

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

### Issues Paper 2 - Towards Healing Process

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|                           | Several opinion pieces have been published on this issue (Attachment A).                                                                                                                                                                                          |

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

## Issues Paper 2 - Towards Healing Process

*'It's not Towards Healing, it actually takes you towards madness'.<sup>1</sup>*

### 1.0 Overview

This submission on the Towards Healing (TH) process is submitted to the Royal Commission into Institutional Responses to Child Sexual Abuse.

This submission consists primarily of a collation of evidence from interviews conducted for my PhD research (see page 9). A full analysis of this data will be available with the completed thesis.

Having said that, the main areas of concern with the TH process have been identified and categorized in this submission. All evidence from the research has been tested against the provisions in the TH protocol.

A brief background of the civil and criminal limitations and difficulties for victims seeking justice, have also been included in this submission, especially findings from the research indicating that only one civil case (out of about 2000) has reached adjudication in the courts since the 1990s. This is primarily due to what is known as the 'Ellis defence.'

This submission has not dealt with some other major concerns with the TH process: Independence, including the appointments of TH personnel; transparency; confidentiality and referrals to the police by TH. These will be addressed and examined in the completed thesis.

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<sup>1</sup> V1-24

## Terminology

The terminology used in the Towards Healing protocol differentiates between a 'complainant', a person who is alleging sexual abuse, and a 'victim', a person whose allegation has been proven.

The primary victims interviewed in this research are always referred to as a 'victim'. This term has been chosen because it is the language of the protocol and the law. Many people who have been sexually abused prefer to be known as 'survivors'. Much of the literature now uses the term 'survivor'. Many victims/survivors say that a victim becomes a survivor.

The use of the term 'victim' in this research is not pejorative, nor does it mean the sexually abused person is powerless. The term 'victim' in this research means that the person was sexually abused.

Church Authority: A Bishop or leader/provincial of a religious organisation

V1: Primary Victim

V2: Secondary Victim

LA: Legal Advocate – Solicitors representing the victim

LB: Litigation Barrister - representing the victim

LP: Prosecution (Criminal) Solicitor

PB: Prosecution (Criminal) Barrister

NLA: Non-legal advocate

## 1.1 Introduction to Towards Healing

Towards Healing (TH) was set up by the National Committee for Professional Standards that was established by the Catholic Bishops and leaders of Religious Institutes. Its function is to oversee the development of policy, principles and procedures of a 'compassionate and just system for dealing with complaints of sexual abuse' by catholic clergy.<sup>2</sup>

*The main purpose of Towards Healing is to assist the complainant to **find healing**, and where possible, to experience some measure of reconciliation with the Church. Its purpose therefore is primarily a **pastoral one**.*

This emphasis on a 'pastoral' process distinguishes it from a legal process.<sup>3</sup>

TH is a national protocol receiving complaints from all over Australia, other than complaints emanating from the Melbourne Archdiocese.

The Catholic Bishops and leaders of religious organisations in Australia, acknowledge:

*...with deep sadness and regret that a number of clergy and religious and other church personnel have abused children, adolescents and adults who have been in their pastoral care.<sup>4</sup>*

Unlike the Melbourne Response, TH has formulated a set of principles and procedures.<sup>5</sup>

The TH protocol has undergone revisions since they were first published in 1996. These were led by Professor Patrick Parkinson from the Faculty of Law at Sydney University. Consideration of the requirements of Canon Law were part of these revisions so that

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<sup>2</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010).

<sup>3</sup> Ibid.

<sup>4</sup> Ibid 1.

<sup>5</sup> Ibid.

'decisions made through *Towards Healing* could be securely implemented.'<sup>6</sup> It is not clear what this means and there is no explanation as to which Canon Law provisions are involved and what weight they may carry in TH determinations.

## 2.0 Principles for dealing with complaints of abuse

### 2.1 Introductory comments

The TH principles for dealing with complaints of abuse note that the breach of trust, the abuse of authority and the professional misconduct of clergy or religious are associated with 'any attempt [by them] to sexualise a pastoral relationship'. Also, any form of sexual behaviour with a child or young person is always sexual abuse and is both immoral and criminal.<sup>7</sup>

Physical and emotional cruelty also constitute an abuse of power and when serious physical pain or mental anguish are caused, without any legitimate disciplinary purpose, then abuse is committed.<sup>8</sup>

### 2.2 The response of the Church

The response of the Church is underpinned by seven principles, to which the Church makes a firm commitment to strive for in its handling of complaints.

#### 2.2.1 Truth

The Church is committed to seeking to know and understand the full extent of the problem of abuse and its causes, especially abuse that is committed in a community that professes the values of Jesus Christ. It is also committed to seeking to know the truth, so far as possible, about individual allegations of abuse. Such commitments are made because to conceal the truth is unjust to victims, a disservice to accused people and damaging to the whole church community.<sup>9</sup>

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid 7.

<sup>8</sup> Ibid 7.

<sup>9</sup> Ibid 9.

### 2.2.2 Humility

The Church recognizes that humility is essential if victims are to be cared for and abuse if prevented in the future. It is very humbling for a Christian church to have to acknowledge that some of its clergy, religious and other church personnel have committed abuse.<sup>10</sup>

This provision does not define 'humility' and what that may encompass in order for the Church authorities to care for victims and prevent abuse in the future. It also does address the other criminal component of these crimes when clergy sexual assaults were covered up or concealed by the hierarchy of the Church.

### 2.2.3 Healing for the victims

The Church authorities accept they have a responsibility to seek to bring healing to victims of abuse and that a sensitive and compassionate response must be the first priority, even when the allegations are unproven.<sup>11</sup>

At the first interview, and assuming the truth is being told, the complainant should be assured that the abuse should be named for what it is and that it is the offender who is to blame, and not the victim.<sup>12</sup>

Victims should be asked what their needs are to ensure they feel safe from further abuse and should be offered appropriate assistance, as this is the Christian thing to do when the person present is very possibly a victim of abuse.<sup>13</sup>

If the abuse did happen, the Church Authorities must listen to victims concerning their needs and ensure they are given such assistance as demanded by justice and compassion.<sup>14</sup>

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<sup>10</sup> Ibid 9.

<sup>11</sup> Ibid 9.

<sup>12</sup> Ibid 9.

<sup>13</sup> Ibid 9.

<sup>14</sup> Ibid 9.



#### 2.2.4 Assistance to other persons affected

The Church must also strive to assist in the psychological and spiritual healing of others who have been 'seriously affected' by the abuse such as family members, the parish, school or other community in which the abuse occurred, the family and close friends of the offender and other clergy and religious.<sup>15</sup>

#### 2.2.5 A response to those accused

If the accused, who must be presumed innocent until proved otherwise, steps aside from their position while the matter is pending, 'it is to be clearly understood that they are on leave and that no admissions of guilt are implied by this fact' and they are not to be referred to as offenders or in any way treated as offenders.<sup>16</sup>

#### 2.2.6 A response to those guilty of abuse<sup>17</sup>

When guilt is admitted or proved, the response must be appropriate to the gravity of the abuse and consistent with the appropriate civil law or canon law. Depending on the seriousness of the abuse, certain offenders will not be given back the power they have abused and cannot return to ministry. That is, where the offender has abused children or vulnerable adults *and* such abuse of the vulnerable adult may well happen again.<sup>18</sup>

There is acceptance that the Church and the community expect a serious and ongoing role by the Church authorities in seeking to ensure that offenders are held accountable; that there is a true appreciation of the enduring harm caused by the offenders; that offenders seek professional help and do whatever is in their power to make amends. This means that the Church authorities have contact with the offender and some form of influence over their conduct.

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<sup>15</sup> Ibid 9-10.

<sup>16</sup> Ibid 10.

<sup>17</sup> Ibid 10-11.

<sup>18</sup> Ibid 10-11.

### 2.2.7 Prevention

There is commitment to make every effort to reduce the risk of abuse by church personnel and this is to be achieved by education and the implementation of appropriate codes of conduct.<sup>19</sup>

The processes for selection and training for clerical and religious life continue to be reviewed and the procedures for those in ministry include police checks, verified references from previous employers and induction processes.<sup>20</sup>

There is also commitment to the education of church personnel on the seriousness of abuse and its adverse effects and to a program of community education and awareness in the recognition and response to abuse.<sup>21</sup>

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<sup>19</sup> Ibid 11.

<sup>20</sup> Ibid 11.

<sup>21</sup> Ibid 11.

### 3.0 Procedures for dealing with complaints of abuse

The TH procedures are underpinned by the above principles for dealing with complaints of abuse and apply to all complaints by church personnel with pastoral relationships. That is, clerics, religious personnel, lay employees or volunteers.

#### 3.1 Personnel

##### 3.1.1 National Committee

The National Committee for Professional Standards (National Committee), which was established by the Australian Catholic Bishops Conference and Catholic Religious Australia, oversees the development of the policy, principles and procedures in relation to complaints of abuse against Church personnel.<sup>22</sup>

##### 3.1.2 The Director of Professional Standards

The Bishops and leaders of religious organisations are also responsible for appointing a Director of Professional Standards (the Director) for each State and Territory. The Director must manage the entire complaints process and is responsible for appointing assessors (see below); convening and chairing meetings with the Resource Groups; liaising with the National Committee, the Resource Groups and the Church bodies; the safe-keeping of documentation in connection with the TH processes and procedures and keeping the complainant and the accused informed of the process.<sup>23</sup>

##### 3.1.3 Resource Groups

The Catholic Bishops and leaders of religious organisations also establish and maintain Professional Standards Resource Groups (Resource Groups) that advise all Catholic Church bodies in Australia in matters relating to professional standards and are responsible for each State and the Northern Territory.<sup>24</sup>

The Resource Group consists of at least one priest or religious and a suitable number of

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<sup>22</sup> Ibid 13.

<sup>23</sup> Ibid 14-15.

<sup>24</sup> Ibid 14.

men and women (not more than ten) of diverse backgrounds and faith traditions who are skilled in child protection, the social sciences, the civil and Canon law and industrial relations.<sup>25</sup>

#### 3.1.4 Consultative Panel

This panel consists of at least five members with the requisite experience, expertise and impartiality to advise and assist Bishops and Religious Order leaders about matters in this area. This Panel must be consulted if a priest or religious is criminally charged or is an unacceptable risk to children, young people or vulnerable adults.<sup>26</sup>

#### 3.1.5 National Review Panel

The National Committee for Professional Standards is charged with appointing this National Review Panel which is comprised of up to nine members from the wider Australian community. This Panel may decide on requests for a review of the process or the findings of the TH process.<sup>27</sup>

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<sup>25</sup> Ibid 14.

<sup>26</sup> Ibid 15-16.

<sup>27</sup> Ibid 16.

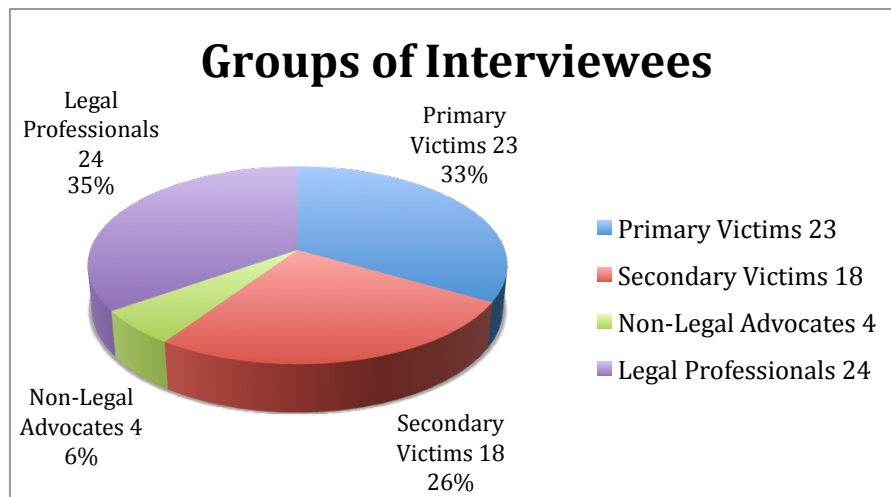
## 4.0 The research

### 4.1 Background

This PhD research is examining whether or not victims of catholic clergy sexual assault are finding justice. The two main pathways to seek justice are the criminal jurisdiction (prosecutions and convictions of the accused and/or the person who concealed the sex crimes) and the civil jurisdiction (suing either the church or diocese, the particular religious order or the offender). Because both these jurisdictions are so restrictive and problematic, victims have returned to the Catholic Church looking for justice.

