



Submission of Slater & Gordon Lawyers to the
**Royal Commission into Institutional Responses
to Child Sexual Abuse**

in response to Issues Paper No. 2 concerning *Towards Healing*
released 9 July 2013

Introduction

1. Slater & Gordon Lawyers is Australia's largest consumer law firm, with over 70 offices across all Australian states and territories other than the NT, offering a wide range of legal services to individuals and families.
2. Slater & Gordon has a long history of acting for victims¹ of child sexual abuse. Over the past 20 years we have acted for hundreds of victims of abuse by Catholic Church religious personnel and many others from both religious and secular institutions and groups. These cases have been litigated in Victoria, Western Australia and New South Wales. We have obtained compensation for many victims by way of negotiated settlements during difficult and hard-fought litigation, and we have acted for individuals who have obtained compensation through the *Towards Healing* and *Melbourne Response* protocols of the Catholic Church.
3. Slater & Gordon has also embarked upon both class and group actions on behalf of people who have been injured and suffered loss as a consequence of the negligent actions or failures of major corporations, institutions and organisations. Many of these cases have been conducted on a *pro bono* basis, including the firm's representation of child victims of sexual and physical abuse.
4. In the 1990s Slater & Gordon conducted the first major sexual abuse litigation in Australia. Proceedings were commenced on behalf of over 200 men who were victims of sexual and physical abuse when in the custody of the Christian Brothers Order, in four institutions run by them in Western Australia. The head office of the Order at the time was in New South Wales and the litigation was conducted across the three jurisdictions. Slater & Gordon is currently acting on behalf of a group of people who were abused in the Fairbridge² group of homes in Australia.

¹ References to 'victims' refers to victims of criminal abuse or alleged criminal abuse by personnel of religious or other organisations unless otherwise stated. Reference to 'complainants' refers to those who have made a complaint through the Church's protocols of *Towards Healing* and the *Melbourne Response*.

² The Fairbridge organisation operated child migration schemes for underprivileged British children in Canada, Rhodesia (Zimbabwe) and Australia from 1912 until 1980. This action is focused on the children who were in homes in New South Wales.

5. Since the first claims in the 1990s, Slater & Gordon has also represented a significant number of individual victims seeking redress for abuse perpetrated by members of the Catholic Church. This work has included providing representation and advice to victims involved with *Towards Healing* or the *Melbourne Response*, as well as representing individuals in litigated compensation claims.
6. Our work with victims has provided us with insight into the range of legal problems that confront them when considering and conducting legal action against the perpetrators of sexual or physical abuse, or against any relevant controlling or authorising agency, such as the Catholic Church.
7. When this Royal Commission was announced in December 2012 we were among many in Australia who welcomed it. In our view, this Royal Commission represents an important step towards providing access to justice to the many Australian victims who have to date been denied justice. Victims of child sexual abuse have been wronged not only when the actual abuse occurred, but also when the Church denied responsibility, and when fair compensation to victims was limited by the Church's exploitation of legal impediments which often prevent legitimate claims from succeeding. In the late 1990s, when the Church established its alternative compensation protocols, further damage was visited upon victims because of the confusing and opaque operation of these protocols.
8. The Church has promoted the development of its internal compensation and reparation schemes, *Towards Healing* and the *Melbourne Response*, as a pastoral response to the suffering of victims. The rationale underpinning these programs is the concern that victims may otherwise be unable to obtain compensation at law. This argument is self-serving, however: had the Church not relied so successfully upon technical statutory and common law defences to allegations of negligence, victims with legitimate claims could have been compensated fairly. The Church's own actions left victims with effectively no viable alternative but to seek compensation through its own internal compensation mechanisms.
9. In doing so, the Church has not acted as a model institution charged with guardianship and care of members of our community and has used and exploited the inadequacies of the law to avoid what would otherwise be a just solution for many victims – the acknowledgement of a wrong done and the payment of fair compensation by the groups responsible. Rather, in litigation the Church has relied upon the peculiar status that has been conferred upon it at law, and technical defences concerning time limits and corporate succession to avoid the substance of many compelling claims.

10. Below we outline some of the legal impediments faced by victims when they report abuse and seek compensation and explain why the Church authorities then ‘needed’ to develop the *Towards Healing* protocol, as well as highlighting what we have observed to be the protocol’s principal shortcomings.

The Royal Commission’s Terms of Reference require it to look into:

‘...what institutions and governments should do to address, or alleviate the impact of, past and future child sexual abuse and related matters in institutional contexts, including, in particular, in ensuring justice for victims through the provision of redress by institutions, processes for referral for investigation and prosecution and support services’...and to “...make any recommendations arising out of your inquiry that you consider appropriate, including recommendations about any policy, legislative, administrative or structural reforms. ...that you may consider appropriate, ‘...changes to laws, policies, practices and systems that have improved over time the ability of institutions and governments to better protect against and respond to child sexual abuse and related matters in institutional context...’³

Background

11. The January 2010 iteration of the Church’s *Towards Healing* protocol states:
‘The Church makes a firm commitment to strive for seven things in particular: truth, humility, healing for the victims, assistance to other persons affected, a just response to those who are accused, an effective response to those who are guilty of abuse and prevention of abuse’.⁴
12. At paragraph 41.1.1 the document refers to ‘Outcomes Relating to the Victim’ and states that *‘Financial assistance or reparation may also be paid to victims of a criminal offence or civil wrong, even though the Church is not legally liable’.*
13. The desire for justice demanded by victims is in many cases a desire for financial compensation and/or reparation, as the best available proxy for real redress for the often-irreparable harm and suffering that has been inflicted upon them and their families. The fact that the *Towards Healing* protocol indicates that the Church may pay compensation even when it is not *‘legally liable’⁵* suggests a willingness to do something more for complainants than is legally required. We encourage this sentiment, although in our experience it has not been borne out in practice.⁶

³ Letters Patent for the Royal Commission, paragraphs (d) and (h).

⁴ *Towards Healing* 2010, paragraph 12.

⁵ *Ibid*, paragraph 41.1.1.

⁶ See paragraphs 15 – 43 below.

14. Missing from the Royal Commission's 'Issues Paper 2' is reference to the *Melbourne Response*, which is the Melbourne Archdiocesan protocol to allegations of sexual abuse. It has a different structure from the *Towards Healing*⁷ protocol. The development of the *Melbourne Response* slightly pre-dates *Towards Healing*, although both protocols were developed in the context of, and in response to, growing community awareness and anger concerning historical abuse of minors by clergy. Whatever the historical justifications for the development of these different protocols, we consider that the continued existence of parallel systems is unwarranted. The simultaneous operation of both protocols creates uncertainty and confusion for victims, and adds to the complexity of resolving complaints, without any practical benefit to claimants. The *Towards Healing* protocol is invoked when abuse occurs within the Archdiocese of Melbourne and the abuser was member of religious order which is not a party to the *Melbourne Response* protocol, otherwise the *Melbourne Response* is the appropriate protocol. If abuse occurs outside the Melbourne Archdiocese then *Towards Healing* is the appropriate protocol.

A brief explanation of the different protocols can be found below:⁸

Towards Healing.

- a. Complaint handling is managed by the National Committee for Professional Standards ('NCPS'), jointly appointed by the Australian Catholic Bishops Conference ('ACBC') and Catholic Religious Australia.
- b. The NCPS' role is to oversee the handling of the complaints. Each state has separate Directors of Professional Standards who manage the complaint-handling process and who make recommendations about responses to the various Church authorities (which might include diocesan bishops, or heads of religious orders).
- c. There are several discrete phases of the complaint handling process:
 - i. Contact – meeting the complainant and recording the complaint and advising of the right to take the complaint to the police;
 - ii. Facilitation – investigation of the complaints raised; and
 - iii. Assessment – meeting with the complainant, the offender and the Church authority to arrive at resolution and award compensation.
- d. These different phases may have different personnel involved and may take varying lengths of time. There are no prescribed time limits for any of these phases.

