever the commission by another person of a sexual offence against a child (49A); knowing of the commission of a serious indictable offence and having information that might procure a prosecution of conviction, accepting any benefit for not disclosing that information (s326).

<sup>55</sup> Protocol, clause 37.7

<sup>56</sup> Procedural fairness is also referred to as natural justice, although procedural fairness is the preferred term: *Kioa v West* (1985) 159 CLR 550, 583-584 per Mason J, 601 per Wilson J, 631 per Deane J, *Waga v Technical & Further Education Commission* [2009] NSWCA 213, [45] per Beaten JA, Beazley and Giles JJA agreeing.

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- (a) a right to a hearing without undue delay;<sup>57</sup>
  - (b) a decision-maker who is free from any interest in the outcome of the matter in dispute, who is free from the appearance of having prejudged the matter or having any bias or prejudice;
  - (c) disclosure to parties of all relevant material to be considered,<sup>58</sup> and in particular, information adverse to their interests so as to afford a party the opportunity to respond, address, oppose or contradict the information;<sup>59</sup>
  - (d) a reasonable opportunity for each party to present their case, including the right to lead evidence and to test the opponent's evidence by cross-examination and a reasonable opportunity to obtain the services of counsel;<sup>60</sup>
  - (e) decisions made in accordance with the relevant rules of evidence, allowing all relevant and reliable evidence that is of an appropriate probative value to be admissible in court proceedings;
  - (f) the provision of reasons for the decision;<sup>61</sup>
  - (g) the right to receive assistance where self-represented so as to enable full participation and ensure a fair hearing;<sup>62</sup> and
  - (h) a right to legal representation of their choice.<sup>63</sup>

52. It is essential that internal complaints processes respect and follow procedural fairness rules, which are widely recognised as producing better decisions that are more likely to be accepted by those affected by them. Most lay people would expect that a decision maker would be impartial, base a decision on evidence and allow a person affected by the decision an opportunity to be heard.<sup>64</sup>

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<sup>57</sup> For example, s.2A of the *Administrative Appeals Tribunal Act 1975* (Cth) states that the Tribunal has a duty to act expeditiously and avoid delay. In Victoria, see s98(1)(d) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

<sup>58</sup> See Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action* (LBC Information Services, 2nd ed, 2000). See also *Sullivan v Department of Transport* (1978) 20 ALR 323; *McLachlan v Australian Securities and Investments Commission* (1999) 85 FCR 286

<sup>59</sup> Information adverse to their interests – *Sullivan v Department of Transport* (1978) 20 ALR 323; *Kioa v West* (1985) 159 CLR 550; *Ansett v Minister for Aviation* (1987) 72 ALR 469; *Applicant Veal of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 ALR 411

<sup>60</sup> *Barton v Estate Agents Licensing Authority* [1998] 1 VR 164; *Martin v Rowling* [2005] QCA 128 at [30] per Fryberg J, at [86]-[87] per Mullins J; *Adams v Wendt* (1993) 30 ALD 877

<sup>61</sup> Except in exceptional cases: *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 279; *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd (No 2)*

<sup>62</sup> *Reisner v Bratt* [2004]; *Tomasevic v Travaglini* [2007] VSC 337 per Bell J; *Minogue v HREOC* (1999) 84 FCR 438 at 445-6

<sup>63</sup> However, administrative bodies and lay tribunals may have a discretion to exclude lawyers pursuant to an empowering statute, though this refusal may in itself amount to a breach of procedural fairness: *Li Shi Ping v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 35 ALD 557; 570; *Wabz v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 204 ALR 687, 59

<sup>64</sup> There are examples of private organisations being required by legislation to comply with aspects of procedural fairness obligations, including: under the National Privacy Principles, organisations must give reasons for denying access to personal information, or refusing to amend personal information; employers are required to follow concepts of procedural fairness when taking disciplinary action and might otherwise face a claim for unfair dismissal; and private education providers are required to have an internal complaints handling and appeals process for overseas students.



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53. It is therefore useful to assess the Towards Healing process, both on the face of the documentation itself, and the way in which it is implemented, according to whether procedural fairness principles are followed.

54. Towards Healing reflects procedural fairness principles in a number of ways. For example:

- (a) the overriding principles emphasise a commitment to knowing the truth, stating that concealing the truth is unjust to victims, a disservice to accused people and damaging to the whole Church community;<sup>65</sup>
- (b) the process of assessment is required to be “as transparent as possible to all concerned”;<sup>66</sup>
- (c) for complainants, the following principles are emphasised:
  - (i) an open, sensitive compassionate response to complainants, even when it is not yet certain that allegations are accurate;<sup>67</sup>
  - (ii) the right to know the findings of the assessment and the reasons for them;<sup>68</sup>
- (d) for the accused person, the following principles are emphasised:
  - (i) the right of the accused to be presumed innocent until proven guilty;<sup>69</sup>
  - (ii) the right to be informed promptly of the nature of the complaint, and to be provided with enough detail about the complaint to be able to offer a response.<sup>70</sup>
  - (iii) the opportunity to respond to the complaint, either in an interview or in writing;<sup>71</sup>
  - (iv) the right to obtain independent legal advice, with the Church to reimburse such expenses where the accused cannot afford to pay;<sup>72</sup> and
  - (v) the right to know promptly the findings of the assessment and the reasons for them.<sup>73</sup>

