

## Royal Commission into Institutional Responses to Child Sexual Abuse

### Submission of Lewis Holdway Lawyers Regarding Towards Healing

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<b>Length of Time in field of Religious Sexual Assault</b>	18 years

#### Introduction

Our firm has been working with victims of sexual assault by members of religious organisations for 18 years. To date, we have assisted over 200 victims to seek justice through a number of church protocols including the Towards Healing process.

In 2010, Paul Holdway, a principal of our firm, was awarded the Law Institute of Victoria President's Award for Access to Justice for his longstanding work with victims of clergy abuse. The material we present in this Submission is therefore based on our extensive experience in this field.

It is our view that many of our clients have encountered significant difficulties when engaging with the Towards Healing protocol. In our experience, despite its very commendable written Principles in the first part one of the protocol, in practice it is a flawed process, which is in need of significant reform.

We have observed that unfortunately a number of our clients have been significantly further damaged as a result of going through the Towards Healing process. They have in fact experienced quite the opposite of healing. We refer to this dynamic as 'systemic abuse'. We therefore welcome the invitation of the Royal Commission to hear from those who have engaged in the Towards Healing process.

We have read Issues Paper 2 published by the Royal Commission and advise that we will respond only to the points set out in the Issues Paper which are relevant to our practice.

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

In 2009, we wrote a submission to Patrick Parkinson when he conducted a review of the Towards Healing process.

We refer the Commissioners to that submission in Appendix 1, as this document provides a detailed response to both the Principles and our clients' experiences of the Procedures as set out in the protocol.

The Commissioners will note from the Parkinson submission that while we for the most part endorse and affirm the Principles, our concerns regarding them can be broadly summarised as follows:

1. There is a critical omission in that spiritual abuse and damage are not included in the Principles section. As such, there is a failure to fully grasp the gravity of sexual assault in a religious context.
2. While 'secondary victims' are included in Section 20, in practice, very little is offered to extended family members and communities affected.
3. There are no guidelines for the implementation of the Principles and such guidelines would ensure both compliance with and (hopefully) uniform application of the Principles.

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

We are not in a position to comment on either the engagement or the accountability of the various religious authorities which are parties in Towards Healing cases.

However, it appears to us that the religious authorities engage only if they feel inclined to do so, and if they are held accountable, it is certainly not to the victim.

From the victim's side of the table, it appears to us that there is a very wide difference in engagement depending on which responsible authority we are dealing with. A rare few have been highly engaged and sincere. The majority have appeared uncomfortable and only just engaged, and a few have been highly disengaged, clearly only taking part under sufferance.

We take this opportunity to point out that as Towards Healing is seen as a response from 'the church', for many clients it is perceived as an 'in house' solution and they therefore have difficulty in trusting that they will receive a just outcome through the process.

**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.**

1. Location

The Director for Towards Healing in Victoria is based in Mildura, which has given rise to many difficulties to our clients when trying to seek support. We believe that the service should be located in Melbourne and have an office so that victims and professionals can properly engage with it.

Due to the distance of the Towards Healing office, one of our clients has had to meet with the Director in Melbourne in a café at Southern Cross Railway Station. This was very traumatising for him; he broke down and had to walk away during this meeting while his wife continued to explain the situation to the Director.

2. Lack of skills to manage traumatised clients and families

Based on our experience we consider there to be a lack of sufficient skills, training and understanding on the part of the personnel employed by Towards Healing. We believe that some staff fail to appreciate the trauma suffered by victims of sexual abuse. This leads us to question the level and adequacy of trauma training undertaken by Towards Healing Staff prior to and during their appointment.

3. Staff perceived to be 'on the Church's side

Some clients have reported that they felt some Towards Healing staff, such as Contact Persons, Assessors and Facilitators, were chosen for these positions due to their connection with the Church, not for their particular qualifications. Some have acted defensively of the

church in meetings with the victims and in doing so demonstrate that they simply do not have the professional skills required for these specialised roles.

#### 4. Lack of Independence or perceived independence

We are aware of one Towards Healing facilitator who concurrently works for a religious authority. We consider this to be a direct conflict of interest as all facilitators should be or at least appear to be, independent of the religious authority.

#### 5. Lack of transparency in process

We have previously expressed our concern to the Towards Healing National Office in Sydney that the approved panel of Facilitators mentioned in Clause 41.3 is not made available to victims or to their advocates. Although Paragraph 35.5 of the protocol states that the names of approved facilitators 'shall be made available publicly' we have only once known this to be the case (in about 1998). In our view, the approved panel should be published, broadened and updated.

#### 6. Lack of resources

It is also our view that the whole Towards Healing organisation is significantly under-resourced. For example, the Victorian office based in Mildura is not attended five days of the week and it can be several days before messages are returned or letters are responded to.

We understand that there are only two part-time staff in the Victorian office. We have formed a belief that the staff are volunteers. We see the need for more staff, and for those staff to be appropriately trained, paid, professional staff.

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

Many clients choose not to take civil action against the church authority or the accused due to the fact that there is little chance of making a successful civil claim against the relevant Catholic Church authority. These clients are therefore often only left with the option of a Towards Healing process and for many, this is the best option of a bad bunch of options.

