

# **‘Towards Healing’**

**Designed primarily for the church, not victims**

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

**3 September 2013**



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## WHO WE ARE

The Australian Lawyers Alliance is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The Australian Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The Australian Lawyers Alliance is represented in every state and territory in Australia. We therefore have excellent knowledge regarding legislative change and what impact this will have upon our clients.

More information about us is available on our website.<sup>1</sup>

## ACKNOWLEDGMENTS

The Australian Lawyers Alliance thanks its members and staff for their contributions to this submission, in particular, Dr Andrew Morrison RFD SC, Lauren Fitzpatrick and Emily Mitchell.

Dr Andrew Morrison RFD SC appeared for the plaintiff in the *Lepore* and *Ellis* cases and has practised extensively in the personal injury field in NSW and in other states since 1976. He has appeared in a significant number of appellate cases in the High Court and NSW and WA Courts of Appeal. He has been an ALA media spokesperson on these issues.

## INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Royal Commission into Institutional Responses to Child Sexual Abuse ('the Commission') into *Towards Healing*.

The Australian Lawyers Alliance submits that *Towards Healing* has essentially failed to respond to victims' needs for transparency, accountability and redress.

The failure to report abuse to Police has been systemic, and to date, no one has been charged under s316 of the *Crimes Act*, for failing to report abuse to Police.

In addition, the Catholic Church cannot be sued in Australia as a legal entity, which is unique in the common law world. This has meant that many individuals have had either access to meagre compensation or none at all.

We will address the terms of reference laid out in the Issues Paper, in particular, 1; 2; 3; 4; 6; 7; 8; 9; 10; 13; 14 and 15.

We look forward to the report and recommendations of the Commission on this crucial issue.

## TERM OF REFERENCE 1

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

The best example of the deficiencies in the *Towards Healing* process is the case of John Ellis.

Ellis approached the church complaining of having been abused in the early 1980s. The church took more than a year to appoint an assessor/investigator and as a consequence, by the time he was appointed, the abuser, a former parish priest, was no longer capable of giving useful information.

The assessor accepted Ellis' claim in full. This, in turn, meant accepting that the breakdown of his marriage and the loss of his partnership in Baker Mackenzie (solicitors) were a consequence of his abuse whilst an altar boy. See *Ellis v Pell*

[2006] NSWSC 109.

The church offered him \$30,000 in compensation inclusive of costs on the basis of confidentiality and a waiver of liability in favour of the church and Cardinal Pell, whose predecessor had appointed Father Duggin as a parish priest.

When Mr Ellis rejected this offer, the church made no further offers and resisted his claims. See *Trustees v Ellis* [2007] NSWCA 117, where it was held that the church did not exist as a legal entity, its trustees (holding its property) were not liable and in any event, neither church nor trustees, nor the relevant bishop, were responsible for the conduct of priests.

Furthermore, Mr Ellis was ordered to pay the church's costs, believed to be approximately \$750,000. After a prolonger period, Cardinal Pell agreed to waive those costs.

Mr Ellis' claim for abuse, which the church accepted had occurred, was accordingly, unsuccessful.

This is not an isolated case.

The Australian Lawyers Alliance provided a letter to Cardinal George Pell on 3 July 2012 (attached) which stated that 'the *Towards Healing* process conducted by the Catholic Church appears to have been subverted in the case of Thomas Gerard Keady, Brother John Vincent Roberts CFC, and Brother Anthony Peter Whelan CFC.

We have attached the Australian Lawyers Alliance submission to the Family and Community Development Committee of the Parliament of Victoria Inquiry into the handling of child abuse by religious and other organisations, which elaborates further on this issue.

#### **TERMS OF REFERENCE 3 & 4**

#### **Principles and procedures; engagement and accountability of institutions**

*Towards Healing* appears to be designed primarily for the protection of the church's assets and reputation rather than for the benefit of the victims.

At the Victorian Parliamentary Inquiry, Victorian Police provided evidence that no case of abuse had ever been reported to Police in that state.

Cardinal Pell gave evidence that he had reviewed the files of complaints in the Sydney archdiocese and could not say whether any of them had been reported to the police.

He himself did not report to the police a complaint a complaint made to him when he was Archbishop of Melbourne in 2002, about Father 'F'.

Monseigneur Usher, who apparently dealt with a substantial number of aberrant priests, has been unable to point to any case which has been referred to the police.

It does appear that a police officer was appointed to the *Towards Healing* process. It is as yet unclear on what basis such an officer could sit in on a private organisation and take no official action in respect of anything heard.

That officer has claimed that no names were disclosed, but it does not appear that any effort was made to ascertain the names of victims or abusers or to undertake any police involvement.

It follows that any information provided could not be a defence to s316 of the *Crimes Act*, or its predecessor, the common law offence of misprision of felony because critical information was not disclosed to police.

The fact that the officer destroyed all records made during the course of that officer's duties demonstrates an unhealthy and inappropriate relationship between police and the church. It may even constitute a criminal offence. See the reported comments of the former NSW DPP, Nicholas Cowdery QC, on this matter.<sup>2</sup>

Some matters, it appears, were never even investigated. In the *Ellis* case, there was unchallenged evidence from his successor altar boy, Mr Stephen Smith, that in 1983, he gave Father McGloin, Dean of the Cathedral in Sydney, a statutory declaration detailing sexual assaults perpetrated upon him by Father Duggin.

Instead of investigating this claim, Father McGloin confronted him with his abuser and left them alone.

Understandably, Mr Smith did not pursue the matter further. Despite requests from the Australian Lawyers Alliance, it does not appear that Cardinal Pell has investigated this conduct.

## TERM OF REFERENCE 6

### Connection between participation in *Towards Healing* and rights to access justice systems in Australia

The Church's claim that it is effectively immune from suit in Australia is unique in the common law world.

In the USA, Canada and Ireland, the Church has been treated as a *corporation sole* or legal entity capable of being sued in respect of abuse.

In England, the Church accepts that its trustees are its secular arm and liable to meet any verdict against the Church. See *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256; *JGE v the English Province of Our Lady of Charity and the Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 (QB); and *The Catholic Child Welfare Society and Ors v Various Claimants and the Institute of the Brothers of the Christian Schools and Ors* [2012] UKSC 56.

In each of these English cases, the Church was held liable, either directly, or vicariously, or both, for the criminal conduct of its priests.

The English Supreme Court in the last of those cases said that the relationship between bishop and priest was sufficiently close to that of employer/employee to justify making the Church liable for criminal acts of sexual assault.

The *Ellis* decision is in stark contrast and leaves Australia isolated in the common law world.

The High Court in *State of NSW v Lepore* [2003] 212 CLR 511 left open (by a narrow majority) the question as to whether vicarious liability existed for criminal conduct by an employee.

The *Ellis* decision sits ill with the authorities referred to above.

The result is that, only in Australia, and only in respect of one Church in Australia, do victims have no entity to sue (since the abuser has usually taken a vow of poverty and may well be dead) and only one Church in Australia is not liable for its

clergy.

The Australian Lawyers Alliance submits that urgent legislative reform, along the lines of the draft legislation circulated by David Shoebridge MLC in the NSW Parliament, the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2012* (NSW), is required. We attach the draft Bill to our submission.

We note that draft also addresses the extension of time required under NSW Limitation law by the overwhelming majority of victims. See the associated report 'Justice for Victims' attached.

We also attach to this submission an article authored by Dr Andrew Morrison RFD SC that outlines a number of major cases pertaining to rights to compensation for child sexual abuse in religious institutions, both in Australia and overseas.

## **TERM OF REFERENCE 7**

### **Conduct of investigations**

The Father 'F' case is a very good example of the misconduct of investigations and of placing the assets and reputation of the Church ahead of the needs of victims.

It is submitted that not merely was there clear evidence of abuse and of the failure of senior clergy to report that abuse to police, but that there was also clear evidence of the silencing of victims and of the use of Church financial resources to assist the abuser against his victim.

The recent internal investigation by the Hon. Tony Whitlam QC is, the Australian Lawyers Alliance submits, merely a further example of the failure to take any useful or effective action in the most serious of cases, and proof that the Church cannot be trusted to improve its own poor record of misconduct. We have attached an analysis of the Whitlam report to our submission.

Another clear example is the NSW Commission of Inquiry into the failure by NSW Police and senior clergy to take any effective action against known abusive priests in the Newcastle Maitland diocese.

We also note that the Archdiocese of Melbourne admitted on its website to making compensation payments to about 300 victims in the previous 14 years, and identified 86 offenders, of whom 60 were priests. However, Victoria Police says the Archdiocese never referred a single complaint to police, and appears to have



dissuaded victims of sexual crime from reporting to the police.<sup>3</sup>

We also point to the report of Professor Patrick Parkinson AM to the Victorian Parliamentary Inquiry, which specifically comments on the lack of transparency in the *Towards Healing* process.<sup>4</sup>

### TERM OF REFERENCE 8

#### Application of confidentiality

The Australian Lawyers Alliance submits that confidentiality has only one role: to protect the reputation of the Church at the expense of proper reporting to police, in accordance with the obligations under s316 of the *Crimes Act*.

### TERM OF REFERENCE 9

#### Standard of proof applied in *Towards Healing*

The Australian Lawyers Alliance is not critical of the standard of proof or of the conduct of assessors under *Towards Healing*.

In the overwhelming majority of cases of which the Australian Lawyers Alliance is aware, the victims' claims have been accepted.

It is the failure to report to police; application of confidentiality; the inadequacy of compensation and the apparent absence of a civil remedy against one Church only, that is unacceptable.

### TERM OF REFERENCE 10

#### Role and participation of lawyers and other third parties in the *Towards Healing* process

The *Towards Healing* guidelines require reporting to police.<sup>5</sup> There is no evidence of substance that these guidelines have been followed at any level within the

Church.

The presence of a police officer in *Towards Healing*, absent names of victims and abusers, was not compliant with the reporting obligation. It seems merely to have offered comfort to the Church in respect of its own misconduct.

Ultimate responsibility for failure to report must rest in each diocese, with the Bishop or Archbishop and his senior advisers.

### TERM OF REFERENCE 13

#### Options for redress

##### Common law

The *Ellis* case, as described earlier, indicates the gross inadequacy of redress under *Towards Healing*.

This extends not only to individuals that have suffered abuse directly as a result of misconduct by a local parish priest, but also individuals attending Catholic parochial schools. Those injured in Catholic parochial schools may have no one to sue for abuse or even negligence, unless a Bishop chooses to consent to the Trustees (who hold the school's assets) being sued. See *PAO, BJH, SBM, IDF and TMA v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Ors* [2011] NSWSC 1216.

Legislative reform is the only remedy.

The access to compensation via other means other than under the common law in Australia is grossly unsatisfactory.

##### Towards Healing

Clause 36.5 of *Towards Healing: Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church in Australia* ('Towards Healing Guidelines') (January 2010) provides that:

'if a complainant chooses to be represented by a lawyer in seeking compensation from the Church Authority, and is not seeking any form of pastoral support or other engagement with the Church, then the matter should proceed outside of *Towards Healing* by **the normal means**

**appropriate to the resolution of civil claims.** The Church Authority should **nonetheless endeavour to act with a concern for the wellbeing of the complainant in seeking to resolve the civil claim.**<sup>6</sup>

However, a civil compensation claim cannot proceed successfully due to the precedent created by *Ellis*, thus leaving such procedures defunct.

As a result of the lack of legal status of the Church as an unincorporated association, and the lack of receiving any compensation from an abuser priest, victims have no choice but to go to *Towards Healing* 'for the crumbs that the Archdiocese was prepared to push off the table'.<sup>7</sup>

It has become clear that the outcome of such mediation will depend on the strength of the legal position of both parties. If the threat of taking the matter to court is no longer there, then claimants just have to accept what is offered.

Lawyers who have worked with victims of abuse report that it is standard practice for the Church's lawyers to reference the *Ellis* defence, and tell victims to either accept a low settlement offer, or inevitably lose their case in court. As Dr Andrew Morrison SC says, "If this [*Ellis*] decision stands, it is not just this litigant that fails; this decision says that the Church, in effect, is not amenable to suit."

In the Sydney Diocese of the Catholic Church, the maximum payment that is authorised under the *Towards Healing* process is \$50,000, and anecdotal reports suggest that most payments are well below this.

Other dioceses such as Maitland-Newcastle do not limit payments, and explicitly do not rely on the *Ellis* defence, and therefore have provided more substantial settlement sums to victims.

This figure is grossly inadequate to compensate individuals for the significant losses sustained within their lifetime. In addition, for an individual to be eligible to claim this meagre payment, the abuser must be alive.

Many individuals have committed suicide as a result of the abuse to which they were subjected, such as Damien Jurd and Daniel Powell in the Father F case.<sup>8</sup>

It is clear that *Towards Healing* is a process designed to minimise payment to victims, done in private, whose outcome protects the accused, and the Catholic Church. There is a lack of care towards the victims, with a focus on money. The Australian Lawyers Alliance believes that such callous disregard for the plight of victims amounts to a second round of abuse.

## Government victims' compensation schemes

Government victims' compensation schemes can be accessed by individuals that have suffered abuse, but these schemes do not acknowledge liability on the part of the Church; and does not punish those who allowed abuse to fester and continue.

The government victims' compensation schemes establish rigid timelines within which individuals must report abuse in order to be eligible for compensation. We have attached a summary of the restrictive conditions of such schemes to our submission.

However, even these meagre payments are not secure.