⁷ For the remainder of this Submission, references to *Towards Healing* are references to both *Towards Healing* and the *Melbourne Response* as the generic descriptor for both protocols, unless separately identified or otherwise stated.

⁸ http://www.cam.org.au/Portals/45/Documents/factsheets/Fact-Sheet-1_The-Melbourne-Response-and-Towards-Healing.pdf Fact Sheet No.1 provided by the Archdiocese of Melbourne 3 October 2012.

- e. In the final phase of the *Towards Healing* process, the complainant is able to meet with the Church authority to discuss the abuse and the outcomes sought.⁹ This is seen by the Church to be an important component of the pastoral role of *Towards Healing*.
- f. Paragraph 44 of the protocol sets out the circumstances in which a complainant may seek a review of the decision, stating that this should be done within three months of the facilitation decision being made. There is no option for review of a decision by another tribunal or court.
- g. There is no stated cap on the financial compensation available.
- h. There is an option for the complainant to have legal representation, though the payment of legal costs for representation is not a feature of the protocol. In our experience legal representation has not always been recommended to complainants under the protocol, although this position has improved more recently.
- i. There has been some external review of the *Towards Healing* protocol, notably by Professor Peter Parkinson in 1999 and 2008¹⁰ in which he made certain recommendations and criticisms of the process.
- j. There is no available information about the process undertaken by the Catholic Church when dealing with confirmed offenders under *Towards Healing*. The protocol states that '*Serious offenders, in particular those who have been found responsible for sexually abusing a child or young person....will not be given back the power they have abused*'.¹¹ There is no specific statement in the protocols regarding reporting criminal behavior to the police.
- k. Variations are noted within the operation of *Towards Healing* from state to state. In NSW there is 'oversight of the process by Ombudsman NSW' but none of the other states' processes describe this kind of oversight.¹²
- l. Additionally, in NSW there is a legal requirement for reporting of criminal activity, but this is not imposed in other jurisdictions.

The Melbourne Response:

- a. Complaints are received by 'Independent Commissioners',¹³ who investigate and advise the Archbishop of Melbourne whether the complaint should be upheld, the appropriate form of the response to the victim, and the action to be taken

⁹ Ibid, paragraph 41.4.1

¹⁰ Professor Parkinson's Submission to the Victorian Parliamentary Inquiry, pp 3- 4, and evidence to the Inquiry on 19 October 2012.

¹¹ *Towards Healing*, paragraph 27.

¹² Rev Shane McKinlay on the Church's 'Facing the Truth' website <http://www.cam.org.au/facingthetruth>

¹³ What 'independent' means in this context is unclear. The commissioners are not employees of the Church because they are both senior barristers but they are retained by the Church for the purpose of forensic investigation.

against any offending Church personnel.¹⁴ However, not all Church personnel in the Archdiocese of Melbourne are a part of the *Melbourne Response*¹⁵.

- b. The *Melbourne Response* establishes a separate Compensation Panel. This panel makes an assessment of the claim and determines any award of compensation. The Panel consists of a Chair (usually a senior member of the Victorian Bar), a psychiatrist, a solicitor and a community representative all of whom are appointed by the Archbishop of Melbourne. The Panel's recommendations as to ex-gratia compensation are binding on the Archbishop and are capped at \$75,000. This amount does not appear to be indexed. There is also capacity to pay for counseling and medical support through Carelink, which is funded in addition to any compensation payments. There is no built-in mechanism for the complainant to meet the Panel but the Commissioners do meet with the complainants.
- c. The *Melbourne Response* has apparently never been the subject of any external review.
- d. In terms of dealing with offenders, accused clergy are generally placed on administrative leave, which means that they are removed from ministry, while under investigation.¹⁶ The *Melbourne Response* does provide for the Independent Commissioner to exercise discretion in this matter:

'It has been the practice of the Archbishop of Melbourne to seek advice from the Independent Commissioner as to whether an accused priest should be placed on Administrative Leave while under investigation. It has been the invariable practice of the Archbishop to accept the Commissioner's recommendation'.¹⁷

Civil litigation procedures¹⁸

15. Despite the existence of *Towards Healing* and the *Melbourne Response*, victims of abuse by members of the Catholic Church retain the right to seek compensation, and potentially other remedies, through civil litigation rather than proceeding through those protocols.
16. No amount of money will ever remedy the damage caused by the trusted authority figures in the Church who abuse children. However, in practice, independently assessed awards of compensatory damages by civil Courts remain the best available

¹⁴ The *Facing the Truth* submission to the Vic Parliamentary Inquiry 2013 notes at paragraphs 8.2 and 8.6 that the Archbishop has accepted all recommendations made by the Commissioners.

¹⁵ The *Melbourne Response* protocol does not cover complaints about members of religious congregations within the Archdiocese of Melbourne which is a confusing situation for complainants.

¹⁶ *Facing the Truth* is the Church's submission to the *Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organizations 2012* ('*Victorian Parliamentary Inquiry*'), paragraph 8.6.

¹⁷ *Facing the Truth* paragraph 8.6.

¹⁸ Discussion of these procedures will be predominantly from a Victorian perspective, however our experience has been that the practices and observations discussed are present throughout Australia.

form of compensation for victims. As such, the strengths and weaknesses of the civil litigation system for victims seeking compensation provides a useful point of comparison against which the resolution mechanisms and protocols adopted by the Church can be assessed.

16. Depending on the circumstances, victims of abuse may have causes of action in negligence or trespass/battery available to them. As in all litigation, the strength of such claims will depend on the evidence available to support the allegations made, however there are a number of features impeding the success of claims that are peculiar to (or at least consistent features of) claims about clergy abuse. For the purposes of this submission, we highlight some of the most pressing difficulties that face victims at common law.

Daunting and delayed claims

17. One of the most immediate and daunting problems facing victims who may decide to pursue a claim will be the threatening and imposing nature of civil litigation. Invariably, a victim seeking to explain his or her circumstances can expect to be cross-examined by defendants in court, often at some length. The adversarial nature of the process means that it will often involve accusations, or inflammatory questions, directed at victims with a view to challenging or undermining the basis of their story. Although the cross-examination process is a fundamental part of Australia's common law system and provides a valuable means of testing a plaintiff's claims, it is nonetheless relevant that the prospect of aggressive or uncomfortable cross-examination by the Church's representatives can be particularly daunting to victims of child sexual abuse, and can often be a significant discouragement to pursuing a claim at all. In circumstances where the Church is aware of a long institutional history of moral, if not legal, culpability for the kinds of wrongful acts alleged in such claims, we would suggest that adopting a different approach to litigation would be appropriate, in general.
18. The incidence of often-lengthy delays between the occurrence of the alleged crime and the victim's reporting the abuse is a well-documented phenomenon. Considering the trauma and psychological effects of the abuse involved, the delay is wholly understandable. It is not uncommon for cases of abuse to go unreported by victims for long periods of time, with some people well into adulthood before being able to come to terms with their experiences sufficiently to allow them to contact police or legal advisers (and even then, often with considerable difficulty). In our experience representing abuse victims and reviewing their medical evidence, this kind of delay in

reporting is an inherent feature of the abuse itself. A distinguishing, if not defining, characteristic of claims involving clergy abuse is therefore the fact that they will usually be investigated and resolved long after the events in question occurred.

19. This delay between the abuse and the operation of any dispute-resolution process creates a number of difficulties in the context of Australian civil litigation. Regrettably, at present, the burden of these difficulties falls disproportionately on the victims.

