



Australian
Human Rights
Commission

Towards Healing

**AUSTRALIAN HUMAN RIGHTS COMMISSION
RESPONSE TO THE ROYAL COMMISSION INTO
INSTITUTIONAL RESPONSES TO CHILD SEXUAL
ABUSE: ISSUE PAPER 2**

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) in response to its call for submissions regarding the *Towards Healing: Principles and Procedures in Responding to Complaints of Sexual Abuse against Personnel of the Catholic Church in Australia (Towards Healing)* complaints process.
2. The Commission has a statutory responsibility to inquire into and attempt to resolve complaints of discrimination and breaches of human rights under federal human rights and anti-discrimination law. The work of the Commission's national complaint Investigation and Conciliation Services includes dealing with complaints about sexual harassment and breaches of the Convention on the Rights of the Child (CRC). In some cases, alleged acts raised in complaints to the Commission may also be the subject of separate criminal or civil law proceedings. The Commission has extensive experience in conducting and teaching administrative investigation and statutory conciliation. However, the Commission does not have specific expertise in handling complaints of child sexual abuse and has no direct experience in relation to the implementation of the *Towards Healing* complaint process.
3. Accordingly, the Commission's submission should be understood as an outline of children's rights in relation to handling complaints of child sexual abuse and a general comment on aspects of the *Towards Healing* complaints process.

2 Outline of children's rights in relation to handling complaints of child sexual abuse

4. Human rights as they relate to children are articulated in the CRC. Articles 19, 34, 39, 12 and 3 in the CRC are particularly pertinent to the handling of complaints of child sexual abuse.
5. Articles 19, 34 and 39 of the CRC oblige Australia to take all appropriate measures to protect children from sexual abuse and sexual exploitation by:
 - implementing mechanisms to report abuse against children
 - providing clear guidance and training on when and how to refer the issue of abuse to the responsible agency
 - investigating instances of abuse
 - providing treatment that promotes the physical and psychological recovery and social reintegration of children who have experienced abuse

- judicial involvement through criminal law proceedings against people suspected of child abuse.¹
6. Article 12 of the CRC obliges Australia to implement mechanisms, including complaint mechanisms, to hear the views of children. Further, article 12 requires that these mechanisms should be firmly anchored in laws and institutional codes, and should provide children with:
- access to appropriate information, including information about policies and complaints procedures in formats appropriate to their age and capacities
 - adequate support, if necessary
 - feedback on weight given to their views
 - procedures for remedies or redress.²
7. Article 3 of the CRC obliges Australia to protect the best interests of children in individual situations as well as the best interests of children as a group.³ Article 3 also requires that the best interests of individual children who survive sexual abuse, as well as the best interests of other children who may be at risk of a perpetrator reoffending, must form the primary purpose of decision-making about whether to commence judicial involvement through criminal law proceedings against a perpetrator.⁴

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

8. *Towards Healing* provides principles and procedures for dealing with complaints relating to a range of behaviours which are defined as ‘abuse’ and which include acts against adults as well as children and also the sexual abuse of children. In light of the particular sensitivities and complexity of issues related to the abuse of children, it would seem appropriate for complaint processes regarding such matters to be documented separately and include much more detailed information about mandatory reporting, how *Towards Healing* may intersect with criminal justice and child protection systems and the associated responsibilities of Church personnel to ensure the best interests of children.
9. The Commission notes that a number of principles relevant to best practice complaint processes involving sensitive subject matter and vulnerable clients

¹ General Comment 13, para 49-54.

² General Comment 12, para 48, 49,82.

³ General Comment 12, page 18, para 72.

⁴ General Comment 13, page 21, para 54.

are reflected in the *Towards Healing* document. For example, the importance of:

- a sensitive, compassionate and non-judgemental initial response to complaints
- the involvement of guardians of children
- an independent support person to assist complainants articulate the complaint, understand the complaint process and make informed decisions, with this person having no role in judgement or determination of the issues raised in the complaint
- reducing the potential for any trauma or harm arising from the complaint process itself
- ensuring that those administering the complaint process have the specific knowledge and skills required to do so.

10. As previously noted, however, the Commission cannot comment on how these principles have been implemented in practice.