The primary legislative impediments for victims to access civil action are the following:

- A.** The Statute of Limitations; - in practice this means that the victim must issue proceedings within three years of the events; at age 21 if the assaults occurred when the victim was under 18, or within three years of becoming aware of the impacts. This restrictive law is completely out of step with current psychological research which indicates that victims of sexual assault usually remain silent about the assaults for a decade or two before disclosing. Even long term limitation periods out to 37 years of age in our experience often miss the timeframe in which victims come forward.
- B.** The church not being a legal entity; - in practice the church cannot be a defendant in civil proceedings, only the Archbishop or Provincial at the time of the offences and only if they can be made vicariously liable.
- C.** The church's assets being protected by property trusts; in practice this prevents victims from seeking compensation.
- D.** Church personnel not being considered employees; - in practice, this means that bishops and archbishops cannot be held accountable for the actions of offending priests, or for moving offending priests from parish to parish,

- E. The accused often having no assets due to a vow of poverty; - in practice this prevents victims from seeking compensation.

For a detailed examination of the key legal issues, we refer the Committee to an article we wrote for the Law Institute Journal in Victoria – a copy is attached as Appendix 2.

**The conduct of investigations, including the engagement with the victim, the accused and the institution or responsible authority; the standard of proof applied during the *Towards Healing* process.**

In our experience, many of the Assessments are conducted by two Catholic ex-policemen who are very forensic in their approach to these cases. Assessment interviews are tape recorded and the questions put to the victims are very detailed. For example, “did Father wear rosary beads on the left or the right side when he abused you?”

We have been concerned that there have been occasions when the required burden of proof sought by the Assessors has effectively been beyond reasonable doubt rather than on the balance of probabilities.

In some cases the victim is further traumatised by the re-telling of their abuse, and the subsequent detailed questioning. Under the Protocol the Assessment follows the Contact Interview and so it is the second time that victims are required to tell of their experiences in detail. Many feel that they are on trial and that the starting point of the Assessors is that they are not to be believed.

This approach is very much the opposite to what victims expect when they engage with a Church process and they find it confusing that the church authority is treating them with suspicion rather than compassion.

The Assessors appear to demonstrate little acknowledgement of or understanding of the impacts of trauma, including the impact on a victim’s memory and ability to recall dates and times.

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

We consider that the involvement of support people for the victim is essential. We have found that on occasions our involvement as lawyers has been to ensure that the victim has a ‘buffer’ when they need it, and to ensure that they are not drawn into cooperating with a process that they are finding unhelpful. For these reasons, we have always encouraged our clients to go through the process with our support and not by themselves.

While we consider that the role of lawyers is necessary, we appreciate that our involvement can escalate a defensive response from the religious authority, and can result in making the process legalistic rather than pastoral. Such dynamics can be avoided however when the religious authority approaches the victim with an attitude of compassion and remorse, rather than being legalistic and defensive.

Some clients have reported to us that they have found the involvement of Catholic Church Insurances (CCI) to be intrusive and unnerving and therefore somewhat of a hindrance to a positive and healing process. Having CCI involved is helpful insofar as it resources the religious authority to match their acknowledgment and apology with sufficient compensation. We have been involved in case where CCI’s presence undermines the sincerity of the

religious authority and appears to restrict the compassion and care that some religious authorities wish to demonstrate to victims.

### **The role of canon law in *Towards Healing*.**

It is not clear what canon laws are relied on in the protocol and how these might be applied vis a vis the civil law. As such, it is difficult to be certain as to whether the relevant canon law is consistent with civil law.

It is our view that the relationship between canon Law and civil and criminal law should be transparent and that canon law should always be subject to the law of the State. Otherwise a dual system may operate to the disadvantage of victims.

We are concerned that the role of canon law may enable the religious authority to conduct its own investigations by its own staff according to its own laws with an absolute lack of objective accountability.

While we acknowledge that canon law is important to the Catholic Church, it is imperative that it is not invoked to avoid taking responsibility for the criminal behaviour of paedophile priests or to allow crimes against children to continue to be perpetrated with minimal consequences for the offenders.

### **The options for redress under *Towards Healing*, in particular:**

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

The *Towards Healing* protocol sets out that the purpose of the Facilitation is to address the needs of the victims. Options for redress necessarily will vary depending on the needs of the individual victim and in our experience usually include at least the following:

- An apology (verbal and written)
- Funding for counselling for the victim and /or their family members
- Ex gratia payment

We have attended Facilitations where we have seen firsthand the wonderful healing that occurs when a heartfelt and genuine apology is given, abuse is acknowledged and concern has been shown for the victim.

This for us has been *Towards Healing* at its best. Such interactions have enabled both the victim and the representatives of the perpetrators to deal directly with the spiritual damage that has been done, as well as the pain and emotional trauma.

When the *Towards Healing* process is adhered to and put into practice by compassionate religious authorities it can be a positive tool. However, when the protocol is departed from, or reduced to a legalistic point-scoring exercise (which sadly has been a common experience in recent years), it can be destructive and harmful to the victims.