Forensic difficulties

20. Self-evidently, the more time that passes after an incident of abuse, the less evidence will be available to be examined. Over the course of time, memories fade, witnesses and actors die or become difficult to locate, and records are lost, damaged or destroyed. In a civil claim in negligence or trespass/battery, the burden of proof falls squarely on the claimant, making lost or difficult-to-recover evidence a serious problem for plaintiffs.
21. In cases of clergy abuse, in our experience the difficulties caused by the passage of time adversely affects claimants substantially more than it does defendants. In any claim, victims will need to positively establish a number of elements; defendants can succeed by simply pointing to the fact that one or more of those elements has not been made out. A lack of evidence overall would be expected to, and does, cause a net disadvantage to the plaintiff in such a claim.
22. Victims typically begin the investigation and litigation process at a disadvantage: they are required to recall events from their childhood, which is of itself difficult given the length of time that will have passed. Their recollections may be influenced by the manner in which they observed and interpreted events at the time, creating issues concerning the reliability of their childhood recollections. Their memories may also be affected by the trauma they experienced at the time.
23. It is also reasonably common for victims to have some difficulty in locating witnesses who might be able to corroborate their versions of events: identifying and contacting childhood friends or classmates after decades have passed are often unsuccessful. Victims may begin the process with little more than their own recollections to support them, and may remain in a position of great difficulty in terms of identifying supporting evidence. This is a difficulty that is

obviously compounded by the fact that the abuse in question typically occurs in secret.

24. In contrast, the Church and other religious organisations have significant advantages in terms of corporate record-keeping and 'institutional memory' – they will typically have retained, and have access to, significantly greater volumes of material concerning a claimant's circumstances. Because of their relationship with the Church or religious orders, defendants will normally have much greater information about the alleged perpetrators of abuse and their historical activities and movements. In addition, in cases where religious authorities were made aware of other historical allegations about clergy others associated with religious orders, documentation and records of their consideration may also be available (assuming they have been retained and haven't been lost or destroyed in the intervening period).
25. A claimant in litigation will typically only gain access to records such as these through discovery – either by seeking an order for production of materials prior to commencing proceedings or in the ordinary course of the interlocutory discovery process. Pre-action discovery tends to be difficult to obtain in Church abuse claims, as succeeding in such an application typically will require being able to produce sufficient evidence to support the proposition that an applicant may be entitled to make a claim for relief from a defendant – however as discussed above, in many cases at that stage of an investigation the entirety of the evidence may amount simply to a claimant's word. If a proceeding is issued, in our experience defendants will typically apply to have claims struck out early, relying on some combination of the difficulties identified below.
26. Applications for claims to be struck out by Church defendants concerning the abuse of minors are a major hurdle for claimants. Defendants are often able to point to a lack of substantiating or corroborative evidence, imprecision or vagueness in claims made (which in practice is often necessary because of the lack of concrete evidence available when drafting pleadings), or misidentified defendants (for instance, claiming against one corporate entity related to the church rather than another, or worse, claiming against an available corporate defendant where a 'proper' defendant, such as the Catholic Church, may have no legal status or capacity to be sued) or claimants' difficulties in identifying or recalling the names of the perpetrators, to support applications that claims should be dismissed at an early stage. Such applications can often be successful. If a strike-out application succeeds prior to the discovery process

being undertaken, it is quite possible that critical evidence needed to support a claimant's case may never become available to them.

27. As a consequence of these arrangements and the unique circumstances of Church abuse cases, it can be quite difficult for a claimant to gain access to the evidence necessary to investigate and assess their claims.

Identification of defendants: practical difficulties in suing individuals

28. Victims of abuse may have causes of action against the perpetrators of the abuse, but also potentially other corporate entities involved, including religious orders or entities established to represent the Church (or elements thereof) at law. Typically, although not universally, victims would often bring claims in negligence against the corporate or more 'supervisory' entities, and claims in trespass or battery against the individual perpetrators.
29. The fact that the alleged perpetrators of clergy abuse will typically be some decades older than their victims creates practical difficulties in claims that proceed long after the abuse occurred. Most obviously, the perpetrators may be deceased or very elderly or infirm by the time most claims are commenced. In some cases, defendants will be unable to be found. The vows of poverty and other incidents of the way of life chosen by many clergy and other religious defendants will mean that they will have very limited assets or estates against which to claim. In practice, therefore, there is often very little to be gained in claiming against an individual perpetrator. There is almost no point in pursuing a claim personally against a deceased perpetrator.
30. For this reason, claimants often seek to focus the attention of their claims on 'the Church' or particular religious orders involved. Practically, this makes sense, as these groups are the entities that retain assets with which claims might be paid, as well as usually being in possession of relevant evidence and other material. Morally, this approach also reflects the widely-held view that these entities bear significant responsibility for the history of clergy and religious abuse in Australia and the lack of effective protections for and responses to the minors who were victimised.
31. The typical common law devices by which claims concerning conduct of an individual might be made against their 'employer' or 'supervisor' organisations are the principles of agency and vicarious liability. In an ordinary case, an employer will be vicariously liable for negligent or wrongful acts of an employee

occurring in the course of employment, and otherwise entities may be liable for the wrongful acts of agents that occur within the scope of their authority.

32. Such claims are unavailable to religious abuse victims – churches and religious orders have been held not to ‘employ’ clergy and are not principals for them as agents in any relevant sense. At law, clergy and other religious personnel are thus effectively unrelated to the religious institutions they operate within. Although, fundamentally, the actions of the perpetrators of abuse are illegal and therefore would not be expected to give rise to problems of agency and vicarious liability in the ordinary course, findings issues such as these highlight the artificial manner in which the overarching church and religious entities have managed to be insulated from the individuals within them
33. The combination of the impracticality of claiming against individual perpetrators, and the inability to attach liability in trespass or battery to ‘institutional’ defendants in this way will mean that, strategically, claimants will often seek to claim against institutional organisations in their own right, alleging negligence or other wrongful conduct that was a cause of the abuse and harm suffered. Regrettably, this approach is fraught with its own problems.

Identification of defendants: Lack of a corporate entity to sue

34. The difficulty of claiming against an institutional religious defendant in its own right is perhaps best highlighted by the fact that, at law, there is no legal entity known as ‘the Catholic Church’ – there is no legal person against which a claim may be made.
35. The Church exists in a unique position: legally, the overarching entity doesn’t exist. Unincorporated associations and other entities may exist in respect of particular sub-groups and orders, however they will variously either hold no assets or claim that they have no relation to the organisations or individuals involved with particular claims of abuse.
36. In order to facilitate legal relationships between Church entities which, on one view, have no legal personhood, and other actors who do, state legislation will often create statutory corporations that will act as the interface between the legally ethereal Church entity, and other parties in society. Such corporations are defined specifically to, for instance, hold and deal with property on behalf of religious organisations. In recent years, some claimants have attempted to

conduct litigation against these property-holding corporations; these claims have been unsuccessful, on the basis that the corporations' objects are strictly limited to property-holding, and thus they could not hold or assume any legal liabilities or duties owed by other Church entities.¹⁹ The absurdity of this is perhaps best demonstrated by the question: How is it that a church corporate entity can escape liability in tort for acts of abuse committed on the very property it holds?

37. The result of this situation is that it is very difficult for a claimant to conduct litigation directly against a Church entity – any claim that actually proceeds to court will be met by an application from a defendant that it be struck out, on the basis that the claimant has no cause of action against that defendant. Such applications are usually successful. Even if it is accepted that claimants have an otherwise good cause of action, they are left in the invidious position of being unable to exercise it against a legal entity.

38. Although it is beyond the scope of this submission, in our view this state of affairs is particularly regrettable, and is almost single-handedly responsible for the extraordinary difficulties encountered by claimants. The Church in many respects is able to take advantage of very many of the benefits of the Australian legal system in terms of, for instance, property-dealing, succession and taxation, while avoiding many of the duties and obligations imposed on other members of society in exchange for those privileges. If, for instance, the Church was to be considered an ordinary corporate entity (and therefore a legal person) at law, holding property in its own right and employing (or having as its agents) its clergy, many of the obstacles currently faced by victims would be substantially less insurmountable. In a modern, secular society such as contemporary Australia, the unique status afforded to religious organisations in this way seems particularly anachronistic and unhelpful.

