



**Submission from the  
Truth Justice and Healing Council**

**Royal Commission into Institutional Responses to Child Sexual Abuse**

**Issues Paper No. 5 | Civil Litigation**

**15 April 2014**



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Justice Peter McClellan AM  
Chair  
Royal Commission into  
Institutional Responses to Child Sexual Abuse

Via email: [solicitor@childabuseroyalcommission.gov.au](mailto:solicitor@childabuseroyalcommission.gov.au)

Dear Justice McClellan

As you know, the Truth Justice and Healing Council (the Council) has been appointed by the Catholic Church in Australia to oversee the Church's response to the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission).

We now submit the Council's submission in response to the Royal Commission's Issues Paper 5 – Civil Litigation.

Yours sincerely

**Francis Sullivan**  
**Chief Executive Officer**  
**Truth Justice and Healing Council**  
15 April 2014



## Our Commitment

The leaders of the Catholic Church in Australia recognise and acknowledge the devastating harm caused to people by the crime of child sexual abuse. We take this opportunity to state:

- Sexual abuse of a child by a priest or religious is a crime under Australian law and under canon law.
- Sexual abuse of a child by any Church personnel, whenever it occurred, was then and is now indefensible.
- That such abuse has occurred at all, and the extent to which it has occurred, are facts of which the whole Church in Australia is deeply ashamed.
- The Church fully and unreservedly acknowledges the devastating, deep and ongoing impact of sexual abuse on the lives of the victims and their families.
- The Church acknowledges that many victims were not believed when they should have been.
- The Church is also ashamed to acknowledge that, in some cases, those in positions of authority concealed or covered up what they knew of the facts, moved perpetrators to another place, thereby enabling them to offend again, or failed to report matters to the police when they should have. That behaviour too is indefensible.
- Too often in the past it is clear some Church leaders gave too high a priority to protecting the reputation of the Church, its priests, religious and other personnel, over the protection of children and their families, and over compassion and concern for those who suffered at the hands of Church personnel. That too was and is inexcusable.
- In such ways, Church leaders betrayed the trust of their own people and the expectations of the wider community.
- For all these things the Church is deeply sorry. It apologises to all those who have been harmed and betrayed. It humbly asks for forgiveness.

The leaders of the Catholic Church in Australia commit ourselves to endeavour to repair the wrongs of the past, to listen to and hear victims, to put their needs first, and to do everything we can to ensure a safer future for children.

## Authorising Church Bodies

The following Catholic Church bodies have authorised the Truth Justice and Healing Council to represent them at the Royal Commission:

### Dioceses

Archdiocese of Adelaide	Diocese of Broome	Diocese of Sandhurst
Archdiocese of Brisbane	Diocese of Bunbury	Diocese of Toowoomba
Archdiocese of Canberra-Goulburn	Diocese of Cairns	Diocese of Townsville
Archdiocese of Hobart	Diocese of Darwin	Diocese of Wagga Wagga
Archdiocese of Melbourne	Diocese of Geraldton	Diocese of Wilcannia-Forbes
Archdiocese of Perth	Diocese of Lismore	Diocese of Wollongong
Archdiocese of Sydney	Diocese of Maitland-Newcastle	Eparchy of Saints Peter & Paul of Melbourne
Diocese of Armidale	Diocese of Parramatta	Military Ordinariate of Australia
Diocese of Ballarat	Diocese of Port Pirie	Personal Ordinariate of Our Lady of the Southern Cross
Diocese of Bathurst	Diocese of Rockhampton	
Diocese of Broken Bay	Diocese of Sale	