55. However, Towards Healing also appears to fall short of procedural fairness standards in other respects.

56. Firstly, the independence and impartiality of decision-making appears to be somewhat compromised:

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<sup>65</sup> Protocol, clauses 13-14

<sup>66</sup> *Ibid.* clause 40.11

<sup>67</sup> *Ibid.* clauses 17-18

<sup>68</sup> *Ibid.* clause 40.9.3

<sup>69</sup> *Ibid.* clause 26

<sup>70</sup> *Ibid.* clause 38.5

<sup>71</sup> *Ibid.* clauses 38.8 and 40.4

<sup>72</sup> *Ibid.* clause 38.6

<sup>73</sup> *Ibid.* clause 40.9.3

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- (a) the person with key responsibility in each State and Territory for managing each complaints process, the Director, is appointed by the Church which is the subject of the complaints made. This appointment process gives rise to a perception of bias even if the individual Director acts independently;
  - (b) While the assessors “must be, and be seen to be, independent of the Church Authority,<sup>74</sup> the complainant and the accused”, their role is only to investigate, report and make recommendations. There is no requirement that the Church Authority adopt their recommendations;
  - (c) while the Resource Group comprises ten individuals from diverse backgrounds, it has an advisory role only; and
  - (d) The ultimate discretion rests with the Church Authority as to whether it is satisfied with the truth of the complaint, and how it will respond. The Law Council notes that the Church Authority is responsible for the Church body to which the accused person is or was connected at the time of the alleged abuse.<sup>75</sup> Again, this may give rise to concerns about possible bias.

57. Without casting impunity on any individual member of this governance framework, the Law Council notes that these factors are likely to affect community perceptions over whether justice is seen to be done, as well as whether it is done. It recognises the difficulty of any organisational internal complaints process, which is funded by the organisation being investigated, in ensuring that appropriate standards of impartiality and independence are met. However, it is concerned by the potential for conflicts of interest, and the potential effects on independent decision-making or review processes, which are inherent in the governance structure outlined above. On this basis, the Law Council considers that confidence in the process could be strengthened by an external statutory oversight body such as that recommended by the LIV.

58. Secondly, the complainant appears to be discouraged from accessing independent legal advice during the determination of his or her complaint under the Towards Healing process. This issue is discussed further below.

59. Thirdly, Towards Healing provides that a matter can be closed by the Director where “the complainant decides not to cooperate with an assessment process or in other respects does not cooperate with the Director in moving the process forward”.<sup>76</sup>

- (a) It is unclear what kind of behaviour constitutes a “lack of cooperation” by the complainant. In this regard, the Law Council considers that some explanatory notes regarding what is meant by “lack of cooperation” would be useful.

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<sup>74</sup> *Ibid.* clause 40.1. The “Church Authority” is defined in the Protocol as including “a bishop, a leader of a religious institute and the senior administrative authority of an autonomous lay organisation, and their authorised delegates, responsible for the Church body to which the accused person is or was connected at the time of the alleged abuse” (page 3).

<sup>75</sup> *Ibid.* The “Church body” is defined as a diocese, religious institute and any other juridical person, body corporate, organisation or association, including an autonomous lay organisation, that exercises pastoral ministry within, or on behalf of, the Catholic Church (page 3).

<sup>76</sup> *Ibid.* clause 40.3.6

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*Application of procedural fairness principles*

60. The above comments are principally concerned with the procedural fairness requirements contained in the Towards Healing document. However, it is essential to look beyond the documents involved, and assess the degree to which procedural fairness has been actually afforded in practice.
61. The Law Council is aware that the Towards Healing document has been reviewed a number of times and amended as a result of these reviews. However, it is unaware of any public analysis regarding the extent to which victims and persons accused are afforded procedural fairness under the Towards Healing process in practice.
62. The Law Council is, however, aware of the preliminary findings recently reported by Ms Courtin in this regard. In addition to finding that many victims feel re-traumatised, disempowered and isolated as a result of the Towards Healing and Melbourne Response processes, these findings include that:
- (a) the Towards Healing and Melbourne Response processes and personnel are not seen by the victims or legal representatives interviewed to be independent;
  - (b) While victims are actively lobbied under both the Melbourne Response and Towards Healing processes not to have a legal representative, each diocese retains its own legal team; and
  - (c) there is a discrepancy in whether monetary payments are made, and the extent of such payments, due to such decisions being at the discretion of the relevant bishop or head of the particular religious order.<sup>77</sup>

*Case Study: Melbourne Response*

63. The following case study provided by the LIV, which discusses the Melbourne Response's adherence to procedural fairness, further helps to illustrate the concerns raised above about the Towards Healing document.

*Under the scheme established by the Melbourne Response, an "Independent" Commissioner (currently one of two Senior Counsel) is appointed to enquire into and advise the Archbishop with respect to complaints of sexual and other abuse by Church persons. The Independent Commissioner may conduct hearings and is required by the Terms of Appointment to the office to observe the rules of natural justice. The Terms of Appointment do not specifically state that natural justice will be afforded to the complainant (as opposed to a priest, religious or other person required to produce to the Commissioner a document, or to answer a question), nor do they expressly state what "natural justice" should entail.*

*The Terms of Appointment acknowledge that a priest, religious, or other person required to produce to the Commissioner a document, or to answer a question, may refuse to do so on the basis of self-incrimination. They also permit the Independent Commissioner to report sexual abuse to the police, subject to a requirement that all information shall be treated as confidential and "privileged". Except to the extent that a complainant must consent to the giving of any confidential information to the police, it is not clear on whose behalf the confidentiality and privilege will be claimed.*