Limitation of actions

39. Another fundamental difficulty faced by victims is the operation of 'limitation of actions' legislation in all Australian jurisdictions. These statutes impose time limits on the commencement of civil proceedings (often three or six years from the date the cause of action accrues or is 'discoverable'), in most cases three years from the date on which a cause of action accrues, with a long-stop period of 12 years (though there is much variability depending on the jurisdiction).

¹⁹ See, e.g., *Ellis v Pell* [2006] NSWSC 109.

Time is usually taken to start running when a claimant knows that they have suffered harm caused by another party's wrongdoing. In a 'delayed' case alleging abuse, it is usual for a defendant to raise as a defence the argument that the claim is 'out of time'.

40. Most jurisdictions do provide a mechanism for dealing with out-of-time claims: it may be possible to apply to a court for an extension of time in which to commence a proceeding. In such an application, the burden once again falls squarely on the claimant – they will need to convince a court that there is a good reason for the delay, and that a defendant will not be unfairly prejudiced by an extension.
41. An interesting by-product of the combined effects of the difficulties outlined above is that, typically, the prejudice that might be occasioned by a claim being run out of time will be almost entirely that of the plaintiff. The forensic difficulties inherent in a delayed claim detailed above will mean that the plaintiff will have much greater difficulty than the Church, as a corporate and institutional defendant, in sourcing and presenting evidence in support of his or her position. A defendant, in contrast, has the benefit of its own records, and has the ability to cross-examine the plaintiff and any lay witnesses that are available. As the burden of proof falls on the plaintiff to establish the elements of his or her cause of action, the circumstances of a delayed claim such as this present an inevitable disadvantage. As such, even in cases where a plaintiff can convince a court to grant an extension of time, they will often remain at a significant disadvantage.
42. Despite this, applications for extensions of time are of themselves complex, expensive and difficult to run, and in our submission do not adequately respond to the unique circumstances that abuse victims find themselves in. The process of realising and coming to terms with abuse that was perpetrated by a trusted figure such as a Church representative is often a complex and lengthy one, as is reflected in the medical and psychological evidence presented by claimants. The legal system's response to plaintiffs' delayed diagnoses and claims has often failed to take adequate account of this, and has presented claimants with an unnecessarily substantial degree of risk that a judge might find that the claim could have been brought earlier.
43. Victims of abuse who make a claim some time after the abuse itself occurred are at a disadvantage from the outset, as a result of the applications of limitations periods. When a defendant pleads a limitations point as a defence,

which in our experience is almost always, claimants are faced with significant risks of having their claim struck out early, proceeding to trial and losing on this point, and/or facing a substantial adverse costs order.

'Victims of crime' processes

44. An alternative option for claimants to pursue in some jurisdictions will be 'victims of crime' assistance schemes, which may provide some limited relief in cases where a tribunal can be satisfied that harm has likely been suffered as a result of the commission of an offence.
45. Victims of crime compensation schemes are typically far less confronting and difficult for a claimant to endure, and will not require proof to the criminal standard: in some cases they do not even require that a conviction against the accused perpetrator has been recorded. They do impose caps and limits on the compensation that may be available which, in our experience, will be markedly less than the compensation a successfully litigated claim might expect to achieve in all but the most limited (or evidentially weak) claims.
46. As a means of affording justice to victims, while these schemes are valuable additions to the various civil and criminal systems around the country, in our view they are not ideal systems upon which to rely to compensate victims of clergy abuse. Firstly, they can necessarily only provide limited responses to claimants, in line with the limited scope of the tribunals' remits, and the fact that these schemes must also be able to provide compensation to many other kinds of victims of crime throughout society. Secondly, and more fundamentally, absent the ability to confiscate assets of a defendant, the burden of compensating victims under such schemes will fall on the state, rather than the religious entities involved. In our view, this is inequitable.
47. We believe that where a claimant can establish that they were abused by clergy or other associated with religious institutions, the legal and moral responsibility for providing adequate redress lies with the religious organisations or institutions involved. We believe that such redress should be calculated to match what a court would order as compensation if the claim was successful, and should not be artificially capped or limited.
48. In our view, *Towards Healing* and the *Melbourne Response* are not adequately responding to these obligations.

Establishment of Towards Healing/Melbourne Response

49. There are three key reasons for the establishment of these protocols according to the Church; pastoral care, compensation and prevention.

Pastoral care

50. The Catholic Church asserts in the 2010 iteration of Towards Healing that protocol will address victims' 'experience of fear, shame, confusion and the violation of their person'.²⁰ At paragraph 8 it states:

"We recognise that responses to victims by the many Church Authorities vary greatly. We express regret and sorrow for the hurt caused whenever the response denies or minimises the pain that victims have experienced. Through this document we commit ourselves to principles and procedures that apply to all Church Authorities..."

At paragraph 19, it states:

"Whenever it is established, either by admission or by proof, that abuse did in fact take place, the Church Authority shall listen to victims concerning their needs and ensure they are given such assistance as is demanded by justice and compassion."

Compensation

51. Since 1996 there have been over 300 awards of compensation through the *Melbourne Response* according to Peter O'Callaghan.²¹ Figures for *Towards Healing* are not readily available, although the Archbishop of Melbourne has stated that there have been about 600 successful claims for compensation made against the Church in Victoria.

Prevention

52. Chris Geraghty has observed: '*The Church has for centuries presumed that it can police its own borders, that it is an independent empire, not answerable to any secular power. It has had its own language, its own administration and training programs, its own schools and universities, with its own system of laws and regulations, police force and lawyers, a developed list of penalties and its own courts and processes. A law unto itself – an organization founded by God*

²⁰ *Towards Healing*, paragraph 6.

²¹ Peter O'Callaghan SC, Reply to Rev K Dillon 26 July 2013 Victorian Parliamentary Inquiry 2012 at Page 7.

*and answerable only to God.*²² It is against this background that the Church's failure to report criminal activity among its own can be understood, but not condoned.

53. According to the *Towards Healing* protocol, if guilt has been admitted or proved the offender should not return to clerical duties because that individual cannot have returned to them the power he has abused.²³ The protocol contains no clear statement as to the Church's responsibilities to report the abuse to the police. Evidence has recently emerged in Victoria suggests that the Church has never initiated a report of child sexual abuse to the police.²⁴ In these circumstances it is difficult to see how the Church's protocol fulfills this its aim of prevention.

Difficulties experienced by our clients who have sought compensation through *Towards Healing/Melbourne Response*

*"The sexual abuse of children is abhorrent. It has a devastating and long-lasting effect on victims and their families, and on the community generally. It should not be tolerated or condoned by any modern society"*²⁵

Confusion and conflict of interest

54. One of the primary difficulties involved with the operation of *Towards Healing* and the *Melbourne Response* is that these protocols straddle different, and often contradictory, functions. Are they adversarial systems for the assessment of compensation or a mechanism for the Church's counseling and pastoral outreach? Is it appropriate that the Church (and its various religious orders as part of the *Towards Healing* process) seek to promote healing and reconciliation with victims while negotiating terms of compensation arrangements? One is necessarily a function of reconciliation and collaboration

²² *Sexuality and the Clerical Life* Chris Geraghty in *Child Sexual Abuse, Society and the Future of the Church' Interface: A Forum for Theology in the World* Vol 16 No.1 2013, page 67. Geraghty was a former priest who left the seminary and became a lawyer and judge of the District Court of NSW. He has written a memoir of his experiences and spoken and written on these issues.