To gather the data, 69 people were interviewed from Victoria and NSW. They were:

- 23 Primary victims/survivors
- 18 Secondary victims (family members, partners and loved ones)
- Legal professionals: 12 legal advocates, 3 litigation barristers, 3 prosecution solicitors, 2 criminal barristers and 4 County Court judges
- 4 Non-legal advocates (an advocate for the victim who is not a lawyer)



Before Towards Healing is discussed, it is necessary to briefly outline some of the inherent problems or concerns with the criminal and civil options for victims of child sexual assault, in particular, clergy child sexual assault – problems which corral the victim back into the Catholic Church and their internal complaints processes.

#### 4.2 Criminal jurisdiction<sup>28</sup>

In relation to the criminal jurisdiction, it is well established that convictions for child sexual assaults are low and successful appeal rates are high.

In Victoria, for every thousand victims of child sexual assault in the community (this is child sexual assault generally and is not restricted to Catholic clergy),<sup>29</sup> about 10% report<sup>30</sup> their abuse to the police. Also, victims of sexual assault are the least likely of all victims to report the incidents to police.<sup>31</sup>

Of the 10% that do report, there will be about 6 convictions.<sup>32</sup> This represents a conviction rate of about 6% of reported cases or 0.06% of actual cases in the community.

In relation to Catholic clergy child sexual assault, Victoria police quote a figure of reporting to the police of about 8%, reducing those above numbers even further.<sup>33</sup>

This attrition<sup>34</sup> of successful prosecutions continues into the appeal phase of the criminal process where more than half of the convictions are appealed (this is between

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<sup>28</sup> Judy Courtin, 'Judging the Judges: How the Victorian Court of Appeal is Dealing With Appeals Against Conviction in Child Sexual Assault Matters' (2006) 18 *Current Issues in Criminal Justice* 266 See also: Victorian Law Reform Commission (2003) *Sexual Offences, Interim Report*.

Victorian Law Reform Commission (2004) *'Sexual Offences: Law and Procedure', Final Report*.

<sup>29</sup> There are no available figures determining the incidence or prevalence of Catholic clergy sexual abuse, compared with non-clergy sexual abuse.

<sup>30</sup> Victorian Law Reform Commission (2003) *Sexual Offences, Interim Report*.

Child sexual assault is the most under-reported crime in our society: Department of Justice, *Sexual Assault Reform Strategy, Final Evaluation Report* (January 2011) Executive summary.

<sup>31</sup> Family and Community Development Committee, Victorian Parliament, Melbourne, 19 October, 2012, (Deputy Commissioner G. Ashton) 12.

<sup>32</sup> Courtin, above n 29.

<sup>33</sup> Family and Community Development Committee, Victorian Parliament, Melbourne, 19 October, 2012, (Deputy Commissioner G. Ashton)

<sup>34</sup> The number of Nolle Prosequis in child sexual assault cases has increased since the VLRC report 2004: Department of Justice, *Sexual Assault Reform Strategy, Final Evaluation Report* (January 2011) Executive Summary.

two and six times the appeal rate for other crimes).<sup>35</sup> About half of the appeals will be successful and by the time there are retrials (and further appeals) and acquittals, the number of successful convictions is further eroded.<sup>36</sup>

The 'secondary legal trauma' associated with the trial process,<sup>37</sup> the difficulty with obtaining a conviction and the very real threat of successful appellate proceedings, mean that victims are faced with a clear disincentive to use the criminal courts as a means of seeking justice.

Of course, the other contributing factor with the criminal pathway is the inherently long time, or delay, between the offences occurring and reporting or disclosing the crime – an average of 26 years.<sup>38</sup> This of course, brings its own evidentiary problems in a trial, making a successful outcome for the victim even more difficult.

### 4.3 Civil jurisdiction

With the second pathway, the civil jurisdiction, several impediments exist.

#### 4.3.1 Statute of Limitations

As just mentioned, one of the well-recognised and inherent problems with child sexual assault is that victims typically don't report or disclose the crimes for decades, if ever. This fact is neither reflected, nor catered for, in these statutes. So the first hurdle would be for the victim to apply to the courts for an extension of time in which to hear the case.

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<sup>35</sup> Courtin, above n 29, 268.

<sup>36</sup> Courtin, above n 29, 268-269.

<sup>37</sup> Especially cross examination, where the credibility of the complainant's character is 'put on trial in ways that are unparalleled in other areas of the law': Victorian Law Reform Commission *'Sexual Offences: Law and Procedure', Final Report, (2004) 83.*

<sup>38</sup>

#### 4.3.2 Ellis defence

The second impediment relates to what is commonly known as the 'Ellis defence'. Basically, this legitimate legal defence emanated from a 2007 NSW Court of Appeal<sup>39</sup> case in which Ellis, the plaintiff, tried to sue, amongst others, the Sydney Archdiocese Property Trust – a trust that held and managed the assets and property of the Sydney archdiocese. Every diocese and religious order is structured in the same way. The Catholic Church successfully argued in this case, that the Property Trust is not the correct entity to sue because the trustees were never responsible for the behaviour of the priests. Because there is no other legal entity for the Church to sue for these mostly historical crimes, victims are stymied. Or, another way of looking at it is, the Catholic Church is effectively immune from suit.

#### The research – Civil claims

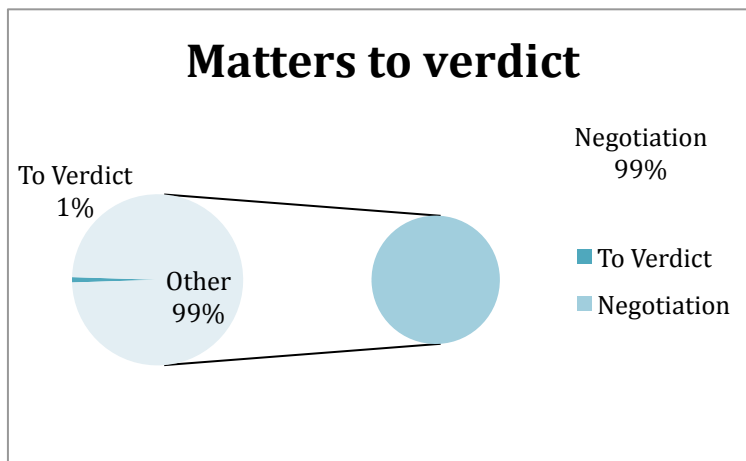
In relation to the fifteen litigation lawyers (12 litigation solicitors and 3 litigation barristers) interviewed in this research, apart from one matter in the late 1990s, a class action that went all the way to the High Court and failed, every other Catholic matter has had to be negotiated. That is, not one other matter has reached adjudication or verdict in the courts.

These 15 lawyers have represented approximately 2200 victims of clergy abuse, between them.

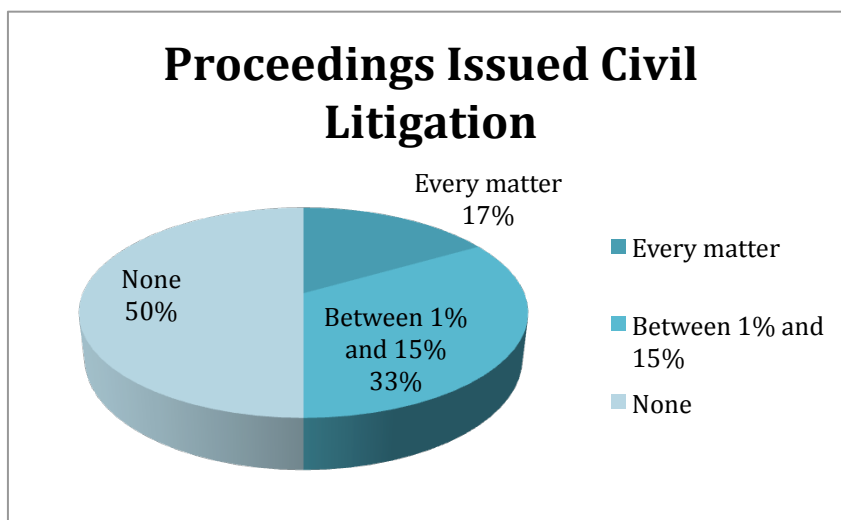
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<sup>39</sup> *Trustees of the Roman Catholic Church v Ellis and Another* (2007) 63 ACSR 346; [2007] NSWCA 117.





Negotiation is very common in litigation, but with the Catholic cases, and because of the Ellis defence, half of the lawyers in this research never issue proceedings (that is, lodge writs with the courts). About a third of the lawyers very occasionally (between 1% and 15% of their cases) issue proceedings, and only a few lawyers (less than a fifth) will issue proceedings with every matter. Regardless of whether proceedings are issued or not, only one case has reached adjudication, or verdict, since the early 1990s. This is primarily due to the Ellis defence.



The class action mentioned consisted of about 200 victims, leaving a further 2000 odd clients from this group of lawyers that have also suffered as a result of the Ellis defence. What this means at a national level is that there are possibly tens of thousands of clergy

victims who do not have equal access to the civil courts. This is a clear breach of a fundamental human right.

#### 4.3.3 Corporation Sole

Problems exist too if victims want to sue an Archbishop or Bishop from the time of the assaults. Once again, because there may be decades before reporting the crimes, the Bishop of the time is often dead or has lost capacity. But, one is prevented from suing an incumbent Bishop because he is not what is called a 'corporation sole'. That is, the current bishop cannot be held liable for any of the wrongs of his predecessor, such as concealing the crimes of the accused or offender. A clear example of this is the current Bishop of Ballarat, Bishop Bird, cannot be sued for the alleged crime of concealment of sex crimes by his predecessor, Bishop Mulkearns or Archbishop Cardinal George Pell cannot be sued for the alleged crime of concealment of his predecessor, Archbishop Frank Little.

In the case of *Ellis, Mason, P* rejected the submission<sup>40</sup> of the plaintiff that Archbishop Pell 'is a legal person who *eo nomine* [by that name] is liable for the obligations of his predecessor because perpetual succession (with attendant liability in tort) is conferred upon that office.'<sup>41</sup> Mason, P found that there is no statute or Crown grant constituting the Archbishop of Sydney a corporation sole<sup>42</sup> and 'there is nothing to suggest that Roman Catholics in Australia have ever conducted their property affairs on the basis of the bishop of a diocese being a corporation sole at common law.'<sup>43</sup>

#### 4.3.4 Vicarious Liability

The other impediment relates to the law of vicarious liability – a very old doctrine in which an employer can be held liable, albeit vicariously, for the negligence or wrongs of the employee. Australia's conservative approach with this doctrine in relation to sex crimes by the employee, contrasts sharply with the recent advancements in the UK and

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<sup>40</sup> *Trustees of the Roman Catholic Church v Ellis and Another* [2007] NSWCA 117 [154].

<sup>41</sup> That is, the Plaintiff submitted that the Archbishop was a corporation sole, 'in which are vested the obligations to pay damages and/or equitable compensation that are sued upon, being obligations putatively incurred by a predecessor in the office.'