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<sup>77</sup> Ms Courtin, above at n47, pages 8-10

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*Victims' and their representatives reported experiences of this process have indicated failings, including a lack of independent support for victims and a lack of transparency of procedures and process.*

*... The use of the word "Commissioner" in this private context appears to be an anomaly: the term is usually associated with a high-level official appointed by government with legislated terms of reference and mechanisms to ensure public accountability and transparency, including record keeping and reporting obligations. None of these defining elements of a "Commissioner" could be said to apply to the "Independent Commissioner" under the Melbourne Response, which is a private appointment of the Melbourne Archdiocese, with no public accountability and no obligation to report publicly on activities.*

The principles and procedures of Towards Healing relating to the accused, and particularly the responses and outcomes available

64. On the face of the Towards Healing document, there appears to be a reasonable focus on respecting the accused person's rights to the presumption of innocence and procedural fairness. This need is balanced with the requirement that a person be removed from office where it is necessary to ensure children's safety, until a matter has been resolved.
65. The right of an accused person to obtain legal advice is enshrined, with the Church to fund such legal advice where the accused person is unable to do so. In addition, there is an emphasis on providing the accused person with an opportunity to respond to the complaint, and ensuring that enough detail is provided so that the complainant is able to offer a response.
66. However, the Law Council is concerned about the extent to which Towards Healing ensures that an accused person's right to silence is assured, noting that the privilege against self-incrimination in criminal proceedings, and possibly related processes, is recognised as a fundamental human right.
- (a) Together, this right and privilege reflect the rationale that the prosecution must prove guilt beyond reasonable doubt, rather than the accused needing to prove their innocence.
  - (b) Moreover, the right recognises the power imbalance that often exists between police and a suspect, and reduces the risk of a vulnerable and innocent suspect providing police with a false confession, resulting in a wrongful conviction.
67. While Towards Healing states that "an accused person may be invited to admit to an offence, but is not bound to do so, nor may an oath be administered", his or her right to silence is not explicitly outlined.<sup>78</sup>
68. The Law Council considers that internal complaints processes should explicitly recognise and give effect to both the right to silence and the privilege against self-incrimination.

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<sup>78</sup> Clause 40.4.2

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The engagement and accountability of institutions and responsible authorities of the Catholic Church in the Towards Healing process

69. As noted above, adherence to the principles of accountability and transparency of decision-making is essential to building confidence in any complaints adjudication process.
70. In this respect, the Law Council notes that information does not appear to be available about the general outcomes of the Towards Healing process.<sup>79</sup> Such information could for example include:<sup>80</sup>
- (a) the number of cases dealt with in each jurisdiction or diocese each year;
  - (b) the number of claims related to current versus historic abuse;
  - (c) how many claims were upheld or rejected;
  - (d) the immediate outcomes of the claims, including the quantum of any monetary reparations or financial assistance, and other support provided;
  - (e) the length of the assessment and facilitation process;
  - (f) the number of review processes implemented, and the results of those reviews;
  - (g) whether the Church Authority adopted the recommendations of assessors, or the Review Panel;
  - (h) the number of cases in which referrals were made to the police;
  - (i) the number of cases related to criminal or civil proceedings;
  - (j) information about the pathways pursued by complainants – for example, whether they exited Towards Healing to pursue civil proceedings, or whether under Towards Healing deeds of release, they agreed not to pursue such claims;
  - (k) how the Church dealt with alleged perpetrators while the complaint was on foot, as well as how the Church dealt with the perpetrator as a result of any claims being substantiated;
  - (l) the support provided to victims of the process, and their satisfaction with the process overall; and
  - (m) amendments to internal processes which have been implemented as a result of Towards Healing.
71. The Law Council is concerned that without such publicly available information, overall confidence in the accountability and transparency of Towards Healing may be undermined. The absence of such information may also undermine the perception

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<sup>79</sup> The Law Council understands that Towards Healing has been reviewed a number of times, with amendments made as a result. However, there does not appear to be readily available, specific information about these reviews.

<sup>80</sup> The Law Council emphasises that any reporting would need to have careful regard to issues of confidentiality and privacy.

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that the Church is openly acknowledging and learning from the wrongs which have been done to victims.

72. The LIV has emphasised that access to external review of private internal handling processes increases accountability of private organisations and facilitates adherence to procedural fairness principles. The LIV's recommendations for a statutory oversight body which would provide such a function are set out in detail below.

The relationship between participation in the Towards Healing process and the rights of victims to access the civil and criminal justice systems in Australia

73. The Law Council considers that there are two facets to this question, which involve the degree to which:

- (a) participation in the Towards Healing process affects the rights of victims to access the civil and criminal justice system;<sup>81</sup> and
- (b) the reasons why criminal and civil law actions may not be pursued or may prove unsuccessful. This may mean that victims engage in Towards Healing because of barriers to pursuing their claims within the civil and criminal justice systems.