²³ *If guilt has been admitted or proved, the response must be appropriate to the gravity of what has happened, while being consistent with the civil law or canon law which governs the person's position. Account will be taken of how serious was the violation of the integrity of the pastoral relationship and whether there is likelihood that such behaviour could be repeated. Serious offenders, in particular those who have been found responsible for sexually abusing a child or young person, or whose record of abuse of adult pastoral relationships indicates that they could well engage in further sexual exploitation of vulnerable adults, will not be given back the power they have abused. Those who have made the best response to treatment recognise this themselves and realise that they can no longer return to ministry*: paragraph 27, *Towards Healing* 2010.

²⁴ Victoria Police Submission to Victorian Parliamentary Inquiry 2012, paragraph 3.1.

²⁵ Margaret Cuneen SC Commissioner, at the opening of the NSW Inquiry into Maitland – Newcastle Diocese on 1 July 2013.

and the other almost always adversarial. The two roles of compensation payer and pastoral carer are, in our view, not a good mix.

55. Claimants can find this blurring of roles deeply troubling. They cannot easily disentangle these purposes – whether the Church investigators are ‘on their side’ or representing the interests of the Church. Claimants can, in reality, have no assurance that there is true independence within this process. The pastoral role of discussing complaints within *Towards Healing* is often fulfilled by volunteers from the Church who may express concern and care for the victims, but who are also responsible for providing reports which might then be the basis upon which the Church Authority determines compensation. The individual assessors may have the best of intentions, but it is often unclear to complainants the nature of the relationship they should have with them. This can be the source of considerable distress and mistrust.

56. Justice may be achieved for some complainants when a Church representative offers an apology, but the benefit is soured, if not completely negated, by a subsequent adversarial approach taken towards the assessment of compensation. The discussion about compensation is likely to occur at the same time as the giving of the ‘apology’, and this exercise contributes to the injustice felt by complainants. If the complainant is not legally represented and is in a room with representatives of the Church, its lawyers and/or its insurers, this is often confusing and overbearing for the complainant, and from a legal perspective raises serious questions about the integrity of the compensation process being undertaken.²⁶

57. It is not unusual for discussions between the complainant and the investigator to occur in public places such as cafes or in Church halls or at the back of the local Church. This approach may intend, on the part of the Church, to be more informal and less threatening to the complainant but for some of our clients the effect has been disbelief that their deeply personal stories of abuse are discussed in such indiscrete circumstances. This also contributes to the confusion in the mind of the complainant as to the seriousness with which the Church has approached dealing with their complaint. In addition, complainants’ cases may be handled or processed by more than one person within the Church Authority, which can also be a source of confusion to complainants.

²⁶ Catholic Church Insurances Submission to Victorian Parliamentary Inquiry 2012, p2 and p8, notes that it has participated in the development of measures taken by the Church at the end of the 1980s and to the appointment of the General Manager of CCI to a Special Issues Committee (which evolved into the National Committee of Professional Standards) and in more recent times in 2005 CCI has paid for the full time position of Protection and Prevention officer who advises Professional Standards office on risk management in child safety.

58. The complainants often have no idea of the existence of the two separate Church protocols, nor do they generally understand the nature of the different 'Church Authorities'²⁷ which will handle the complaint. The organisation of the Church and its various dioceses is not typically a matter of general knowledge, even for people who were raised Catholic.
59. Our experience has been that the *Melbourne Response* protocol is clearer in its complaint-handling than *Towards Healing*, because there is continuity in the personnel involved and there is a routine formality about the process of receiving and responding to complaints. Despite these advantages, the term 'independent Commissioners' gives a particular authority to decision-makers within the process that does not immediately reveal that the Commissioner is retained by the Church and paid to investigate and make recommendations to the Panel, which in turn advises the Archbishop. Without criticising the individual commissioners for their work within these frameworks, the degree of real 'independence' involved cannot be assured to complainants.
60. There is also an inherent conflict of an interest present when the purported primary objectives of the process are of pastoral care and reparation but representatives of the Church's insurer are closely involved in the development of the protocol policy, in which limitation of financial exposure is a significant factor.²⁸

No timelines for completion of procedural steps

61. Neither the *Towards Healing* nor the *Melbourne Response* protocol has any provision for defined or pre-specified timelines within which particular functions are to be completed. The period of investigation may take months, and facilitation might take just as long with the complainant essentially having no ability to assess whether the complaint is being handled efficiently or not. This has the effect of disempowering the complainant from the outset, reducing the sense that they have any control over or input into the process.

²⁷ *Towards Healing*, page 3.

²⁸ Dr Robert Grant is a US-based psychologist who specialises in abuse and trauma, has worked with the Catholic Church on sexual abuse issues in seven countries, and has written a number of books on clerical abuse. In the late 1990s he was living in Sydney and advising the St John of God brothers in relation to the psychiatric facilities they ran. He was soon asked to help the National Committee for Professional Standards, which was working on the draft of *Towards Healing*, the church policy for dealing with clerical sexual abuse. Dr Grant has told *Lateline* he was disturbed by how much influence Catholic Church Insurance had in formulating the church's protocol. <http://www.abc.net.au/news/2013-08-08/church-adviser-says-insurer-dictated-treatment-of-abuse/4874926> Viewed 3 Sept 2013.

62. The period of time in which any step in the process occurs is completely within the control of *Towards Healing* and its personnel. Estimates or expectations of timelines are not given by the Church personnel to complainants and this can create a sense of futility and hopelessness for complainants. While we acknowledge that there may be good reason for the lengths of time taken to complete some investigations, the failure to keep the complainant informed is frequently interpreted as evasion or avoidance – adding further stress and concern to an already difficult situation.
63. Of particular concern is the fact that participation in the *Towards Healing* processes will not ‘stop time’ for the purposes of civil litigation. If resolution of the complaint cannot be reached through the non-litigated process and the claimant needs to commence proceedings in court, they may find themselves further disadvantaged by the further lapse of time while they unsuccessfully engaged with *Towards Healing* or the *Melbourne Response*.
64. We suggest that it is in the interests of all parties that clear timelines be provided within these protocols for the resolution of complaints. Complainants must be able to make informed decisions about how to protect their rights. Engaging in the Church protocols should not jeopardise rights to recourse to litigation. The Church should be precluded from subsequently relying on ‘limitations of actions’ defences for the period that it has been on notice of potential claims through *Towards Healing*.

Confidentiality

65. There have been releases signed under the protocols between parties that have ‘denied liability’ and sought confidentiality. Although the explanation by the Church for this is to retain privacy for the complainant, in our experience such clauses are typically a method to contain scandal and limit the availability of evidence and procedural precedents in future claims.
66. Confidentiality terms together with the ‘in-house’ nature of these protocols and the lack of any regular auditing means that there is ultimately no ability for victims to understand the compensation and assessment procedures being employed around them: victims are asked to simply take the Church at its word. This approach is of particular concern in cases where victims are not required (or not encouraged) to obtain independent external advice about the processes being undertaken purportedly to assist them.

67. Confidentiality clauses reduce the capacity of complainants to separately raise awareness about the perpetrator or to ensure they are removed from their role as priests or prevent their contact with children. Confidentiality contributes to the perception by complainants that the Church does not act on these complaints and remove priests or clergy from ministry.