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

11. It is important for internal complaint processes to afford procedural fairness to both complainants and respondents. A number of important principles relevant to ensuring procedural fairness for respondents are reflected in the *Towards Healing* document. For example, the importance of:

- allegations not being accepted as fact merely because a complaint is made
- the right for a respondent to know of the allegations and have a right of reply
- the investigation being completed in a timely manner
- any decision to 'stand down' a respondent from their office pending investigation being undertaken in a manner which ensures this is not seen as an inference or finding of guilt
- respondents having access to a support person in relation to the process and the right to obtain independent legal advice.

12. As previously stated, the Commission cannot comment on how these principles have been implemented in practice.

13. It is also noted that some practices which would enhance procedural fairness for respondents are not included in *Towards Healing*. Specifically:

- providing for a respondent to be informed upfront of the possible sanctions if the allegations are found to be true as this ensures the respondent, when making a reply, is fully aware of potential implications

- providing the respondent with an option to comment on any proposed finding and sanction before the final decision.

5 The selection criteria, if any, which should be used to employ or engage personnel including assessors and facilitators involved in Towards Healing, and their selection, appointment and engagement and manner in which conflicts of interest are dealt with

14. A central component of a best practice complaint process is that it is both fair and seen to be fair. Crucial to this is that those facilitating the process and associated decision makers do not have, and are not seen to have, any personal or professional interest in the complaint or its outcome. Where there are significant concerns about potential bias or conflicts of interest in relation to an organisation's internal complaint process, it may be beneficial to have the process facilitated by an external body or alternatively to provide for review options by an external body.
15. In light of the subject matter of complaints and the context in which *Towards Healing* operates, it is considered important that the knowledge and skills of those facilitating the process, particularly investigators, include:
- an understanding of the purpose and conduct of investigations in different legal contexts, for example the differentiation between administrative, disciplinary, and criminal investigations
 - a detailed understanding of behaviours that could constitute crimes or be the basis for other civil claims
 - specific training and experience in conducting investigations involving children and vulnerable people.

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

16. It is of concern that *Towards Healing* does not appear to provide for complainants to have access to independent legal or expert advice at an early stage in the process. When a complaint is brought forward, it would be appropriate for the complainant to be referred for independent legal or expert advice about options available to address the alleged act through criminal or civil procedures and/or the *Towards Healing* process. This would ensure that complainants make informed decisions with reference to the potential benefits and disadvantages of each form of process as well as ensure the preservation of their rights.
17. It is understood that the *Towards Healing* process of facilitation is available to complainants where there has been a finding of a court, for example in relation to a criminal offence. It is therefore important that complainants are aware that

this process can be accessed at the conclusion of any criminal action, not only as an alternative to criminal action.

7 The application of confidentiality to any aspect of the Towards Healing process and the person subject to any applicable confidentiality

18. The Commission notes that while there are numerous references to 'confidentiality' in the *Towards Healing* procedures, there is insufficient information about what is specifically required and relevant to different roles in the process and any associated limits on confidentiality.

8 The standard of proof applied during the Towards Healing process

19. It is understood that the civil law standard of proof, 'on the balance of probabilities', is the standard that is generally applied in complaint processes related to internal disciplinary procedures.
20. It is noted however that complaints regarding behaviours such as sexual harassment or abuse can be very difficult to prove as there are often no witnesses to the events and therefore decisions may be based solely on considerations of complainant and respondent testimonies. Accordingly even where complaints are not substantiated, it is often the case that disciplinary complaint procedures may provide for investigators to make recommendations to address risk issues raised by the complaint. For example while no specific finding is made against the respondent, an investigation may recommend the organisation undertake general staff education about acceptable behaviour. Such a provision is included in *Towards Healing* at 40.9.1.

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

21. As previously mentioned, the *Towards Healing* document provides only limited reference to mandatory reporting and how *Towards Healing* may intersect with responsibilities of Church personnel under criminal law and child protection systems. It would no doubt be of value if reporting requirements of Church personnel were clear both in law and in policy.
22. The development of protocols with Police referenced at 37.7 of the policy would appear to be crucial in ensuring that the *Towards Healing* process does not compromise police action relevant to public safety.
23. This submission has been prepared with the expertise of the Investigation and Conciliation Services at the Commission.