### Religious Institutes

Adorers of the Blood of Christ	Loreto Sisters	Sisters of Mercy Brisbane
Augustinian Recollect Sisters	Marist Brothers	Sisters of Mercy North Sydney
Augustinian Sisters, Servants of Jesus and Mary	Marist Fathers Australian Province	Sisters of Mercy Parramatta
Australian Ursulines	Marist Sisters – Congregation of Mary	Sisters of Nazareth
Benedictine Community of New Norcia	Ministers of the Infirm (Camillians)	Sisters of Our Lady of Sion
Blessed Sacrament Fathers	Missionaries of God's Love	Sisters of St Joseph
Brigidine Sisters	Missionaries of the Sacred Heart	Sisters of St Joseph of the Apparition
Canons Regular of Premontre (Norbertines)	Missionary Franciscan Sisters of the Immaculate Conception	Sisters of St Joseph of the Sacred Heart
Canossian Daughters of Charity	Missionary Sisters of Mary, Queen of the World	Sisters of St Joseph, Perthville
Capuchin Friars	Missionary Sisters of St Peter Claver	Sisters of St Paul de Chartres
Christian Brothers	Missionary Sisters of Service	Sisters of the Good Samaritan
Cistercian Monks	Missionary Sisters of the Sacred Heart	Sisters of the Good Shepherd
Columban Fathers	Missionary Sisters of the Society of Mary	Sisters of the Holy Family of Nazareth
Congregation of the Mission – Vincentians	Missionary Society of St Paul	Sisters of the Little Company of Mary
Congregation of the Most Holy Redeemer – Redemptorists	Oblates of Mary Immaculate	Sisters of the Resurrection
Congregation of the Passion – Passionists	Order of Brothers of the Most Blessed Virgin Mary of Mount Carmel (Carmelites)	Society of African Missions
Congregation of the Sisters of Our Lady Help of Christians	Order of Friars Minor Conventual	Society of Catholic Apostolate
Daughters of Charity	Order of Saint Augustine	Society of Jesus
Daughters of Mary Help of Christians	Order of the Friar Servants of Mary (Servite Friars)	Society of St Paul
Daughters of Our Lady of the Sacred Heart	Our Lady of the Missions	Society of the Divine Word Australian Province
De La Salle Brothers	Patrician Brothers	Society of the Sacred Heart
Discalced Carmelite Friars	Pious Society of St Charles – Scalabrinians	Sylvestrine-Benedictine Monks
Dominican Friars	Poor Clare Colettines	Ursuline Missionaries of the Sacred Heart
Dominican Sisters of Eastern Australia & The Solomons	Presentation Sisters – Lismore	
Dominican Sisters of North Adelaide	Presentation Sisters – Queensland Congregation	<b>Other Entities</b>
Dominican Sisters of Western Australia	Presentation Sisters – Tasmania	Australian Catholic Bishops Conference
Faithful Companions of Jesus	Presentation Sisters – Victoria	Catholic Religious Australia
Family Care Sisters	Presentation Sisters – Wagga Wagga Congregation	Catholic Church Insurance Limited
Franciscan Friars	Presentation Sisters – Western Australia	Professional Standards Office Tasmania
Franciscan Missionaries of Mary	Religious of the Cenacle	Professional Standards Office NSW/ACT
Franciscan Missionaries of the Divine Motherhood	Salesians of Don Bosco	Professional Standards Office NT
Franciscans of the Immaculate	Salvatorian Fathers	Professional Standards Office Qld
Holy Cross – Congregation of Dominican Sisters	Secular Institute of the Schoenstatt Sisters of Mary	Good Samaritan Education and Lourdes Hill College
Holy Spirit Missionary Sisters	Servants of the Blessed Sacrament	Good Samaritan Education and Mater Dei
Hospitaller Order of St John of God	Sisters of Charity of Australia	Good Samaritan Education and St Mary Star of the Sea College
Institute of Sisters of Mercy Australia & Papua New Guinea	Sisters of Jesus Good Shepherd "Pastorelle"	Good Samaritan Education and St Patrick's College
		Loreto Mandeville Hall Toorak
		Trustees of Mary Aikenhead Ministries



## The Truth Justice and Healing Council

The Catholic Church in Australia (the Church) welcomes the establishment of the Royal Commission into Institutional Responses to Child Sexual Abuse as an opportunity to acknowledge the truth about child sexual abuse within the Church, and to have these issues investigated and considered, objectively and publicly. It is an opportunity to bear witness to the suffering of the many victims of this abuse.

The Church is committed to cooperating fully with the Royal Commission, without reservation or qualification.

In February 2013 the Australian Catholic Bishops Conference (ACBC) and Catholic Religious Australia (CRA)<sup>1</sup> jointly established the Truth Justice and Healing Council (the Council) to coordinate and oversee the Church's overall response to and appearance at the hearings of the Royal Commission.

The Council is a body of 12 people, with expertise spanning such fields as child sexual abuse, trauma, mental illness, suicide, psycho-sexual disorders, education, public administration, law and governance. The majority of Council members are lay, two of its members are bishops, and one of its members is a Brigidine sister. Three of the Council members are either themselves victims of abuse or have immediate family members who are victims. The Council provides independent advice to the ACBC and CRA, through a Supervisory Group, which is comprised of the Permanent Committee of the ACBC, and representatives of CRA. The Supervisory Group may accept or reject such advice. The Supervisory Group fully endorses this Submission. The members of the Supervisory Group are listed on the TJHC website [here](#).<sup>2</sup>

The Council is chaired by the Hon Barry O'Keefe AM QC, former Chief Judge of the Commercial Division of the Supreme Court of New South Wales and a former Commissioner of the NSW Independent Commission Against Corruption.