68. The Church across the world has sought to contain information about sexual abuse. Confidentiality clauses have contributed to this containment. This has been evidenced in both the US and in Ireland in which Yvonne Murphy J, who chaired the Commission of Inquiry into sexual abuse within the Catholic Archdiocese of Dublin between 2006 and 2009 and after being made aware of allegations against 172 priests concluded as follows:

*“The Commission has no doubt that clerical child sexual abuse was covered up by the Archdiocese of Dublin and other Church authorities over much of the period covered by the commission’s remit. The structures and rules of the Catholic Church facilitated that cover-up. The State Authorities facilitated the cover-up by not fulfilling their responsibilities to ensure that the law was applied equally to all and allowing the Church institutions to be beyond the reach of the normal law enforcement processes. The welfare of children which should have been the first priority, was not even a factor to be considered in the early stages. Instead, the focus was on the avoidance of scandal and the preservation of the good name, status and assets of the institution and of what the institution regarded as its most important members - the priests”.*²⁹

Caps on compensation

69. While no specific caps are referred to under *Towards Healing*, there is a cap of \$75,000 for compensation under *Melbourne Response*. The compensation usually paid under *Towards Healing* is modest, which reinforces the view that the protocols are not primarily directed towards achieving justice, expediting common law resolution outcomes and expressing compassion towards complainants, but rather may serve as financial damage control for the Church. In our experience, many of the claims resolved through these protocols would be resolved for greater amounts – often substantially so – if they were successfully litigated.

²⁹ Extracted from '*Clerical Sexual Abuse: the Irish Experience*', Law Institute Journal, June 2013, excerpts from Yvonne Murphy's *Kirby Oration*.

70. Our experience is that *Towards Healing* compensation payments are usually modest; often between \$20,000 and \$30,000. There is no way of determining what has been paid to complainants over the years save for the occasional statements made by Church personnel from time to time,³⁰ and even these do not attempt to separate out actual compensation amounts paid from the legal, administration and insurance costs incurred in the course of conducting the protocols and defending civil litigation. To our knowledge there have been two external reviews³¹ of the operation of *Towards Healing* but the results of these reviews have not been made publicly available.
71. As far as we know there has never been an external review of the operation of *Melbourne Response*. Peter O'Callaghan has responded to accusations of bias or lack of compassion by stating that his files could be reviewed by the Victorian Parliamentary Inquiry. He provided files on a confidential basis to members of the Inquiry for review and to counter allegations made against his handling of matters.³² The determination of levels of compensation is not done by the Independent Commissioners but by the Panel.
72. Acknowledging the difficulty of generalising about the seriousness of these cases, in our view, it is nonetheless reasonable to suggest that many of these cases would have been awarded more in damages in a Victorian court compared with what was awarded under the Church protocols.
73. Damages in the courts for these types of claims are usually not large.³³ However for those claims in which there might be a significantly larger sum of compensation payable due to the particular circumstances involved, affected individuals who can only proceed through *Towards Healing* or the *Melbourne Response* are sorely prejudiced by the protocols.
74. There is no real way of determining how a complainant's award of compensation is assessed. Because there is no internal or external review of 'awards' of compensation there is no ability for a complainant to know whether they have received a reasonable amount of money for their claim compared with other claims of a similar type or degree of gravity. There is no guarantee of

³⁰ CCI Insurances have been quoted as saying the Church has identified some 600 victims and CCI have paid out some \$30million (*Lateline* report).

³¹ These reviews have been conducted by Professor Patrick Parkinson.

³² Peter O'Callaghan SC Reply to Rev K Dillon 26 July 2013 Vic Parliamentary Inquiry

³³ Compare some of the recent court decisions in sexual assault cases in which there were awards, such as: *GGG v YYY* [2011] VSC 429, a civil case concerning sexual abuse by an uncle in which the abused plaintiff was awarded \$267,000 (comprising general damages of \$200,000, aggravated damages of \$20,000, exemplary damages \$30,000 and special damages of \$17,000 with subsequent submissions invited on interest (over 33 years) and costs. See also *SB V State of NSW* [2004] VSC 514, a civil case concerning sexual abuse in and related to foster care arrangements, in which the plaintiff was awarded damages in the sum of \$281,461 (comprising general damages of \$195,000, past loss of earnings of \$26,461 and future loss of earning capacity of \$60,000).

consistency of approach or assessment standards, and compensation amounts may vary significantly across different claims and from different assessors. Even practitioners familiar with the workings of the programs struggle to reconcile varying outcomes over time.

Standard of proof

75. The standard of proof under which the investigators work is 'the balance of probability'.³⁴ We believe this is the appropriate basis on which victims' claims should be assessed, as it replicates the standard required in civil claims.

Procedural rules

76. The internal operation of the *Towards Healing* protocol is opaque. In Victoria the protocol is conducted out of the Professional Standards Office in Mildura, which is staffed part-time. When and how a complaint is processed is not made clear publicly. Despite the general description in the *Towards Healing* protocol there is little information available about the individuals who perform the work or the nature of their involvement with Church. It is generally unknown to claimants and their representatives whether they are volunteers or employees, what kind of training or expertise they have in the conduct of sensitive investigations. These are all considerations that we believe are relevant in informing how a victim should respond to offers made and steps taken under the protocols.
77. In Sydney, the Office of Professional Standards is the main office from which complaints are directed but depending on where the event took place, or where the perpetrator is now resident, these may be factors which determine which diocesan Church Authority will conduct the investigation.

No judicial review

78. There is no opportunity for appeal against the finding of the Independent Commissioner, nor is there an appeal mechanism in relation to decisions of *Towards Healing*. However, Peter O'Callaghan in his Reply³⁵ comments that Order 56 of the *Supreme Court Rules (Vic)* provides a mechanism to seek

³⁴ Paul Murnane, Reply Submission to the Victorian Parliamentary Inquiry, 23 February 2013 at page 2.

³⁵ Peter O'Callaghan Reply to Kevin Dillon, paragraph 7 (Victorian Parliamentary Inquiry).

natural justice should there be a denial. The time limit in which an application can be brought is 60 days from the date of the decision. We contend there would be significant difficulty attendant upon this course of action and the remedies available are limited, and this is particularly so in cases where legal representatives are not involved throughout the process. To the extent that an application under Order 56 is the only review mechanism made available, we would have concerns about the availability of this course of action to many claimants, as well as its capacity to remedy factual or legal errors encountered in the course of administering the protocols.

79. Apparently 97% of complaints made under *Melbourne Response* have been accepted³⁶ which is offered as another reason why an appeal right is not necessary, and that therefore there can be no apprehension of bias. Although this may well be the case, this statistic alone says nothing about the adequacy of the resolutions that were achieved in those cases, nor whether claimants, properly advised, ought to have appealed against the results within these protocols, where a court would be considered likely to provide a significantly more favourable result.
80. We have had experience in a case in *Towards Healing* which there has been compensation paid and a release signed where the complainant had no legal representation at first instance, but once we assisted the complainant there was a significant increase in the amount of compensation paid. This caused us some concern about the adequacy of first-instance offers being made to unrepresented claimants. To date, we have not had any similar experience with the *Melbourne Response*.
81. The Church's approach to litigation has generally been aggressive. It is the difficulty of access to compensation through the Courts created by this stance which has effectively directed victims into the Church's in-house compensation protocols. These internal processes were criticized by Cummins J in his 2012 Report:
- 'A private system of investigation and compensation, no matter how faithfully conducted by definition cannot fulfill the responsibility of the State to investigate and prosecute crime. Crime is a public, not a private matter. The substantial number of established complaints of clerical sexual abuse found by Mr O'Callaghan (many of which are likely to relate to offences committed against children) reveal profound harm and any private process that attempts to address that harm that [sic] should be publicly assessed.'*³⁷

³⁶ Ibid.

³⁷ *Cummins J Report* Vol 2 p356, paragraph 14.5.3.