74. With respect to the degree to which participation in Towards Healing affects the rights of victims to access the civil and criminal justice system, the Law Council notes that Towards Healing states that "No Church investigation shall be undertaken in such a manner as to interfere in any way with the proper processes of criminal or civil law". However, it also makes the following observations:

- (a) Referral of crimes to the police:
  - (i) Towards Healing may constitute an initial, less intimidating step for victims to raise complaints, and may increase their willingness to refer abuse to police and participate in subsequent proceedings.
  - (ii) However, as noted above, the Law Council considers that specific guidance and training should be referred to in Towards Healing in relation to relevant persons appropriately identifying criminal wrongdoing, particularly in relation to historic conduct or where a person has encouraged or assisted a crime.
  - (iii) In addition, a victim may feel less likely to come forward to police if he or she felt further traumatised by his or her involvement in the Towards Healing process. This may have the perverse effect of limiting the number of referrals made to the police.
  - (iv) The Law Council considers that more specific information regarding the interaction between the Towards Healing process and referrals to the police would help to address this issue.
- (b) Limitation periods –

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<sup>81</sup>In exploring this issue, it is important to acknowledge that avenues for legal redress under both criminal and civil law exist for people who have been criminally abused as children by personnel in religious organisations. These avenues are not mutually exclusive and criminal prosecutions brought on behalf of the State for offences are independent from claims for compensation that may be brought by individuals in civil proceedings.

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- (i) Many survivors of abuse may not report their experiences of abuse for lengthy periods of time after they have taken place, due to the trauma involved and the discomfort associated with recounting such incidents publicly. However, statutory limitation periods may operate to bar a person from pursuing a civil claim because of such delays (see further discussion below).
  - (ii) Where a victim makes a complaint through an internal complaints process such as Towards Healing, the time taken for this process to be completed may operate to further decrease the likelihood of falling within statutory limitation periods for a civil claim.
  - (iii) This may occur even where the Towards Healing process has not been resolved to the satisfaction of the complainant, with the result that neither the civil justice system nor Towards Healing offer any redress. The Law Council notes that the LIV has recommended to the Victorian Inquiry that where a victim makes a complaint directly to a religious organisation about abuse, the “clock” should stop for the purposes of calculating time under any applicable limitation periods in Victoria.
- (c) Deeds of release and legal advice –
- (i) As noted above, Towards Healing refers to victims signing deeds of release as one of the possible outcomes of the process. Such deeds may prevent the person from pursuing further civil action against the Church.
  - (ii) While the Law Council considers that it is appropriate to prevent ‘double dipping’, it is concerned that there is no specific provision in Towards Healing for victims to access independent legal advice until the deed of release is contemplated, rather than earlier in the process (see discussion below). This may have the effect that the victim decides to sign a deed of release rather than pursue more advantageous civil pathways, due to a lack of advice provided earlier in the process about the availability of these pathways.

75. More generally, the reasons why criminal and civil law actions might not be pursued or might be pursued unsuccessfully require consideration. Such factors may mean that victims engage in Towards Healing because they are unable to pursue actions within the civil and criminal justice systems.

76. The LIV has noted that there are many reasons why criminal and civil law actions might not be pursued or might be unsuccessful. It states that some of the barriers to criminal and civil justice are common to all cases of criminal abuse of children. These include:

- (a) *Shame or mistrust* – Victims of sexual abuse may be reluctant to report the crimes for any number of reasons, including shame or a mistrust of the criminal justice system.
- (b) *Delay and effect on proof of claim* – Complaints of sexual abuse of children are often pursued long after the time of the abuse, when the victim is an adult and psychologically capable of processing and acting on their past experiences. This delay can lead to problems in terms of proving the abuse either to a criminal or civil standard, particularly where the perpetrator is

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deceased, and civil proceedings are brought against the deceased's estate, or another person implicated in the abusive act.

- (c) *Statutory time limitations* – In the case of civil claims, statutory time limitations may operate to bar a delayed claim. Limitation periods may also be a barrier to accessing State or Territory victims' compensation schemes.
- (i) For example, in Victoria, an action for damages in respect of personal injury must generally be brought within three years from the date on which the cause of action accrued.<sup>82</sup>
  - (ii) A long stop period also exists in many jurisdictions to provide a final cut-off date for the commencement of proceedings, regardless of whether a cause of action has been discovered.<sup>83</sup> Exceptions exist in certain circumstances, allowing the time to effectively be paused for a period; however, beyond the long-stop date a claimant will require a court's permission to continue a claim.
- (d) *Access to evidence* – Noting that there is often a substantial gap between the alleged abuse and the time claimants first raise their experiences with others, the LIV's members report that it is not uncommon for documents to be lost, and witnesses to have either passed away or to have forgotten relevant events. Considering the onus of proof is on the claimant in a civil claim, this can often represent a significant obstacle to redress for legitimate claims.

77. The LIV has noted further barriers to criminal and civil justice that are specific to cases of sexual abuse of children by personnel in religious organisations. These include:

- (a) *Reluctance of victims* – For example, abused children and their families might subscribe to the faith of the religious organisation, and may not want to question or compromise people or organisations that are representative of their faith. They may also fear alienation from their faith community.
- (b) *Lack of available funds* – Where a perpetrator has taken a vow of poverty, there may be insufficient funds with which to pay damages in relation to a civil claim, and proving that an organisation or body is legally responsible for the acts of the perpetrator of the abuse may be a further obstacle, as discussed below.
- (c) *Corporate and organisational structure of religious orders and entities* – The organisational and corporate structure of most religious organisations poses a significant barrier to civil law claims. Religious organisations are typically unincorporated associations which cannot sue, or be sued. Office holders within a religious organisation may exist as corporations sole (a corporate structure effectively reduced to a single office-holder who can be liable for his or her predecessor's actions)<sup>84</sup> or may have liability only as specific individuals.