<sup>42</sup> *Trustees of the Roman Catholic Church v Ellis and Another* [2007] NSWCA 117 [162]

<sup>43</sup> *Ibid* [181].

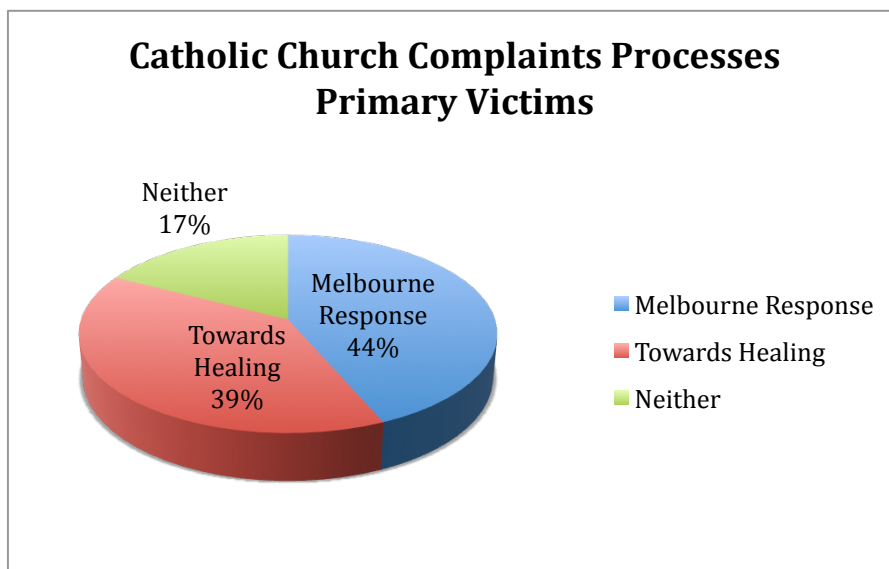
Canada, where Catholic Archdioceses have been held vicariously liable for the sexual assaults on children by one of its priests.

Because victims of catholic clergy sexual abuse are so severely limited, or hamstrung, in looking for justice in the criminal and the civil courts, they are drawn to the Catholic Church's internal complaints processes, Towards Healing, a national response, and the Melbourne Response, for the Melbourne Archdiocese.

## 5.0 Catholic Church complaints processes – Melbourne Response and Towards Healing

### 5.1 Introduction

Both of these processes were set up in 1996/1997. Cardinal Pell, Archbishop of Melbourne at the time, established what is called the Melbourne Response, which covers the geographical region of the Melbourne Archdiocese and Towards Healing deals with complaints from the rest of the country



An almost equal number of primary victims had been through the Melbourne Response and the Towards Healing process, whilst just under a fifth had not been through either process. These numbers do not represent the national or even the Victorian reality, as the many of the interviewees contributing to this research were from the Melbourne region.

The remainder of this submission will focus on some of the findings of this research in relation to Towards Healing.

## 6.0 Towards Healing

### 6.1 Introduction

Of the twenty-three primary victims who contributed to this research, nine of them, about two fifths, went through the TH process and contributed to the data on TH. An additional primary victim who did not go through the TH process, did contribute to the data. That is, just under half of the primary victims interviewed in the research, contributed to the data for TH.

Of the 15 litigation lawyers who were interviewed, thirteen, more that four fifths, had represented clients through the TH process.

All but one of these lawyers made comments about, and/or gave opinions of, the TH process. The average number of Catholic clergy abuse-related clients represented by these lawyers is approximately 2200. It is unknown at this stage what percentage of these 2200 clients went through the TH process (these figures to come).

The number of primary victims in this research who went through the TH process is small. The number of clients represented by the lawyers though is significant, although the entire 2200 clients did not go through the TH process. Overall, the weighty evidence of the lawyers, firmly buttresses that of the primary and secondary victims in relation to the TH process.

Four secondary victims, just under a quarter of the secondary victims contributing to this research, either experienced, and/or commented on, the TH process.

Two non-legal advocates contributed to the data on TH.

This submission will now present some evidence from the interviews in this research and in relation to the TH process.

The remainder of this submission will be categorized as follows:

1. Initial contact with TH
2. Assessments and Investigations
3. Facilitations and Mediations
4. The overall process and its impacts on the victims
5. TH as a legalistic and adversarial process and legal representation for victims
6. The use of discretion by the different Church Authorities
7. The positives of TH

## 7.0 Initial contact with Towards Healing – Contact Persons

### 7.1 Introduction

The Church authority or the Director of Professional Standards may receive a written complaint. Alternatively, the complaint may be verbal and dealt with by a contact person.

The initial contact at TH for the victims is the ‘contact person’ who is appointed by the Resource Group. They receive complaints and may act as a support person for the complainant in communications between the complainant, the Church Authority and the assessor. The contact person shall also be available for the complainant through the entire process, although he or she is not the complainant’s therapist or counselor. Contact persons shall be skilled listeners and sensitive to the needs of complainants.<sup>44</sup>

A contact person shall listen fully, honestly and compassionately to the person laying the complaint, both concerning the facts of the situation and its emotional, psychological and spiritual effects.<sup>45</sup>

### 7.2 Evidence from the research

The initial contact with TH is pivotal for victims. Some primary victims reported that, feeling vulnerable and fearful, their initial contacts with TH were very difficult. The two areas of concern related to the use of Catholic church buildings or offices for the first meeting between TH personnel and the victim and, secondly, that victims need to contact a complete stranger on the telephone to discuss, sometimes for the very first time, a topic that is highly personal and distressing.

#### Church premises

One male victim,<sup>46</sup> who had spent time in the seminary as a young man and who was familiar with the workings of the church, had his first meeting with TH personnel at the

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<sup>44</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) 15.

<sup>45</sup> Ibid 15.

Catholic Church Insurances building in the 'Catholic precinct' of East Melbourne and very close to St Patrick's Cathedral. This man pondered such inappropriateness as 'intimidating' for a 'half-suicidal bloke or woman who'd been traumatized by a Parish Priest ... Social Work 101', he said, 'is creating a mutual environment.'

This was supported by a lawyer<sup>47</sup> who warned that 'You've got to be very sensitive' about TH personnel insisting on meeting the victim at a church property.

#### Initial contact by telephone and 1800 number

The use of the telephone for contacting TH, was also found to be traumatic and inappropriate. One male victim<sup>48</sup> conveyed surprise and a feeling of 'extreme vulnerability' when his only option for his first contact with TH was via a '1800' telephone number with a 'complete stranger' in an office more than 300 kilometers away in Albury. This man was located in Melbourne. 'You're ... being asked to share what is the most intimate and deepest part of yourself ... with this anonymous individual' and 'on a telephone'.

The use of a '1800' number can exacerbate the trauma and uncertainty for the victim because a '1800' number is often associated with the commercial world.

The above victim was certainly 'put off' by such an introduction to TH, and believed that hundreds of other victims would also be put off and say 'I can't do this.' Such a 'condition' of the TH protocol 'might be there in the full knowledge that it actually does have this set of consequences.'<sup>49</sup>

Another male victim<sup>50</sup> talked about his initial telephone call with TH and felt that he was 'an annoyance' for the woman on the other end. He said, 'I got the sense ... that I was a problem to be dealt with and how dare I ring up.'

The first contact for another male victim<sup>51</sup> was with Centre Care<sup>52</sup> in a rural city in Victoria. He reported difficulties when giving a statement to a female contact person at

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<sup>46</sup> V1-24.

<sup>47</sup> LA-1.

<sup>48</sup> V1-20.

<sup>49</sup> V1-20.

<sup>50</sup> V1-21.



Centre Care, who was angry with him because he insisted that the word 'rape' be included in his statement.

### 7.3 Comment

Such inappropriate means of first contacts with TH for victims display a lack of understanding and empathy by the church for the anxious and psychologically-harmed victims.

Such circumstances and evidence also runs contrary to the TH protocol that provides the contact person shall, or must, be sensitive to the needs of complainants<sup>53</sup> and shall listen fully, honestly and compassionately.<sup>54</sup>

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<sup>51</sup> V1-23.

<sup>52</sup> Centre Care is now called Catholic Care and offers counseling and family services to the community.

<sup>53</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) 15.

<sup>54</sup> *Ibid* 15.

## 8.0 Assessments/Investigations

### 8.1 Introduction

The Director of Professional Standards is responsible for appointing assessors. The Resource Group must keep a list of suitable people, not from its own members, to be Assessors. Assessors are responsible for investigating complaints and examining areas of dispute.

The Church Authority (or delegate) seeks a response from the accused to determine whether the facts of the case are significantly disputed. If there is a 'significant dispute or uncertainty about the facts,' the matter is sent for investigation by the Director.<sup>55</sup> If there is no significant dispute, the matter is not investigated and proceeds to the facilitation.

There will be one or two assessors, both appointed by the Director. The assessors must be, and be seen to be, independent of the Church Authority, the complainant and the accused.<sup>56</sup>

They investigate the complaint by separately interviewing the complainant, who must be invited by TH to have a support person with them,<sup>57</sup> and the accused, who must be invited to have either a support person or a legal adviser present during the interview.<sup>58</sup> The accused's version of events must be put to the complainant.<sup>59</sup>

A finding about the truth of the complaint is made on the balance of probabilities. A written report with findings and reasons must be provided to the Church Authority and the Director.<sup>60</sup>

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<sup>55</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) 20.

<sup>56</sup> *Ibid* 21.

<sup>57</sup> *Ibid* 22.

<sup>58</sup> *Ibid* 23.

<sup>59</sup> *Ibid* 22.

<sup>60</sup> *Ibid* 22.

In relation to interviewing children and young people, only TH personnel who are 'professionally recognized as skilled practitioners in interviewing children' must be

chosen. Interviews with people who have an intellectual or psychiatric disability, must only be conducted by 'appropriately qualified and experienced' people.<sup>61</sup>

The Church Authority shall discuss the findings and recommendations of the assessment with the Director and if the complaint is sustained, the Church Authority must seek the advice of the Consultative Panel and may seek advice from the Director of the Professional Standards who will seek to ensure that assessments are completed as quickly as possible and as transparently as possible. It is the Director's responsibility to ensure that this principle of timeliness is adhered to.<sup>62</sup>

## 8.2 Evidence from the research

In relation to the assessments and the assessors in Victoria and in NSW, several concerns exist. Firstly, the frequency of assessments and investigations, for some lawyers, has increased in 'recent years'. Secondly, the nature of the investigations can be overly forensic and legalistic, negatively impacting on the victims. Thirdly, the standard or quality of the investigations can be cursory and poor resulting in detrimental outcomes for some victims. Fourthly, the behaviour of the investigators has been, at times, insensitive and inappropriate. And, finally, the standard of proof used by the investigators is questionable, particularly when the investigators are ex policeman who would have worked to the much higher and criminal standard of 'beyond reasonable doubt', compared with the lower and civil standard, 'on the balance of probabilities'.

### Increased frequency of investigations

In relation to the increased frequency of investigations at TH, one lawyer<sup>63</sup> observed most of her client's cases are now being investigated and assessed, whereas it used to be that most went directly to facilitation.

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<sup>61</sup> Ibid 24.

<sup>62</sup> Ibid 24.

<sup>63</sup> LA-1.

The purpose of an assessment is 'to investigate the facts of the case... where there is a significant dispute or uncertainty as to the facts, or where there is a need for further information concerning the complaint.'<sup>64</sup> If investigations are more frequent now, this indicates there is an increase in the number of significant disputes and uncertainty about the facts of these cases. Why is this the case?

One answer is that the discretion granted to the many provincials and bishops around Australia (see page 63), means that those who are more 'legalistic' will insist on an investigation<sup>65</sup> regardless of whether there is a significant dispute and/or uncertainty as to the facts with the case.