We have also witnessed many Facilitations which start very well with a very genuine apology but end with a disappointing offer of ex gratia payment, such that the apology is effectively rendered meaningless to the victim. This causes further damage to the victim.

A requirement to keep any settlement figure and settlement discussions confidential is not uncommon in our experience.

There is no clarity about how the level of an offer of ex-gratia payment is made. We have found it to vary significantly between religious authorities, even up to a ten or twenty fold difference. In this context it is very hard for a victim to feel that justice has been served where the outcome depends on who sits across the table rather than on the impact of the sexual assaults on the victim's life and their needs for healing and recovery. We have been involved in cases where ex-gratia payments range from \$2,000 to \$350,000.

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

Although the protocol allows for a review of process at Paragraph 44, it has been our experience that this process has been ineffective in addressing the concerns of the complainant. Again, this may be due to a lack of resources and poor personnel skills.

Although it is stated to be a review of process only, we are aware of at least one case where the finding that the client was a victim was overturned upon review, leaving the victim with no right of reply. In our experience a review is conducted by a senior Barrister thus making the process even more legalistic.

### **Conclusion**

While we consider that the protocol in itself can be a genuine and effective response for some victims we have also observed on many occasions that the response of Towards Healing staff has denied and minimised the pain of victims. It also is problematic for some victims that essentially, the protocol is a Church response and not therefore not objective.

When this happens, the impacts of the original abuse are compounded and the process becomes harmful.

It is our view that regrettably in recent years, this has been the case for victims, such that our position is one of extreme vigilance over the process should our clients choose to engage in it. Even then, we cannot fully protect our clients from the systemic harm which inevitably occurs when the religious authority and the Towards Healing staff fail to respond with compassion and professionalism.

If the Royal Commissioners would like to hear from us in person regarding these matters we are happy to attend a meeting with them.

Paul Holdway and Ruth Baker  
Lewis Holdway Lawyers'  
30 August 2013.

# **Lewis Holdway Lawyers**

## **Submission to Towards Healing Review 2009**

### **Introduction**

The Towards Healing document ("the Protocol") establishes "public criteria" according to which the community may judge the resolve of Church leaders to address issues of abuse within the Church. It states that if the principles and procedures are not followed, then "we (the Bishops and Church leaders) will have failed according to our own criteria."

It is our view that, unfortunately, the principles and procedures outlined in the Protocol have in many cases, not been followed. We therefore welcome this opportunity to provide feedback to the National Committee for Professional Standards and Church leaders.

Our submission offers examples of how failure to follow the principles and procedures of the Protocol has impacted, in some cases most severely, on the well being of complainants who have approached Towards Healing and relied on its rhetoric.

Our submission comes from our case experiences with Towards Healing (about 120) since 1996 with an emphasis on cases in the last year to keep it as relevant to the Review as possible.

We note the Principles outlined in Part One of the Protocol and support these. It is the failure to implement the Procedures in the context of these Principles that has, in our opinion, led to Towards Healing being less than satisfactory in a number of cases for our clients and we except the overwhelming majority of Victims who engage with it.

We offer this document as constructive feedback and in the hope that improvements will be made to benefit all parties involved in the Towards Healing process.

### **Response regarding the Principles (Clauses 1-32)**

#### *Clauses 1-5*

We affirm the Principles outlined in Clauses 1-5 of the Protocol regarding Sexual Abuse, Physical and Emotional Abuse.

However, we see a gap in that the very critical areas of Spiritual Abuse and Damage are not included in the Principles section. Such an omission fails to fully grasp the gravity of sexual assaults in a religious context. The acknowledgement and inclusion of Spiritual Abuse and Damage would add greatly to a more comprehensive consideration of victims' welfare and needs.

#### *Clause 10*

We affirm the acknowledgment in Clause 10 of the Protocol that offenders frequently present as caring and good and that "exemplary public lives can be used as an excuse for a private life that contradicts the public image."

We ask however, given such an acknowledgement, why in practice does the Protocol demonstrate a reluctance to accept a complaint which happens to be the first or sole complaint against an accused? We respectfully suggest that this practice is not only

misguided, but it also creates a bias against the victim in cases where a victim happens to be the first complainant. We understand this to be more of an implementation issue rather than a matter of amending the Principles. Perhaps Guidelines for Implementation should be developed to remind personnel to avoid this bias.

#### *Clause 12*

We affirm the stated 7 goals for the response of the Church in Clause 12 of the Protocol.

#### *Clause 20*

With regard to "Assistance to other persons Affected," Clause 20 of the Protocol states that the Church will strive to assist in psychological and spiritual healing of "those persons, who as well as victims, have been seriously affected by the abuse." In our view such persons include family members and parish community members. We support the inclusion of these parties but note that in practice, very little is offered to extended family members and communities affected. Guidelines of how these parties could be assisted should in our view, be included in the Protocol.

Clause 20 also refers to an effective response to those accused which has to be appropriate to the gravity of the offence; and consistent with canon law or civil law. However, there are no criteria set out by which to judge how serious the offences are, how the degree of harm is measured, and how the likelihood of repeat offending is established. Indeed, it is not clear who makes these findings, or what canon laws or civil laws apply. These are serious gaps, which should be addressed.