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<sup>82</sup> See for example, *Limitation of Actions Act 1958* (Vic) s.5(1AA) and Part IIA.

<sup>83</sup> Under ss.27D(1)(b), 271(1)(b) of the *Limitation of Actions Act 1958* (Vic), this is 12 years after the date of the injury, or 12 years after the claimant turned 25 in the case of a personal injury caused by a parent/guardian or a close associate of a parent/guardian, in Victoria.

<sup>84</sup> The case of *Ellis v Pell* demonstrates the complexities of suing a religious organisation with respect to sexual abuse of a child: *J Ellis v Pell and the Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2006) NSWSC 109



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- (d) *Privileges* – For example, a member of the clergy may be entitled to refuse to divulge information made during a religious confession.<sup>85</sup>
  - (e) *Vicarious liability for criminal acts* – In this respect, the LIV has noted that there is uncertainty as to whether a religious organisation is vicariously liable for criminal abuse of children by its personnel.
  - (f) *Lack of mandatory reporting requirements under the criminal justice framework* – For example, in its submission to the Victorian Inquiry, the LIV noted that under Victoria’s child protection regime certain people are obliged to report knowledge of sexual abuse of children to the Department of Human Services.<sup>86</sup> However, it emphasised the lack of mandatory reporting obligations to police rather than the Department.

78. The Law Council notes that the barriers to criminal and civil justice identified above may apply to a greater or lesser degree across Australia, depending upon the jurisdiction involved.

79. The Law Council understands that the focus of the current Issues Paper is investigating the Towards Healing process. However, it considers that this investigation should take place within the broader context of difficulties experienced by victims of abuse in successfully obtaining civil and criminal justice outcomes. Such difficulties are likely to direct victims towards engagement with the Towards Healing process, even if this is not their first choice, in the absence of effective alternatives.

80. The Law Council considers that the Royal Commission, in a subsequent Issues Paper, should focus on the barriers to civil and criminal justice which are experienced by victims of child sexual abuse within institutional organisations.

The standard of proof applied during the Towards Healing process;

81. The Law Council notes that the Towards Healing refers in a range of clauses to the need for guilt to be either admitted or proven for a complaint to be substantiated.

82. For example:

- (a) clause 19 refers to “wherever it is established, either by admission or by proof, that abuse did in fact take place”;
- (b) clause 26 states that “all persons are presumed innocent unless and until guilt is either admitted or determined in accordance with the requirements of the law governing their position;”
- (c) clause 27 refers to guilt “being admitted or proved”;
- (d) clause 40.4.1 states that an accused shall be informed that “in both civil and Church law a person is presumed innocent until proven guilty;”

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<sup>85</sup> For example, in Victoria, section 127(1) of the *Evidence Act 2008* (Vic) provides that a person who is or was a member of the clergy of any church or religious denomination is entitled in any court proceeding to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.

<sup>86</sup> Part 4.4, *Children, Youth and Families Act 2005* (Vic)

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- (e) clause 40.9 requires assessors to “make findings about whether they consider the complaint to be true on the balance of probabilities, based upon the evidence available at that time”; and
  - (f) clauses 42.5 and 42.6 refer to a person being “found guilty of abuse”.

83. There is a lack of clarity about the standard of proof in many of these clauses. This contrasts with the clear, consistent standards which apply under the criminal and civil justice systems, which generally refer to the standard of proof as either “beyond all reasonable doubt” (in criminal cases), or as “on the balance of probabilities” (in civil cases).
84. Only clause 40.9 clearly states the applicable standard of proof (“on the balance of probabilities”). The Law Council recommends that all references to proof in Towards Healing need to be similarly clear, whether they involve the civil or criminal standard.
85. Without this clarification, the Law Council notes the potential for inconsistent interpretations to arise as to the standard of proof which is required.

The role and participation of lawyers, insurers and other third parties in the Towards Healing procedure and whether such involvement assists or hinders the process

86. As noted above, the Law Council is concerned that there is no specific reference to the complainant accessing independent legal advice except in relation to a Deed of Release to be signed following the facilitation process.
87. As further noted, there is no specific reference to the complainant having a legal adviser present at his or her interview, or to his or her right to obtain independent legal advice at the complaint assessment stage. This differs from the approach taken to the accused person, who is advised of his or her rights on both counts.
88. The Law Council is concerned about the lack of specific references to independent legal advice for the complainant prior to the assessment and facilitation process and the signing of the Deed of Release.<sup>87</sup> This may impede the victim from accessing important information about the strongest legal course of action which is available to him or her, given his or her specific circumstances, while the complaint procedure is unfolding.
- (a) In a similar vein, the requirement that a complainant who, earlier in the process, chooses to be represented by a lawyer in seeking compensation, and does not seek pastoral support or other Church engagement, must proceed outside of Towards Healing, is also of concern. The Law Council queries why a complainant should be expected to seek “pastoral support or other engagement” with the Church in order to participate in the Towards Healing process, which is ostensibly focussed on ensuring healing and knowing the truth, rather than ensuring that complainants remain connected in some manner to the Church. Some victims may wish simply to obtain an acknowledgement of wrongdoing through the process and remedies offered by Towards Healing, as part of their individual healing process. This should be recognised as legitimate by Towards Healing.

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<sup>87</sup> Towards Healing does envisage that the victim may access legal advice, and have a legal adviser present, at the point of facilitation of possible outcomes. It also states that if the victim is not legally represented at the facilitation meeting, nor should a lawyer be present for the Church (41.4.2, page 25).