#### Forensic and legalistic Investigations

The nature or approach of the investigations at TH can be overly forensic and legalistic, negatively impacting on the victims.

The TH protocol provides that 'a sensitive and compassionate response to the complainant must be the first priority'<sup>66</sup> for TH personnel.

Although the church appoints a 'so-called independent assessor' victims believe they are not being assessed, rather they are being investigated and 'being tested, examined, disbelieved.'<sup>67</sup> Such legalistic and forensic assessments by the two investigators in Victoria, for example, who are ex policemen and Catholic, 'are very forensic in their conduct and approach and it's a very difficult interview for our client' and 'very traumatic' for the victims.<sup>68</sup>

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<sup>64</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) section 40.2, 22.

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<sup>66</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) section 17, p 9.

<sup>67</sup> LA-9.

<sup>68</sup> LA-1.

This also raises the issue of independence of the TH personnel. Clearly, and as a minimum, the two Victorian assessors are not seen as independent. The issue of independence of the TH process overall will be discussed in a later document.

An example of an overly forensic interview of a victim involved a very vulnerable client who was asked whether:

*... the rosary beads hanging off the cassock of the offender were sort of on the right side or on the left side. What kind of cross was it? I mean, we're talking about abuse from 35, 40 years ago. And we're asking questions of a person who, I would say, has a developmental delay. Very hard, really, really hard.*<sup>69</sup>

This same Victorian lawyer said, 'I don't think I've had any assessments that I'm terribly happy with ... I don't like the forensic approach and it's always ex-police interviewing.'

Another example of an overly forensic and legalistic interview of a vulnerable victim<sup>70</sup> in relation to an incident of sexual assault, was when one of the investigators asked the victim:

*...'Did you see the penis?' [The victim said] no I don't believe I did see his penis. He said you must have seen the penis. There would be much more impact if you saw the penis. And I said I didn't see the penis. It was all about the penis. Please stop talking about the penis. I didn't see a penis. What am I? In a Woody Allen movie.*

Overly forensic and legalistic investigations could be a result of the TH process being designed, in part, by lawyers, which is a 'bad start'.<sup>71</sup> Also, audio recording of the interviews with the victims makes the client feel 'very vulnerable.'<sup>72</sup> The TH protocol provides that 'a written or taped record shall be made of the interview',<sup>73</sup> but, all interviews are audio recorded, and as such, it is recommended that people don't go

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<sup>69</sup> LA-1.

<sup>70</sup> V1-3.

<sup>71</sup> LA-9.

<sup>72</sup> LA-1.

<sup>73</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) section 40.8, P 23.

through the assessment interview without their lawyer or support person with them,<sup>74</sup> as the experience for victims, especially if they are unrepresented, is 'quite difficult'.<sup>75</sup>

### Insensitive and inappropriate conduct

As mentioned above, 'a sensitive and compassionate response to the complainant must be the first priority'<sup>76</sup> for TH personnel. Concern is raised again with the investigators at TH displaying insensitive and inappropriate behaviour.

Although a male victim<sup>77</sup> found the two Victorian investigators respectful, one experience was 'odd, strange and disturbing in its consequence.' After interviewing the accused, the investigators delivered a message to the victim saying the accused (a) didn't remember who the victim was, and (b) was very sorry for any hurt that he might have caused to the victim. 'That was pretty disturbing ... I didn't think it was appropriate.' This victim believed there was no understanding by the investigators of the impact upon him.

Another example of insensitive and inappropriate comments from one of the investigators to the victim was:

*... I went to a Christian Brothers' school and it never happened to me. I guess I was just lucky. And the other one said to me, and this is what I found most hurtful, didn't you know better not to do those things with that man? And at that point, I thought switch off ... this is where I'm drawing a line in the sand, thank you very much, goodbye.<sup>78</sup>*

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<sup>74</sup> LA-1.

<sup>75</sup> LA-9.

<sup>76</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) section 17, p 9.

<sup>77</sup> V1-20.

<sup>78</sup> V1-3.

### Caliber or standard of investigations

The caliber or standard of the investigations at TH was also brought under scrutiny by some of the interviewees.

Firstly, assessors can make reasonable requests of the church authorities for access to documents that may assist them in their investigation, subject to any legal obligations or confidentiality. And, the Church Authority shall comply.<sup>79</sup> That is, compliance from the church authority is not discretionary.

Despite this, in a NSW case, the Jesuits (the religious order involved in this case) would not co-operate with the investigator and did not give the names of potential witnesses for the investigator to interview. At this stage, there was no other evidence that the sexual assaults happened, other than the victim's word.<sup>80</sup> The Jesuits were also cognisant of a 'dark era' at the school involved during the same time this victim was sexually assaulted.<sup>81</sup>

If the Jesuit provincial or other members of the order were aware of the 'dark era' at the same school and at that time, why were they insisting on an investigation, or at the very least, why were they not providing relevant documents and information to the investigator?

The status of the relationship between a victim and an investigator and the victim and the Jesuit order, is markedly unequal. The power imbalance is vast. Mostly, victims are vulnerable. The definition of a 'vulnerable person', according to the TH protocol is, *inter alia*:

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<sup>79</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010). Section 50.7, page 23.

<sup>80</sup> V1-13.

<sup>81</sup> V1-13.

*...a person with an intellectual disability, mental illness or other impairment that makes it difficult for that person to protect themselves from abuse or exploitation*<sup>82</sup>

All sexual assault victims are psychologically and/or mentally impacted. Such vulnerability needs and demands, according to the TH protocol, a very high standard of professional conduct on behalf of the investigators and a response from the religious orders that is based on good faith and compassion.

Overall, 'the assessors don't do a proper investigation'. Apart from asking the accused 'did you do it', no further investigation is done. 'If they'd conducted any sort of proper or thorough investigation, they would have found other complaints.'<sup>83</sup>

Some very simple methods of investigation, such as interviewing staff members and fellow students from the time, should provide the minimum of standards for the investigators and the Church Authorities. Importantly, a collaborative, open and compassionate response is central to any investigation.

[It is] '*Deeply disturbing that it [TH] asserts that it investigates matters, but its investigations are, as far as I'm concerned, a sham, not very thorough.*'<sup>84</sup>

### Burden of Proof

A finding about the truth of the complaint is made on the balance of probabilities. A written report with findings and reasons must be provided to the Church Authority and the Director.

Because the investigators in Victoria are ex policemen, one lawyer,<sup>85</sup> expressed concern about whether or not the burden of proof exercised is too high. That is, being ex policemen, they would be more *au fait* with the higher criminal standard of 'beyond reasonable doubt', compared with the lower civil standard, 'on the balance of

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<sup>82</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010). Page 5.

<sup>83</sup>

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<sup>85</sup> LA-3.



probabilities'. This was also a concern for a non-legal advocate who said that 'a lot of the people, depending on ... their profession ... raise the bar of the burden of proof'<sup>86</sup>

### 8.3 Comment

According to the evidence, the assessors and the assessments are below standard, causing negative and harmful impacts on the victims. Unnecessary investigations are being carried out. Investigations can be overly forensic, legalistic, insensitive and inappropriate. The standard of investigations is inadequate and there is concern that the burden of proof is set too high and beyond that of 'on the balance of probabilities'.

In relation to the frequency of investigations at TH, the longer the TH process has been in place, the more complaints will have come forward. This means there are increasingly larger and more comprehensive databases of accused, offender and victim information held within TH and the religious orders and dioceses. As a result, the number of investigations, or at least the extent of the investigations, should be reducing, not rising.

The investigative approach by the assessors is particularly forensic and legalistic, highlighted by the inappropriate questioning of victims about the minutiae of the crime. This approach also raises concerns about the standard of proof actually being considered by the assessors.

The victims' experiences above reflect little or no understanding by the investigators as to what constitutes sensitive, empathetic and appropriate behaviour. Such behaviour can be abusive and traumatic for these victims most of whom already suffer depression and/or PTSD. The TH protocol<sup>87</sup> requires that 'special care be taken in interviewing a person with ... a psychiatric disability and any such interview shall be conducted only by an appropriately qualified and experienced person.'

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<sup>86</sup> NLA-2.

<sup>87</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) section 40.3.5, P 22.

Based on this evidence, some of the investigators for TH appear to be neither appropriately qualified nor have the appropriate experience to be dealing with vulnerable, psychiatrically disabled victims of clergy sexual abuse. And special care has not been taken.

Although the sample size of this data relating to investigations at TH are small, it does, nevertheless, reflect the views of five lawyers who, collectively, have represented about 950 Catholic clergy abuse clients. They also represent Victoria and NSW and as such, are significant and representative.

## 9.0 Facilitation/Mediation

*Mediation can be 'disempowering, insulting, impersonal, biased and inappropriate to this type of offence.'*<sup>88</sup>

### 9.1 Introduction

The Resource Group must keep a list of suitable people to be facilitators. Facilitators, appointed by the Director, facilitate meetings and mediate agreements between the Church and the complainant/victim.<sup>89</sup>

Facilitators arrange and moderate communication between the Church Authority and the victim and also provide the means of addressing the needs of the victim and where an apology may be given to the victim. Mediations address any unresolved issues.<sup>90</sup>

It is the responsibility of the facilitator to 'seek to know the ongoing needs of the victim and the response of the Church Authority to those needs'. The facilitator must also seek to know the support needs of the victim's family and of 'the community in whose midst the abuse occurred if the abuse is publicly known.'<sup>91</sup>

The Church Authority and the victim shall endeavour to agree on a facilitator, either from the approved panel or otherwise a qualified mediator approved by the Director for Professional Standards, who is suited by reason of training and experience to understand the needs of victims of abuse. In the absence of agreement, the Executive Officer of the National Committee for Professional Standards shall appoint a facilitator.<sup>92</sup>

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<sup>88</sup> NLA-5

<sup>89</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) 15.

<sup>90</sup> *Ibid* 25.

<sup>91</sup> *Ibid* 25.

<sup>92</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) 25.

Of note here is the absence of independence with regard to the approval of a mediator, other than one who is already approved by TH. Theoretically, this means that a victim and his/her lawyer may never be able to choose their own mediator.

## 9.2 Evidence from the research

Contrary to the commitment by the church that it will strive to respond to victims such that there will be healing for the victims, the majority of the Victorian interviewees who went through the TH process, in particular the facilitation part of the process, gave evidence that the facilitator's approach was not directed to bring healing to the victims. Rather, it was outcome-driven and focused on settling the matter as quickly as possible.

Pressure was applied to victims by the facilitator to take the money and settle. The interests and needs of the victims (which, as noted above, are the responsibility of the facilitator to 'seek to know') were either ignored or trodden on by the facilitator and/or the church authority. The main needs of the victims were to be able to tell their story, to be heard, understood, taken seriously and have the sex crimes and their subsequent impacts on them and their families, acknowledged. They wanted to feel better and to heal. Instead, they felt worse, misunderstood, frustrated and in many cases, suicidal.

Of the primary victims contributing to this research and who went through the TH process, nearly half spoke specifically about the failings of the facilitator and the facilitation process in both Victoria and NSW.

### Outcome driven approach

Multiple interviewees gave evidence that their TH process was 'outcome driven'. There was pressure for them to settle so the matter could be closed.

A male primary victim<sup>93</sup> was told by the facilitator, about whom he 'felt uncomfortable' and 'too cool for school attitude', that his claim was '100% rock solid ... you're a \$50,000 person ... we should go and meet the provincial ... sign some documents.' Letting the

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<sup>93</sup> V1-3.

facilitator know that he, the victim, was seeking justice and clarity, the facilitator insisted, 'you have to ask for money ... this is what this is about. You have to get money so we can resolve this and close it.'