The current members of the Council are:

- Archbishop Mark Coleridge, Archbishop of Brisbane
- Professor Maria Harries, Adjunct Professor at Curtin University and Research Fellow in Social Work and Social Policy at the University of Western Australia
- Mr Jack Heath, CEO of SANE Australia
- Associate Professor Rosemary Sheehan, Department of Social Work, Faculty of Medicine, Nursing and Health Sciences, Monash University
- Hon Greg Crafter AO, former South Australian Minister of Education
- Sr Maree Marsh, former Congregational Leader of the Brigidine Sisters and psychologist with Anti-Slavery Australia at the University of Technology Sydney, Faculty of Law
- Bishop Bill Wright, Bishop of the Diocese of Maitland-Newcastle

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<sup>1</sup> CRA is the peak body, previously known as the Australian Conference of Leaders of Religious Institutes, for leaders of religious institutes and societies of apostolic life resident in Australia.

<sup>2</sup> <http://www.tjhcouncil.org.au/about-us/members-of-supervisory-group.aspx>

- Professor Greg Craven, Vice-Chancellor of the Australian Catholic University
- Ms Elizabeth Proust AO, former Secretary to the Victorian Department of Premier and Cabinet, and Chairman of the Bank of Melbourne and Nestlé Australia and member of other boards
- Mr Stephen Elder, former Member of the Victorian Legislative Assembly and Parliamentary Secretary for Education and currently Executive Director of Catholic Education for the Archdiocese of Melbourne, and
- Dr Marian Sullivan, child and adolescent psychiatrist.

The CEO of the Council, Mr Francis Sullivan, has worked in government and private practice and has held positions as Secretary-General of the Australian Medical Association, Chief Executive of Catholic Health Australia and consultant to the Pontifical Council for the Pastoral Care of Health Care Workers at the Vatican. He is also an Adjunct Professor at the Australian Catholic University.

The Council oversees the Church's engagement with the Royal Commission, including by:

- speaking for the Church in matters related to the Royal Commission and child sexual abuse
- coordinating the Church's legal representation at, and the Church's participation in, the Royal Commission.

The Council's role extends to:

- initiating research into best practice procedures, policies and structures to protect children
- assisting in identifying any systemic institutional failures that have impeded the protection of children
- providing information to the Royal Commission concerning the various procedures, policies and structures that have been successively put in place by Church organisations over the past 25 years to deal with complaints and instances of child sexual abuse and any improvements which might be made to them to provide greater protection for children
- seeking to promote lasting healing for the victims and survivors of abuse.

To date, 31 dioceses and 97 religious institutes (commonly referred to as congregations and orders) have given an authorisation to the ACBC or CRA, authorising those bodies to represent and act for them in the engagement of the Church with the Royal Commission.

The ACBC and CRA have in turn delegated that authority to the Council. The Council therefore seeks to appear at the Royal Commission for all the authorising bodies, and will speak with one voice for all of them.

Pursuant to these arrangements, the Council thus acts for all archdioceses and dioceses in Australia, with the exception of three of the Eastern Rite Eparchies, and for all the major religious institutes. The Council also acts for a number of other Catholic organisations including Catholic Church Insurance Limited (CCI).

For practical purposes, the Council will ordinarily speak for the whole Church: its dioceses, its religious institutes, its priests and religious, in the Royal Commission.

The Catholic Church in Australia today is an extensive and diverse religious organisation committed to worship, prayer and pastoral care. It is involved in providing pastoral, educational, health, human and social services across Australia.<sup>3</sup>

Notwithstanding that all the dioceses and religious institutes are autonomous and independent, each from the other, with no one central or controlling authority, and with each free to govern its affairs separately and independently, all are united in their support for the principles stated in the Commitment at the head of this Submission.

Those principles are also fully shared by all the innocent and high-minded priests and religious whose long years of devoted and selfless service have been admirable and who are heartbroken by the revelations of sexual abuse which have emerged in recent decades.

The Council's aim is to do everything in its power to ensure that the Royal Commission has available to it from the Church all the material that it needs for the work it seeks to do, so as to ensure that a light is shone on dark places and times and events, and to ensure that nothing is concealed or covered up in respect of what Church personnel did or failed to do.

The Council seeks to fulfil that role, on behalf of the Church, in a spirit of honesty, openness and genuine humility.