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- (b) In addition, the Law Council notes that for many victims, financial assistance or monetary reparation may only be possible through the Towards Healing process, given that there are fundamental difficulties in pursuing civil claims (see further discussion above). It is important that the rights of victims to obtain independent legal advice at all stages during the Towards Healing process are specifically recognised.

89. In making the above remarks, the Law Council appreciates that Towards Healing is intended to be pastoral response, whose “intent is to meet victims and survivors primarily in a pastoral relationship as opposed to an adversarial, legal approach. The intention is to focus first on the person in need rather than on the question of liability”.<sup>88</sup> However, it submits that this focus should not mean that there should be no specific references to victims accessing independent legal advice, and involving legal advisers, as part of the complaints process.

- (a) Many victims are likely to need help in navigating the complex decisions required as they participate in Towards Healing.
- (b) In addition, the fact of their abuse at the hands of the Church, which was often committed against them as children, is likely to render many people highly vulnerable in their subsequent dealings with the Church. Without assistance, they may be unlikely to negotiate effectively and on an equal footing with Church Authorities, to their own subsequent disadvantage.

90. The Law Council’s concerns are reinforced by Ms Courtin’s preliminary findings that in practice, while victims are actively lobbied under both the Melbourne Response and Towards Healing processes not to have a legal representative, each diocese retains its own legal team. Ms Courtin has further reported that victims who are legally unrepresented go through the process at a disadvantage due to marked power discrepancies.<sup>89</sup>

The sufficiency of the guidelines in relation to referral of matters to police:

91. This question has been substantially addressed under the heading, “The principles and procedures of Towards Healing as instruction for Church authorities dealing with complaints and redress regarding victims of child sexual abuse” (see “Investigation and prosecution of crimes by the State”).

The options for redress under Towards Healing

92. In particular, this question addresses:

- (a) the circumstances in which financial assistance may be paid;
- (b) the level of monetary payments and how they are determined;
- (c) other forms of financial support;
- (d) the apologies or acknowledgements which are provided to victims; and
- (e) the conditions imposed including any confidentiality agreements.

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<sup>88</sup> Truth, Justice and Healing Council, *Towards Healing*, available at <http://www.tjhcouncil.org.au/support/towards-healing.aspx>

<sup>89</sup> Ms Courtin, above at n47, pages 8-9

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93. As noted above, each Church Authority holds discretion over whether financial assistance or monetary reparations are payable to victims under Towards Healing, and the amounts payable. This raises questions about the consistency of when, and what payments are made across different claims.
94. In contrast, in civil proceedings, the application of precedents, their public nature and the reporting of significant proceedings, means that they are more likely to result in consistent outcomes overall.
95. In relation to caps on payments, while information does not appear to be generally available regarding any caps under Towards Healing, there is a cap of \$75,000 on the amount payable under the Melbourne Response.<sup>90</sup> This amount is slightly more than the maximum of \$70,000 which would be payable from the Victorian Victims of Crime Assistance Tribunal (VOCAT).<sup>91</sup> However, the Law Council notes advice from LIV members that if a person with the strongest possible claim were to succeed in a civil claim, if they had suffered a substantial loss of earnings or significant pain and suffering, the damages could exceed \$200,000.<sup>92</sup>
96. More generally, without more specific information being made available about the outcomes of the Towards Healing process, the Law Council is unable to comment on the extent to which appropriate redress appears to be offered to victims. This includes the provision of apologies, financial assistance or other support.
97. With respect to the conditions imposed, including any confidentiality agreements, the Law Council notes that Towards Healing explicitly provides that:

*Complainants shall not be required to give an undertaking which imposes upon them an obligation of silence concerning the circumstances which led them to make a complaint, as a condition of an agreement with the Church Authority.*<sup>93</sup>

#### The nature and extent of the review process available

##### *Right of independent review*

98. Within the criminal and civil justice systems, the Law Council considers that the right of independent review underpins the rule of law. In the civil justice system, for example, this means that executive decision-making should be subject to meaningful judicial and administrative review.
99. As noted above, Towards Healing enables the complainant, the accused and the Church Authority to seek a review of the process, and/or the findings of the assessment. The review is arranged by the chairperson of the National Review Panel and is intended to be “an independent evaluation, not only of whether there is substance in any of the grounds for complaint, but also whether the principles established in the first part of the document have been adhered to”.<sup>94</sup>
100. The Law Council makes the following comments about this right of review:

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<sup>90</sup> <http://www.cam.org.au/Portals/0/Documents/Melbourne-Response-2012-brochure.pdf>

<sup>91</sup> Under ss 8-8A of the Victims of Crime Assistance Act 1996 (Vic), awards of compensation are capped at \$60,000 plus an amount of \$10,000 for ‘special financial assistance’ (i.e. ‘pain and suffering’ damages).

<sup>93</sup> Clause 41.5

<sup>94</sup> Clause 44.2

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- (a) the reviewer provides a report and recommendations to the National Review Panel, which then makes recommendations to the Church Authority. Ultimately, however, the Church authority is not bound to adopt the report or recommendations;
  - (b) while the review encompasses the specific process and findings of an investigation, clause 44.2 of Towards Healing states that the review is not of the outcomes determined under parts 41 and 42, which include financial assistance or reparation. In this regard, Ms Courtin has stated that:

*“There is no internal review or appeal by Melbourne Response or Towards Healing of compensation amounts or the provision of an apology or counselling. Towards Healing does provide for a review of its process only.”<sup>95</sup>*
  - (c) the Director’s ability to close a matter where a complainant has not “cooperated” with the process appears to undermine the complainant’s right of review; and
  - (d) Towards Healing also states that the review is available for accused persons only if they “cooperated” with the assessment process. This may undermine the ability of the accused person to rely on his or her right to silence.