When commencing the TH process, another male victim,<sup>94</sup> was not ready, emotionally and psychologically, to meet the provincial of the Christian Brothers. The facilitator was insisting on a meeting, despite the victim's plea that he needed more time. The victim said to the facilitator:

*I'm still in a bad spot. I'm having trouble being around people I love let alone the representative of the church that abused me as a kid ... [I have a] fear that I'll fly across that table and rip that collar and that throat out of the bloke that's sitting there. I'm frightened for him and I'm frightened for myself. I need more time ... [I'm] in a really, really vulnerable spot.*

The facilitator, a registered psychologist, told the victim TH would withdraw its support and cease the counseling sessions until such time that the victim agreed to have the meeting.

*'He knew that I wasn't far off killing myself ... the facilitator ... had no words of understanding or sympathy or empathy. Nothing... to him ... I was another one off the list.*

This same man<sup>95</sup> wanted to make sure his offender was 'not out there abusing someone else and that the church put processes in place to stop that ever happening again.' The facilitator said, 'what about financially?' The victim, who was needing 'to understand how I can move forward, how I can get better', immediately felt like 'dry reaching and asking for a bucket ... I don't understand how I can be in a place where I can't think.' This victim left TH feeling suicidal.

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<sup>94</sup> V1-21.

<sup>95</sup> V1-21.

Another victim,<sup>96</sup> who felt the process was outcome-driven and not the pastoral and healing process that he needed and was wanting, talked about a meeting/facilitation with the Salesian Order in which he was trying to explain the extent of the childhood sexual assaults and rapes and their impacts on him and his family. The church authority would neither listen nor talk to him about these major and central concerns. Rather, they wanted to settle that day and initially offered him \$7000. Expressing his anger and frustration the man said:

*- my loader would just fit inside the front of the Cathedral. 22 pillars. You start knocking down pillars, that place would just cave in you know. Just do donuts on the marble floor! Fuck.*

This man's wife<sup>97</sup> said, 'it wasn't the money or anything. He wanted the recognition' and some assistance to move on.

Another male victim<sup>98</sup> also spoke of the outcome-driven approach of the facilitator, whom he described as 'a bit out of his depth', 'not very professional' and 'he actually didn't understand. He was a bit more product than process.' The final mediation/facilitation for this victim was 'terrible ... wearing, disappointing.'

### The facilitation process

In relation to the overall concerns of the interviewees, one NSW lawyer claimed that TH facilitators 'are just not very good at it',<sup>99</sup> whilst a Victorian victim<sup>100</sup> said 'there were lots of moments of mediocrity where I had to almost steer the process', whereas the victim was supposed to be the client in the relationship.

Victims have the option of using a facilitator of their choice, 'subject to approval by Professional Standards', but according to this lawyer, TH 'do not like it at all.' The victim

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<sup>96</sup> V1-23.

<sup>97</sup> V2-18.

<sup>98</sup> V1-24.

<sup>99</sup> LA-9.

<sup>100</sup> V1-3.

is not told they have a say in nominating a facilitator, because ‘they wouldn’t know one person from another, so we’re just going to nominate’.<sup>101</sup>

### 9.3 Comment

According to its own protocol, and in relation to the role of the facilitator, there is failure by TH in the way the facilitators have managed and dealt with victims.

It is the responsibility of the facilitator to ‘seek to know the ongoing needs of the victim and the response of the Church Authority to those needs’.<sup>102</sup> This has not happened.

The main needs of most victims are to find healing, to tell their story and be acknowledged. Instead, victims’ needs have been stifled whilst being pressured to sign documents so their case can be closed.

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<sup>101</sup> LA-9

<sup>102</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) 25.

## 10.0 Towards Healing process and its impacts on the victims

### 10.1 Introduction

According to the National Committee of Professional Standards (the Committee), which is made up of Australian Bishops and provincials of religious orders, one of the main purposes of TH is 'to assist the complainant to find healing'.<sup>103</sup>

Healing for victims is also one of the seven core principles to which the Church is committed to striving.<sup>104</sup> As such, the church authorities accept that they have a responsibility to seek to bring healing to those who have been victims of abuse and that a sensitive and compassionate response must be the first priority, even when the allegations are unproven.<sup>105</sup>

Victims should [not must] be asked what their needs are to ensure they feel safe from further abuse and should [not must] be offered appropriate assistance, as this is the Christian thing to do when the person present is very possibly a victim of abuse.<sup>106</sup>

Alternatively, if the abuse did happen, the Church Authorities must listen to victims concerning their needs and ensure they are given such assistance as demanded by justice and compassion.<sup>107</sup>

The second last provision should not be discretionary. It is petty that it is so. Just because the church authority has not proved that the complaint is valid, should not prevent the church from treating all complainants and victims equally. Curiously, the earlier provision, 'a sensitive and compassionate response must be the first priority,

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<sup>103</sup> Ibid.

<sup>104</sup> Ibid 9.

<sup>105</sup> Ibid 9.

<sup>106</sup> Ibid 9.

<sup>107</sup> Ibid 9.



even when the allegations are unproven', insists that the Church authority not treat complainants any differently from victims.<sup>108</sup>

Another core principle to which the church is committed to striving for is the 'truth'.

The Church is committed to seeking to know and understand the full extent of the problem of abuse and its causes, especially abuse that is committed in a community that professes the values of Jesus Christ. It is also committed to seeking to know the truth, so far as possible, about individual allegations of abuse. Such commitments are made because to conceal the truth is unjust to victims, a disservice to accused people and damaging to the whole church community.<sup>109</sup>

Contrary to these principles of the Church, this research finds that the victims not only do not find healing within the TH process, they suffer further damage and harm. The impacts of the TH process on the victims are multiple and serious, including being suicidal and attempted suicide.

The research also finds that the TH process, contrary to striving to know and find the truth, by its practices, it conceals and prevents the truth from coming out.

This section on TH is based on the evidence of twenty-five interviewees. That is, more than a third of all the interviewees who contributed to this research.

The legal professionals included 9 legal advocates, one litigation barrister, one prosecution barrister and one prosecution solicitor. There were two non-legal advocates, eight primary victims and two secondary victims.

Of the nine solicitors, all but one had represented victims through the TH process.

Of the nine primary victims who had been through TH, two thirds contributed to this section.

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<sup>108</sup> Ibid 8.

<sup>109</sup> Ibid 9.

Although several positives of the TH process were forthcoming from some of the interviewees (see below), the overall damning evidence is extensive and incontrovertible.

## 10.2 Evidence from the research

A summary of the evidence from the research will be followed by some of the testimonies in relation to the harm caused to victims by the TH process.

### Harm not Healing

A digest of the lawyers' views and opinions found the TH process does not provide a healing environment for victims, rather it causes harm and damages victims. Many victims felt suicidal during and/or after the TH process. It re-traumatizes victims and is highly detrimental to them. It further victimizes and is very disrespectful of victims. There is no therapeutic understanding for the victims and it is disempowering. It denies victims justice.

As with the lawyers' summary above, the primary and secondary victims' views and opinions also found the TH process causes further harm and damage. Primary victims felt stripped bare, suicidal and depressed. There was despair and hopelessness; humiliation and embarrassment; dislocation, confusion and fragility. Victims felt bullied whilst their stories were minimized. The process was disempowering, tortuous and belittling. Victims felt angry, hurt, frustrated, beaten down, manipulated, destroyed and attacked.

A male victim's experience was:<sup>110</sup> 'I was so close ... to killing myself.'

Healing was the primary purpose of going to TH, which meant 'justice, a sense of vindication or acknowledgement and apology.' Instead, the TH process was about 'buying silence ... the operation was a success, but the patient died'.<sup>111</sup>

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<sup>110</sup> V1-21.

<sup>111</sup> V1-24.

The well-intentioned TH protocol was not implemented for this same victim<sup>112</sup> who found the TH experience as ‘disempowering for anyone who is trying to work through what are difficult issues.’

There were several references to the title of the process, ‘Towards Healing’. One male victim described the irony. ‘Towards Healing, and yet my experience was anything but that’,<sup>113</sup> and, ‘you know ... it’s not towards healing, it actually takes you towards madness.’<sup>114</sup>

A particular provincial of a religious order approached the TH process and the victim ‘like an academic exercise’ and would not speak with the victim. This was a task allocated to the church’s lawyer, thus further harming the victim.<sup>115</sup>

Lack of information about the TH process for many victims, was highly detrimental and disempowering<sup>116</sup> because victims being understood and responded to compassionately is essential.<sup>117</sup>

Although the TH process has ‘been a lot better’ in the last couple of years, there have been some ‘negative’ experiences where the victim has been re-traumatised and re-abused.<sup>118</sup> Another lawyer<sup>119</sup> went further and said that ‘most people feel re-traumatised by the process’.

### Depression and suicide

*... if I had have committed suicide back then, [XXXXXX] would have been the cause ... He was manipulating the system to have one less person to worry about because he’d be dead. Now, I see that as clear as day. That’s not conspiracy theory, it’s just fact. And I don’t know how many other people he’s done that to.’<sup>120</sup>*

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<sup>112</sup> V1-24.

<sup>113</sup> V1-20.

<sup>114</sup> V1-24.

<sup>115</sup> LA-1.

<sup>116</sup>

<sup>117</sup> LA-1.

<sup>118</sup> LA-10.

<sup>119</sup> LA-7.

<sup>120</sup> V1-21.

Depression and feelings of suicide, in contrast to healing, were common consequences for most primary victims who went through the TH process, and who contributed to this research. This finding is also firmly buttressed by the lawyers' evidence.

TH caused 'much psychological damage' as a victim was 'going deeper and deeper into depression and despair' and there were times when he 'felt suicidal, extremely alienated, quite incapacitated ... and hopeless and devoid of any sense of life being good, life being joyful'.<sup>121</sup>

Another male victim<sup>122</sup> who became suicidal as a result of the TH process, said: 'I was so close ... to driving... through ... the gates of St Pat's school and smashing into the school ... and killing myself ... I was like a stifled voice and no one would listen.'

One victim<sup>123</sup> 'only just managed to talk [a victim in the TH process] out of resorting to a noose in desperation.' A large part of the problem is 'the aggressively unhelpful attitude of church leaders, who consider us an enemy to be beaten down, manipulated and destroyed, not innocent victims of their own wrong doing.

And 'their attack dog lawyers', who seem to take pride in just how damaging they can make the process for victims in the hope we will give up, give in, or best of all, commit suicide.'<sup>124</sup>

Contrary to TH being a healing process, one victim<sup>125</sup> likened his experiences in dealing with the Marists and their lawyers to 'exactly the same sort of position that a ... child [is in when] they are being assaulted.' That is, 'being compelled and controlled' such that this man felt shocked, powerless, exhausted and resigned. 'I just wanted to turn around and walk away. Just go and hide under the covers ... every vestige of my private self was just being torn into.'

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<sup>121</sup> V1-20.

<sup>122</sup> V1-21.

<sup>123</sup> V1-14.

<sup>124</sup> V1-14.

<sup>125</sup> V1-20.

Those who went through the TH process were 'very unhappy with how they were treated, believe they were denied justice, and consider it a key component in the church's cover-up of their abuse. A number of those victims felt suicidal as a direct result of their treatment by Towards Healing.'<sup>126</sup>

### The process

The TH process is flawed. It is a Kangaroo court giving TH the 'opportunity to mislead and lie'. It is a sham and a con and an incredibly unsatisfactory process. It is difficult, inappropriate and insensitive. It is deficient, condescending, depersonalizing, demeaning and obscene. TH has failed miserably.