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<sup>3</sup> See Annexure B, TJHC Submission to Royal Commission Issues Paper No 2: Towards Healing, 30 September 2013 <[http://tjhcouncil.org.au/media/39435/30549468\\_2\\_TJHC-Towards-Healing-submission-30-Sep-2013.pdf](http://tjhcouncil.org.au/media/39435/30549468_2_TJHC-Towards-Healing-submission-30-Sep-2013.pdf)>

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## Executive Summary

- 1 Aside from the difficulties faced by any plaintiff who may wish to bring a civil claim in relation to sexual abuse, two particular difficulties arise if the abuse occurred when the plaintiff was a child and the plaintiff wants to bring such a claim against a Catholic Church entity. They are:
  - (a) Statutes of limitation issues, and
  - (b) Identifying the responsible party against whom to bring the proceedings.
- 2 This Submission discusses those difficulties and proposes certain changes to the law.
- 3 In relation to the issue of statutes of limitation operating in many circumstances to bar civil claims arising from incidents which occurred when the plaintiff was a child, the Submission discusses possible options which the Royal Commission may wish to consider. The Council submits that the preferable option in relation to these claims is for the Royal Commission to recommend that governments in Australia establish limitation periods of 25 years running from the age on which the victim reached his or her majority, with the victim being entitled to apply to have the period extended.
- 4 The Catholic Church in Australia is not a single incorporated body. Identifying a responsible party against whom to bring proceedings can be difficult if the institution in which the abuse occurred is an unincorporated association and there is not an appropriate entity capable of responding to the proceedings. The Council submits that legislation should be introduced imposing a requirement on all unincorporated associations which appoint or supervise people working with children to establish an incorporated entity able to be sued on behalf of the institution. The entity would be the entity against whom any victim of alleged abuse who wished to take civil proceedings against the institution concerned could proceed.
- 5 The legislation would require the institution to:
  - (a) take reasonable steps to ensure that the entity is sufficiently insured and/or indemnified from the assets of the institution to meet any civil claims which may be made against it relating to the abuse of a child, and
  - (b) take steps to make the entity and its purpose known by the community.

## 1 Introduction

- 1 Although there is a popular community understanding that the Catholic Church is a discrete legal entity, the position at law is different. The Catholic Church is not a legal entity, either in Australia or worldwide. At law, ‘the Church’ is not a thing but is a grouping of people who have a common religious belief founded on Jesus Christ. Within that grouping are other groupings known as archdioceses, dioceses, parishes and religious institutes.<sup>4</sup> Under Australian law, churches generally, and archdioceses, dioceses, parishes and religious institutes as groupings within a church, are usually treated as voluntary unincorporated associations.<sup>5</sup> An unincorporated association cannot sue or be sued in its own name because it does not exist as a juridical entity.<sup>6</sup> Nor, generally speaking, can a representative order be made against the members of an unincorporated association.<sup>7</sup>
- 2 As voluntary unincorporated associations are not legal entities, they cannot own property under the civil law. To facilitate the management of, and dealings with, land of the Catholic Church, legislation in a number of the States and Territories creates statutory bodies corporate to act as trustees, with the power to appoint, manage and deal with Church land.<sup>8</sup> In New South Wales, for example, the *Roman Catholic Church Trust Property Act 1936* provides that there shall be for each diocese trustees of Church trust property,<sup>9</sup> who shall be the bishop and his diocesan consultors, that those trustees are a body corporate and that all Church trust property within the diocese is vested in the body corporate.<sup>10</sup>
- 3 The mechanism that is used in Western Australia to facilitate the management of, and dealings with, Church land is the corporation sole.<sup>11</sup> In that State the bishop of each diocese is constituted by legislation as a corporation sole.<sup>12</sup> The formula in each of the Acts is similar: the Act constitutes the bishop as a corporation sole, by his corporate name, and with perpetual succession, and states that by and in that name he may sue and be sued and may purchase, hold and dispose of property. The effect of the provisions is that Church property in Western Australia vests in the relevant bishop as a corporation sole.

<sup>4</sup> Religious institutes are more commonly referred to as “religious orders” or “religious congregations”. There are in Australia some 180 religious orders and societies of apostolic life (which for present purposes can be treated as equivalent to orders). Some religious orders are incorporated bodies.

<sup>5</sup> *Attorney-General (NSW) v Grant (Presbyterian Church case)* (1976) 135 CLR 587 at 600; *The Trustees of the Roman Catholic Church for the Archdiocese of Sydney v TGP Architects & Planners Pty Ltd* [2005] NSWSC 381, [22]; *Trustees of the Roman Catholic Church v Ellis* (2007) 70 NSWLR 565, [47]

<sup>6</sup> *Trustees of the Roman Catholic Church v Ellis* at [47]

<sup>7</sup> *Ibid* at [62] – [93]

<sup>8</sup> The position in Queensland is a little different. There, by virtue of legislation enacted in 1861, at least some of the bishops are bodies corporate. Each successive Bishop of Toowoomba, for example, is a body corporate by the name and style of The Corporation of the Roman Catholic Diocese of Toowoomba.

<sup>9</sup> This is defined in such a way as not to include property held on trust for a religious order or congregation.

<sup>10</sup> In Victoria, the *Roman Catholic Trusts Act 1907* (Vic) has a similar effect. While arrangements in other Australian jurisdictions relating to the holding of Church property are also similar, they differ in their detail. The position is comprehensively set out in Lucas, Slack, d’Apice, *Church Administration Handbook* (St Pauls, 2008), chapter 15.