#### *Clause 30*

Clause 30 states that the Church will make every effort to reduce risk of abuse by Church personnel. We affirm this Principle but suggest that further detail on how Church personnel will be screened to minimise the risk should be added. We suggest that an inclusion of how such screening will occur would add to the authenticity of such a statement.

#### *Clause 32*

We note that in Clause 32 that Bishops and Catholic leaders assert their commitment to the Principles outlined in Part One. In light of this, we respectfully ask that they carefully consider our suggestions and comments, as practitioners who have been using the protocol for some years. We urge them to take action, to ensure that the excellent principles outlined in the Protocol are complied with.

### **Response regarding the Procedures (Clauses 33-45)**

#### *Clause 33*

We are encouraged by the acknowledgement in Clause 33.4 that a team approach to address the psychological, spiritual, medical, legal and practical questions may be required. We affirm this statement as since 1996 our own professional approach has been to acknowledge the need for a holistic response to victims of clergy abuse. Despite this clause however, we are aware that on some occasions our holistic approach has been treated with suspicion within the Towards Healing process. In some cases, funding for victims who have preferred the holistic service we offer has been refused by Church authorities, to the detriment of victims.



### *Clause 34*

We suggest that the definition of Pastoral Care in Clause 34 of the Protocol requires expansion to include a range of care that is specific to victims of religious sexual assault. Pastoral care is a difficult concept to define and can be so broad that it can lose any practical application and meaning. In our view, it requires an acknowledgement that pastoral care in the area of assisting victims of clergy/religious assault is a specialised field, and should be promptly provided for victims by those suitably qualified.

### *Clauses 35 & 36*

While Clause 35 outlines Structures and Personnel, it has been our experience that the State Professional Standards Resource Group (PSRG) does not have a public profile. As such, the PSRG is not approachable to professionals or to the public, making communications and establishing a positive relationship difficult.

A further difficulty is that PSRG members are appointed by Bishops, with the criteria for such appointments being unknown. In addition, to our knowledge there are no victim representatives on the PSRG. This is a concerning omission as such a role would clearly assist in ensuring that the service offered by the PSRG adequately meet the needs of victims.

Clause 35.3.1 states that "the Director shall manage the process." We regret to inform that our experience of the management of the process, in particular over the past four years, has been inadequate to say the least.

This is in part due to the Victorian Director being based six hours out of the Melbourne CBD, making it logistically difficult for victims and their representatives to receive an adequate service. You will appreciate that face to face contact can provide reassurance to victims who often are injured psychologically in such a way as to become dislocated.

It has also been due to a significant number of avoidable issues which our clients have experienced. These issues and errors have made client victim experiences of the Towards Healing process highly stressful at best and damaging at worst. We offer the following specific examples, noting that this is not an exhaustive list:

1. Insistence that victims make the 1800 call themselves to enter their complaints. In Clause 36: Receiving a Complaint, it does not state that victims have to ring the 1800 number. It is our view that it is not ethical to expect a victim of sexual abuse to report their experiences to complete strangers over the phone as a pre-requisite to entering the Protocol. Written entry or entry via a representative should be expressly permitted in the Protocol.
2. Failure to keep telephone appointment to enter complaint.
3. Inadequate preliminary investigations.
4. Significant and ongoing time delays in management of process.
5. Ongoing lack of Communication from Towards Healing office.
6. Appointments of inadequate or inappropriate Contact Persons - e.g. not caring/compassionate, unable to record claim clearly/accurately.
7. Inadequate Contact Reports - not complying with Protocol requirements
8. Inadequate Assessor and Assessment - e.g. not interviewing Victim but still making a finding.
9. Unnecessarily Legalistic process - e.g. cross-examination type approach/questioning of everything/requiring Court level evidence to prove each allegation/referring for Psychiatric testing to a medico-legal therapist unskilled in Pastoral Care.
10. Refusal to engage in a pastoral meeting.

11. Unnecessary Referral for Assessment - e.g. where known serial offender already incarcerated.
12. Failure to notify of medical appointment and refusal to reschedule same appointment.
13. Requirement for concession or prior treating psychologists will be contacted.
14. Lack of pastoral care.
15. Badgering of victims as to their need for legal/pastoral services.
16. Assessor confusion between beyond reasonable doubt and balance of probabilities in making Assessment findings (exacerbated in Victoria by being mostly former Police personnel).

As a result of experiencing some or many of the issues noted above, we have had a number of clients who have suffered considerable stress, exacerbating their original injuries. This has been all the more serious because the Towards Healing protocol is seen as a Church response. As such, when the protocol is not adhered to, this adds another layer of damage to the victims and further damages the Church's integrity.

One way for victims to receive a better service is to follow the suggested practice for the role of Contact persons as outlined in Clause 35.4. In our experience, the Contact Persons have in practice had no role post-interview, neither have they been a support person or a liaison person.

We note in Clause 36.2 that "information on these processes will be widely circulated to the public." It is our view that this is not practised. However, if we are incorrect, please advise how such information is circulated.