#### Possible Response

101. The Law Council’s submission has identified a number of significant concerns about the Towards Healing process. These include concerns regarding:

- (a) the reported experiences of victims under the process;
- (b) the need to ensure that relevant persons understand the full range of criminal offences which may arise in cases of abuse, so that allegations of criminal conduct are appropriately referred to the criminal justice system;
- (c) the extent to which principles of procedural fairness are applied, particularly in relation to the independence of decision-making;
- (d) the extent to which the privilege against self-incrimination and the accused’s right to silence are respected;
- (e) the lack of clearly defined standards of proof against which decisions are made, and the potential for inconsistent outcomes;
- (f) the lack of specific references to the complainant accessing independent legal advice at all stages of the Towards Healing process;
- (g) the limitations of the independent review process;
- (h) the limitations relating to accountability and transparency with respect to the decisions taken, and the outcomes involved; and
- (i) the relationship between participation in the Towards Healing process and the rights of victims to access the civil and criminal justice systems in Australia.

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<sup>95</sup> Ms Courtin, above at n47, page 11

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102. In response to the concerns identified above, the Law Council notes that there is a need to amend and strengthen the Towards Healing process in a manner which specifically addresses each of these concerns. It has made a number of recommendations throughout this submission in this regard.

103. More specifically, the Law Council refers to the LIV's recommendations to the Victorian Inquiry for an external independent statutory body which would provide an external review mechanism for internal response processes of religious and other non-government organisations based on principles of restorative justice.

*LIV Recommendation: External Independent Statutory Oversight Body*

104. The LIV has emphasised that:

- (a) the State can prescribe appropriate procedures for internal processes and monitor compliance with those procedures. Any existing internal complaints processes that do not meet the prescribed procedures would necessarily have to be reconstituted to comply with the procedures; and
- (b) access to external review of private internal handling processes increases accountability of private organisations and facilitates adherence to procedural fairness principles. In many settings – including discrimination law, employment law, health services, financial services and education – various complaint handling review agencies provide oversight of private sector organisations dealing with complaints.<sup>96</sup>

105. In response to the Victorian Inquiry, the LIV has further noted that there are alternative models for hearing and resolving widespread complaints of historical wrongdoing, including the appointment of independent assessors, commissions of inquiry and the regular use of informal modes of appropriate dispute resolution based on restorative justice.<sup>97</sup> Features of the alternative model advocated by the LIV for resolving historical wrongdoing include:

- (a) independence (and perceived independence) from the responsible organisations, noting that the imposition of truly independent third party umpires greatly enhances the credibility of any dispute resolution system.<sup>98</sup>
- (b) informal, appropriate dispute resolution-based processes, avoiding adding stress to what is already a difficult process for complainants.<sup>99</sup>

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<sup>96</sup> These include, for example, the Victorian Equal Opportunity and Human Rights Commission (*Equal Opportunity Act 2010* (Vic) Part 9), the Australian Human Rights Commission (*Australian Human Rights Commission Act 1986* (Cth) Part II Division 2, 3), the Overseas Students Ombudsman (*Ombudsman Act 1976* (Cth) Part IIC), the Energy and Water Ombudsman (Victoria) (Energy and Water Ombudsman of Victoria Limited Constitution cl 3), the Health Services Commissioner (*Health Services (Conciliation and Review) Act 1987* (Vic) Part 3, 4) and the Financial Services Ombudsman (Financial Ombudsman Service Constitution cl 12; Financial Ombudsman Service Terms of Reference).

<sup>97</sup> Paul Holdway and Ruth Baker 'Acting for Victims of Religious Sexual Assault: Challenges for Victorian Lawyers' November 2010) *Law Institute Journal* 50 <http://www.liv.asn.au/News-and-Publications/Law-Institute-journal/Archived-Issues/LIJ-November-2010/Acting-for-victims-of-religious-sexual-assault-cha>. See also Peter Condliffe 'Practice what you preach: using restorative justice as an alternative to clergy abuse, *ADR Bulletin of Bond University DRC* (2009) 11 (6) Vol 11 No 6 November 2009

<sup>98</sup> Graeme Orr and Joo-Cheong Tham, Work and Employment (2011) *Australian Journal of Administrative Law* 18, 12

<sup>99</sup> Chief Justice Diana Bryant and Deputy Chief Justice John Faulks, The Helping Court Comes Full Circle: The Application and Use of Therapeutic Jurisprudence in the Family Court of Australia (2007) *Journal of Judicial Administration* 17, 93

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- (c) efficient resolution of claims: civil law claims can be prolonged, particularly where a respondent seeks to obstruct or delay matters. An appropriate dispute resolution-based approach with an active mediator (or other referee) with appropriate powers can assist in overcoming delays.<sup>100</sup>
  - (d) no requirement for claimants to participate in systems or services offered by respondent institutions (such as pastoral care services) or to face the accused or perpetrator (or indeed any member of the religious organisation) in person, if it is against the victim's wishes.<sup>101</sup>
  - (e) observance of principles of procedural fairness, noting that the legitimacy of any system designed to precede the pursuit of common law rights through the courts will ultimately depend on observance of such principles.<sup>102</sup>

106. In particular, the LIV has recommended that an independent statutory oversight body should be established to provide an external review mechanism for internal response processes of religious and other non-government organisations based on principles of restorative justice. It supports such a mechanism on the basis that it would increase the accountability of private organisations and facilitate adherence to procedural fairness principles.