<sup>11</sup> The corporation sole concept originated under ecclesiastical law in England as a means of managing church property. The utility of a corporation sole at common law is that it provides a means whereby continuity in the exercise of powers of an office can be obtained, despite the mortality of office holders. *Halsbury’s Laws of England* (4<sup>th</sup> ed.), vol. 14, para. 458 states with reference to the constitution of the Church of England: “The bishop is a corporation sole, with perpetual succession and a seal.” The suppression of the Catholic Church in England that began with Henry VIII and the English Reformation led to the change under which Catholic bishops were not constituted as corporations sole. (As to the situation concerning bishops of the Catholic Church, see *Halsbury’s Laws of England* (4<sup>th</sup> ed.), vol. 14, para. 1397.)

<sup>12</sup> See, for example, *Roman Catholic Church Property Act 1911* (WA), s.4 (Archdiocese of Perth) and *Roman Catholic Geraldton Church Property Act 1925* (WA), s.4 (Diocese of Geraldton).

- 4 In South Australia the Catholic Church Endowment Society Incorporated was established in the 1800s and appointed as trustee for the benefit and advancement of 'The Roman Catholic Church in the Province of South Australia'. 'As a result, the Endowment Society holds considerable assets as trustee for the church within the Province of South Australia.'<sup>13</sup>
- 5 Statutory bodies corporate have also been created to facilitate the holding and management of land on behalf of religious orders. For example, the *Roman Catholic Church Communities' Lands Act 1942* (NSW) creates bodies corporate for the purpose of holding, dealing with and managing property that is subject to a trust for the use and benefit of certain religious orders, associations and societies particularised in s.3 of the Act and Schedule 2 to the Act.
- 6 However, not all land on which religious orders administer schools comes within the potential scope of that legislation. In some cases, religious orders administer a school in circumstances where the land and facilities are owned by the diocese or parish in which the school is located. The Marist Brothers, for example, in some cases own the land on which they operate a school but the larger number of the schools they administer are located on land that is owned by the diocese or parish.<sup>14</sup>

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<sup>13</sup> Lucas, Slack, D'Apice, *Church Administration Handbook* (St Paul's, 2008), p 261

<sup>14</sup> The legislation in New South Wales deals with this situation by excluding church trust property within the meaning of the *Roman Catholic Church Trust Property Act 1936* from the scope of the *Roman Catholic Church Communities' Lands Act 1942*.

## 2 Bringing claims in the Courts

- 1 Since the late 1970s society has become increasingly aware that some lay individuals, clergy and religious within a variety of institutions (governmental and non-governmental), including the Catholic Church, have sexually abused children in their care. That abuse is a crime. In the context of the Catholic Church, it is also a grave betrayal of the trust that people have placed in the Church and is shameful for the whole Church. The pain and suffering which victims have endured is a matter on which Pope Benedict XVI expressed his deep sorrow on his visit to Australia in 2008.<sup>15</sup>
- 2 The sexual abuse of children in any institutional context raises fundamental considerations of where responsibility lies for not only the actions of the perpetrator but also the just handling of the response to the abuse.
- 3 The use of the law of torts to bring claims in the civil courts for sexual assault is a relatively recent development.
- 4 There is no doubt that, in very many cases, a person who has suffered sexual abuse as a child will have suffered harm as a result. As the Family and Community Development Committee of the Parliament of Victoria said in the report of its Inquiry into the Handling of Child abuse by Religious and other Non-Government Organisations, *Betrayal of Trust*,<sup>16</sup> many such victims of abuse in an institutional setting want justice. They want an opportunity to restore their lives and to repair the damage they experienced as a consequence of being criminally abused by a person in the organisation.<sup>17</sup> While justice may mean different things to different victims, for many recourse to civil litigation is important 'not only as an avenue to seek compensation, but also as a form of acknowledgement and accountability for the harm they have suffered'.<sup>18</sup>
- 5 That is not to say that civil litigation is necessarily an effective mechanism for providing redress in relation to the long-lasting and harmful effects of sexual abuse. Court judgments in civil litigation matters focus on 'damages' or financial compensation as the legal remedy for harm. That focus deflects attention from what may be required to deal positively with the consequences of the injury, including ongoing counselling and, in cases where the injury occurred in the Church context, an opportunity for healing through re-establishment of a pastoral relationship.
- 6 It is also the case that public accountability through the reporting of proceedings and judgments is not a necessary result of the bringing of civil claims. Data from the United States suggests that, in that country, the vast majority of claims related to sexual abuse are settled out of court.<sup>19</sup>
- 7 As the Council said in its submission to the Royal Commission dated 30 September 2013 in relation to *Towards Healing*,<sup>20</sup> there are well-known difficulties in the path of any victim who may be giving consideration to bringing legal proceedings. They include:
  - (a) A civil action for damages is conducted and dealt with in public. Many victims may not want painful and sensitive matters associated with sexual abuse to be dealt with in this way

<sup>15</sup> St Mary's Cathedral, Sydney, 19 July 2008

<sup>16</sup> November 2013

<sup>17</sup> See Part B of the report.