#### *Clause 41*

In our experience the approved panel of Facilitators mentioned in Clause 41.3 is not made available to Victims or their advocates, is very small and not updated and is dominated by the preferences of the Lawyers acting for Insurers, particularly Catholic Church Insurances. The approved panel should be published, broadened and updated.

Clause 41.3.9 should be clarified to make it clear that the legal and other advocacy/support costs of the Victim are ordinary and reasonable costs of the process of Facilitation.

#### *Other*

We have been previously informed that Towards Healing is a "free pastoral care service." However, in our experience, this is far from the case. We have had clients who are desperately seeking a pastoral care response but have been refused pastoral meetings and have not been offered any practical support. Our view is that this lack of pastoral response renders Towards Healing (despite the positive principles it espouses) to be merely a complaints process which leaves many victims hurt and frustrated.

For many of our clients, they have found the lack of provision of pastoral care and the absence of Church personnel in the Towards Healing process to be an overwhelming negative. Clearly, each victim's needs should be assessed on a case by case basis.

#### **Summary**

The Protocol states that the Church is responsible to bring healing to victims (Clause 16). For many of our clients however, sadly, this has not been the case. Our goal as professionals in this area is to promote and assist healing for the victims. Our comments are provided in this spirit and we hope they will be accepted as such.

The protocol further states at Clause 17 that a compassionate response to the complainant must be a priority. Again, for many of our clients, the response of Towards Healing has unfortunately been anything but compassionate.

Despite this, we are committed to continuing to work within the protocol to the best of our ability to meet the needs of our clients.

We greatly appreciate this opportunity to contribute to discussions for a better process for victims.

We look forward to receiving a copy of your report in due course.

A handwritten signature in black ink, appearing to read "Paul Holdway". The signature is written in a cursive, slightly slanted style.

for Paul Holdway & Ruth Baker  
Australian Lawyers  
Lewis Holdway Lawyers  
Melbourne, January 2009.

# ACTING FOR VICTIMS OF RELIGIOUS SEXUAL ASSAULT

## CHALLENGES FOR VICTORIAN LAWYERS

**S**exual assault by members of religious institutions can occur across different denominations and religions. The injuries sustained by victims<sup>1</sup> are significant, and frequently result in long-term impacts on their physical and psychological health and welfare. The extent of the damage caused can be so great that many victims choose never to disclose or to seek resolution of their abuse experience. For those who do seek justice, the legal options available in Victoria are limited.

Should a victim choose to have their day in court, there are a number of legal technicalities that must be overcome.

Where context permits, this article will use the institution of the Catholic Church to give context, and will deal only with information available in the public domain. The authors acknowledge that many other religious organisations have been the subject of allegations against their members, aside from the Catholic Church.

This article will outline some of the options for victims and, in doing so, will also identify the challenges for legal practitioners. These include, but are not limited to, overcoming the restrictions of limitation periods, legal identity issues (who to sue), obtaining access to church assets, and the doctrine of vicarious liability.

Alternatives to civil action include making a police complaint, which may result in criminal proceedings against the offender, or making a complaint to the relevant church's internal professional standards process.

In Victoria, the Catholic processes are "Towards Healing" and the "Melbourne Archdiocese Response". The broadly stated aim of both protocols is to provide a compassionate and pastoral response to victims. However, it is prudent for clients to also retain the protection and guidance of a lawyer in pursuing either process.

### CRIMINAL PROCEEDINGS

Practitioners should encourage victims who have been sexually or physically abused by members of religious organisations to report the offences to the police. In many cases the alleged offenders are either dead or too old to withstand any legal proceedings. However, it is useful to make the report, for two reasons.

First, it can be a positive aid to the victim's psychological recovery, as it enables them to feel some sense of being proactive on an issue that they may have felt paralysed about for many years. Second, it places the details of the alleged offenders on record, which can prove helpful for the cases of other victims who report after them.

Practitioners should assist their clients to attend the closest police SOCA (Sexual Offences Child Abuse) unit to make their statement. Despite its name, SOCA is not restricted to receiving complaints from



Practitioners representing victims of sexual assault by clergy must be aware of both the vulnerability of their clients and the difficulties they face in taking legal or restorative action.

**By Paul Holdway  
and Ruth Baker**



... many adult survivors tend not to report the assaults until the limitation periods have been passed by a substantial period of time.

children; in the authors' experience, clients benefit from approaching SOCA in the first instance, as these police offices are equipped to deal with sexual assault victims.

In the event that the alleged offender is located and well enough to stand trial, and if the matter proceeds to a guilty verdict, then the client may apply to the court for a compensation order under s85B of the *Sentencing Act 1991*, as discussed in a previous issue of the *LJ*.<sup>2</sup>

## VOCAT

A police complaint may not result in criminal proceedings against the alleged offender, but it does open up to the client the option of making an application to the Victims of Crime Assistance Tribunal (VOCAT).

A VOCAT application is a good option for victims who are unable to seek compensation from any other source. Note that such applications have a time limit of two years. As the alleged abuse has often reportedly occurred more than two years previously, clients may not qualify for the lump sum special financial assistance (SFA). However, it is possible to apply to VOCAT to request an extension, providing the client meets the criteria outlined in s29(3)(a)-(g) of the *Victims of Crime Assistance Act 1996* (Vic).