According to another lawyer who has represented about 550 clients TH is 'a sham'. He refuses to deal with Towards Healing and claims 'it is designed from the ground up in such a way as to obfuscate and defraud the psychiatrically damaged victims. I will not have anything to do with it whatsoever.'<sup>127</sup>

TH is special Kangaroo court 'that is all in our favour, and dress it up and seem like it's wonderful. However, the secret Kangaroo Court gives TH 'the opportunity to mislead and lie to people about the offences and particularly the offenders'.<sup>128</sup>

Additional allegations about TH reveals that many victims are told by the church authority that they, the church, 'haven't heard of him [the alleged offender] before, and you're the only one who has come forward.' In reality, however, TH has previously met with and settled other victims' matters involving that abuser. 'And I've got those cases. In two separate cases involving two separate abusers. In the first case, the abuser sexually assaulted at least five victims that I know of. I took a statement from one victim whom TH misled and told that they had not previously heard of the abuser, and he only became aware of their deceit when two other victims whom TH had previously settled contacted him. I then acted for three further victims of this abuser.'<sup>129</sup>

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<sup>126</sup> NLA-5.

<sup>127</sup> LA-12.

<sup>128</sup> LA-12.

<sup>129</sup> LA-12

'In the second case, the victim was told that there was no evidence that in the 1970's the Marist Brothers knew [REDACTED] abused any child, and they could not substantiate his claim. That man then stood outside Marcellin College Randwick handing out pamphlets. A parent read one and advised that he too, was earlier assaulted by [REDACTED] and that his mother complained to the school. I am now acting for eight or nine other victims of [REDACTED] (who was previously known as [REDACTED] when he taught at St Josephs in the 1960s before being sent to Marcellin College). TH is a sham and it is a con.'<sup>130</sup>

Backing this evidence, another lawyer said the victims were told that they were the first or only person to lodge a complaint about that particular accused/offender, or, they said the victims' allegations couldn't be substantiated when TH had processed claims for other victims or school class members who had made allegations against that same accused/offender.<sup>131</sup>

Along these same lines, and in relation to the facilitations/mediations at TH, it was argued that the facilitations were used to try and 'excuse the behaviour' of offenders and accused, rather than providing a healing environment for the victim.<sup>132</sup> That is, the TH process was being used more for the benefit of the church and to the detriment of the victim.

The TH personnel are 'well-intentioned people, but they are generally doing it because they really support the church in first place'.<sup>133</sup>

TH is 'a way of the church containing the matter [the crime]'.<sup>134</sup>

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<sup>130</sup> LA-12.

<sup>131</sup> LA-1.

<sup>132</sup> LA-5.

<sup>133</sup> NLA-2.

<sup>134</sup> LP-3.

The fundamental thrust of TH, which has the church authority being pivotal in the process, is another major concern for lawyers. The victim must deal with the current representative of the very church authority that often supported the offender.

Compared with the complaints processes of other institutions and religious organizations, the TH process delivers a 'lower satisfaction rate' with respect to both the compensation amount and the way the process itself is set up.'<sup>135</sup>

The TH process is 'flawed'<sup>136</sup> and most victims go to TH because there are no other options for seeking justice and compensation in the civil courts (due to the Ellis Defence - see Page 16).

One lawyer<sup>137</sup> didn't know anybody 'who has had a good Towards Healing process' whilst a non-legal advocate<sup>138</sup> found TH as 'very depersonalizing' where the 'standards of competency vary greatly' and it's 'so flawed'.

Although having heard that TH was 'more engaging of the victims and less traumatising', one lawyer<sup>139</sup> who had no direct experience with TH disagreed. 'I think it is deficient. My view is that the Catholic Church needs to be setting up independent [funding] bodies ... to help victims.'

There is a vast chasm between the intentions and objectives of the TH protocol and the implementation of those objectives. The Church has not 'managed to fulfill the objectives that it was designed to meet' and 'it's very limited in the people that it can effectively assist.'<sup>140</sup>

'I did always think that TH was meant to be a sort of restorative justice process. And it has failed miserably.'<sup>141</sup>

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<sup>135</sup> LA-5.

<sup>136</sup> LA-11.

<sup>137</sup>

<sup>138</sup> NLA-2.

<sup>139</sup> LA-2.

<sup>140</sup> LP-3.

<sup>141</sup> PB-1.

Many references were made by the primary victims about the process itself and the personnel. There was 'ongoing conflict and disagreement in the process' which resulted in 'dislocation, confusion and fogginess'. After every meeting with TH, this man felt 'fragile ... one is a case to be dealt with ... a number to be processed, packaged and shelved.'<sup>142</sup>

An experienced ethicist and psychologist<sup>143</sup> found that the TH personnel treatment of him was 'so inappropriate ... if I had less mastery of my emotional regulation or if I was in a heightened state of distress ... and I'd just become a yes person ... I might be in a worse place than I am right now.'

The TH process was like, 'standing in the middle of a road and a truck running me over' and 'there has been such a lack of evidence of a gratifying or successful outcome.'<sup>144</sup> For another,<sup>145</sup> it was '... long, drawn-out, tortuous process.'

For those that TH helped in terms of the outcome, there were still concerns about the process. Even though the outcome of the TH process 'absolutely' helped a female victim move on, one had to be 'really strong to get through it, and have really strong support people.'<sup>146</sup>

Surprisingly, a TH contact person advised one victim, off the record, to go to the police and that basically, the TH process 'was crap'.<sup>147</sup> This is mirrored by the fact that 'It's very much jobs for the boys I think ... cowboys.'<sup>148</sup>

One victim would 'never have gone to an internal authority ... My feeling of Towards Healing is damage control ... as cheap as possible and keeping things out of the public eye.'<sup>149</sup>

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<sup>142</sup> V1-20.

<sup>143</sup> V1-3.

<sup>144</sup> V1-3.

<sup>145</sup> V1-20.

<sup>146</sup> V1-5.

<sup>147</sup> V1-24.

<sup>148</sup>



A male victim,<sup>150</sup> whose historical relationship with church authorities was one of 'automatic respect and deference', contrasted the TH process with a 'warm embrace' saying 'it wasn't anything other than a distancing.'

TH is 'really quite disappointing' because 'they [the Church Authorities] were being dragged kicking and screaming through the ... process.'<sup>151</sup>

### Other impacts

There were other impacts of the process such as the victim feeling stripped bare, humiliated and embarrassed. 'It was never pleasant. It wasn't even a sense of, finally I have someone listening'.<sup>152</sup>

My 'psychological wellbeing and ... sense of self, was like an object of contention for agents of the broader community'.<sup>153</sup>

My husband 'was not respected' in the TH process. 'It just made him more angry. I think it spurred him on to fight for ten years against the Catholic Church, because I don't think he got any justice.'<sup>154</sup>

A secondary victim,<sup>155</sup> whose son had disappeared for some years before he was found dead from suicide, decided to never return to TH, after an initial experience with counseling within the TH process. 'I felt unsatisfied with that.' After viewing a plaque on a wall which was awarded to a nun by TH, this secondary victim 'felt sick ...I couldn't talk about it. I started with Towards Healing, so I was pretty cold about that.'

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<sup>149</sup> V1-22.

<sup>150</sup> V1-20.

<sup>151</sup> V1-5.

<sup>152</sup> V1-3.

<sup>153</sup> V1-20.

<sup>154</sup> V2-18.

<sup>155</sup> V2-16.

A male victim, who is a psychologist, likened the belittling experience of requesting more counseling from TH to that of 'a school child putting up his hand to request to go to the toilet.'<sup>156</sup>

### Feeling bullied and stories minimized

Another theme running through the stories of many of the interviewees relates to a feeling of being bullied during the process and victims feeling that their stories of the sexual abuse and their impacts, were minimized and not taken seriously. For some, their stories were overtly dismissed, thus quashing the truth.

One man,<sup>157</sup> whose reason for going to TH in the first place was to find healing, felt 'stripped quite bare of my personal identity... Bullied ... I was just sort of like being invited to a tea party' where his reasons for going to TH were 'minimised'. 'You know it will not end happily over a cup of tea.'

'I never felt understood' at TH. This secondary victim, whose son had suicided, wanted to talk about what the offending priest had done to her son and that he needed to 'pay for his crime'. She felt that these issues were 'minimised'. 'There was never going to be action about the abuse. No.'<sup>158</sup>

One male victim<sup>159</sup> told of his wish, which he later described as 'naïve', 'that there are going to be people who care about what is going on.' This desire of his 'was attacked, it was eroded, it was challenged.'

### 10.3 Secondary victims

According to the TH protocol, the Church must also strive to assist in the psychological and spiritual healing of others who have been seriously affected by the abuse such as family

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<sup>156</sup> V1-3.

<sup>157</sup> V1-3.

<sup>158</sup> V2-16.

<sup>159</sup> V1-20.

members, the parish, school or other community in which the abuse occurred, the family and close friends of the offender and other clergy and religious.<sup>160</sup>

This broad-brush statement, includes disparate classes of people from a single family member or spouse/partner through to a 'whole church community', who may have been affected. The protocol provides that those who are 'seriously affected' by the incidents of abuse are entitled to assistance. There is no definition of 'seriously affected' and any assistance is limited to 'psychological and spiritual healing' and does not include monetary compensation.

TH 'keeps it quiet, keeps it hidden, and I think that's subversive.'<sup>161</sup> Others found the process for their spouse/partner as frustrating and very difficult.

Although the TH protocol claims that psychological assistance will be provided to those 'seriously affected' by the sexual assaults, one secondary victim<sup>162</sup> gave evidence that TH never offered her any assistance of help. 'Not once did they say, how are you coping, me, personally? They didn't once see if I needed help ... I wasn't part of the equation, which I thought was unjust.'

#### 10.4 Comment

More than a third of all the interviewees in this research contributed to this section on the impacts of the TH process on the victims and the problems concerning the process overall. This includes three quarters of the legal advocates for victims, who between them have represented about 2000 clients (not only TH clients) from both NSW and Victoria. The victims' evidence also relates to NSW and Victoria. This evidence is substantial.

The impacts on victims of the TH process, a deeply flawed and Church-focused process, are multiple and grave. They range from being suicidal to depression, anxiety, loss of

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<sup>160</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) 9-10.

<sup>161</sup> V2-12.

<sup>162</sup> V2-18.

self-esteem, confusion and alienation. Victims feel re-traumatised, re-abused and disempowered.

Only those who haven't committed suicide have been able to contribute to this research, although some of them have contemplated and/or attempted suicide.

## 11.0 Legalistic and adversarial process

### 11.1 Introduction

This section of the paper will examine the provisions in the TH protocol that establish and champion the fact that TH is a pastoral, and not legalistic or adversarial process. The examined data deal with the legalistic nature of the TH process itself, cases where victims were not being legally represented and the claim that there is a policy at TH to either not advise that victims to get legal representation and/or dissuade the victims from getting legal representation.

There were fourteen contributors to this topic. That is, about a quarter of all interviewees contributing to this research. There were eight lawyers, or just over half of the 15 legal advocates, four primary victims and two secondary victims.

The main purpose of Towards Healing is to assist the complainant (victim) to find healing, and where possible, to experience some measure of reconciliation with the Church. Its purpose therefore is primarily a pastoral one.<sup>163</sup>

This emphasis on a pastoral process distinguishes it from a legal process and 'should people wish to take their complaints to the police or other civil authorities, they are strongly urged to do so'.<sup>164</sup>

Despite the 'pastoral' or 'non-legalistic' underpinning or thrust of the TH process, the protocol does explain that the victim and the Church Authority (or its delegate) may be legally represented at the facilitation meetings. If the victim is not legally represented, then neither shall the Church Authority. Also, the victim must choose between a lawyer and a support person at these facilitation meetings.<sup>165</sup>

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<sup>163</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010).

<sup>164</sup> Ibid.

<sup>165</sup> Ibid 25.

The very tenor of this protocol is legalistic.