<sup>18</sup> Report, p 520

<sup>19</sup> According to one source, over 3,000 civil lawsuits relating to clergy sex abuse were filed in the US between 1984 and 2009. Between 1986 and 2009, only 37 went to trial: BishopAccountability.org, *Documenting the abuse crisis in the Roman Catholic Church*, Data on the Crisis, www.bishopaccountability.org

<sup>20</sup> Section 7 of the Council's submission

- (b) Proving the facts relevant to the abuse itself when the events may have occurred a long time ago may be very difficult
  - (c) Proving that the plaintiff's present condition was caused by the abuse may present complex problems, especially if there is a range of factors in the plaintiff's life that may have contributed to that condition, and
  - (d) The uncertainty and stress associated with the bringing of any legal proceedings in the courts and the length of time involved in bringing matters before the courts.
- 8 These may be regarded as ordinary difficulties of litigating a claim involving sexual abuse. This Submission does not address them in any detail. What it does address are two difficulties that are of particular significance for a victim of child sexual abuse wishing to sue a Church entity. Those difficulties are:
- (a) Defendant issues - identifying a responsible party against whom to bring proceedings; and
  - (b) Limitation periods – the operation of statutory limitation periods which may bar the claim.
- 9 Those difficulties are discussed more fully below.

## 2.1 Identifying a responsible party against whom to bring proceedings

- 10 As mentioned above, voluntary or unincorporated associations are not entities which can be sued. The absence of a legally recognisable body that can be sued is often a major difficulty for potential plaintiffs contemplating the bringing of proceedings against the Church or Church entities for breach of duty of care or other tortious action in relation to injury caused as a result of abuse perpetrated by Church personnel.
- 11 If the perpetrator is still alive, it may be possible to maintain a civil action against him or her. However, often, of course, he or she will have limited means available to satisfy a judgment.
- 12 For this reason, a potential plaintiff may prefer to bring any action against the relevant bishop or Church leader. But here too a potential plaintiff faces difficulty. While it is possible to sue a bishop or leader of a religious order if the bishop or leader was aware of abuse perpetrated by a priest or member of the order but did nothing to seek to prevent the abuse, that bishop or leader may have died and the present day bishop or leader may not have held that position at the time the abuse occurred. If the present day bishop or leader was not the bishop or leader at the relevant time, he or she cannot be held responsible for the abuse.
- 13 This principle was affirmed in the decision of the NSW Court of Appeal in *Trustees of the Roman Catholic Church v Ellis*.<sup>21</sup> In that case one of the issues before the court was whether Cardinal Pell was a proper defendant in proceedings in which Mr Ellis sought damages against several Church bodies arising from sexual abuse perpetrated on him by an assistant parish priest of a parish in the Sydney Archdiocese. The court held that Cardinal Pell was not a proper defendant. Mason P said:

*The nature of the episcopacy in the Roman Catholic Church is... arguably sufficient to ground a finding that the Archbishop has the capacity to control most activities conducted in the name*

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<sup>21</sup> [2007] NSWCA 117

*of the Church in the Archdiocese... this alone does not translate automatically into a basis for establishing some species of vicarious liability in every member of the Church at any point of time or a basis for finding that the Archbishop is a corporation sole.*<sup>22</sup>

- 14 As is discussed above, in most jurisdictions in Australia, legislation provides for the vesting of Church property in trustees. The trustees may therefore be the owners of the land on which the abuse occurred, and the assets they hold may be significant. However, liability in relation to child sexual abuse cannot attach to them merely by virtue of their ownership of the land and, in many cases, the legislation does not confer on them a power to appoint, deal with or control Church personnel. In *Trustees of the Roman Catholic Church v Ellis*,<sup>23</sup> the NSW Court of Appeal held that the Trustees of the Roman Catholic Church for the Archdiocese of Sydney were not proper defendants to the action. The function of holding Church property which was given to them under the *Roman Catholic Church Trust Property Act 1936* could not be inverted into a proposition that they and the funds they administered could be rendered subject to all legal claims associated with Church activities.<sup>24</sup>
- 15 The effect of the NSW Court of Appeal decision in *Archbishop of Perth v "AA" to "JC" Inclusive*<sup>25</sup> is that the establishment of the "statutory bishop" in Western Australia is to be regarded as having similar effect to the establishment of the statutory trustees in other States, namely, that the bishop has been created as a corporation sole for the limited purpose only of the holding, acquisition, disposition and management of property. There is nothing in the *Roman Catholic Church Property Act 1911 (WA)* which makes the Archbishop of Perth liable for actions in tort arising from the conduct of persons unrelated to property.<sup>26</sup>