Transparency

82. The decisions of the Panels that determine compensation for complainants are not made available to complainants or their legal advisors. There is no body of earlier public decisions that might guide or assist subsequent complainants. Accordingly, there is no way a complainant can understand or analyse the basis upon which a determination has been made.
83. A complainant is given no real understanding of the investigation process undertaken or the referral of matters from one Church authority to another. An example of this difficulty is as follows: a person makes a complaint to the National Office of the Professional Standards Office in Sydney. The abuse complained of occurred in the Archdiocese of Sydney and the complainant is initially referred to that 'Church Authority' in the Archdiocese of Sydney. Contact is made and the complaint discussed with a view to resolution. However, the alleged perpetrator was last a priest in an adjoining Diocese, so the complaint handling 'Church Authority' is transferred to the personnel from that Diocese. However, the complainant has not been informed of this move from one 'Church Authority' to another and is subsequently left confused by, and suspicious of, the change of personnel who are now investigating the claim.
84. There are reports prepared by the *Towards Healing* investigators and there are also recorded interviews by the *Melbourne Response*, however the complete transcript of these interviews is not always available to the complainant. Usually only a summary of the Investigator's report is available to the complainant. Other relevant documents may or may not be provided. This, again, creates difficulties for claimants in assessing or reflecting upon the appropriateness of offers made, and in fully instructing legal or other advisers after the fact.
85. Unlike in formal litigation, where discovery of relevant documents can be obtained, there is no obligation placed on the Church under these protocols to produce and make available relevant evidence to complainants. In such circumstances, claimants may be asked to make decisions about the adequacy of offers of compensation made under the protocols, without the ability to assess the likely strength of their claims should they proceed to court.

Prevention

86. Paragraph 30 commits the *Towards Healing* protocol to make every effort to reduce risk of abuse by Church personnel through education and the implementation of appropriate codes of conduct. However, there is little evidence to indicate what this really means. There have been few laicisations of priests due to child sexual abuse. To our knowledge there is no information available from *Towards Healing* or the Catholic Bishops Conference or any other body which might monitor this kind of information.
87. There is evidence of the Church's failures in dealing with priests who have been found to have abused children. The case of Rev McAlinden from the Diocese of Maitland-Newcastle has been the subject of recent review. Archbishop Pell refers to the failures of his predecessor, Archbishop of Melbourne, Francis Little in his handling of the case of a Rev Baker as examples.
88. The Parliamentary Inquiry occurring in the Maitland-Newcastle Dioceses ('The Cunneen Inquiry'³⁸) reveals that there were mixed messages sent by Church officials regarding the circumstances of McAlinden's 'retirement'. In the face of allegations of serious sexual assault his priestly facilities were removed, ostensibly due to ill health, and on 5 March 1993 a letter from the then Vicar General to the Maitland Central Clergy Fund stated that McAlinden was residing with a relative and that he had retired from priestly duties but that he should be 'accorded all the benefits of retired priests from 1 March 1993'.³⁹ The recent investigation by Whitlam QC commissioned by the Bishops of Paramatta refer to other examples.
89. The Report Commissioned by the Bishops of Parramatta into 'H' (2012) revealed serious omissions of the Church hierarchy in the Maitland Diocese about the handling of sexual assault allegations. The Report found that there were no formal requirements to report such matters to the police or any authorities and combined with the determined efforts of many in the Church leadership to provide support to accused priests, often to the detriment of the accusers, there was no chance that the Church could have prevented further abuse. While in our view, there is little evidence that can be provided by the Church of the capacity of *Towards Healing* and the *Melbourne Response* to

³⁸ The Cunneen Inquiry is properly known as the 'Special Commission of Inquiry into matters relating to the Police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle'. It was established in NSW after the allegations of cover-up made by Chief Inspector Peter Fox, especially in relation to priests Denis McAliden and James Fletcher, both deceased and the subject of allegations of sexual assault. Established 21 November 2012 and 25 January 2013 by Letters Patent in the State of NSW.

³⁹ Exhibit 121 in the Cunneen Inquiry. The Cunneen Inquiry is due to report its findings on 28 February 2014.

contribute to the prevention of crimes, Whitlam commented in his conclusions that if the *Towards Healing* protocol had been in force at the time when H was offending in the late 1980s then his offending would have been stopped.

90. Frank Brennan SJ recently stated, "Clearly, the Church itself cannot be left alone to get its house in order. That would be a wrongful invocation of freedom of religion in a pluralist, democratic society."⁴⁰ In Ireland, when the Murphy Commission sought to obtain documents relating to the Irish Church's handling of the sexual abuse issue in that country, the Roman Church sought to avoid providing those documents based on Vatican immunity⁴¹ and in the US there have been refusals by Church authorities to release documents on the basis that requiring such disclosures would be an abuse of freedom of religion.
91. The 2012 Victorian Parliamentary Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations received submissions about the need for mandatory reporting alluding to the Church's inability to properly prevent further crime. The report of the Inquiry, though not yet released⁴² will likely review this matter from the Victorian perspective.
92. At paragraph 5.1, the Archdiocese of Melbourne sets out its response to the Victorian Parliamentary Inquiry, "*Facing the Truth*" that:

*"Since the late 1970s, society has become increasingly aware both of the extent of sexual abuse and its harmful effects. Prior to that, the extent of the damage suffered by children who had been sexually abused was not properly understood. As a result, society, including the Church, was slow to adequately respond to and address the issue. Awareness of sexual abuse of children was slow to percolate through society and the Church. Initially, some parts of society thought of sexual abuse of children in terms of incest. The realisation gradually developed that the problem was significant and that sexual abuse was perpetrated by people of a range of temperaments, from all walks of life, including clerics and religious."*⁴³

93. If this is intended as an explanation as to why little was done in response to abuse concerns, then it must be considered in the context of knowledge that "Both the 1917 and 1983 CODES of Canon Law contain substantive and procedural provisions for dealing with a priest who is charged with sexually abusing a minor. Pursuant to the provisions, the offense constitutes a grave

⁴⁰ Father Frank Brennan SJ, Law and Justice Oration, at the Law and Justice Foundation 2012 Justice Awards Dinner, Wednesday 31 October 2012, Parliament House, Sydney
<http://www.eurekastreet.com.au/article.aspx?aeid=33917>

⁴¹ Murphy report, paragraphs 2.23.-2.24.

⁴² The Inquiry has recently sought an extension of time and will report on 30 September 2013.

⁴³ *Facing the Truth* at page 13, paragraph 5.1.

crime and grievous sin, and could result in permanent dismissal from the priesthood. Both CODES envision administrative and judicial phases in the procedure to determine guilt and to impose a penalty, in accord with the requirements of fundamental due process. In general, these substantive and procedural provisions of canon law were ignored by the bishops.¹⁴⁴

94. According to Yvonne Murphy J the problem of clerical child abuse has been known and recognised by the Church for millennia. Over the centuries a strong denunciation of clerical child sexual abuse has been articulated by popes and Councils. The Church developed various legal and procedural measures to deal with the problem. The most recent of these specific measures was the 1962 instruction 'Crimen Solicitationis' although Murphy J indicates that her inquiry revealed confusion about the actual status of the document⁴⁵.

Criminal reporting

95. Criminal reporting of abuse is mandatory in NSW, and we consider that there is no reason why it should not be so in all the other jurisdictions in Australia. It has been established that the Church has been able to comply with the reporting requirements in NSW, and as such, it cannot plausibly be argued that it could not do so in other jurisdictions. If the Royal Commission cannot establish this then we suggest that it should recommend the implementation of mandatory reporting requirements in each jurisdiction.
96. In relation to the criminal abuse of children by 'religious personnel', the Cummins Inquiry Report concluded: *'Any private system of investigation and compensation which has the tendency ...to divert victims from recourse to the State, and to prevent abusers from being held responsible and punished by the State, is a system that should come under clear public scrutiny'*.⁴⁶ We strongly agree with this sentiment.
97. The recommendations of the Cummins Inquiry stated that there should be mandatory criminal reporting of child physical and sexual abuse by religious and staff of religious and other non-governmental organisations. We agree that this is necessary to ensure the prevention of further crimes. Cummins rebutted opposition of the Victorian Bishops to this proposal by noting that:

⁴⁴ *Clergy Sexual Abuse Crisis and the Spirit of Canon Law* Rev John J Coughlin Vol 44 2003 *Boston College Law Review*. Prof Law Boston College (Coughlin is also a Franciscan priest).