In May 2013 in NSW, drastic cuts were made to the victims' compensation scheme that capped the maximum payment to any one individual at \$15,000 (reduced from \$50,000). The Victims' Compensation Tribunal was abolished. This change was also retrospective. Individuals that had lodged all the necessary paperwork and were waiting for their claim to be resolved, lost their rights overnight through no fault of their own.

In many of the schemes, time limits on claiming for abuse are so short as to deprive most victims of any compensation. An Anglican Church survey of victims of abuse in the Brisbane area found some years ago that the average time from abuse to first complaint is approximately 19.5 years. This accords with the experience of those practicing in the area. The average victim is denied compensation. (See 'Summary of access to victims of crime compensation schemes in Australia', attached.)

The Women's Legal Centre NSW lodged an urgent complaint to the UN Special Rapporteur for Violence Against Women, describing the legislative changes and its impact on women in NSW.<sup>9</sup> These impacts will also be more widespread, and could be seen to be the first step in the rollout of the National Injury Insurance Scheme in relation to victims of crime nationally.

At a federal level, the rollout of the National Injury Insurance Scheme proposes to create a no-fault scheme that removes liability from medical professionals, employers, councils and those that have injured others via a crime. All States and Territories have committed to the implementation of certain benchmarks within the Intergovernmental Agreement on the National Disability Insurance Scheme Launch, signed at COAG on 7 December 2012.

It remains unclear to what extent the National Injury Insurance Scheme will establish threshold criteria that removes smaller claims, or whether the right to sue will be abolished altogether (as has been previously proposed).

The implementation of the National Injury Insurance Scheme could mean that individuals' ability to claim compensation could be reduced even further. While compensation cannot be claimed from the Catholic Church at present, the changes under the National Injury Insurance Scheme could impact on claims made against other institutions, Churches and individuals, if the right to sue under any head of damage was eliminated or reduced.

The Australian Lawyers Alliance maintains that in no instance should the right to sue be abolished, but that individuals must retain the right to choose whether to take legal action and pursue a remedy for any violation of their human rights.

#### TERM OF REFERENCE 14

##### Nature and extent of the review process available

Most complaints have been accepted. It is the absence of proper remedy which is much more of a problem than any question of review.

#### TERM OF REFERENCE 15

##### The role of *Towards Healing* in the prevention of child sexual abuse

*Towards Healing* mouths platitudes in relation to concern for victims and the need to report to police.

In practice, compensation depends upon the attitude of a particular Bishop or Archbishop. Large sums have been paid in compensation to hundreds of victims in the Newcastle-Maitland diocese. In the Sydney archdiocese, Cardinal Pell resists any payments beyond the nominal sums under *Towards Healing*.

In the words of Care Leavers Australia Network ('CLAN') Australia, 'until an impartial third party is given the responsibility to oversee a compensation scheme, and there are other avenues for victims to obtain justice, the *Towards Healing* process will never provide true justice for victims of Catholic Church abuse.'<sup>10</sup> Until then, *Towards Healing* is a failed process designed more to protect the interests of

the Church than the rights of victims.

The failure to report criminal misconduct by clergy, teachers and others to police means that *Towards Healing* has failed to protect existing and future victims of abuse. The absence of public acknowledgment of wrongdoing and appropriate financial compensation leaves victims with a justifiable belief that their rights and needs are subordinated to the financial interests and good name of one of the wealthiest organisations in Australia.

## CONCLUSION

Ultimately, *Towards Healing* is a failed process that is designed to better protect the interests of the Church than the rights of victims.

The Catholic Church has previously stated that:

‘the Church makes a firm commitment to strive for seven things... truth, humility, healing for the victims, assistance to other persons affected, an effective response to those who are accused and those who are guilty of abuse, and prevention of abuse.’<sup>11</sup>

This has sadly, not been the case for many individuals throughout Australia.

The *Towards Healing Guidelines*, in declaring the principles for dealing with complaints of abuse, provide that:

‘sexual abuse by clergy, religious, or other Church personnel of adults in their pastoral care may be subject to provisions of civil or criminal law. **Even when there are no grounds for legal action**, we recognise that serious harm can be caused, including damage to a person’s faith and truth in God.’<sup>12</sup>

In reality, there are no grounds for legal action against the Catholic Church, because uniquely in the common world, the Catholic Church does not exist as a legal entity in Australia and is not responsible for its own priests.

The damage that can be caused not only ‘damages a person’s faith’ but also causes significant economic loss, pain and suffering and in some cases, a need for ongoing care and support as a result of the trauma sustained, or tragically, can result in suicide.

Individuals should be able to access their rights under common law to take legal action against an institution which has, in many cases, placed its own interests above those that have been abused. This cover up of instances of abuse, and failure to report to Police, has led to many further instances, and further trauma suffered by a greater number of individuals.

The Australian Lawyers Alliance submits that legislative reform is required to ensure that the Catholic Church exists as a legal entity and that individuals have access to redress and the dignity in being able to hold accountable those who allowed such acts to continue.

## ATTACHMENTS

**Australian Lawyers Alliance, *ALA Submission to the Family and Community Development Committee of the Parliament of Victoria, Inquiry into the Handling of Child Abuse by Religious and Other Organisations*, (3 July 2012).**

This submission to the Victorian parliamentary inquiry contains a number of valuable annexures about specific cases.

The above document also annexes at the end:

**Australian Lawyers Alliance, *Correspondence to Cardinal George Pell*, 3 July 2012.**

**Australian Lawyers Alliance, *Summary of access to victims of crime compensation schemes in Australia* (2013).**

This document provides an overview of the necessary legislative conditions, particularly in relation to limitation restrictions, for individuals attempting to gain compensation under victims of crime compensation schemes.

**Dr Andrew Morrison RFD SC, ‘*Compensation for Child Sexual Abuse in Religious Institutions*’, (2013) 116 *Precedent* (May/June 2013).**

This article provides case summaries regarding sexual abuse in religious institutions. The situation in Australia contrasts remarkably with the position of the same church in the rest of the common law world.

**Dr Andrew Morrison RFD SC, ‘*Reporting the Failures of the Catholic Church In Regard To Father ‘F’*’, (2013) *Precedent* (to be published December 2013)**

This article comments on the failures of the Whitlam Report.

***Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2012 (NSW).***

This bill was introduced by David Shoebridge MLC in the NSW Parliament.

***Justice for Victims, Seeking remedy for victims of abuse by the Catholic Church (June 2012).***

Mr Shoebridge also produced a paper on the draft legislation, which is attached, but also can be accessed at: <<http://davidshoebridge.org.au/wp-content/uploads/2012/09/120613-Justice-for-Victims-CAMPAIGN-BOOKLET.pdf>>

We also wish to draw the Commission's attention to:

These comments from the former NSW DPP, Nicholas Cowdery QC:

- **'Former DPP slams priests for failing to report abuse'**, *ABC Radio National AM*, Saturday July 7, 2012. Accessed at <<http://www.abc.net.au/am/content/2012/s3540947.htm>>
- **'Conflict of interest in *Towards Healing*'**, *ABC Lateline*, February 27 2013. Accessed at <<http://www.abc.net.au/lateline/content/2013/s3699997.htm>>

***Professor Patrick Parkinson AM, Inquiry into Handling of Child Abuse by Religious and Other Non-Government Organisations, (July 2012).***

Accessed at  
<[http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child\\_Abuse\\_Inquiry/Submissions/Parkinson\\_Patrick.pdf](http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Parkinson_Patrick.pdf)>

***Towards Healing: Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church in Australia (January 2010)***

This document can be accessed at  
<[http://www.catholic.org.au/index.php?option=com\\_docman&task=doc\\_download&qid=1346&Itemid=395](http://www.catholic.org.au/index.php?option=com_docman&task=doc_download&qid=1346&Itemid=395)>

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**REFERENCES**

<sup>1</sup> Australian Lawyers Alliance (2012) <[www.lawyersalliance.com.au](http://www.lawyersalliance.com.au)>

<sup>2</sup> These comments can be accessed on *ABC Radio National* and *ABC Lateline*. Please see listing in Attachments.



<sup>3</sup> Catholic Archdiocese of Melbourne, *A Pastoral Letter on Sexual Abuse*, (1 July 2010). See <http://www.cam.org.au/Melbourne-Response/A-Pastoral-Letter-on-Sexual-Abuse>

<sup>4</sup> Please see listing in Attachments.

<sup>5</sup> *Towards Healing: Principles and procedures in responding to complaints of abuse against personnel of the Catholic Church in Australia*, (January 2010) ('Towards Healing Guidelines'), cl 37.4; 37.5; 37.6; 37.7 at 18.

<sup>6</sup> *Ibid.* cl 36.5, at 17.

<sup>7</sup> *Catholica*, 20 November 2012. Accessed at <http://www.catholica.com.au/forum/index.php?mode=printpost&post=117779>

<sup>8</sup> Broken Rites Australia, 'The church kept quiet about "Father F" for 30 years, until the media exposed the church's silence,' (Article updated 1 February 2013). See <http://www.brokenrites.org.au/drupal/node/210>

<sup>9</sup> For more information, see Women's Legal NSW, 'Victims Compensation Changes' (2013). Accessed at <http://www.womenslegalnsw.asn.au/law-and-policy-reform/NSW-Victims-Compensation-Review.html>

<sup>10</sup> CLAN Australia, Submission on the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2012 (NSW)*, (2012) <http://www.clan.org.au/images/Submission%20RE%20bill%20to%20amend%20property%20trust%20of%20Catholic%20Church.pdf>

<sup>11</sup> *Towards Healing Guidelines*, cl 12, at 8.

<sup>12</sup> *Ibid.*, cl 4, at 7.



3 July 2012

To the Executive Officer  
Family and Community Development Committee  
Parliament House  
Spring Street  
East Melbourne VIC 3002

**ALA SUBMISSION TO THE FAMILY AND COMMUNITY DEVELOPMENT  
COMMITTEE OF THE PARLIAMENT OF VICTORIA  
INQUIRY INTO THE HANDLING OF CHILD ABUSE BY RELIGIOUS AND OTHER  
ORGANISATIONS**

1. The Australian Lawyers Alliance NSW has been actively calling for the Victorian Inquiry to become a National one. Abuse does not stop at State boundaries.
2. Attached for your assistance are four documents:
  - (i) Paper by Dr Andrew Morrison RFD SC entitled "Claims Against Religious Institutions" dated March 2012.
  - (ii) Consultation Draft Bill prepared by Mr David Shoebridge MLC, from NSW Parliament.
  - (iii) Investigation report by former Assistant Police Commissioner Norm Maroney under the Towards Healing process date 2 August 2011.
  - (iv) Letter to Cardinal Pell dated 3 July 2012.
3. The first document is a study of cases against religious and other institutions in Australia and England by Dr Andrew Morrison RFD SC, an ALA spokesperson. As you will see from that paper, in the *Lloyd v Bambach* case, a convicted child sex abuser was employed by the NSW Catholic Education Office and sent to schools which were not told of his history. When complaints were made about him at schools, those who complained were threatened and he was simply moved on to other schools to recommence his abuse. Sadly, there is no evidence that these practices in the Roman Catholic Church have ceased.
4. In the case of *Ellis v Pell and the Trustees of the Roman Catholic Church for the Diocese of Sydney*, the Towards Healing process found that Ellis had been abused but the Church was able to avoid liability to compensate him by arguing that his abuser priest was not employed by the Church (absence of vicarious liability) and that the Church was not a legal entity and could not be

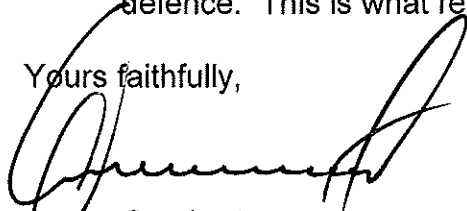
sued. The very considerable property of the Church is held by Trustees who are not liable either for misconduct by priests or, the Church would argue, even for misconduct by teachers in Roman Catholic parochial schools. The NSW Court of Appeal held that the Church has so constituted itself as to effectively make itself immune from suit. Given that priests have generally taken a vow of poverty, they are unlikely to be useful defendants.

5. A survey by the Anglican Church in Brisbane found that the average time from abuse to first complaint was just under 20 years. There are obvious reasons for this. Victims are often too ashamed to disclose the truth. They may confuse a totally inappropriate relationship with a loving one. They may have been threatened, either directly or through their families, should they reveal the truth. They may be quite unaware of the extent of the damage done to them until much later. They may have attempted to put the abuse out of their minds whilst trying to get on with their lives as best they can.
6. The effective consequence of the *Ellis* decision is that unlike the rest of the common law world (United States, Canada, Ireland, England) only in Australia is the Roman Catholic Church effectively immune from suit. Moreover, that immunity does not appear to apply to the other churches or at any rate, even if it did, none of them appear to take the *Ellis* defence.
7. Examples of cases where the *Ellis* defence has failed in England (*Maga* and *JGE* for example) are provided. However, at least in the Sydney Archdiocese, *PAO* provides an example of a case where the defence was successfully taken in respect of abuse in a Roman Catholic parochial school.
8. It is noteworthy that in each of these cases involving the Roman Catholic Church, the Church's own Towards Healing process had accepted that the abuse occurred.
9. Also noteworthy was that in the *Ellis* case, the subsequent altar boy came forward and said that he also had been abused. However, he went to the Dean of the Roman Catholic Cathedral in Sydney and complained to Father McGloin, the then Dean. He provided a statutory declaration. This was not reported to Police. He was confronted with his abuser and deterred from pursuing his complaint further. The Church did not contest this evidence in the *Ellis* case.
10. All of this is extremely disturbing and requires legislative reform. A Consultation Draft Bill prepared by David Shoebridge MLC from the NSW Parliament is attached. You may find it helpful as a model for reform. It is anticipated that it will be introduced into the NSW Legislative Council later in the year. It aims to make the Church Trustees liable for Church misconduct and the Church vicariously liable for the conduct of both priests and teachers.
11. The Roman Catholic Church has placed great importance upon the Melbourne process or the Towards Healing process. This is an internal investigation. The Church is yet to point to any case in which it has itself referred criminal conduct to the Police in accordance with its legal obligations

in NSW. We attach an investigation by former Assistant Police Commissioner Norm Maroney under the Towards Healing process, where findings were made that complaints by a former pupil against a former teacher were valid, both in respect of the teacher and the former Year master. There was also a complaint that the Head Teacher at St Patrick's College, Sutherland had been complained to directly by the distraught pupil, who had spoken to the Headmaster's secretary. Before that Headmaster's secretary or any other confirmatory person could be interviewed, Brother Brian Brandon of the Christian Brothers instructed Mr Norm Maroney on 27 July 2011 to cease his inquiries forthwith. The inference that the Church's own supposedly independent investigatory process was subverted to protect a priest who was a former principal of the school is clearly very strong. In this regard we refer to our attached letter to Cardinal Pell of today's date.