## 2.2 Limitation periods

- 16 Since many, if not most, claims of sexual abuse involve events alleged to have taken place many years ago, often decades in the past, most civil claims are likely to be barred by the operation of current statutory limitation periods.<sup>27</sup> As a result, victims will generally need to seek from the Court an extension of time in which to bring proceedings. The application will involve additional cost and delay.
- 17 In determining whether or not to grant an extension of time, Courts take into account a range of factors including:
- (a) whether the justice of the case requires that the application be granted<sup>28</sup>

<sup>22</sup> at [78]

<sup>23</sup> [2007] NSWCA 117

<sup>24</sup> See also *Uttinger v The Trustees of the Hospitaller Order of St John of God Brothers* [2008] NSWSC 1354; *PAO v Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Ors* [2011] NSWSC 1216. The latter case related to a suit brought by former students of Patrician Brothers School at Granville in relation to alleged sexual abuse by a teacher at the school in 1974. The Trustees in 1974 owned the land on which the school stood. The case concerned an application by the Trustees for their removal from the proceedings. Hoeben J held that the proceedings against the Trustees should be dismissed. He said that there was "no evidence in the material before me which establishes, either inferentially or directly, that the Archdiocese Trustees had anything to do with conducting the Granville School or schools generally." (at [99])

<sup>25</sup> (1995) 18 ACSR 333

<sup>26</sup> (1995) 18 ACSR 333 at 353 (Cole JA)

<sup>27</sup> Each Australian jurisdiction has a limitation statute setting out the rules governing the period of time in which a plaintiff must commence a civil proceeding. The prescribed limitation periods range from 3 to 6 years for tortious claims. Where a personal injury is one suffered by a person when he or she was a child, the limitation period generally runs from the date on which the child attains his or her majority. An application to extend the limitation period may be made in all States and Territories.

<sup>28</sup> For example, see *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; *Holt v Wynter* (2000) 49 NSWLR 128; and *Itek Graphix Pty Ltd v Elliott* (2002) 54 NSWLR 207.

- (b) the expiry of insurance cover<sup>29</sup>
  - (c) whether a fair trial is possible having regard to the time that has elapsed since the events in question, and such factors as (where they apply) the death or unavailability of the accused and/or witnesses, the unavailability of relevant documents, and so on
  - (d) the length of the delay, and any explanation for it
  - (e) whether the granting of an extension would result in significant prejudice to the defendant (and, prima facie, a defendant is prejudiced by being deprived of the protection of the limitation period).
- 18 The onus is on the victim to satisfy the Court that the limitation period should be extended. The decision to extend time is discretionary and the outcome of the application is uncertain. A Church authority may be prepared to waive reliance on a limitation defence in some cases but that would be a decision to be made on a case by case basis by the individual Church authority depending on the facts and circumstances of each case.

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<sup>29</sup> *Windsurf Holdings Pty Ltd v Leonard* [2009] NSWCA 6 at [90]

### 3 Law reform

- 1 The Council is committed to contributing constructively to proposals the Royal Commission may recommend for safeguarding children in institutional settings and for addressing the problems described above in bringing civil claims should children be abused in those settings. This section of the Submission raises proposals that the Royal Commission may wish to consider in that regard.

#### 3.1 Statutes of Limitation

- 2 In the *Betrayal of Trust* report the Parliamentary Inquiry in Victoria recommended that the Victorian Government adopt the approach of some Provinces in Canada in abolishing limitation periods for civil actions involving sexual abuse claims if the misconduct occurred while the complainant was a minor.<sup>30</sup> The report set out the terms of the amendment made to the Limitation Act of British Columbia in that regard.
- 3 One option the Royal Commission may wish to consider is to make a recommendation to all governments in Australia for a similar amendment to be made to their statutes of limitation.
- 4 The adoption of this course could, however, have an adverse impact on the fair and efficient administration of justice in cases where the timing of a claim causes significant prejudice to a defendant.
- 5 For this reason, the Council submits that the preferable option is for the Royal Commission to recommend that limitation periods be maintained in cases where a child has been sexually abused in an institutional context but that the limitation period be lengthy and that it be capable of being extended, subject to a defendant having an onus to satisfy the court that it not be extended. In particular, the Council submits that the Royal Commission should recommend that, in child sexual abuse matters:
  - (a) the limitation period should expire 25 years after the victim attains his or her majority, and
  - (b) the period be capable of being extended on the application of the victim, subject to the defendant having the onus of satisfying the court that the granting of the extension would result in significant prejudice to the defendant.
- 6 If statutes of limitation were to be amended in this way, the Council is of the view that the amendments should apply to all claims relating to child sexual abuse, not just those relating to abuse arising in institutions.