### 11.2 Evidence form the research

Contrary to the above TH provisions, this research has found that the TH process is legalistic and adversarial. Victims have been to facilitation meetings unrepresented to find the church authority is legally represented. Victims, who have wanted a pastoral response, were denied such because the victim wanted to be supported by a lawyer through the process. The entire process, from contact to facilitation and agreement, has been divisive and conflictual.

Broadly, the church authorities within the TH process have been described as legalistic, adversarial, defensive, not user-friendly, conflictual, disagreeable, arrogant, litigious, aggressive, hostile, insincere, hypocritical, bullying, misleading and threatening.

The Ellis defence, the statute of limitations and the fact that settlements are with denials of liability mean 'it's still quite an adversarial process ... even though you are meant to be outside that process.'<sup>166</sup>

Several examples from the research will now be examined to attest to these damaging claims by the interviewees.

#### Not a pastoral process

Most of the victims wanted a pastoral response from the church authorities. They wanted to be able to sit down with the church representative to be heard, taken seriously and acknowledged. They also want the church authority to really care about what happened to them.

When one victim requested a meeting with the Marist provincial, he was 'batted away'.<sup>167</sup> It was a condition that he be part of the TH process if he was to be granted a pastoral meeting with the provincial. But because this victim had engaged a lawyer to

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<sup>166</sup> LA-5.

<sup>167</sup> V1-20.

support him through the TH process, the lawyers for the Marist Order told the victim that his engagement of a lawyer meant that he, the victim, had initiated a civil adversarial process, and therefore, could not be part of the TH pastoral process.

A particular provincial of a religious order 'doesn't meet with victims'. Rather, the victim has to deal with the lawyers for that Order. This can only stifle any attempt at a pastoral process making the TH process 'very legalistic, very, very legalistic.'<sup>168</sup>

A number of cases 'turned into quite an adversarial process' due to the victims' dealings with 'people at the church authority or ... the Professional Standards office.' 'It becomes very adversarial and emotions tend to get raised on either side and they walk away with an unsatisfactory experience of it.'<sup>169</sup>

Also, in relation to a pastoral approach as pledged by the TH protocol, as many as half of the religious orders and dioceses involved in the TH process don't advocate for the victim to have their own support. 'They're repeating the same arrogance and power ... that were symptoms of what caused ... the assault in the first place.'<sup>170</sup>

'At every twist and at every turn there is conflict, there's disagreement, there are matters and issues to be grappled with.'<sup>171</sup>

### Distrust and defensiveness

Another indicator of an adversarial approach is 'distrust' between the victim and the church ... which means the process will not work'. Although this lawyer was 'pretty happy' with the TH process in her first three of four years, more recently she 'found them to be a bit more legalistic and difficult to work with.'<sup>172</sup>

A further element or ingredient of an adversarial process is a stance of defensiveness. Depending on the particular religious order, the personnel can be defensive and where the victim has been responded to defensively particularly when they have 'bared their

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<sup>168</sup>

<sup>169</sup> LA-9.

<sup>170</sup> LA-3.

<sup>171</sup> V1-20.

<sup>172</sup> LA-1.

soul', it takes the process 'backwards' and the whole thing falls apart. 'Embracing the victim' and 'compassion', not defensiveness, are necessary for a successful outcome. The TH process is not 'user-friendly...' and there is a 'real lost opportunity' for the TH personnel to respond with 'compassion in a meaningful way, rather than go straight to a legal approach.'<sup>173</sup>

This evidence was endorsed by another lawyer<sup>174</sup> who found that the TH party can get 'very defensive very quickly', especially when the victim engages a legal advocate. The TH personnel think they (TH) 'can control the process better' when the victim does not have legal representation.<sup>175</sup>

A pastoral approach also requires trust and honesty. This ingredient was wanting when the lawyers for the Christian Brothers 'were not willing to accommodate my request that they don't contact the client directly.'<sup>176</sup> Despite this request, the client (the victim) was contacted directly and informed of a meeting with the lawyers for the Christian Brothers, that he, the victim, was going to attend without his lawyer being present. This is another example of distrust between the parties, which connotes an adversarial approach.

Another example of TH undermining the legal representative and inveigling the victim involved TH organising a meeting with the victim 'without informing his lawyer. ' They've gone completely behind our back ... and didn't check with me' which meant the victim would have given 'his statement without me present or any legal advice.' This lawyer cancelled the appointment and sent a letter saying 'I was disgusted with how they've handled it given that it was very clear that we were acting, and I haven't heard from them.'<sup>177</sup>

Also, some of the religious orders of nuns 'are reluctant to admit any error on behalf of their order – ever, basically.' The nuns were harder to deal with in negotiations and

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<sup>173</sup> LA-1.

<sup>174</sup>

<sup>175</sup> LA-1.

<sup>176</sup> LA-4.

<sup>177</sup> LA-5.



'much tighter with the purse strings, much more reluctant to acknowledge the ... criminality of the actions' and there is 'almost a misguided sense of pride.'<sup>178</sup>

### Legal Defences

The Ellis defence, (see Page 16), is very commonly brought up by lawyers both within and outside the TH process. The lawyers for the Christian Brothers '... bring up [the Ellis defence] every time' in negotiations and 'they've got it up their sleeves'.<sup>179</sup> There are 'snide comments' such as 'who are you going to sue?' This same lawyer also reports that the non-Catholic organisations, such as the Salvation Army, do not rely on, or threaten the use of, the Ellis Defence.

*They are very litigious, for men of god who whoever they proclaim to be, they certainly have a lot of legal defences they like to trumpet out.<sup>180</sup>*

Another legal advocate<sup>181</sup> gave evidence that the lawyers acting for the Christian Brothers 'don't want to have to deal with' the victim and 'are very keen to portray an image that their client (the Christian Brothers) is untouchable.' There was a threatening and adversarial approach where 'repeated legal arguments' were used (the Ellis defence and the Statute of Limitations) 'because the essential point is they can't be sued' and '...I really see the entire attitude and position and presentation as strategic.' 'Unless ... you can find a defendant, then we'll offer a small amount of money but we won't do any more than that.'

With such exploitation of the legal defences, the TH 'litigation process' 'simply perpetuates the abuse'. There is no access to litigation (with the Ellis defence and the statute of limitations) and 'it needs to be at least a level playing field and its not.' Victims feel that they ... go cap in hand and beg ... "you give us what we want or we'll see you in court". We are saying, "Please compensate us" – there's not that safety net ... you have to

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<sup>178</sup> LA-3.

<sup>179</sup> LA-5.

<sup>180</sup> LA-5.

<sup>181</sup> LA-4.

say to a client “this is their final offer, if you’re not prepared to take that, you’ve really got nowhere to go”.<sup>182</sup>

### The Christian Brothers

The Christian Brothers representatives were observed as being insincere and hypocritical in that a ‘very caring’ manner towards the victim in the facilitation was promptly substituted by a ‘quite aggressive ... hostile and ... sanctimonious view’, when the victim left the room.<sup>183</sup>

Such a duplicitous and adversarial approach was also displayed when the Christian Brother’s representative in another case requested a ‘private word’ with the lawyer’s client (the victim). The representative told the victim that ‘your case has got a lot of legal difficulties and I’m just telling you this as a favour because your lawyer might not have told you...’. The CB representative ‘used the session to basically bully him into accepting an offer of compensation’ rather than having ‘a man-to-man discussion about things in a ‘healing environment’.<sup>184</sup>

Another example relating to the Christian Brothers involved a victim who had been sexually assaulted by a (now convicted) Christian Brother, which the victim found

‘pretty horrific’ and was ‘the main cause of his distress’. Because this victim also experienced problems at work, the Christian Brothers were ‘trying to use that to discount what had happened to him with [the offender].’ There was no information forthcoming from the Christian Brothers about the many other allegations against this particular offender and the fact there had been a previous conviction. ‘It was really misleading’.<sup>185</sup>

The Christian Brothers’ attitude was ‘condescending, disbelieving – and very, very difficult’.<sup>186</sup>

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<sup>182</sup> LA-6.

<sup>183</sup> LA-5.

<sup>184</sup> LA-5.

<sup>185</sup> LA-5.

<sup>186</sup> LA-7.

### 11.3 Comment

The TH process, despite the multiple provisions in the protocol advancing a pastoral approach, is an adversarial and legalistic process. The very protocol itself is legalistic with an abundance of discretionary and non-discretionary provisions and even the 'black letter of the law' approach of the language and layout.

If the Church prefers a legalistic and adversarial approach, that can be accepted by the victims and the lawyers. But it should not feign otherwise, especially when the Church is dealing with already vulnerable victims of sexual crimes committed by members of that same Church. And these crimes were concealed and covered-up by other members of that same Church.

## 12.0 Legal representation

### 12.1 Introduction

In relation to legal representation of victims through the TH process, the victim and the Church Authority (or its delegate) may be legally represented (by an 'adviser') at facilitation meetings. If the victim is not legally represented, then neither shall the Church Authority. The victim must choose between a lawyer and a support person.<sup>187</sup>

### 12.2 Evidence from the research

Many victims enter and complete the TH process not only being legally unrepresented, but have 'no external advocate at all.' Many unrepresented victims wrongly assumed the contact person at TH was their advocate. And the contact person did not advise the victims that they had the choice of being represented. Having 'nobody who stands with them ... is one of the main deficiencies of Towards Healing ... where people do have an advocate, they are treated better in Towards Healing.' also, if a victim was unrepresented, this was exploited by TH, compared with the represented victim.<sup>188</sup>

To reflect this point, one victim,<sup>189</sup> who said that he 'had trust in the church that they would be able to recognise what had happened, provide an apology and investigate the matter...', later realised that he 'was very naïve and very uninformed and not very sensible.' This man was not legally represented at that time.

The advice from one victim was to 'never tackle it by yourself ... It'd just be too overwhelming'. She reported not being understood and one must have 'strength to

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<sup>187</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) 25.

<sup>188</sup>

<sup>189</sup> V1-13.

fight'. Despite her 'feistiness', this woman 'wouldn't even think about' going through the TH process without an advocate.<sup>190</sup>

'Most people who we've come in contact with going through the Towards Healing process without any representation has tended to be negative ... this is a terribly inappropriate'.<sup>191</sup> Also, if a victim is not legally represented, they remain 'uninformed' and 'disempowered' by this process.'<sup>192</sup>

Contrary to the TH protocol, 'if the victim is not legally represented, then neither shall the Church Authority',<sup>193</sup> one male victim, who was accompanied only by his counselor at the facilitation meeting, found the Christian Brothers were represented by the provincial and three others, including lawyers.<sup>194</sup>

Victims weren't 'given the opportunity of obtaining legal advice' and the process is 'designed so that the church is legally represented, but the psychiatrically damaged person who was molested, isn't'.<sup>195</sup>

A female victim went to TH with a complaint and was not represented by a lawyer. She did not receive any financial compensation at all. A male victim, also unrepresented, received some funding for his Kung Fu classes but no financial compensation. When each of these people went to this lawyer (independently of each other) they eventually did receive financial compensation. The woman received \$100,000 and the man received \$50,000.<sup>196</sup>

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<sup>190</sup> V1-5.

<sup>191</sup> LA-9.

<sup>192</sup> LA-9.

<sup>193</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) 25.

<sup>194</sup> V1-19.

<sup>195</sup> LA-12.

<sup>196</sup> LA-10.

The standard of legal representation is also very important because if a victim is 'poorly' represented, 'it can be the same or as bad as someone who goes in unrepresented [or] ... it could be actually worse than people who are unrepresented.'<sup>197</sup>

### 12.3 Comment

Legal representation for victims going through the TH process is of paramount importance especially that there is a marked power imbalance between the Church authorities and the victims. Victims also need to be informed of the process and know that they are being supported in what is a hostile and legalistic environment.