12. In NSW, the obligation to report serious criminal conduct to the Police was until 1983 through the common law misdemeanour of misprision of felony and since 1983 under the provisions of Section 316 of the *Crimes Act*. To date, and despite the widespread evidence of failure by Church authorities to report serious misconduct (even including effectively defrocking priests) we are unable to point to any case in which the Church has itself directly informed the Police in accordance with its legal obligations. There are serious allegations in respect of these matters against Archbishop Philip Wilson of Adelaide in respect of his time as Bishop of the Newcastle/Maitland Diocese.
13. It is clear that only legislative reform will provide an adequate remedy. The criminal remedies clearly are inadequate to force the Church to do what is right. The Shoebridge MLC Bill offers a way forward.
14. We hope that this material is of assistance to the Committee and would be happy to assist further by way of oral or additional written submissions should the Committee see this as being of advantage. If the Committee decides to hear oral evidence, we would like the opportunity to make submissions directly.
15. It should be made quite clear in these submissions that abuse is not confined to the Roman Catholic Church or indeed, even to religious organisations. The case examples quoted by Dr Morrison in the attached paper make this perfectly clear. However, the major problem is clearly with the Roman Catholic Church because of its highly inappropriate reliance upon the *Ellis* defence. This is what requires a legislative response.

Yours faithfully,



Inana Gumbert  
NSW Branch President  
**Australian Lawyers Alliance**

**AUSTRALIAN LAWYERS ALLIANCE**

**NSW STATE CONFERENCE**

**23 - 24 MARCH 2012**

**CLAIMS AGAINST RELIGIOUS INSTITUTIONS**

**by**

**DR ANDREW MORRISON RFD SC**

**16<sup>th</sup> Floor Wardell Chambers**

1. ***Graham Rundle v The Salvation Army (South Australia) Property Trust and Keith Ellis*** [2007] NSWSC 443, ***Salvation Army (South Australia Property Trust) v Graham Rundle*** [2008] NSWCA 347.

In 1960 Graham Rundle was eight when his father placed him in full-time care and custody at a home called Eden Park conducted in South Australia by the Salvation Army. This boys' home required young children to work on farm activities. Graham Rundle claimed that whilst he was at the home he was sexually assaulted by another boy. He complained to a supervisor, Keith Ellis, then known as Sergeant Ellis, who was a full-time carer. He says Ellis took no action. Subsequently and over five years, he was regularly sexually abused by other boys and by Ellis himself. This included being taken to Ellis' mother's home in Adelaide, where (with other boys) extensive sexual abuse, including oral sex and buggery, occurred.

In addition to the sexual abuse, he claims that he was physically abused and beaten for complaining. This included solitary confinement, deprivation of food and warmth.

He commenced proceedings in the NSW Supreme Court in 2003. He applied for an extension of time under the old South Australian legislation. At first instance, Simpson J found the allegations credible. She extended time. She also found that the solicitors acting for the Salvation Army had attempted to mislead the court. One of the Victorian solicitors had by affidavit and oral evidence told the Court that the records of the psychiatrist who attended Eden Park had been destroyed. It emerged in cross-examination that this solicitor knew that the psychiatrist could not have treated Graham Rundle and accordingly the destruction of his records was irrelevant. This was not disclosed to the Court voluntarily.

The other solicitor by affidavit and oral evidence drew to the attention of the Court that a senior officer running the home had died. What was not brought to the Court's attention was that this officer had been interviewed and a detailed statement taken from him in regard to the allegations long before his death.

On 18 August 2003 on an ABC program "Four Corners" a spokesman for the Salvation Army said, "We have no statute of limitations applying to victims of the Salvation Army ... we will never close the book on anyone who has gone through our care as long as they live ...". Notwithstanding this, the Salvation Army vigorously defended the extension of time application and on it being granted at first instance, appealed to the Court of Appeal.

The Court of Appeal rejected the appeal. There was no error in Simpson J's approach and the adverse findings about the two solicitors were upheld. The fact that Simpson J referred to criminal proceedings against Ellis being able to continue was relevant to whether a fair but not perfect trial was still possible.

Ellis was subsequently convicted in South Australia over a large number of offences, including against this plaintiff. The Salvation Army subsequently settled the plaintiff's claim.

2. *Angelo Lepore v The State of New South Wales* (2003) 212 CLR 511

Angelo Lepore was a pupil in a government school aged 7 in 1978. With other pupils he was taken for alleged misbehaviour from the classroom into a storeroom adjoining it and made to remove his clothes. He was struck and the assault had a sexual element. He complained of this and action was taken against the teacher, who was charged with four counts of common assault, including assault upon him. The Magistrate "expressed bemusement" that the charges were not more serious. The teacher pleaded guilty. However, the principal punishment inflicted was merely a recommendation to the Education Department that the teacher should not teach pupils below Year 7!

At first instance, Downs DCJ determined liability separately and concluded that the teacher had assaulted the Plaintiff. This was unsurprising since no-one asserted otherwise. Unfortunately, he made no findings as to the nature of the assault or the number of assaults so as to render this finding useful. However, he concluded that the Education Department had not been negligent in the supervision of its employee teacher.

On appeal to the Court of Appeal, the majority held that strict liability arose from the non-delegable duty of care owed by an education authority to a pupil. See *Kondis v State Transport Authority* (1984) 154 CLR 672 per Mason J at 686. See also *Commonwealth v Introvigne* (1982) 150 CLR 258, where Mason J at 271 held the Commonwealth liable for the negligence of teaching staff in a school run in the ACT by the New South Wales Education Department.

In the Court of Appeal, Mason P found breach of the non-delegable duty of care and Davies AJA agreed. Heydon JA dissented but thought vicarious liability was open, although it had not been argued. This was on the basis that the Trial Judge's finding left open the argument that what was involved was an unauthorised or unlawful form of chastisement which could be said to fall within the scope of his duties giving rise to vicarious liability. However, he would have preferred a retrial given the absence of useful fact-finding at first instance.

With two Queensland cases, the NSW Department of Education appealed to the High Court. The appeal was enlivened by recent superior court decisions in Canada and England. In *Bazley v Curry* (1999) 174 DLR (4<sup>th</sup>) 45, the Canadian Supreme Court had to consider a claim by a sexually abused child against a non-profit children's foundation which operated residential care facilities for emotionally troubled children. The foundation had unknowingly hired a paedophile. The issue was whether, assuming the foundation had not been negligent, it was nonetheless vicariously liable. The Supreme Court of Canada held it was. The situation was governed by the Salmond test, which posits that employers are vicariously liable for employee acts authorised by an employer or unauthorised acts so connected with authorised acts that they may be regarded as modes (albeit improper modes) of doing unauthorised acts. Thus employers have been held liable for thefts by employees from customers. The fundamental question is whether the wrongful act is sufficiently related to the employer's aims. Relevant is whether power, intimacy and vulnerability made it appropriate to extend vicarious liability in the circumstances.

In *Lister & Ors v Hesley Hall Ltd* [2001] 2 All ER 769, the plaintiffs were residents at a school for boys with emotional and behavioural difficulties owned by the defendant, which employed a warden who systematically sexually abused them. He was ultimately convicted of multiple criminal offences. The Trial Judge held that Hesley Hall could not be liable for

his criminal acts. The Court of Appeal agreed. The House of Lords unanimously held the plaintiff should succeed and that the defendant was vicariously liable for the acts of criminal and sexual assault. Their Lordships noted that the Salmond test was not confined to a wrongful act authorised by the employer or a wrongful and unauthorised mode of doing some act authorised by the employer but that Salmond on Torts (1<sup>st</sup> ed 1907 pp 83-84) went on to add that such an employer:

“... is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they may rightly be regarded as modes - although improper modes - of doing them.”

This was the germ of the “close connection test” adumbrated by the Canadian Supreme Court and applied by the House of Lords.

In *State of New South Wales v Angelo Lepore & Anor* (2003) 212 CLR 511, the appeal of the State of New South Wales was allowed in part and a retrial was ordered. In substantial measure, the reasoning of Heydon JA in the New South Wales Court of Appeal was adopted by the majority. Gleeson CJ said that vicarious liability was open and that intentional wrongdoing, especially intentional criminality, was relevant but not conclusive as to whether or not it was proper to hold the Education Department liable. He referred to the sufficient connection test. Where there is a high degree of power and intimacy, the use of that power and intimacy to commit sexual abuse may provide a sufficient connection between the sexual assault and employment to make it just to treat such conduct as occurring in the course of employment (para 74).

Gaudron J held that where there is a close connection between what was done and what that person was engaged to do, vicarious liability might arise and an employer may be estopped from denying liability for deliberate criminal acts of an employee.

McHugh J took the approach of the majority in the Court of Appeal that a non-delegable duty meant strict liability.

Kirby J agreed with the approaches in Canada and the United Kingdom and would have found for Angelo Lepore on the basis of vicarious liability.

Gummow, Hayne and Callinan JJ would not extend vicarious liability to deliberate criminal acts. However, Gummow and Hayne JJ agreed that a retrial should occur.

Accordingly, there was a majority of four for the proposition that the plaintiff could succeed but no agreement between them as to why. It is noted that none of that majority is now sitting on the court.

The action went back to the District Court to be reheard and was ultimately settled in a satisfactory fashion. It remains unclear whether in Australia there can be vicarious liability for deliberate criminal acts in the way left open by the majority in *Lepore*. It is also clear that the majority in the High Court have reduced the non-delegable duty to no more than a duty to do what is reasonable in employing someone so that it is not clear that the content of the duty is any greater than a delegable duty of care.



3. *Gerald Gregory Lloyd v Anthony Gerard Bambach and the Trustees of the Roman Catholic Church for the Diocese of Newcastle/Maitland [2005] NSWSC 80*

Gerard Lloyd was one of two students sexually abused in a co-educational Roman Catholic primary school, St Michael's at Nelson Bay, conducted by the Roman Catholic Church. The assaults consisted of the teacher seating a boy on his lap behind the teacher's desk at the front of the classroom so that the desk obscured the view of the other pupils. He would place a hand inside the boy's pants and masturbate him. Subsequently, the teacher started taking the plaintiff out during lunchtime and engaged in anal intercourse with the 10 year old child. He threatened the boy that if he said anything he would kill the plaintiff and his family and specifically would "kill your mum". Neither the plaintiff nor the other pupil told their parents about the assaults. It was only when a fellow student told his father about the strange behaviour in class that police were notified. Bambach was arrested in September 1988 and charged with two counts of sexual abuse of a minor. He was given a suspended sentence subject to entering into a good behaviour bond. His employment was terminated.

Subsequently, the plaintiff said he had not disclosed the full extent of the sexual abuse partly because of his embarrassment and partly because of the traumatic effect it had had on his mother. He had not told the police of the anal intercourse.

Unfortunately these two boys were by no means the first to be sexually assaulted by Bambach as a school teacher. Before being employed by the Catholic education office, Bambach had been employed by the NSW State Department of Education. In 1962 he appeared in the District Court at East Maitland charged with 12 counts of indecently assaulting young boys during the course of his employment as a teacher and assistant principal at Stroud Central School, operated by the State Education Department. The charges involved five different boys with allegations disturbingly similar to the present case. He pleaded guilty in respect of three of the 12 counts, admitted the indecent handling of four boys and ultimately a deferred sentence was given. The remaining nine charges were not proceeded with. The deferred sentence was conditional upon psychiatric treatment and not seeking employment or associating with young persons of either sex, but particularly males.

Subsequently he was employed by the second defendant through the Catholic Education Office in 1974. His employment file went missing before hearing. However, Bambach ultimately revealed that in obtaining employment with the Catholic Education Office, he had fully disclosed his previous criminal convictions to the Bishop.

Bambach was initially placed at St Paul's Primary School at Gateshead. He was subsequently acting deputy principal at St John's at Lambton and Holy Family at Meriwether, before being appointed as a Year 5 teacher and vice-principal at St Michael's Catholic School in Nelson Bay. In one of the previous schools he received a warning "regarding similar matters" from an officer of the Catholic Education Office. This was not conveyed to the principal of St Michael's before he was employed there. Two years before the assaults on the plaintiff a complaint was made at St Michael's that Bambach was sitting children on his knee during class. The principal assured the parent that she would speak to Bambach and the practice would be stopped. She drew this complaint to the attention of the Catholic Education Office.