107. The LIV has further recommended that consideration should be given to whether the independent statutory oversight body should also be able to receive complaints directly, noting that its powers could include the issuing of guidelines for preventing abuse.

108. More specifically, in response to questions put in the Victorian Inquiry context, the LIV has submitted that:

- (a) a statutory oversight body could properly administer external review for both (a) internal response processes of religious and other non-government organisations ("procedural review"); and (b) claims for compensation. It states that a single body could encompass both functions, although it may be appropriate to divide the functions between two separate bodies;
- (b) any party to an internal complaints process should be able to apply to the statutory oversight body for an assessment of whether the procedural standards have been met in a given internal complaints process; and any recommendations as to how a failure to meet these standards could be rectified. This could either be a consensual process, or required through a mechanism by which parties are required to seek from the statutory oversight body or another appropriate body an endorsement of a settlement reached through an internal complaints process;
- (c) adjudication of compensation claims should be on a no costs basis (an unsuccessful complainant would not be required to meet the costs of the respondent organisation if his or her claim were ultimately unsuccessful), and claims could arise from unsuccessful attempts to reach a settlement through an internal process or independently of any internal complaints process;

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<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid.*

<sup>102</sup> Matthew Groves, 'The Imaginary Observer of the Bias Rule' (2012) Australian Journal of Administrative Law 19, 188

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- (d) organisations within the statutory oversight body's jurisdiction should contribute to a fund to meet compensation awards, wholly or in part, approved or made by the body; and
  - (e) in exercising the compensation function, the statutory oversight body could engage conferencing and other restorative justice techniques to resolve complaints in a sensitive and effective manner.

109. The LIV has also emphasised that such a statutory oversight mechanism would not be intended as a substitute for the criminal and civil justice systems but as an additional option, and that impediments to criminal and civil redress must be properly addressed through law reform.

110. The Law Council further notes that if a statutory oversight mechanism were to be considered at the national level, consideration would need to be given to the basis of such a scheme. That is, any Commonwealth legislation would need to be based on a relevant Constitutional head of power. This may require States to refer the matter to the Commonwealth under s.51 (xxxvii).<sup>103</sup> Alternatively, a nationally consistent model, legislated by individual States and Territories, could be pursued.

*LSSA Recommendation – Truth and Reconciliation Process of the Royal Commission*

111. The Law Council also notes that members of the LSSA have separately recommended that the Royal Commission itself should offer a “truth and reconciliation” forum for victims of institutional child abuse.

112. While the LSSA's recommendation would not impact directly on the Towards Healing process or other relevant internal complaints processes, the LSSA supports a process of acknowledgment, apology and healing.

113. With this in mind, the LSSA suggests that it would be part of the healing process for victims to have a truth and reconciliation forum in which to air their grievances, including a dedicated Commissioner and staff for that process. The Commissioner and staff would be trained and versed in the processes of restorative justice to allow victims' rights and interests to be given an appropriate forum..

114. LSSA members have observed that the Mullighan Inquiry<sup>104</sup> in South Australia incorporated a similar forum, and feedback provided from members suggested that it provided considerable benefit for victims, some of whom may not always want legal outcomes.

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<sup>103</sup> Australian Constitution

<sup>104</sup> The South Australian Commission of Inquiry into Children in State Care and the Commission of Inquiry into the Children on Anangu Pitjanjtatjara Yankunytjatjara (APY) Lands, reports dated 31 March 2008 and 30 April 2008 respectively (both inquiries are commonly referred to as the Mullighan Inquiry).



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## Conclusion

115. The Law Council considers that the Towards Healing process must:
- (a) ensure that all allegations involving criminal behaviour are promptly referred to the criminal justice system for investigation and prosecution;
  - (b) offer procedural fairness to both the victim and the accused person;
  - (c) respect the accused person's right to silence;
  - (d) ensure the provision of independent legal advice at all stages of the process;
  - (e) emphasise the independence of decision-makers;
  - (f) be open, transparent and accountable; and
  - (g) be subject to external oversight and review processes.
116. The Law Council's analysis of Towards Healing suggests that while it incorporates aspects of these standards, it also falls short in several important respects. Furthermore, it has identified a number of ways in which Towards Healing may impact adversely on victims' ability to seek recourse through the civil and criminal justice processes.
117. In response to these concerns, the Law Council emphasises the need to amend and strengthen the Towards Healing process in a manner which specifically addresses each of its concerns. It has made a number of recommendations throughout this paper in this regard.
118. In particular, the Law Council refers to the LIV's recommendations to the Victorian Inquiry for an external independent statutory body which would provide an external review mechanism for internal response processes of religious and other non-government organisations based on principles of restorative justice.
119. The Law Council also refers to the LSSA's recommendation that the Royal Commission should itself consider offering a separate "truth and reconciliation" forum for victims of institutional child abuse, in order to support the process of acknowledgment, apology and healing.
120. Finally, the Law Council has also highlighted the importance of the Royal Commission addressing the barriers to civil and criminal justice for children who have suffered institutional sexual abuse in a separate Issues Paper.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel, President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.