#### 3.2 Identifying a responsible party against whom to bring proceedings

- 7 Any abuse or mistreatment of children is abhorrent. The sexual abuse of children by Church personnel is particularly abhorrent given the moral and social dimensions of the Church's responsibilities.

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<sup>30</sup> Report, section 26.3

- 8 In the Council's view it is time for society to accept a new approach to the safeguarding of children within institutions. The approach, as set out below, would impose on all unincorporated entities which engage with children new obligations aimed at ensuring that there is a properly funded entity available to be sued should a child be abused while in the care of the institution or while engaging with the institution.
- 9 The Council submits that there should be legislative change at the national level in Australia which imposes a requirement on all unincorporated associations that appoint or supervise people working with children to establish an incorporated entity as a person against whom any victim of alleged abuse who wishes to take civil proceedings against the association may proceed.
- 10 The entity would be the entity against whom any victim of alleged abuse who wished to take civil proceedings against the institution concerned could proceed. The entity would also be responsible for meeting any redress payments levied against the institution under any statutory redress scheme which the Royal Commission may recommend.
- 11 The legislation would require the institution to:
  - (a) take reasonable steps to ensure that the entity is sufficiently insured and/or indemnified from the assets of the institution to meet any civil claims which may be made against it relating to the abuse of a child, and
  - (b) take steps to make the entity and its purpose known by the community.
- 12 The entity would in effect be the nominal defendant for the particular institution. The entity would be the person against whom all claims would be brought, including claims arising from circumstances that occurred before the date of commencement of the legislation.
- 13 In making this submission, the Council does not intend that strict liability would attach to the incorporated entity. The plaintiff would still carry the onus of satisfying all factual elements of his or her claim, including proving that, in the particular circumstances, the entity is liable for the acts alleged against the doer of the acts.
- 14 There are of course some entities within the Church which already have corporate entities in place that are the appropriate entities for responding to civil suits. For example, if a civil litigant wished to bring proceedings against the bishop of Toowoomba in relation to a tortious act done by a priest of the Diocese of Toowoomba, the appropriate defendant would be The Corporation of the Roman Catholic Diocese of Toowoomba which, by virtue of letters patent issued on 12 June 1930, is the corporate name of the body corporate constituted by each successive bishop of Toowoomba. Similarly, many of the religious congregations have corporate trustees which are the proper defendant to any claim brought against the congregation.
- 15 The legislation which the Council proposes would need to make it clear that it is not intended that a new corporate entity be established in these circumstances but that the existing corporate entity would sufficiently meet the legislative requirements.

## 4 Conclusion

- 1 The Council welcomes this opportunity to address some of the legal issues which have arisen in relation to litigation in the area of child sexual abuse, and has proposed the reforms set out in this Submission as important steps towards ensuring that the civil courts are open and available to victims of child sexual abuse.
- 2 In particular, the Council recognises and endorses the need for law reform around the issue of whether ‘the Church’ can be sued. The Council has put forward in this Submission a proposal for how this could be achieved.
- 3 This change in itself embodies an important recognition that the option of civil litigation, against an identifiable and appropriate defendant, should be available to claimants who want to bring actions against Catholic Church bodies, in the same way that claimants can sue other bodies or organisations.
- 4 The Council also takes this opportunity, however, to reiterate its view that civil litigation is inevitably difficult, time consuming, expensive and uncertain. It may also not be the best way of achieving healing for victims of child sexual abuse. For these reasons there should also be more appropriate and accessible avenues for victims of child sexual abuse to seek redress.
- 5 The Council is on record as supporting a redress scheme for all institutions that deal with children which is specifically designed for victims of child sexual abuse and which includes counselling support as an element. The Council considers that such a scheme, if properly designed and supported, would provide victims with an easier process, quicker outcomes and greater scope for achieving healing for victims than would civil litigation.
- 6 On that basis, the Council urges that, while action should be taken to address the legal issues raised by the difficulty of bringing proceedings against institutions which are unincorporated associations, the aim should not be to make civil litigation the only option available for claimants to seek redress.
- 7 Alternative redress schemes should remain a high priority for the Royal Commission. Placing priority on the development and urgent implementation of an effective alternative redress model will, in the Council’s view, offer victims a faster, cheaper and more accessible avenue through which to seek redress. If such a redress scheme is introduced, and works effectively, victims should have less cause to resort to civil litigation to obtain a fair and just outcome in their case.
- 8 The Council notes that the matter of redress schemes is to be the subject of a further issues paper from the Royal Commission. In responding to that paper in due course, the Council intends to deal with issues in relation to civil litigation that the Council has not addressed in this Submission.