In 1987 another parent complained to the new school principal at St Michael's that there was community concern about Bambach engaging in inappropriate behaviour with school

children, including sitting children on his lap and touching them. The parent was confronted in the principal's office with Mr Bambach, who denied the behaviour, and the principal backed his teacher. There was no further investigation.

In 1987 there was a further complaint to the principal from two mothers who had heard their young children tell of a pupil jumping from Mr Bambach's knee and doing up his fly. One of the parents complained to the former headmistress and also to the Catholic Education Office. Again, there was a meeting and Bambach denied the complaint. The principal threatened the mothers that if they made false allegations they could be sued. No students were interviewed and no investigations undertaken. The Director of Schools at the Catholic Education Office was notified and affirmed "complete confidence in the integrity of Mr Bambach".

A further event occurred in 1988. The plaintiff's mother became concerned about inappropriate gifts from Bambach to her son and complained to the parish priest. Nothing was done.

It was only when a parent went directly to the police rather than complaining to the school or the Catholic Education Office that Bambach's predatory abuse of children under his charge was finally brought to a halt. A solicitor parent was told by his son that he had seen Bambach put his hand up a boy's shorts in the classroom and he contacted Nelson Bay Police. Bambach was ultimately convicted in 1989. Sentence was deferred upon entering into a bond in the sum of \$1,000, to be of good behaviour for a period of five years.

Bambach continued to attend the local church. The Church community and the local priest were threatening in their behaviour to Mrs Lloyd for damaging the reputation of 'Holy Mother Church'.

The plaintiff sought an extension of time in which to sue. That extension was fiercely resisted by the Church. However, Master Malpass extended time in 2005 in which to sue both Bambach and the Trustees of the Roman Catholic Church for the Diocese of Newcastle/Maitland. There was a belated attempt by the Church to argue that the Trustees could not be liable, but they left this argument too late to be able to raise it. The hearing of the proceedings was ultimately settled as against the Trustees of the Church in a satisfactory manner.

**4. *John Ellis v Pell and the Trustees of the Roman Catholic Church for the Diocese of Sydney* [2006] NSWSC 109, [2007] NSWCA 117, [2007] HCA 697 (16 November 2007)**

John Ellis alleges that from about 1974, when he was 13, and until 1979, when he was 18, he was engaged as an altar server in the Roman Catholic parish at Bass Hill. During this period he alleges he was subject to frequent sexual abuse by a priest, Father Duggan. He sought a representative order against Cardinal Pell on behalf of the Church as an unincorporated association. He also sought to sue the Trustees of the Church, who held its property under the *Roman Catholic Church Trust Property Act* 1936.

John Ellis became a partner in a major commercial firm of solicitors in NSW, Baker & McKenzie. He married in 1983, but separated in 1992 and entered into a further marriage in 2000, which also experienced difficulties. He commenced counselling and the sexual abuse emerged belatedly during the course of that counselling. Ultimately, he was required to leave

as a salaried partner from Baker & McKenzie because his interpersonal skills were so poor that they adversely affected his work and relationships.

John Ellis approached the Church with his complaint. The Church took more than a year to appoint someone to investigate it, by which time Father Duggan was no longer capable of saying anything useful. He subsequently died. The Church opposed an extension of time in which to sue on the basis that it was clearly prejudiced by the death of Father Duggan. However, after the first day of hearing of the application another former altar boy came forward and said that he had also been abused by Father Duggan. He was the successor altar boy to John Ellis. More significantly, he said that he knew that John Ellis was his predecessor and would also have been abused. If asked, he would have disclosed this. Stephen Smith gave unchallenged evidence that in 1983 he gave Father McGloin, Dean of the Cathedral in Sydney, a statutory declaration detailing sexual assaults upon him by Father Duggan. Instead of investigating this claim, Father McGloin confronted him with the perpetrator and left them alone. Understandably, Mr Smith did not pursue the matter further. The Church produced no records of the statutory declaration or of any investigation. At first instance, Patton AJ noted that, "It is rather chilling to contemplate that he is the same Father McGloin referred to in the Judgment of the Court of Appeal delivered 18 September 2005, against whom allegations were made similar to those made against Father Duggan by Mr Smith and the plaintiff." The Church did not call Father McGloin, who is no longer practising as a priest but is in Sydney.

The Church did not challenge the allegations of sexual abuse. It argued, however, that there was no-one to sue in respect of the pre-1986 legislation because the Trustees merely held the property of the Church, which was itself not a legal entity. Patton AJ found that because of the membership of the Church was so ill-defined, he could not make a representative order against Cardinal Pell but found there was an arguable case that the Trustees could be sued. He found that the failure to investigate in 1983 overcame the complaints of prejudice, which were in effect caused by the Church's own misconduct. The plaintiff had first become aware of the seriousness of his condition and its effect on his career when he was sacked by Baker & McKenzie and was entitled to an extension of time.

The Church appealed to the Court of Appeal. It held on 24 May 2007 that neither the current Archbishop nor the Trustees were amenable to suit in respect of the alleged negligence and supervision of a priest said to have sexually abused an altar boy in the 1970s. The Church is an unincorporated association, as is the Catholic Education Office. The Trustees who hold the property of the Church in each Diocese are only liable in respect of property matters, at least for the period prior to legislative amendment in 1986. At least until 1986 there is therefore no-one to sue for negligence or abuse by teachers in Roman Catholic parochial schools in New South Wales. In respect of priests there is no-one to sue after 1986 as well because priests are not employees of the Church. The Church maintains that even after legislative amendment in 1986 it is not liable to suit (except in property matters) even in respect of the conduct of teachers.

The Church had made an offer of \$30,000 in full compensation to John Ellis before he commenced litigation on condition that he gave up his right to sue Cardinal Pell or the Trustees. No other offer was ever made. Leave to appeal to the High Court was refused in November 2007.

The Roman Catholic Church in New South Wales and the ACT seems to have so organised its affairs that there is no liability on the part of the Church for the conduct of priests and no liability in its parochial schools for the conduct of teachers prior to 1986, and, the Church argues, even after that. The implications are obviously very serious for those who suffered injury through abuse or negligence from the Church.

5. *TB v State of NSW & Anor, DC v State of NSW & Anor* [2009] NSWSC 326 (Mathews AJ), [2010] NSWCA 15, *TB v State of NSW* [2012] NSWSC 143 and *DC v State of NSW* [2012] NSWSC 142 (Harrison AsJ)

The two girls, TB and DC, were repeatedly sexually abused by their stepfather from the ages of 8 and 5 respectively. Their mother did nothing useful to assist them. Finally in April 1983, TB herself as a teenager telephoned YACS (the predecessor of DOCS) and complained about the sexual and physical assaults upon herself and her sister. The second defendant, an officer of YACS, interviewed the children on 22 April and their mother on 28 April 1983 and was satisfied as to the truth of their complaints. In accordance with the then practice, the two children were charged with being neglected children within the meaning of the *Child Welfare Act* 1939 and taken to Court. There were a number of hearings at which the Magistrate sought to impose conditions excluding the stepfather from access to the children. However, after a brief period he resumed access and abuse of them. On 15 September 1983, the second defendant interviewed the stepfather, who freely admitted having sexually abused the children. Her report to the Court however, did not disclose any abuse occurring during the remand period. The abuse of the stepdaughters continued until about March 1984. Both were clearly traumatised and the events had a significant effect upon their future life, though they are now married with children of their own.

In August 2001, both plaintiffs reported the sexual assaults to police. Not until 2004 was the stepfather arrested and charged, and he finally pleaded guilty in August 2005 to a series of rapes, indecent assaults and assault occasioning actual bodily harm on the children. Both of the girls were traumatised by the Court proceedings. The stepfather had a previous history of sexual abuse of children, including his own son's 15 year old girlfriend.

The girls sought an extension of time. The complaint was that YACS should have reported the criminal conduct of the stepfather to the police. In 1983, the old offence of misprision of felony still existed. Subsequently, the statutory offence of concealing a serious indictable offence, Section 316 of the *Crimes Act*, replaced it. It was the normal practice of YACS to report such conduct and the officer had said in a written document that she did not know why she had not done so in this case. The Department however, maintained (without calling the officer) that it must have been reported.

At first instance Mathews J held that because the legislation permitted but did not mandate reporting to the police, there had been no breach of duty and the actions were struck out. On appeal, the Court of Appeal held that the plaintiffs clearly had an arguable case against the Department which should go to trial. The action was remitted for a fresh extension of time application, which was heard before Associate Justice Harrison in November 2011.

By judgments on 1 March 2012, Her Honour held that the limitation period was extended under Section 52 of the *Limitation Act* 1969 so that by reason of disability they did not need an extension of time because the limitation period had not expired. In the alternative, in each case, she would have extended time in any event.

**6. *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* (2010) WL 889 335 (CA) [2010] EWCA Civ 256**

The claimant alleged he had been sexually abused by a priest of the Birmingham Archdiocese of the Roman Catholic Church when aged about 12 or 13 in 1975 and 1976. At first instance, Jack J held the claim was not time-barred because the claimant had always been under a disability and he would, if necessary, have extended time in any event. He found the claimant had been sexually abused by Father Clonan substantially as alleged. He found the claimant's father had complained to another priest who shared Father Clonan's accommodation and the Archdiocese had been negligent in not pursuing the matter. However, he found the Archdiocese owed the claimant no duty of care and the Archdiocese was not vicariously liable for Father Clonan's sexual abuse of the claimant.

Lord Neuberger MR in the Court of Appeal found that the trial judge's finding on the limitation period was open to him and that the finding of sexual abuse was supported by the evidence. However, he held that the test laid down by the House of Lords in *Lister v Hesley Hall Ltd* [2002] 1 AC 215, which was consistent with the approach of the Supreme Court of Canada in *Bazley v Curry* (1999) 174 DLR (4th) 45 and *Jacoby v Griffiths* (1999) 174 DLR (4th) 71, meant that the appropriate test was that the wrongful conduct must be so closely connected with acts the employee was authorised to do that for the purposes of the liability of the employer to third parties, the wrongful conduct may fairly and properly be regarded as done in the ordinary course of the employee's employment. Although the claimant was not himself a Roman Catholic, Father Clonan was normally dressed in clerical garb and he developed his relationship with the claimant under the cloak or guise of performing his pastoral duties. The claimant's youth was relevant and it was Church activities, including discos on Church premises, which gave Father Clonan the opportunity to develop his sexual relationship. In the circumstances and applying the close connection test, the Master of the Rolls was of the view that vicarious liability was properly made out against the Archdiocese.

He also accepted that there had been complaints by the claimant's father to another priest who shared Father Clonan's accommodation and that that complaint had not been pursued or investigated, a matter for which the Archdiocese would be vicariously liable. The Master of the Rolls was also of the view that the Archdiocese owed a duty of care to the claimant. To treat it as had been done at first instance as a duty to the world in general was to mischaracterise the duty properly described. He noted that in the Canadian Supreme Court in *Jacoby*, although vicarious liability did not apply there, the case was remitted for determination as to whether there had been a direct breach of duty through failure to supervise. Accordingly, the Master of the Rolls was of the view that the claimant's appeal should be upheld and the Archdiocese's cross-appeal dismissed. Longmore LJ and Smith LJ, also applying the close connection test, agreed.

**7. *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 (QB) (MacDuff J)**

The preliminary issue was whether the Trustees of the Roman Catholic Church could be liable to the plaintiff for sexual abuse and rape by a Roman Catholic clergyman now deceased. This occurred when she was in a children's home in Hampshire between 1970 and 1972. The defendant contended that the clergyman was not its employee and nor was the relationship akin to employment. It argued the action should be struck out because vicarious

liability could not apply. Relevantly, the Trustees stood in the shoes of the bishop for present purposes. Referring to *Viasystems (Tyneside) Ltd v Thermal Transfer Ltd & Ors* [2005] EWCA Civ 1151 (per Rix LJ) MacDuff J noted that the test of vicarious liability had gradually changed to give precedence to function over form as to its application. Thus, the approach in *Trotman v North Yorkshire County Council* [1999] LGR 584, which held that sexual abuse of a pupil by a schoolmaster fell outside the scope of employment had been overtaken by *Lister v Hesley Hall Ltd* [2002] 1 AC 215, applying a close connection test importing vicarious liability. Most recently this has been applied in *Maga* and he followed the approach taken there.

Vicarious liability does not depend upon whether employment is technically made out. True it is that the relationship between the Church and priests contain significant differences from the normal employer/employee relationship. The differences include the lack of the right to dismiss, little by way of control or supervision, no wages and no formal contract.

He noted that in *Doe v Bennett & Ors* [2004] ISCR 436, the Canadian Supreme Court held a bishop vicariously liable for the actions of a priest who had sexually abused boys within his parish. Employment was not conceded, but the priest had taken a vow of obedience to the bishop and the bishop exercised extensive control over the priest, including the power of assignment, the power of removal and the power to discipline him. In these circumstances, the Canadian Supreme Court held the relationship was "akin to employment" and that in the circumstances it was just to make the bishop vicariously liable.

In all the circumstances, MacDuff J held that applying the close connection test, vicarious liability can arise whether or not a strict relationship of employer-employee arises. By appointing Father Baldwin as a priest and thus clothing him with all the powers involved, the defendants created a risk of harm to others, namely the risk he could abuse or misuse those powers for his own purposes. In the circumstances, the defendants should be held responsible for the actions which they initiated by the appointment and all that went with it. The strike out application was accordingly dismissed.