Even if SFA is not available, it is possible to lodge a VOCAT application in order to fund counselling assistance and make other requests to assist in the recovery of the victim.

## CIVIL PROCEEDINGS AGAINST THE OFFENDER

For victims who do not wish to make a police complaint, practitioners should be aware that the actions of the alleged offender are also civil wrongs, so the following civil options may apply.

If an alleged offender is alive and locatable, it is theoretically possible to issue legal proceedings against them for damages. However, in respect of members of religious orders, it is not unusual that they have taken a vow of poverty and will therefore have no assets worth pursuing.

Should the alleged offender have assets, practitioners will still need to overcome two major hurdles prior to running the case: identifying the correct legal entities to sue (usually both the individual alleged offender and their religious order are parties); and overcoming the limitation periods as set out in the *Limitation of Actions Act 1958* (Vic) (ss5(1AA), (1A)).

### Correct legal entity – who to sue?

Determining the proper defendant can be difficult. For example, the Catholic Church in Australia, as represented in each of its dioceses, is an unincorporated association and is therefore not capable of being sued.

The authors understand that the structure of the Catholic Church in Australia is to have local bishops who oversee each diocese, or geographical area. Unlike in the US, an Australian bishop is not a "corporation sole". As such, the appropriate bishop to sue is the one who was in office at the time the offences took place. It is frequently the case that this person is deceased or elderly.

It may also be that any church assets are tied up in property trusts. These entities can be difficult to sue and often claim that they do not conduct the business of the diocese but deal only with the management of property. In the case of *Ellis v Pell*<sup>3</sup> described later, this argument was successfully applied. It therefore may be necessary to name a number of defendants, to ensure there is an entity capable of being sued and an entity that controls church assets.

In the case of an alleged sexual assault perpetrated by a priest of the Melbourne Catholic Archdiocese, the potential defendants could be the individual priest, the archbishop of the diocese and the Catholic Churches Property Trust. The property trust is customarily joined as a party because church assets are usually controlled by such trusts. The current archbishop is joined, because the office of archbishop holds perpetual succession, established under the Code of Canon Law of the Church, to govern the Archdiocese of Melbourne.

However, the canon law acknowledged perpetual succession has not been adopted in Australian law, as the courts have found that

the archbishop of a diocese is not a "corporation sole" (see *Ellis*). As noted, this contrasts with the situation in the US, where courts have held the office of archbishop to be a "corporation sole" – hence largely contributing, in the writers' view, to the successful legal cases against dioceses such as in Boston and Los Angeles.<sup>4</sup>

### Limitation periods

The *Limitation of Actions Act* provides that a claim needs to be brought within three years of the date of the assault, or, if the assault occurs when the client is under 18 years of age, within three years of the date they turn 18.

It can be argued that the three year period may begin to run from the time a victim realises that they are a victim of an offender. In the case of *Clark v Stingel*,<sup>5</sup> Carol Stingel was able to bring an action against Geoff Clark several years after the offences occurred, successfully arguing that the delayed onset of post traumatic stress disorder was a direct impact of the offences Clark had allegedly committed against her.

It is a fact that many victims of sexual and physical assault by members of religious orders are children at the time of the assaults. It is usually extremely difficult for them to disclose the abuse. They may also face the additional pressure of being unable to challenge a religious authority in their lives, particularly when the authority figure is revered by both their own family and the wider community.

As such, many adult survivors tend not to report the assaults until the limitation periods have been passed by a substantial period of time. They are therefore faced with having to seek an extension of time from the court, before their claim can be heard. It has been suggested that defendants have been swift to rely on this legislation and invoke the defence of "out of time".<sup>6</sup>

It is possible to ask the court to extend the limitation period in certain circumstances,<sup>7</sup> but the court only has a discretion to do so, and would weigh up factors such as whether the defendant would have a fair trial in all the circumstances, as well as the length of the delay and the reasons for it.

The practical effect of the legislation, however, is to rule out civil action for many complainants, particularly those who do not have the emotional fortitude to endure two trials – the first to determine whether they can issue proceedings at all, and the second to actually have their case heard.

In this context it is fascinating to see the lobbying by lawyers and victims' groups in a number of US states for suspension of the limitations period for victims of religious sexual



assault. When changes were made to the limitations legislation in the state of California in 2002, the Catholic churches across the state were ordered to pay \$US1 billion in restitution to victims of sexual abuse, and lawsuits have financially crippled the Diocese of San Diego.<sup>8</sup> It is reported that there has been considerable counter-lobbying in relation to the changes to the limitations legislation.<sup>9</sup>

## THE DOCTRINE OF VICARIOUS LIABILITY

In the context of alleged sexual assault by members of religious orders, arguing that church institutions and/or officials should be vicariously liable for the actions of the offender has not been successful. Priests and nuns are not considered to be employees of the church or the religious order. Even if they were held to be employees, the doctrine of vicarious liability does not extend to the criminal actions of employees.

In addition, although it may be argued that the diocese or order effectively placed the alleged offender in a position of power

and trust and the alleged offences were committed while in that role, such actions are clearly outside the scope of their pastoral duties. It remains very difficult to establish evidence that demonstrates that a church authority knew, or ought to have known, that the alleged offender was harming those entrusted to their care.