It is an indictment that victims' lack of knowledge and information about the TH process, is so exploited by the Catholic Church.

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<sup>197</sup> LA-9.

## 13.0 Discretion of the Church Authorities

### 13.1 Introduction

According to the TH protocol, the church must respond to the needs of victims with justice and compassion. At the same time, the provision of an apology, counseling or compensation is completely discretionary.<sup>198</sup> That is, every bishop and every head of Australia's approximately one hundred and forty religious orders, has absolute and individual discretion as to whether, firstly, compensation is to be paid at all, and secondly, what that the amount might be. So, one bishop who is empathetic and understanding may pay \$70,000, whilst another, where the injuries for the victim could be far worse, might receive \$15,000 or less. There is no consistency and there are no guidelines. Discrepancies are the norm.

This is one section of the protocol that is being adhered to by the Church Authorities.

### 13.2 Evidence form the research

Just over a third of the legal advocates spoke to this issue and some found it to be a, if not the, major defect.

The complete discretion for each Church Authority is the 'biggest issue' with TH.<sup>199</sup> Also, 'there is no stated yardstick of any amount that should be paid to anybody.'

*...there is too much disparity from one diocese to the other ... Not even disparity, some of them just don't want to pay any money ... there is no actual directive that they must give financial compensation or reparation ... and then on top of that there is no framework for appeal if the amount is unsatisfactory.<sup>200</sup>*

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<sup>198</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) section 41.1, page 24.

<sup>199</sup> LA-10.

<sup>200</sup> LA-10.

This lack of directive and guidance contrasts with the Anglican Church in NSW, which 'at least [have] defined amounts.' 'There should be some sort of benchmark ... that's a major, major defect [of TH].<sup>201</sup> Also, there is no transparency.<sup>202</sup>

## Amounts

In relation to the amounts of compensation paid to victims, there is consensus that TH payments are paltry and inadequate.

Offers of compensation 'are really low relative to what's happened.' The highest amount this lawyer's clients have received was forty to fifty thousand dollars. 'It's peanuts for the type of abuse.'<sup>203</sup>

Another lawyer<sup>204</sup> agrees: 'We have dreadful trouble trying to get decent money out of them.'

Even though the TH protocol claims there is no cap on the amounts of compensation for victims, 'no one has ever got more than 50 or 60 thousand'. There is a 'reticence of the church to go to ultimate adjudication in the courts' and this is an edict that came from 'Rome', that is to keep these claims out of the courts.<sup>205</sup>

With regard to comparable amounts of compensation in the courts, this same lawyer<sup>206</sup> told of a case that had an economic loss report of 1.75 million dollars. TH might pay a maximum of \$50,000.

It is the lack of money in the TH process that 'kills it'.<sup>207</sup> One client of this barrister received a payout of \$1.25 million and another received \$750,000. Both of these clients were offered between 40 and 50 thousand by TH.

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<sup>201</sup> LA-10.

<sup>202</sup> LA-12.

<sup>203</sup> LA-5.

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<sup>205</sup> LB-3.

<sup>206</sup> LB-3.

<sup>207</sup> LB-3.



A secondary victim<sup>208</sup> said '\$45,000 is a mere pittance. Like we lost over \$100,000 in a business that he [primary victim] couldn't keep on running.'

The secondary victim wanted to say to his partner, 'Say no to them and advise them you'll be taking civil action. Now that's a bluff game, but then I thought, oh god, more pain and agony.'

### The Church Authorities

Re-abuse and re-trauma of a victim can also happen when 'you get a bishop ... who just doesn't want to pay anything. The whole thing can be even worse.'<sup>209</sup>

There is 'great disparity in the results between the religious orders and depending on whether it is the diocese of Ballarat, whether it is the Christian Brothers or Sisters of Mercy'.<sup>210</sup>

This view is supported by another lawyer,<sup>211</sup> who argues that the degree of a legalistic or otherwise approach, depends on the individual church leader, or provincial or Bishop, and is 'very personality based.' Two provincials, one from New Zealand and one from Australia, approached their task disparately. One cried with the victim, the other would not meet with the victims.

Another problem in relation to the use of discretion is the subsequent diverse interpretations and implementations of the TH protocol and/or the policies of the different religious orders and Dioceses. An example of such disparity in the Archdiocese of Sydney involves one church leader believing a victim, whilst others immediately order an investigation to determine the truth of the matter, because they are more 'legalistic'.<sup>212</sup>

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<sup>208</sup> V2-18.

<sup>209</sup> LA-10.

<sup>210</sup> LA-7.

<sup>211</sup>

<sup>212</sup>

Entering the TH process means ‘turning up as a beggar to the all-powerful church’ and ‘it all depends on which powerful [church] figure wants to cover it up or admit the truth.’ This woman could not ‘bow to their authority ... the document [the TH protocol] actually said a lot of the right stuff. But it was a lie.’<sup>213</sup>

Although the TH process could be more mediation-friendly and less adversarial than the Melbourne Response process, those TH mediations that did not work well were due to ‘the tenor of the religious representative who attends the mediation.’<sup>214</sup>

### 13.3 Comment

The lack of guidelines and directives in relation to compensation, apology and counseling, make for diverse outcomes for victims. There is no uniformity. Up to one hundred and forty different Church leaders have complete discretion concerning the three cardinal outcomes for victims: Financial compensation, an apology and the provision of counseling.

Such discretion makes the TH process unfair and unjust for victims. It also contributes to the re-trauma and re-abuse of the victims by making them feel worthless and of little value.

Also, TH trumpets the fact that there is no cap on the amounts of financial compensation. But the discretionary element of TH means there are caps on compensation – perhaps as many self-imposed caps as the more than one hundred Church authorities.

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<sup>213</sup> V1-14.

<sup>214</sup> LA-1.

## 14.0 The Positives of Towards Healing

### 14.1 Introduction

There were some positives of the TH process that were mainly put forward by the lawyers. The opportunity for the victim to tell the Church representative about the abuse and the harm suffered can be very worthwhile and healing for the victim. The funding for counseling was also seen as a positive of the TH process.

### 14.2 Evidence form the research

#### Naming the harm

The TH process 'can also be a positive sort of thing' because the victim had the opportunity to 'name the harm they've suffered and to describe the impact.'<sup>215</sup> This would be similar to the Victim Impact Statements now widely employed in the criminal courts in Australia and around the world.

Some victims '...do get vindication, they've got an opportunity to face the perpetrator or the representative of the perpetrator through the Catholic church ... get the opportunity to describe the effects that the abuse has had on them.'<sup>216</sup>

'By giving them the opportunity to name the harm that they've suffered and to describe the impact,' was also seen as a positive by another lawyer.<sup>217</sup>

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<sup>215</sup>

<sup>216</sup> LA-5.

<sup>217</sup> LA-5.

### Successful mediations

Although not very often, not all TH facilitations or mediations had been negative. A lawyer<sup>218</sup> had been in mediations where:

*...the victim has been moved to tears by the apology of the religious rep, and likewise the religious rep has been in tears listening to the story of the victim. And I don't think you can put a price on that. And people who have had those experiences have gone ahead in leaps and bounds and haven't needed counseling for the next five years.*

Unfortunately, this positive experience was in the minority. Between two and five mediations of 'twenty or so' TH mediations attended by this lawyer, had such an outcome.

### Receiving counseling

A male victim<sup>219</sup>, although very unhappy with the TH process overall, did find the opportunity to have counseling paid for by the church 'a pretty good idea.'

### Collaborative process

Despite the 're-abuse and re-trauma that can happen' with some church authorities, 'generally speaking' the TH process 'can be a helpful process because it's a collaborative process rather than totally litigious, particularly where the survivor/victim has legal representation. Receiving an acknowledgement of the abuse by a representative of the Church, which often occurs in the collaborative process, can be very important for the survivor/victim but must not be allowed to be used as a means of compromising the financial claim.'<sup>220</sup>

A male victim<sup>221</sup> had a very difficult journey through the TH process and he had to conduct his own investigations to support his allegations. When finally, the religious

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<sup>218</sup> LA-1.

<sup>219</sup> V1-3.

<sup>220</sup> LA-10.

<sup>221</sup> V1-13.

order acknowledged that the crimes did happen, this victim said that 'to that extent the Towards Healing process was effective.'

Even though the TH process 'can re-open old wounds' which can be a very difficult process for them 'they do actually feel some sense of closure on the day (settlement). And I've had clients who have really been quite vulnerable in the earlier stages and by the time it's gotten to the final point they feel a sense of relief.'<sup>222</sup>

#### Other

There was 'a chap' at TH who was responsive and 'you could talk to him'. This victim found him 'really good' and 'at least he understood that this [child sexual assault] is ... harmful to children.'<sup>223</sup>

According to one barrister<sup>224</sup> who had dealt with about four TH cases, he thinks the TH process 'is probably a good idea' but there is an element of ... contain[ing] the economic damage to [and the brand name of] the church.'

#### 14.3 Comment

There have been aspects of the TH process that have been positive and rewarding for some victims. The payment by the Church authorities for counseling was taken up by most of the victim interviewees. The granting of funding for counseling and the number of counseling sessions are discretionary, which is problematic, but those victims who did receive the funding say that is a positive of the TH process.

There are individuals within the TH process and the different Church Authorities, who are empathetic, compassionate, caring and genuinely sorry.

Unfortunately, there were very few of these positive comments.

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<sup>222</sup> LA-5.

<sup>223</sup> V1-5.

<sup>224</sup> LB-3.

## 15.0 Conclusion and Comment

Towards Healing was designed by the Church and continues to be managed by the Church, and, contrary to the Church's rhetoric, towards Healing was also designed for the Church. Victims are, yet again, the abused and exploited players in an unconscionable process.

The harm and damage caused to victims is profound and disturbing. This harm, this abuse, is a fresh round of abuse from the Church Authorities. It is not secondary abuse - it is primary abuse.

The Catholic Church, hiding behind and exploiting its legal defences, has set up a process that attempts to further control the victims. It has set up a process that attempts to further silence the victims. It has set up a process that attempts to keep the sex crimes of its clergy securely concealed under its holy mantle.

The Church, that protected its clergy paedophiles and sexual offenders, should not be investigating these very same crimes. The Church should not be left in charge of a process that is self-serving, at the expense of the victims.

Towards Healing needs to be dismantled.

The Towards Healing protocol includes the 'public criteria according to which the community may judge the resolve of the Church leaders to address issues of abuse within the Church. If we do not follow the principles and procedures of this document, we will have failed according to our own criteria.'<sup>225</sup>

Towards Healing has failed.

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<sup>225</sup> Australian Catholic Bishops Conference and Catholic Religious Australia, *Towards Healing - Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church of Australia* (January 2010) 1.

## Attachment A

Links to published opinion pieces on the issue of sex crimes and the Catholic Church and the need for justice

<http://www.canberratimes.com.au/opinion/pell-should-face-up-and-fess-up-20120923-26esa.html>

<http://www.canberratimes.com.au/comment/atonement-not-in-catholic-churchs-best-interests-20130225-2f27u.html>

<http://www.theage.com.au/opinion/society-and-culture/after-decades-of-injustice-the-sex-crime-revolution-arrives-20121203-2aqzh.html>

<http://www.smh.com.au/opinion/politics/the-unholiest-of-pr-spin-20120926-26li3.html>

<http://www.smh.com.au/opinion/politics/the-truth-deserves-a-commission-20120413-1wz1s.html>

<http://www.theage.com.au/opinion/society-and-culture/clergy-victims-need-justice-now-20111013-1lmzy.html>

<http://theconversation.com/profiles/judy-courtin-8743/articles>

<http://www.theage.com.au/national/hell-on-earth-20120624-20wa8.html>