**8. *PAO, BJH, SBM, IDF and TMA v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Ors* [2011] NSWSC 1216 (Hoeben J)**

Hoeben J had to consider whether actions by the various plaintiffs against the *Trustees of the Roman Catholic Church for the Archdiocese of Sydney* and various members of the of the Patrician Brothers religious order should be struck out. It was alleged the Archdiocese Trustees operated, and managed Patrician Brothers religious order should be struck out. It was alleged the Archdiocese Trustees operated and managed Patrician Brothers Primary School Granville when in 1974 each plaintiff was sexually assaulted by Mr Thomas Grealy (also known as Brother Augustine) whilst young students. Associate Justice Harrison in *PAO v Grealy* [2011] NSWSC 355 had refused to strike out or summarily dismiss each of the five proceedings. Before Hoeben J, there was additional evidence. The plaintiffs submitted there was evidence before the Court showing involvement of the Archdiocese Trustees in the running of schools. It was submitted the Trustees exercised control over the Catholic Education Office and Catholic Building and Finance Commission. They were responsible for the financial management of funds collected by the schools by way of fees, donations and the like. Hoeben J concluded that there was no evidence before the Court connecting the Archdiocese Trustees directly or indirectly to the conduct of the Granville school and no indication that such evidence was likely to arise in the future. There was no evidence the

Patrician Brothers handed over control of the school to the Archdiocese Catholic Education system or that the Archdiocese Trustees exercised control over CEO or CBFC. The plaintiffs' cases were held to be hopeless and should not be permitted to go further. The claims were struck out. It was not suggested that there was any legal entity in respect of the Roman Catholic Church which might be sued in respect of the abuse at the school. Hoeben J applied the decision of the Court of Appeal in *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565 (CA).

### **Conclusion**

It appears that the Australian jurisdictions are isolated as the only place in the world where the Roman Catholic Church can claim to have no legal entity capable of being sued for the wrongful acts of priests and possibly (it claims) even for its teachers post legislative amendment in 1986. Only in Australia is there no legal responsibility on the part of the Church for the conduct or misconduct of its priests.

Draft legislation to reverse this position has been circulated by a member of the NSW Legislative Council, David Shoebridge MLC. See the Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2011. Responses to his Consultation Paper have been requested.

The very powerful influence of the Church on all major parties will make legislative change extremely challenging.

**DR A.S. MORRISON RFD, SC**

**CURRICULUM VITAE**

Andrew Stewart Morrison has practised as a barrister in New South Wales since 1976 and was appointed Senior Counsel in 1993. He has since been appointed as Queens Counsel in Tasmania and Western Australia. He has been admitted in all states and territories and has practised in most of them, as well as in appellate jurisdictions. In particular, he has appeared in a number of leading catastrophic injury cases both for plaintiffs and for defendants.

Dr Morrison holds the degrees of B.A., LL.B. from the Australian National University, M.A. (with Distinction) from the University of London, LL.M. from the University of Sydney and Ph.D. from the University of London. He has been on the Board of the Motor Accident Authority and has been Supreme and District Court Arbitrator. He has held a commission and sat as an acting District Court judge. With Mr T.J. Goudkamp, he is a co-author of the Personal Injury Law Manual NSW published by the Law Book Company. He is the author of a number of articles in the Journal of the Royal Australian Historical Society, principally in the area of constitutional history and the Reserve Powers of the Crown. He is a member of the RAHS.

Dr Morrison is Chairman of the School Council at Mosman Church of England Preparatory School and is Chairman of the Board of Directors of Kangaroo Valley Olives Inc. He is married with four sons. He holds the rank of Colonel in the Australian Army Reserve.



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Introduced by Mr David Shoebridge, MLC

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New South Wales

## **Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2012**

### **Explanatory note**

#### **Overview of Bill**

The NSW Court of Appeal has held that property held on trust under the *Roman Catholic Church Trust Property Act 1936* for the use, benefit or purposes of the Roman Catholic Church in New South Wales cannot be used to satisfy legal claims associated with sexual abuse by Roman Catholic clergy, officials or teachers. The object of this Bill is to amend that Act:

- (a) to allow a person suing a member of the Church's clergy, a Church official or a Church teacher in relation to sexual abuse to join the following as defendants in those proceedings (and to make them liable for any damages awarded):
  - (i) the body corporate established by the Act to hold property on trust for the dioceses in which the relevant abuse allegedly occurred,
  - (ii) the trustees that make up that body corporate,
  - (iii) if the regulations so provide, any body corporate established under the *Roman Catholic Church Communities' Lands Act 1942* by which the relevant member of the clergy, official or teacher was employed or that was established as trustee of community land of any community of which the relevant member of the clergy, official or teacher was a part, and

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- (b) to allow a person who is owed a judgment debt in respect of civil liability arising as a result of sexual abuse by a member of the Church's clergy, a Church official or a Church teacher to recover the debt from any of the following (as an alternative to pursuing the clergy member, official or teacher concerned):
- (i) the body corporate established by the Act to hold property on trust for the dioceses in which the relevant abuse allegedly occurred,
  - (ii) the trustees that make up that body corporate,
  - (iii) if the regulations so provide, any body corporate established under the *Roman Catholic Church Communities' Lands Act 1942* by which the relevant member of the clergy, official or teacher was employed or that was established as trustee of community land of any community of which the relevant member of the clergy, official or teacher was a part.
- (c) to suspend the operation of the *Limitation Act 1969* for 2 years in relation to such causes of action that would otherwise be out of time.

### Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

### Schedule 1      Amendment of Roman Catholic Church, Trust Property Act 1936 No 24

Schedule 1 makes the amendments described in the above Overview.

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Clause 1

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The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Act 2012*.

2 Commencement

This Act commences on the date of assent to this Act.

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Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill  
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Schedule 1 Amendment of Roman Catholic Church Trust Property Act 1936 No 24

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**Schedule 1 Amendment of Roman Catholic Church  
Trust Property Act 1936 No 24**

- [1] Part 1, heading  
Insert before section 1:

**Part 1 Preliminary**

- [2] Part 2, heading  
Insert after section 2:

**Part 2 Church property**

- [3] Part 3  
Insert after section 16:

**Part 3 Sexual abuse claims paid from Trust funds**

**17 Definitions**

- (1) In this Part:

*Church official* means any person who acts as a representative of the Church and includes, but is not limited to, any of the following:

- (a) an official, officer or member of staff of the Church or of a diocese of the Church,
- (b) a lay assistant for the Church or for a diocese of the Church,
- (c) a volunteer for the Church or for a diocese of the Church,
- (d) a Provincial-General for New South Wales of a community,
- (e) a Provincial, Superior, Leader or President of a community.

*Church teacher* means a teacher or member of staff of a theological college, school, orphanage or children's home operated under the auspices of the Church or of a diocese of the Church.

*community* means a community within the meaning of the *Roman Catholic Church Communities' Lands Act 1942*.

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Amendment of Roman Catholic Church Trust Property Act 1936 No 24

Schedule 1

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*member of the Church's clergy* includes the following:

- (a) an Archbishop or Coadjutor Archbishop of the Church,
- (b) a Bishop or Coadjutor Bishop of the Church,
- (c) a Vicar Capitular of the Church,
- (d) an Administrator of the Church,
- (e) a Vicar-General of the Church,
- (f) a priest or assistant priest of the Church,
- (g) a sister, nun, brother, monk or seminarian of the Church,
- (h) any other member of a religious order of the Church.

*sexual abuse* means sexual conduct, or conduct that includes sexual conduct (whether or not there was apparent consent to that conduct and whether or not that conduct would, at the time of the relevant conduct, have constituted a sexual offence) perpetrated by a person who was, at the time of the relevant conduct, a member of the Church's clergy, a Church official or a Church teacher, while acting in his or her capacity as such a member, official or teacher.

(2) For the purposes of this Part, a person was *under the care of the Church* if the person was owed a duty of care or fiduciary duty by the Church, a member of the Church's clergy, a Church official or a Church teacher and includes, but is not limited to, having been owed such a duty in the following capacities:

- (a) as a member or parishioner of the Church,
- (b) as a nun, monk or seminarian of the Church,
- (c) as an altar server or other assistant in a church or diocese of the Church,
- (d) as a student of a theological college, school, orphanage or children's home operated under the auspices of the Church or of a diocese of the Church.

18 **Conduct of proceedings relating to sexual abuse by Church clergy, officials or teachers**

(1) The plaintiff in civil proceedings relating to sexual abuse by a member of the Church's clergy, a Church official or a Church teacher of the plaintiff who was, at the time of the sexual abuse, under the care of the Church, may join as a defendant in those proceedings:

- (a) the body corporate established under this Act for the diocese of the Church in which the abuse, or the majority of the abuse, is alleged to have occurred, and

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Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill  
2012

Schedule 1      Amendment of Roman Catholic Church Trust Property Act 1936 No 24

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- (b) the Bishop, and the Diocesan Consultors, of the diocese of the Church in which the abuse, or the majority of the abuse, is alleged to have occurred, in their capacity as trustees of Church trust property in that diocese, and
  - (c) if the regulations so provide, a body corporate established under the *Roman Catholic Church Communities' Lands Act 1942*:
    - (i) by which the relevant member of the clergy, official or teacher was employed, or
    - (ii) that was established as trustee of community land of any community of which the relevant member of the clergy, official or teacher was a part.
- (2) In respect of any such proceedings, the relevant body corporate and its trustees are jointly and severally liable as if they were the member of the Church's clergy, the Church official or the Church teacher against whom the proceedings were also brought.
  - (3) The court hearing such proceedings may extend the application of subsections (1) and (2) to a person who alleges sexual abuse by a member of the Church's clergy, a Church official or Church teacher and who was not at the time of the abuse under the care of the Church, but was so closely connected with the Church that the court believes it would be just to render the Church liable for the abuse, if proven.
  - (4) A plaintiff who intends to joint any body corporate, Bishop or Diocesan Consultor as defendant in proceedings in reliance on subsection (1) must give notice of that intention to the body corporate, Bishop and Diocesan Consultor concerned within 28 days after the filing of the statement of claim in relation to the relevant proceedings.
  - (5) This section extends to a cause of action arising before the commencement of this section.
- 19 **Judgments relating to sexual abuse by Church clergy, officials or teachers may be required to be paid from Trust funds**
- (1) A person who is owed an unpaid judgment debt in respect of civil liability arising as a result of sexual abuse by a member of the Church's clergy, a Church official or Church teacher against a person who was, at the time of the abuse, under the care of the Church, may bring an action for the recovery of the debt against:
    - (a) the body corporate established under this Act for the diocese of the Church in which the abuse, or the majority of the abuse, is alleged to have occurred, and

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Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill  
2012

Amendment of Roman Catholic Church Trust Property Act 1938 No 24 Schedule 1

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- (b) the Bishop, and the Diocesan Consultors, of the diocese of the Church in which the abuse, or the majority of the abuse, is alleged to have occurred, in their capacity as trustees of Church trust property in that diocese, and
  - (c) if the regulations so provide, a body corporate established under the *Roman Catholic Church Communities' Lands Act 1942*:
    - (i) by which the relevant member of the clergy, official or teacher was employed, or
    - (ii) that was established as trustee of community land of any community of which the relevant member of the clergy, official or teacher was a part.
  - (2) In respect of any such action, those bodies corporate and those trustees are jointly and severally liable as if they were the member of the Church's clergy, the Church official or the Church teacher against whom the judgment was given.
  - (3) The court hearing such proceedings may extend the application of subsections (1) and (2) to a person found to have been sexually abused by a member of the Church's clergy, a Church official or Church teacher and who was not at the time of the abuse under the care of the Church, but was so closely connected with the Church that the court believes it would be just to render the Church liable for the abuse.
  - (4) This section extends to a cause of action arising before the commencement of this section.
- 20 Suspension of bar to actions on basis of limitation period having elapsed
- (1) Despite any provision of the *Limitation Act 1969*, an action on a cause of action for Church sexual abuse is maintainable if it commences during the suspension period, regardless of the date on which the cause of action first accrued.
  - (2) In this section:
    - Church sexual abuse* means sexual abuse by a member of the Church's clergy, a Church official or a Church teacher in relation to a person who was, at the time of the sexual abuse, under the care of the Church.
    - suspension period* means the period commencing on the date of assent to the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Act 2012* and ending on the second anniversary of that date.

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Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill  
2012

Amendment of Roman Catholic Church Trust Property Act 1936 No 24 Schedule 1

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**21 Regulations**

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that is permitted to be prescribed by this Part.



**AUSTRALIAN  
LAWYERS  
ALLIANCE**

**Australian Lawyers Alliance  
NSW State Conference**

**23-24 March 2012  
Crowne Plaza Hotel, Terrigal**

**STREAM B  
Claims Against Religious  
Institutions**

**Andrew Morrison SC  
Barrister, Wardell Chambers**

***1. Graham Rundle v The Salvation Army (South Australia) Property Trust and Keith Ellis [2007] NSWSC 443, Salvation Army (South Australia Property Trust) v Graham Rundle [2008] NSWCA 347.***

In 1960 Graham Rundle was eight when his father placed him in full-time care and custody at a home called Eden Park conducted in South Australia by the Salvation Army. This boys' home required young children to work on farm activities. Graham Rundle claimed that whilst he was at the home he was sexually assaulted by another boy. He complained to a supervisor, Keith Ellis, then known as Sergeant Ellis, who was a full-time carer. He says Ellis took no action. Subsequently and over five years, he was regularly sexually abused by other boys and by Ellis himself. This included being taken to Ellis' mother's home in Adelaide, where (with other boys) extensive sexual abuse, including oral sex and buggery, occurred.