## ELLIS V PELL

The case of *Ellis v Pell*,<sup>10</sup> where sexual abuse of a minor was alleged to have occurred in a Catholic Church context, demonstrates the legal challenges for victims.

John Ellis was 13 when he served as an altar boy in the Roman Catholic parish of Christ the King at Bass Hill. It was alleged that between the ages of 13 and 18 he was frequently sexually assaulted by an assistant parish priest. Ellis did not disclose the assaults until some 9 or 10 years after they had stopped, because he was ashamed. He also genuinely believed that the priest loved and cared for him and that he had to submit to the sexual advances.

Ellis graduated in law in 1992 with first class honours. He became a salaried partner at Baker & McKenzie in 1999, practising principally in building and engineering matters. In December 2000, he began to experience severe conflicts and periods of anxiety, depression and self-abusive behaviour, as well as significant and severe anger. He disclosed the abuse in September 2001, following which his health declined significantly. By December 2003 Ellis could only work part-time, and he ultimately resigned in May 2004.

He filed a statement of claim on 30 August 2004, 19 years after the assaults, suing Cardinal George Pell, Archbishop of Sydney, for and on behalf of the Roman Catholic Church in the Archdiocese of Sydney (first defendant), the Trustees of the Roman Catholic Church for the Archdiocese of Sydney (second defendant), and the priest (third defendant). Ellis later withdrew the action against the priest, who died on 5 October 2004.

Ellis pleaded a cause of action in tort, alleging that the defendants were vicariously liable for the illegal conduct of the priest

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Some victims prefer to approach the church directly, and can instruct lawyers to approach the institution itself to hold it accountable for the behaviour of the alleged offenders.

and also directly liable for what occurred as resulting from breaches of their duty of care towards Ellis while he was in the care of the church as an altar boy. The Church invoked various defences, including the *Limitation Act 1969* (NSW).<sup>11</sup> Patten AJ granted an extension of the limitation period for the causes of action pleaded against the second defendant only.

The Church successfully appealed this decision, arguing that the trustees simply owned and maintained church properties and they had no control over the appointment or conduct of priests and so were not liable for Ellis's alleged abuse.

On appeal to the High Court, counsel for Ellis argued that the Catholic Church "... has so structured itself as to be immune from suit ... that immunity, they say, extends to the present day in respect of the parochial duties of priests. We say that such immunity would be an outrage to any reasonable sense of justice and we say it is wrong in law".<sup>12</sup>

The High Court rejected Ellis's application and the trustees thereby avoided possible liability for the actions of the Church's clergy.<sup>13</sup> Ellis now faces a hefty costs order, which the Church may enforce against him.

The case serves as a warning to lawyers to adequately prepare their clients and warn them of the potential impact of the stress, expense and lengthy nature of civil proceedings in sexual assault cases. The worst case scenario is for a victim to lose a civil case and be made to pay the costs of the defendant(s).

## CHURCH COMPLAINTS PROCESSES

Some victims prefer to approach the church directly, and can instruct lawyers to approach the institution itself to hold it accountable for the behaviour of the alleged offenders. The two processes available in this context in Victoria vis-à-vis the Catholic Church are discussed below.

### "Towards Healing"

Established in 1996, this protocol covers all areas of Australia except the Melbourne Catholic Archdiocese. It has two parts: Part

One sets out the principles for dealing with complaints, and Part Two sets out the procedures to be followed.

In the writers' experience the process can take from six months to four years, depending on the complexity of the case and resources. It requires the client to enter the complaint, undergo an initial report known as the contact report, and, if required, an assessment report. Assessment reports are required when the religious institution does not accept the complaint and seeks further evidence.

If the complaint is accepted by the relevant order or diocese, a psychiatric report is usually required by the order prior to a "facilitation". The purpose of the facilitation is to assess the victim's needs and to allow the religious organisation to consider an apology and an ex gratia payment toward the victim's needs. Any terms of settlement are set out in a deed of release.

When conducted well, facilitations are an excellent opportunity for healing, particularly when an apology is given for acknowledged abuse, and concern has been shown for the victim. The interactions between the representatives of the offender and the victim can enable both to deal positively and directly with the pain, emotional trauma and spiritual damage suffered.

In the writers' experience, this process is not beyond criticism, particularly as the ex gratia payment can be lower than what may be obtained via court proceedings. Levels of payment may also be inconsistent between religious orders and dioceses. Low offers, unfortunately, can render a sincere apology meaningless from the victim's perspective. In the writers' experience and general knowledge, payments made vary from \$5000 to \$250,000 plus, but most payments tend to be at the lower end of this scale, between \$20,000 and \$50,000.

### The "Melbourne Archdiocese Response"

Established in 1996 by then Archbishop Pell, this process has three distinct components: an appointed Independent Commissioner, Carelink (an organisation that links psychological services to victims), and the Compensation Panel, which recommends

to the archbishop amounts to be paid, if any, to each alleged victim given their particular circumstances. The maximum amount of ex gratia compensation payable is currently \$75,000, having been increased from \$55,000 in January 2009.