⁴⁵ Yvonne Murphy J – 2013 *Kirby Oration* extracted at p 23 *Law Institute Journal* June 2013

⁴⁶ Cummins J *Report* Volume 2, p356 at paragraph 14.5.3.

“The Inquiry considers that, in the long term, the potential discomfort or distress to an individual victim caused by the mandatory reporting of the alleged abuse will be outweighed by the public interest in triggering a criminal justice response that holds the perpetrator publicly responsible and aims at deterring potential abusers from using the cover of large organisations and positions of authority or influence over children to commit abuse. The public criminal process would also have a significant public educative effect.”⁴⁷

98. In July 2010, the Archbishop of Melbourne wrote a letter to all Catholic parishes in which he quoted Pope Benedict’s apology and sorrow for the pain and suffering of victims. However, he also stated that victims have always had an unfettered right to take their complaints to the police. Leaving the Church’s position at this point fails to accept any responsibility by church authorities to properly respond to allegations of criminal activity amongst its own ranks. It fails to appreciate that complainants in such circumstances may not yet be mentally in a position to allow them to approach the police independently, and implies that instead the Church is approached on the basis that it purports to represent a supportive and responsive environment to such complaints. Although rare, this approach is particularly grave and unsupportable in cases where an alleged abuser is still involved with a parish, a school or the community more widely. In effect, by failing to report to police such allegations there is a justified sense in the community that the Church has avoided its responsibilities for the care of its people.
99. Although some Church authorities have stated that most complaints are historical and that there is therefore little point in registering the complaint to the police, this avoids the issue that if the police had received these reports in years gone by, there may well have been an opportunity to prevent further abuse. Mandatory reporting necessarily will allow for the monitoring of such reports, which should assist in the prevention of further crime.

A Model for the Church’s future: ‘Model litigant’ requirements

100. There are already model protocols to provide for the protection of vulnerable individual when making a legal claim against a large adversary with deep pockets. The ‘model litigant’ requirements adopted by the Commonwealth and State governments provide a useful template for the way in which we believe the Church should conduct litigation. The model litigant directions set out, in broad terms, the requirement that the Commonwealth and its agencies uphold

⁴⁷ Ibid.

the highest possible standards of fairness, honesty and integrity – going beyond the required ethical or professional standards of lawyers appearing before a court or tribunal.

101. Specifically, the model litigant obligation requires that the Commonwealth and its agencies:
 - act honestly and fairly;
 - deal with claims promptly;
 - pay legitimate claims without litigation;
 - act consistently in the handling of claims and litigation; and
 - consider alternative dispute resolution.

102. The obligation also requires generally keeping costs to a minimum and not taking advantage of claimants who lack resources to litigate a legitimate claim. It should work to prevent defendants from raising or pursuing improper, unnecessary or unviable points, requiring them to make appropriate concessions on matters of fact and law, and confining proceedings to the real issues in dispute. In particular, it should encourage early and equitable resolution of claims in cases where a defendant has identified it is liable.

103. The model litigant requirements do not require defendants to take a ‘soft approach’ to legal proceedings, however. Defendants are able to act firmly and properly to protect their own interests. The obligation also doesn’t prevent defendants from legitimately seeking to recover their costs where appropriate.

104. The Church cannot claim its priority is justice and compassion when in litigation it will rely on technical defenses of statutes of limitations of actions or the failure to prove vicarious liability (e.g. the *Ellis* defence). It is not model litigant behaviour and it does nothing to inspire confidence amongst the community when the Church overlooks moral culpability in favour of technical legal defences.

105. Archbishop Pell notes in his comments to the Victorian Parliamentary Inquiry that the Church should be treated like other institutions in Australian society.⁴⁸ If this is its position, then the Church should equally accept that it should be treated at law like other institutions in society, and accept responsibility for the history of abuse within its institutions rather than relying on artificial and technical defences available by virtue of its status as a legal ‘non-entity’.

⁴⁸ Transcript of Archbishop Pell’s evidence to Victorian Parliamentary Inquiry 27 May 2013 at page 10 “...in terms of compensation the Catholic Church should be treated exactly like every other institution in Australian Society”

106. We believe that adoption and adherence to 'model litigant' requirements would go a substantial way towards ensuring that an appropriate balance is struck between the need for victims' claims to be appropriately assessed, and the right of the Church to defend itself. It would allow the real issues in dispute to be examined, and would prevent reliance on artificial barriers to the proper resolution of legitimate claims such as 'limitation of actions' arguments and disputes over precise identification of related defendants.

Conclusion

107. Our experience over many years in litigation on behalf of victims provides us with significant experience about the pitfalls for unrepresented complainants who seek to achieve justice through the *Towards Healing* and *Melbourne Response* protocols. There is ample evidence from around the world that the Church has not demonstrated proper care for the victims of abuse, and that when exposed the Church has sought to avoid accepting liability and hidden relevant documents.
108. The Church has historically seen itself separate from the civil law of the countries from within which it operates. In the circumstances of the crimes of sexual abuse this has wrought a terrible toll upon the individual victims and on the community. Initially, the Church hoped to avoid scandal but now the failure to respond properly to these allegations in the first place and then to abandon the victims because of the fear of the opprobrium has ensured that the public outrage is far greater.
109. We have provided our recommendations to the Commission below. We would be happy to provide further information or clarification should the Commissioners require.

Recommendations

1. Improve access to justice for victims of child sexual assault by removing or limiting the major impediments to civil action against the Catholic Church, providing a level playing field for victims to obtain appropriate compensation, including:
 - a. Recommending that the Catholic Church adopt and adhere to a 'model litigant' policy when engaged in civil litigation;

- b. Legislate for or secure by agreement with the Church a limited period of amnesty (for example, three years from the date of reporting of the Royal Commission) in which victims of abuse may initiate a civil claim for compensation against the Church in which the 'limitations of actions' defences would not be available;
 - c. Formalise and recognize at law the corporate nature of the Catholic Church in a manner which will allow the entity to be named as an 'authorising agent' and an entity capable of being sued in civil litigation;
 - d. Formalise and recognise at law that the relationship between the Church or religious orders and clergy or religious members is in practice one of employment or authorised agency, such that liability for acts of the latter is capable of attaching to the former for acts occurring in the course of that relationship; and
 - e. For most negligence claims in Victoria (and in other jurisdictions) there are damage and impairment thresholds which a plaintiff must overcome before they can recover damages. These thresholds should be removed for claims in negligence against the Church in circumstances of child sexual abuse (or, alternatively, claims alleging child sexual abuse should be deemed in the *Wrongs Act* and related legislation to satisfy the thresholds).
2. Mandate the reporting of all child sexual abuse to the relevant police authorities in each State and Territory.
 3. Establish a National Compensation Scheme ('NCS') financed by a fund (which is contributed to by the Church and others based on a formula developed by reference to the likely requirements placed upon the fund) which provides a standardised, simple and transparent non-litigated compensation system, with publicly-known caps and limits on available compensation. This process would relieve the dispute-resolution functions of *Towards Healing* and the *Melbourne Response*, leaving those protocols to exclusively administer any pastoral response to complaints by the Church.

The NCS would operate as an alternative to the formal civil litigation system. A complainant could opt into this scheme and any decision would be binding upon the Church; if the complainant was not satisfied with the outcome through the NCS s/he could then pursue civil litigation as well, but would not be compensated twice. Evidence identified or produced in the course of the NCS process could be made available to expedite any subsequent civil litigation.

An office of the NCS should be established that has monitoring and educative roles, and

which provides for the payment of legal representation of victims should they request this when they make a complaint through the NCS.

20 September 2013