In addition to the sexual abuse, he claims that he was physically abused and beaten for complaining. This included solitary confinement, deprivation of food and warmth.

He commenced proceedings in the NSW Supreme Court in 2003. He applied for an extension of time under the old South Australian legislation. At first instance, Simpson J found the allegations credible. She extended time. She also found that the solicitors acting for the Salvation Army had attempted to mislead the court. One of the Victorian solicitors had by affidavit and oral evidence told the Court that the psychiatrist who attended Eden Park had destroyed his records. It emerged in cross-examination that this solicitor knew that the psychiatrist could not have treated Graham Rundle and accordingly the destruction of his records was irrelevant. This was not disclosed to the Court voluntarily.

The other solicitor by affidavit and oral evidence drew to the attention of the Court that a senior officer running the home had died. What was not brought to the Court's attention was that this officer had been interviewed and a detailed statement taken from him in regard to the allegations long before his death.

On 18 August 2003 on an ABC program "Four Corners" a spokesman for the Salvation Army said, "We have no statute of limitations applying to victims of the Salvation Army ... we will never close the book on anyone who has gone through our care as long as they live ...". Notwithstanding this, the Salvation Army vigorously defended the extension of time application and on it being granted at first instance, appealed to the Court of Appeal.

The Court of Appeal rejected the appeal. There was no error in Simpson J's approach and the adverse findings about the two solicitors were upheld. The fact that Simpson J referred to criminal proceedings against Ellis being able to continue was relevant to whether a fair but not perfect trial was still possible.

Ellis was subsequently convicted in South Australia over a large number of offences, including against this plaintiff. The Salvation Army subsequently settled the plaintiff's claim.

## 2. *Angelo Lepore v The State of New South Wales* (2003) 212 CLR 511

Angelo Lepore was a pupil in a government school aged 7 in 1978. With other pupils he was taken for alleged misbehaviour from the classroom into a storeroom adjoining it and made to remove his clothes. He was struck and the assault had a sexual element. He complained of this and action was taken against the teacher, who was charged with four counts of common assault, including assault upon him. The Magistrate "expressed bemusement" that the charges were not more serious. The teacher pleaded guilty. However, the principal punishment inflicted was merely a recommendation to the Education Department that the teacher should not teach pupils below Year 7!

At first instance, Downs DCJ determined liability separately and concluded that the teacher had assaulted the Plaintiff. This was unsurprising since no-one asserted otherwise. Unfortunately, he made no findings as to the nature of the assault or the number of assaults so as to render this finding useful. However, he concluded that the Education Department had not been negligent in the supervision of its employee teacher.

On appeal to the Court of Appeal, the majority held that strict liability arose from the non-delegable duty of care owed by an education authority to a pupil. See *Kondis v State Transport Authority* (1984) 154 CLR 672 per Mason J at 686. See also *Commonwealth v Introvigne* (1982) 150 CLR 258, where Mason J at 271 held the Commonwealth liable for the negligence of teaching staff in a school run in the ACT by the New South Wales Education Department.

In the Court of Appeal, Mason P found breach of the non-delegable duty of care and Davies AJA agreed. Heydon JA dissented but thought vicarious liability was open, although it had not been argued. This was on the basis that the Trial Judge's finding left open the argument that what was involved was an unauthorised or unlawful form of chastisement which could be said to fall within the scope of his duties giving rise to vicarious liability. However, he would have preferred a retrial given the absence of useful fact-finding at first instance.

With two Queensland cases, the NSW Department of Education appealed to the High Court. The appeal was enlivened by recent superior court decisions in Canada and England. In *Bazley v Curry* (1999) 174 DLR (4th) 45, the Canadian Supreme Court had to consider a claim by a sexually abused child against a non-profit children's foundation which operated residential care facilities for emotionally troubled children. The foundation had unknowingly hired a paedophile. The issue was whether, assuming the foundation had not been negligent, it was nonetheless vicariously liable. The Supreme Court of Canada held it was. The situation was governed by the Salmond test, which posits that employers are vicariously liable for employee acts authorised by an employer or unauthorised acts so connected with authorised acts that they may be regarded as modes (albeit improper modes) of doing unauthorised acts. Thus employers have been held liable for thefts by employees from customers. The fundamental question is whether the wrongful act is sufficiently related to the employer's aims. Relevant is whether power, intimacy and vulnerability made it appropriate to extend vicarious liability in the circumstances.

In *Lister & Ors v Hesley Hall Ltd* [2001] 2 All ER 769, the plaintiffs were residents at a school for boys with emotional and behavioural difficulties owned by the defendant, which employed a warden who systematically sexually abused them. He was ultimately convicted of multiple criminal offences. The Trial Judge held that Hesley Hall could not be liable for

his criminal acts. The Court of Appeal agreed. The House of Lords unanimously held the plaintiff should succeed and that the defendant was vicariously liable for the acts of criminal and sexual assault. Their Lordships noted that the Salmond test was not confined to a wrongful act authorised by the employer or a wrongful and unauthorised mode of doing some act authorised by the employer but that Salmond on Torts (1<sup>st</sup> ed 1907 pp 83-84) went on to add that such an employer:

"... is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they may rightly be regarded as modes - although improper modes - of doing them."

This was the germ of the "close connection test" adumbrated by the Canadian Supreme Court and applied by the House of Lords.

C In *State of New South Wales v Angelo Lepore & Anor* (2003) 212 CLR 511, the appeal of the State of New South Wales was allowed in part and a retrial was ordered. In substantial measure, the reasoning of Heydon JA in the New South Wales Court of Appeal was adopted by the majority. Gleeson CJ said that vicarious liability was open and that intentional wrongdoing, especially intentional criminality, was relevant but not conclusive as to whether or not it was proper to hold the Education Department liable. He referred to the sufficient connection test. Where there is a high degree of power and intimacy, the use of that power and intimacy to commit sexual abuse may provide a sufficient connection between the sexual assault and employment to make it just to treat such conduct as occurring in the course of employment (para 74).

Gaudron J held that where there is a close connection between what was done and what that person was engaged to do, vicarious liability might arise and an employer may be estopped from denying liability for deliberate criminal acts of an employee.

McHugh J took the approach of the majority in the Court of Appeal that a non-delegable duty meant strict liability.

Kirby J agreed with the approaches in Canada and the United Kingdom and would have found for Angelo Lepore on the basis of vicarious liability.

Gummow, Hayne and Callinan JJ would not extend vicarious liability to deliberate criminal acts. However, Gummow and Rayne JJ agreed that a retrial should occur.

Accordingly, there was a majority of four for the proposition that the plaintiff could succeed but no agreement between them as to why. It is noted that none of that majority is now sitting on the court.

The action went back to the District Court to be reheard and was ultimately settled in a satisfactory fashion. It remains unclear whether in Australia there can be vicarious liability for deliberate criminal acts in the way left open by the majority in *Lepore*. It is also clear that the majority in the High Court have reduced the non-delegable duty to no more than a duty to do what is reasonable in employing someone so that it is not clear that the content of the duty is any greater than a delegable duty of care.

**3. *Gerald Gregory Lloyd v Anthony Gerard Bambach and the Trustees of the Roman Catholic Church for the Diocese of Newcastle/Maitland* [20051 NSWSC 80**

Gerard Lloyd was one of two students sexually abused in a co-educational Roman Catholic primary school, St Michael's at Nelson Bay, conducted by the Roman Catholic Church. The assaults consisted of the teacher seating a boy on his lap behind the teacher's desk at the front of the classroom so that the desk obscured the view of the other pupils. He would place a hand inside the boy's pants and masturbate him. Subsequently, the teacher started taking the plaintiff out during lunchtime and engaged in anal intercourse with the 10 year old child. He threatened the boy that if he said anything he would kill the plaintiff and his family and specifically would "kill your mum". Neither the plaintiff nor the other pupil told their parents about the assaults. It was only when a fellow student told his father about the strange behaviour in class that police were notified. Bambach was arrested in September 1988 and charged with two counts of sexual abuse of a minor. He was given a suspended sentence subject to entering into a good behaviour bond. His employment was terminated.

Subsequently, the plaintiff said he had not disclosed the full extent of the sexual abuse partly because of his embarrassment and partly because of the traumatic effect it had had on his mother. He had not told the police of the anal intercourse.

Unfortunately these two boys were by no means the first to be sexually assaulted by Bambach as a school teacher. Before being employed by the Catholic education office, Bambach had been employed by the NSW State Department of Education. In 1962 he appeared in the District Court at East Maitland charged with 12 counts of indecently assaulting young boys during the course of his employment as a teacher and assistant principal at Stroud Central School, operated by the State Education Department. The charges involved five different boys with allegations disturbingly similar to the present case. He pleaded guilty in respect of three of the 12 counts, admitted the indecent handling of four boys and ultimately a deferred sentence was given. The remaining nine charges were not proceeded with. The deferred sentence was conditional upon psychiatric treatment and not seeking employment or associating with young persons of either sex, but particularly males.

Subsequently he was employed by the second defendant through the Catholic Education Office in 1974. His employment file went missing before hearing. However, Bambach ultimately revealed that in obtaining employment with the Catholic Education Office, he had fully disclosed his previous criminal convictions to the Bishop.

Bambach was initially placed at St Paul's Primary School at Gateshead. He was subsequently acting deputy principal at St John's at Lambton and Holy Family at Meriwether, before being appointed as a Year 5 teacher and vice-principal at St Michael's Catholic School in Nelson Bay. In one of the previous schools he received a warning "regarding similar matters" from an officer of the Catholic Education Office. This was not conveyed to the principal of St Michael's before he was employed there. Two years before the assaults on the plaintiff a complaint was made at St Michael's that Bambach was sitting children on his knee during class. The principal assured the parent that she would speak to Bambach and the practice would be stopped. She drew this complaint to the attention of the Catholic Education Office.

children, including sitting children on his lap and touching them. The parent was confronted in the principal's office with Mr Bambach, who denied the behaviour, and the principal backed his teacher. There was no further investigation.

In 1987 there was a further complaint to the principal from two mothers who had heard their young children tell of a pupil jumping from Mr Bambach's knee and doing up his fly. One of the parents complained to the former headmistress and also to the Catholic Education Office. Again, there was a meeting and Bambach denied the complaint. The principal threatened the mothers that if they made false allegations they could be sued. No students were interviewed and no investigations undertaken. The Director of Schools at the Catholic Education Office was notified and affirmed "complete confidence in the integrity of Mr Bambach".

A further event occurred in 1988. The plaintiffs mother became concerned about inappropriate gifts from Bambach to her son and complained to the parish priest. Nothing was done.

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It was only when a parent went directly to the police rather than complaining to the school or the Catholic Education Office that Bambach's predatory abuse of children under his charge was finally brought to a halt. A solicitor parent was told by his son that he had seen Bambach put his hand up a boy's shorts in the classroom and he contacted Nelson Bay Police. Bambach was ultimately convicted in 1989. Sentence was deferred upon entering into a bond in the sum of \$1,000, to be of good behaviour for a period of five years.

Bambach continued to attend the local church. The Church community and the local priest were threatening in their behaviour to Mrs Lloyd for damaging the reputation of 'Holy Mother Church'.

The plaintiff sought an extension of time in which to sue. That extension was fiercely resisted by the Church. However, Master Malpass extended time in 2005 in which to sue both Bambach and the Trustees of the Roman Catholic Church for the Diocese of Newcastle/Maitland. There was a belated attempt by the Church to argue that the Trustees could not be liable, but they left this argument too late to be able to raise it. The hearing of the proceedings was ultimately settled as against the Trustees of the Church in a satisfactory manner.

**4. *John Ellis v Pell and the Trustees of the Roman Catholic Church for the Diocese of Sydney* [2006] NSWSC 109, [2007] NSWCA 117, [2007] HCA 697 (16 November 2007)**

John Ellis alleges that from about 1974, when he was 13, and until 1979, when he was 18, he was engaged as an altar server in the Roman Catholic parish at Bass Hill. During this period he alleges he was subject to frequent sexual abuse by a priest, Father Duggan. He sought a representative order against Cardinal Pell on behalf of the Church as an unincorporated association. He also sought to sue the Trustees of the Church, who held its property under the *Roman Catholic Church Trust Property Act 1936*.

John Ellis became a partner in a major commercial firm of solicitors in NSW, Baker & McKenzie. He married in 1983, but separated in 1992 and entered into a further marriage in 2000, which also experienced difficulties. He commenced counselling and the sexual abuse

emerged belatedly during the course of that counselling. Ultimately, he was required to leave

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In 1987 another parent complained to the new school principal at St Michael's that there was

as a salaried partner from Baker & McKenzie because his interpersonal skills were so poor that they adversely affected his work and relationships.

John Ellis approached the Church with his complaint. The Church took more than a year to appoint someone to investigate it, by which time Father Duggan was no longer capable of saying anything useful. He subsequently died. The Church opposed an extension of time in which to sue on the basis that it was clearly prejudiced by the death of Father Duggan. However, after the first day of hearing of the application another former altar boy came forward and said that he had also been abused by Father Duggan. He was the successor altar boy to John Ellis. More significantly, he said that he knew that John Ellis was his predecessor and would also have been abused. If asked, he would have disclosed this. Stephen Smith gave unchallenged evidence that in 1983 he gave Father McGloin, Dean of the Cathedral in Sydney, a statutory declaration detailing sexual assaults upon him by Father Duggan. Instead of investigating this claim, Father McGloin confronted him with the perpetrator and left them alone. Understandably, Mr Smith did not pursue the matter further. The Church produced no records of the statutory declaration or of any investigation. At first instance, Patton AJ noted that, "It is rather chilling to contemplate that he is the same Father McGloin referred to in the Judgment of the Court of Appeal delivered 18 September 2005, against whom allegations were made similar to those made against Father Duggan by Mr Smith and the plaintiff." The Church did not call Father McGloin, who is no longer practising as a priest but is in Sydney.