Ordinarily a victim wishing to make a complaint under this process will first call the Independent Commissioner. They will usually be interviewed by the Commissioner and the interview will be taped. Should the Commissioner make a finding that the person is indeed a victim of sexual abuse (as interpreted under the terms of the Commission, which has stretched from an initially anticipated six months to 13 years), the Commissioner will then refer them to Carelink for professional support services. Carelink also employs a psychiatrist, who can prepare a report for the Compensation Panel's consideration, if required. Carelink makes referrals to psychiatrists or psychologists and must approve the therapist before approving funding. Summaries are required to be provided to Carelink from therapists after every 10 sessions.

The Compensation Panel is described as an "informal hearing". The Panel consists of a chairman, who is a QC, and other members including another lawyer, a psychiatrist and a Catholic layperson. After a hearing with the victim and having read the submitted material, this group decides on a "compensation" amount and makes a recommendation to the archbishop. The recommendation is accepted and a standard letter of apology from the archbishop is forwarded to the client, together with a deed of release.

The process has attracted criticism, including that: the Commissioner's position has been represented as one akin to an independent Royal Commissioner, which some victims have found very misleading; there is a lack of regular review, so as to keep the system's payments in line with current costs facing victims (housing, health and therapeutic resources); and there is concern that there could be potential contamination of police investigations.<sup>14</sup>

## AN ALTERNATIVE APPROACH

In the writers' view, a restorative justice model is a worthwhile, feasible and appropriately sensitive alternative that is worth instituting.

In brief, restorative justice enables a facilitated meeting of the alleged perpetrator (or representatives of the alleged perpetrator) of a crime, with the alleged victim. The alleged victim tells their story and explains the consequences and the impact of the alleged crime



on them. There is opportunity for dialogue between the parties, which can lead to life-changing outcomes for both sides.

While this approach has primarily been used in the juvenile justice area to date, an appropriate restorative justice model could be of enormous benefit to abuse victims, who often feel excluded from any further relationship with the church. For some, this is a very important aspect of the healing process.

## CONCLUSION

It is important for practitioners who work in this field to keep in mind that they are dealing with matters of high emotional intensity. Many clients are grief-stricken by the alleged abuse, the loss of their faith and, in some cases, the treatment of their families by the religious organisation.

Even if a successful legal outcome is achieved, this is but one step in a long journey of recovery. Practitioners will need to exercise patience, remain supportive and expect to bill very little. That said, the work and its challenges are most rewarding. ●

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1. Use of the word "victim" is intended as a description only. It is acknowledged that some clients prefer the term "survivor" or "complainant".
2. Ian Freckelton SC, "Compensation applications require a watching brief", *LJ*, October 2009, pp40-43.
3. *J Ellis v Pell & the Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2006) NSWSC 109; NSWCA 117; (2007) HCA 697.
4. Last year the Roman Catholic Archdiocese of Chicago was reported to have paid out \$US3.9 million to six survivors of sexual assault by priests: "Illinois - \$3.9 million church settlement", *National Briefing/Midwest*, July 2009.
5. *Clark v Stingel* (2005) VSCA 107.
6. It has been suggested that such claims are virtually prima facie statute barred: see Angela Sdrinis and Linda Gyorki, "Ensuring the protection of wards of the State and other children in State care", unpublished paper, Ryan Carlisle Thomas (2009).
7. *Limitation of Actions Act 1958* (Vic) s23A.
8. Orlow, Orlow and Orlow, "NY Bill to change statute of limitations for sex abuse victims fails" (2009): [www.hg.org/article.asp?id=7073](http://www.hg.org/article.asp?id=7073).

9. The New York State Catholic Conference expressed its concerns that waiving the current civil statute of limitations on child abuse cases would be "a potentially disastrous fallout for dioceses around the state": Mike Latona, "Sex abuse Bills go before Assembly steering committee", *Catholic Counter*, April 2009.

10. *Ellis v Pell*, note 3 above. The allegation of sexual abuse was not contested during the hearing.
11. *Limitation Act 1969* (NSW) s14(1): "An action on any of the following causes of action is not maintainable if brought after the expiration of a limitation period of six years running from the date on which the cause of action first accrues to the plaintiff". The causes of action listed include one founded on tort.
12. *Ellis v Pell*, note 3 above, (2007) HCA 697 at [2].
13. Angela Sdrinis, "Pope's sorry is an empty gesture", *Herald-Sun*, 10 July 2008, [www.news.com.au/opinion/popes-sorry-is-an-empty-gesture/story-e6frfs99-111116874549](http://www.news.com.au/opinion/popes-sorry-is-an-empty-gesture/story-e6frfs99-111116874549): "The legal position is now clear, and the church in NSW - and by extension Victoria - is immune from many cases of sexual abuse... this is not a matter of historic record. This is the Catholic Church in 2008 using legal devices to avoid responsibility in court for parishioners raped, sodomised or otherwise abused in its 'care'".
14. Nick McKenzie, "Faith betrayed", *The Age*, 10 August 2009, accessed online via [www.theage.com.au](http://www.theage.com.au).



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