The Church did not challenge the allegations of sexual abuse. It argued, however, that there was no-one to sue in respect of the pre-1986 legislation because the Trustees merely held the property of the Church, which was itself not a legal entity. Patton AJ found that because of the membership of the Church was so ill-defined, he could not make a representative order against Cardinal Pell but found there was an arguable case that the Trustees could be sued. He found that the failure to investigate in 1983 overcame the complaints of prejudice, which were in effect caused by the Church's own misconduct. The plaintiff had first become aware of the seriousness of his condition and its effect on his career when he was sacked by Baker & McKenzie and was entitled to an extension of time.

The Church appealed to the Court of Appeal. It held on 24 May 2007 that neither the current Archbishop nor the Trustees were amenable to suit in respect of the alleged negligence and supervision of a priest said to have sexually abused an altar boy in the 1970s. The Church is an unincorporated association, as is the Catholic Education Office. The Trustees who hold the property of the Church in each Diocese are only liable in respect of property matters, at least for the period prior to legislative amendment in 1986. At least until 1986 there is therefore no-one to sue for negligence or abuse by teachers in Roman Catholic parochial schools in New South Wales. In respect of priests there is no-one to sue after 1986 as well because priests are not employees of the Church. The Church maintains that even after legislative amendment in 1986 it is not liable to suit (except in property matters) even in respect of the conduct of teachers.

The Church had made an offer of \$30,000 in full compensation to John Ellis before he commenced litigation on condition that he gave up his right to sue Cardinal Pell or the Trustees. No other offer was ever made. Leave to appeal to the High Court was refused in November 2007.



The Roman Catholic Church in New South Wales and the ACT seems to have so organised its affairs that there is no liability on the part of the Church for the conduct of priests and no liability in its parochial schools for the conduct of teachers prior to 1986, and, the Church argues, even after that. The implications are obviously very serious for those who suffered injury through abuse or negligence from the Church.

**5. *TB v State of NSW & Anor, DC v State of NSW & Anor* [2009] NSWSC 326 (Mathews AJ), [2010] NSWCA 15, *TB v State of NSW* [2012] NSWSC 143 and *DC v State of NSW* [2012] NSWSC 142 (Harrison AsJ)**

C The two girls, TB and DC, were repeatedly sexually abused by their stepfather from the ages of 8 and 5 respectively. Their mother did nothing useful to assist them. Finally in April 1983, TB herself as a teenager telephoned YACS (the predecessor of DOCS) and complained about the sexual and physical assaults upon herself and her sister. The second defendant, an officer of YACS, interviewed the children on 22 April and their mother on 28 April 1983 and was satisfied as to the truth of their complaints. In accordance with the then practice, the two children were charged with being neglected children within the meaning of the *Child Welfare Act* 1939 and taken to Court. There were a number of hearings at which the Magistrate sought to impose conditions excluding the stepfather from access to the children. However, after a brief period he resumed access and abuse of them. On 15 September 1983, the second defendant interviewed the stepfather, who freely admitted having sexually abused the children. Her report to the Court however, did not disclose any abuse occurring during the remand period. The abuse of the stepdaughters continued until about March 1984. Both were clearly traumatised and the events had a significant effect upon their future life, though they are now married with children of their own.

In August 2001, both plaintiffs reported the sexual assaults to police. Not until 2004 was the stepfather arrested and charged, and he finally pleaded guilty in August 2005 to a series of rapes, indecent assaults and assault occasioning actual bodily harm on the children. Both of the girls were traumatised by the Court proceedings. The stepfather had a previous history of sexual abuse of children, including his own son's 15 year old girlfriend.

The girls sought an extension of time. The complaint was that YACS should have reported the criminal conduct of the stepfather to the police. In 1983, the old offence of misprision of felony still existed. Subsequently, the statutory offence of concealing a serious indictable offence, Section 316 of the *Crimes Act*, replaced it. It was the normal practice of YACS to report such conduct and the officer had said in a written document that she did not know why she had not done so in this case. The Department however, maintained (without calling the officer) that it must have been reported.

At first instance Mathews J held that because the legislation permitted but did not mandate reporting to the police, there had been no breach of duty and the actions were struck out. On appeal, the Court of Appeal held that the plaintiffs clearly had an arguable case against the Department which should go to trial. The action was remitted for a fresh extension of time application, which was heard before Associate Justice Harrison in November 2011.

By judgments on 1 March 2012, Her Honour held that the limitation period was extended under Section 52 of the *Limitation Act* 1969 so that by reason of disability they did not need an extension of time because the limitation period had not expired. In the alternative, in each case, she would have extended time in any event.

**6. *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* (2010) WL 889 335 (CA) [2010] EWCA Civ 256**

The claimant alleged he had been sexually abused by a priest of the Birmingham Archdiocese of the Roman Catholic Church when aged about 12 or 13 in 1975 and 1976. At first instance, Jack J held the claim was not time-barred because the claimant had always been under a disability and he would, if necessary, have extended time in any event. He found the claimant had been sexually abused by Father Clonan substantially as alleged. He found the claimant's father had complained to another priest who shared Father Clonan's accommodation and the Archdiocese had been negligent in not pursuing the matter. However, he found the Archdiocese owed the claimant no duty of care and the Archdiocese was not vicariously liable for Father Clonan's sexual abuse of the claimant.

Lord Neuberger MR in the Court of Appeal found that the trial judge's finding on the limitation period was open to him and that the finding of sexual abuse was supported by the evidence. However, he held that the test laid down by the House of Lords in *Lister v Hesley Hall Ltd* [2002] 1 AC 215, which was consistent with the approach of the Supreme Court of Canada in *Bazley v Curry* (1999) 174 DLR (4th) 45 and *Jacoby v Griffiths* (1999) 174 DLR (4th) 71, meant that the appropriate test was that the wrongful conduct must be so closely connected with acts the employee was authorised to do that for the purposes of the liability of the employer to third parties, the wrongful conduct may fairly and properly be regarded as done in the ordinary course of the employee's employment. Although the claimant was not himself a Roman Catholic, Father Clonan was normally dressed in clerical garb and he developed his relationship with the claimant under the cloak or guise of performing his pastoral duties. The claimant's youth was relevant and it was Church activities, including discos on Church premises, which gave Father Clonan the opportunity to develop his sexual relationship. In the circumstances and applying the close connection test, the Master of the Rolls was of the view that vicarious liability was properly made out against the Archdiocese.

He also accepted that there had been complaints by the claimant's father to another priest who shared Father Clonan's accommodation and that that complaint had not been pursued or investigated, a matter for which the Archdiocese would be vicariously liable. The Master of the Rolls was also of the view that the Archdiocese owed a duty of care to the claimant. To treat it as had been done at first instance as a duty to the world in general was to mischaracterise the duty properly described. He noted that in the Canadian Supreme Court in *Jacoby*, although vicarious liability did not apply there, the case was remitted for determination as to whether there had been a direct breach of duty through failure to supervise. Accordingly, the Master of the Rolls was of the view that the claimant's appeal should be upheld and the Archdiocese's cross-appeal dismissed. Longmore LJ and Smith LJ, also applying the close connection test, agreed.

**7. *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 (QB) (MacDuff J)**

The preliminary issue was whether the Trustees of the Roman Catholic Church could be liable to the plaintiff for sexual abuse and rape by a Roman Catholic clergyman now deceased. This occurred when she was in a children's home in Hampshire between 1970 and 1972. The defendant contended that the clergyman was not its employee and nor was the relationship akin to employment. It argued the action should be struck out because vicarious

liability could not apply. Relevantly, the Trustees stood in the shoes of the bishop for present purposes. Referring to *Viasystems (Tyneside) Ltd v Thermal Transfer Ltd & Ors* [2005] EWCA Civ 1151 (per Rix LJ) MacDuff J noted that the test of vicarious liability had gradually changed to give precedence to function over form as to its application. Thus, the approach in *Trotman v North Yorkshire County Council* [1999] LGR 584, which held that sexual abuse of a pupil by a schoolmaster fell outside the scope of employment had been overtaken by *Lister v Hesley Hall Ltd* [2002] 1 AC 215, applying a close connection test importing vicarious liability. Most recently this has been applied in *Maga* and he followed the approach taken there.

Vicarious liability does not depend upon whether employment is technically made out. True it is that the relationship between the Church and priests contain significant differences from the normal employer/employee relationship. The differences include the lack of the right to dismiss, little by way of control or supervision, no wages and no formal contract.

He noted that in *Doe v Bennett & Ors* [2004] ISCR 436, the Canadian Supreme Court held a bishop vicariously liable for the actions of a priest who had sexually abused boys within his parish. Employment was not conceded, but the priest had taken a vow of obedience to the bishop and the bishop exercised extensive control over the priest, including the power of assignment, the power of removal and the power to discipline him. In these circumstances, the Canadian Supreme Court held the relationship was "akin to employment" and that in the circumstances it was just to make the bishop vicariously liable.

In all the circumstances, MacDuff J held that applying the close connection test, vicarious liability can arise whether or not a strict relationship of employer-employee arises. By appointing Father Baldwin as a priest and thus clothing him with all the powers involved, the defendants created a risk of harm to others, namely the risk he could abuse or misuse those powers for his own purposes. In the circumstances, the defendants should be held responsible for the actions which they initiated by the appointment and all that went with it. The strike out application was accordingly dismissed.

#### **8. *PAO, BJH, SBM, IDF and TMA v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Ors* [2011] NSWSC 1216 (Hoeben J)**

Hoeben J had to consider whether actions by the various plaintiffs against the *Trustees of the Roman Catholic Church for the Archdiocese of Sydney* and various members of the of the Patrician Brothers religious order should be struck out. It was alleged the Archdiocese Trustees operated, and managed Patrician Brothers religious order should be struck out. It was alleged the Archdiocese Trustees operated and managed Patrician Brothers Primary School Granville when in 1974 each plaintiff was sexually assaulted by Mr Thomas Grealy (also known as Brother Augustine) whilst young students. Associate Justice Harrison in *PAO v Grealy* [2011] NSWSC 355 had refused to strike out or summarily dismiss each of the five proceedings. Before Hoeben J, there was additional evidence. The plaintiffs submitted there was evidence before the Court showing involvement of the Archdiocese Trustees in the running of schools. It was submitted the Trustees exercised control over the Catholic Education Office and Catholic Building and Finance Commission. They were responsible for the financial management of funds collected by the schools by way of fees, donations and the like. Hoeben J concluded that there was no evidence before the Court connecting the Archdiocese Trustees directly or indirectly to the conduct of the Granville school and no indication that such evidence was likely to arise in the future. There was no evidence the

Patrician Brothers handed over control of the school to the Archdiocese Catholic Education system or that the Archdiocese Trustees exercised control over CEO or CBFC. The plaintiffs' cases were held to be hopeless and should not be permitted to go further. The claims were struck out. It was not suggested that there was any legal entity in respect of the Roman Catholic Church which might be sued in respect of the abuse at the school. Hoeben J applied the decision of the Court of Appeal in *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis* (2007) 70 NSWLR 565 (CA).

### **Conclusion**

It appears that the Australian jurisdictions are isolated as the only place in the world where the Roman Catholic Church can claim to have no legal entity capable of being sued for the wrongful acts of priests and possibly (it claims) even for its teachers post legislative amendment in 1986. Only in Australia is there no legal responsibility on the part of the Church for the conduct or misconduct of its priests.

Draft legislation to reverse this position has been circulated by a member of the NSW Legislative Council, David Shoebridge MLC. See the Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2011. Responses to his Consultation Paper have been requested.

The very powerful influence of the Church on all major parties will make legislative change extremely challenging.

**DR A.S. MORRISON RFD, SC**

**CURRICULUM VITAE**

Andrew Stewart Morrison has practised as a barrister in New South Wales since 1976 and was appointed Senior Counsel in 1993. He has since been appointed as Queens Counsel in Tasmania and Western Australia. He has been admitted in all states and territories and has practised in most of them, as well as in appellate jurisdictions. In particular, he has appeared in a number of leading catastrophic injury cases both for plaintiffs and for defendants.

C Dr Morrison holds the degrees of B.A., LL.B. from the Australian National University, M.A. (with Distinction) from the University of London, LL.M. from the University of Sydney and Ph.D. from the University of London. He has been on the Board of the Motor Accident Authority and has been Supreme and District Court Arbitrator. He has held a commission and sat as an acting District Court judge. With Mr T.J. Goudkamp, he is a co-author of the Personal Injury Law Manual NSW published by the Law Book Company. He is the author of a number of articles in the Journal of the Royal Australian Historical Society, principally in the area of constitutional history and the Reserve Powers of the Crown. He is a member of the RAHS.

Dr Morrison is Chairman of the School Council at Mosman Church of England Preparatory School and is Chairman of the Board of Directors of Kangaroo -Valley Olives Inc. He is married with four sons. He holds the rank of Colonel in the Australian Army Reserve.

C



LEGAL PROFESSIONAL PRIVILEGE

CONFIDENTIAL REPORT

**INVESTIGATION REPORT**

**Matter:** COMPLAINT BY ROBERT NEIL ROSEWORNE (LIPARI) AGAINST FORMER TEACHER,  
THOMAS GERARD KEADY; BROTHER JOHN VINCENT ROBERTS CFC AND  
BROTHER ANTHONY PETER WHELAN CFC

**Client:** CHRISTIAN BROTHERS

**Dated:** 2 AUGUST 2011

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1 August 2011

Brother Brian Brandon cfc  
Executive Officer  
Professional Standards  
Christian Brothers Oceania Region  
PO Box 851  
PARKVILLE  
Victoria 3052

Dear Brother Brian,

**RE: Assessment in the matter of Robert Neil ROSEWORNE**

#### **Background of Independent Assessor**

Extensive criminal investigation duties with the New South Wales Police Force, retiring at the rank of Assistant Police Commissioner. Four years secondment to the National Crime Authority as the Chief Investigator/Deputy Director of Investigations and Acting Director Investigations. On return to the New South Wales Police appointed Commander of the State Investigative Group (Detective Chief Superintendent) and subsequently Director Operations Support, State Command, with the rank of Assistant Police Commissioner. Diploma in Criminology (Sydney University). Management Certificate (TAFE-3 yr course). Currently a Member Protection Officer (NSW Sports Commission). Holder of a Certificate III in Investigative Services, a Master/Operator Licence under the Commercial Agents and Private Inquiry Agents Act and a Diploma in Security and Risk Management (Australian Security Academy). Currently Official Visitor under the Mental Health Act of NSW (nine years). Currently performing managerial duties for the Employment Screening, Risk and Compliance Team at the Catholic Commission for Employment Relations.

#### **1. INTRODUCTION**

On 16<sup>th</sup> June 2010, the complainant, Robert ROSEWORNE requested that the Catholic Church investigate his complaints of sexual and indecent assaults committed upon him between 1976 and 1977, when he was a student at St Patrick's College, Sutherland, New South Wales. The complaint was to be dealt with under the Towards Healing process of the Catholic Church.

The Assessor will refer to the offences as being committed by Thomas KEADY between October 1976 and January 1978 which will encompass the periods of the assaults being the Christmas holidays 1976/1977 and the assaults that continued during the school year of 1977. The report will refer to the complainant's name as Robert ROSEWORNE, the name he is using at the present time.

In July 2010, the Assessor, Norm Maroney, on receiving preliminary instructions regarding this matter from Mr Michael Salmon, the Director Professional Standards Office NSW & ACT, questioned if the matter came within the jurisdiction of the NSW Ombudsman Act 1974 regarding reportable conduct relating to neglect. The Assessor understands that as a result of this inquiry, Mr Michael Salmon brought his query to the attention of the Broken Bay Diocese and was subsequently advised



that an inquiry at the Ombudsman's office resulted in the decision that it was not within the Ombudsman's jurisdiction and for the matter to continue according to the Towards Healing process. On the 27 July 2010, the Assessor, was formally requested by Mr Salmon, on behalf of the Christian Brothers, to investigate complaints made by a former student Robert ROSEWORNE, who was also known as LIPARI, that in 1976/1977, he had been sexually/indecently assaulted on a number of occasions by a former lay teacher, Thomas Gerard KEADY, whilst he was a student at St Patrick's College, Sutherland, New South Wales. Mr ROSEWORNE further complained that around the same time he had informed his Year Master at the college, Brother John Vincent ROBERTS cfc and the Principal, Brother Anthony Peter WHELAN cfc of the alleged assaults, who allegedly ignored his complaints. ANNEXURE A

On 3 August 2010, the Assessor was advised by Michael Salmon, that the Assessor was to cease the investigation as the Police were now involved in the investigation. ANNEXURE B

On 1 September 2010, the Professional Standards Office was advised by Detective Emma Edwards, that the police investigation had ceased and that no charges would be laid against Thomas KEADY, "as he is not in a mental state to be responding to charges." Detective Edwards confirmed that the Professional Standards Office could go ahead with the Towards Healing process. The file note indicated that during the police investigation it was found that *Thomas KEADY was charged and sentenced in 1963 for committing an indecent assault on a minor. Further, that in 1994 he was charged with a similar offence.* ANNEXURE C

On 14 September 2010, the Assessor was advised by the Professional Standards Office to recommence the investigation into the complaints made by Robert ROSEWORNE/LIPARI. *The written advice also indicated that for the purposes of Towards Healing, the church authority accepted Robert ROSEWORNE'S complaint as substantiated.* ANNEXURE D

On 6<sup>th</sup> October 2010, the Assessor contacted Robert ROSEWORNE to arrange for an interview date and was informed that he was now represented by a Canberra lawyer named Mr Jason Parkinson and that he would not be able to be interviewed by the Assessor. On the same date, Mr PARKINSON telephoned the Assessor and confirmed that the complainant was not to be interviewed by the Assessor. Mr ROSEWORNE had reported the matter to the New South Wales Police and withdrew the request for the matter to be dealt with under the Towards Healing process.

During the investigation the assessment has been put on hold on occasions as a result of the police investigation, civil litigation and further police involvement.

On 25 July 2011, the Assessor received a telephone call from Mr Paul HOLMAN, the Executive Assistant to the Director, Catholic Schools Office, Diocese of Armidale, who stated that he had received a telephone call from a Robert Rosewam (ph: 49826304 - records held with the Assessor indicate that this is the telephone number of Robert ROSEWORNE). Robert ROSEWORNE informed Mr Holman that there was a former teacher, "Earnest Anthony Johns, a paedophile," who had been a teacher at Armidale and was convicted in 1996. He went on to say that "Norm Moroney" was the investigator in the Towards Healing process in relation to his own matter. He also stated that a Vicar General, who had married him, had told him not to pursue the civil case.

Brief inquiries by the Assessor on 26 July 2011, have revealed that an Ernest Anthony JONES, who was a teacher at a Catholic school in Armidale was sentenced in 1996, in the Armidale Local Court to

a three (3) year good behaviour bond for five (5) counts of sexual abuse on a boy aged thirteen (13) years. It was also recorded that JONES, prior to being employed at Armidale had previously been convicted of molesting a girl and served two (2) years gaol. There is no record of where that offence occurred. ANNEXURE Z(i)

St Patrick's College, Sutherland staff records held by the Assessor indicate that an Ernest Anthony JONES was a teacher at the college from 1972 and including 1979. The Assessor does not hold any records relating to JONES after 1979. ANNEXURES S and T

Robert ROSEWORNE/LIPARI was a student at St Patrick's College from 30 January 1974 (5<sup>th</sup> Class) until 1982 (Year 12) ANNEXURE E

Thomas KEADY was a teacher at St Patrick's College from 9 February, 1966 to 2 October 1979. ANNEXURE F

### **1.1 OBJECTIVE OF REPORT**

**On behalf of the Provincial of the Christian Brothers independently investigate/assess:**

- Establish the veracity of the complaint that Robert ROSEWORNE/LIPARI was sexually/indecently assaulted by Thomas KEADY, a former teacher at St Patrick's College, Sutherland between October 1976 and January 1978
- If Brother John Vincent ROBERTS, the complainant's Year Master, was informed of the alleged assaults committed upon Robert ROSEWORNE/ LIPARI by Thomas KEADY
- If Brother Anthony Peter WHELAN, the Principal of the college, was informed by the complainant of the alleged sexual/indecent assaults committed upon him by Thomas KEADY
- Establish the background/teaching history of Thomas KEADY prior to and during his appointment as a teacher at the college in 1966 i.e., previous employer, any criminal history
- Establish if the college authority, checked the background of Thomas KEADY prior to his appointment as a teacher at the college

### **1.2 EXECUTIVE SUMMARY OF FINDINGS**

The complainant, Robert ROSEWORNE/LIPARI, born 30 January 1974, made a Statement of Complaint under the Towards Healing process of the Catholic Church on 16 June 2010. His complaint related to a number of alleged sexual/indecent assaults committed upon him between Christmas holidays 1976 and during the school year of 1977, by a teacher named Thomas KEADY, at St Patrick's College, Sutherland.

Mr ROSEWORNE alleged that in December 1976, during the school holidays, with the approval of his mother, he travelled with Thomas KEADY and another student named Phillip PENDLEBURY, in Mr KEADY's combi van to Thomas KEADY'S caravan at a Windang caravan park. The area is now known as Windang Tourist Park.

It was understood by the two students to have alternative nights sleeping in the caravan and the combi van, the caravan being occupied by Thomas KEADY each night. Whilst on the trip the complainant was indecently assaulted by Thomas KEADY on a boat whilst out fishing and in the

caravan. It is also alleged that later Thomas KEADY indecently assaulted Robert ROSEWORNE in a classroom after this trip.

The allegations by Robert ROSEWORNE and the Findings of the Assessor are as follows:

**ALLEGATION NO 1**

*That Thomas Gerard KEADY between October 1976 and February 1977, in his caravan at Windang, in the State of New South Wales, did by force, restrain (hold down) a young person, Robert Neil ROSEWORNE, also known as Robert Neil LIPARI, and did sexually assault him by holding Robert ROSEWORNE's penis and masturbating him. The assault went on for approximately one hour with the complainant attempting to prevent the assault. FINDING – SUBSTANTIATED*

**ALLEGATION NO 2**

*That Thomas Gerard KEADY between October 1976 and February 1977, on his boat on Lake Illawarra, during a fishing trip, did indecently assault Robert Neil ROSEWORNE, also known as Robert Neil LIPARI, by placing his hand down the front of the complainant's shorts and fondling his penis. FINDING – SUBSTANTIATED*

**ALLEGATION NO 3**

*That Thomas Gerard KEADY between December 1976 and January 1978, in a classroom on multiple occasions, at St Patrick's College, Sutherland, did indecently assault Robert Neil ROSEWORNE, also known as Robert Neil LIPARI, by standing behind him and in so doing, attempted to place his hand down the front of the complainant's shorts. FINDING - SUBSTANTIATED*

**ALLEGATION NO 4**

*That Brother John Vincent ROBERTS between October 1976 and January 1978, whilst a teacher and Year Master at St Patrick's College, Sutherland was informed by a student, Robert Neil ROSEWORNE, also known as Robert Neil LIPARI, that he had been sexually and/or indecently assaulted by a teacher, Thomas KEADY. FINDING –SUBSTANTIATED*

**ALLEGATION NO 5**

*That Brother Anthony Peter WHELAN, between October 1976 and December 1980, whilst the Principal at St Patrick's College, Sutherland, was informed by a student, Robert Neil ROSEWORNE, also known as Robert Neil LIPARI that he had been sexually and/or indecently assaulted by a teacher, Thomas Keady. FINDING – INCOMPLETE INVESTIGATION*

**1.3 BACKGROUND**

According to college records, the complainant, Robert ROSEWORNE, was a student at St Patrick's College, Sutherland, commencing in Class 5 in 1974, aged 9 years of age, and completing his studies in Year 12 in 1982, aged 18 years of age. He was in Year 7 and Year 8 in 1976 and 1977 respectively. ANNEXURE E

School records indicate that the person of interest in this matter, Thomas KEADY, was a teacher at the College from 1966 until 2 October, 1979. ANNEXURE F

Thomas KEADY taught the complainant science during 1976 and 1977. It was during this period, that he was sexually/indecently assaulted by Thomas KEADY in the caravan at Windang, New South Wales, and on Thomas KEADY's boat at Lake Illawarra and in a school classroom.

Robert ROSEWORNE alleges that he informed his Year Master, Brother John ROBERTS of the assault by Thomas KEADY and also the Headmaster, Brother Anthony WHELAN, to no avail.

ANNEXURE L - COPS Report pages 3 & 5 and Statement paragraphs 51 and 53

#### 1.4 INVESTIGATION PROCESS – METHODOLOGY

##### Investigation Plan

An 'Investigation Plan' was prepared by the Assessor outlining his proposed actions. ANNEXURE G

##### Record of interviews

A record of interview was conducted by the Assessor with each of the persons listed below. The interviews were recorded on a laptop computer. Each participant was supplied with a copy of the recorded interview.

- Brother Anthony Peter WHELAN, former Principal, Christian Brothers College, Sutherland  
- ANNEXURE H
- Mr Denis John O'BRIEN, former Deputy Principal, Christian Brothers College, Sutherland  
- ANNEXURE I
- Brother John Vincent ROBERTS, former Year Master, Christian Brothers College, Sutherland  
- ANNEXURE J

##### Statements/written records

- Statement of Complaint to the NSW & ACT Professional Standards Office of the Catholic Church by the complainant, Robert Neil ROSEWORNE/LIPARI ANNEXURE K
- NSW Police Statement made by the complainant, Robert Neil ROSEWORNE/LIPARI dated 6 August 2010 obtained under the Government Information (Public Access) Act 2009 and C.O.P.S records ANNEXURE L

##### Correspondence/Emails/Records:

- Letter dated 25 February 2011 from Assessor to Portland Magistrates Court, Victoria regarding any records pertaining to Thomas KEADY being charged in 1963 with an assault on a minor. Includes E-Mail regarding same dated 3 February 2011 together with follow up letter dated 28 March 2011 for information and emails dated 28 February 2011 and reminder letter dated 28 April 2011 - ANNEXURE M
- Email dated 25 February 2011 to Wyong Local Court requesting any records regarding the charging of Thomas KEADY in 1994 with assault on a young person together with follow up letter for information dated 28 March 2011. Email request for information to Wyong Local Court dated 5 July 2011 (sent on advice from court) -- ANNEXURE N
- Email request dated 3 November 2010, for information regarding staff at the college - Email response from Brother Peter Richardson dated 10 November 2010 regarding teaching staff

- attached to St Patrick's Sutherland from 1966 to 1980 – Email dated 24 November 2010 – a follow up and seeking more information re the earlier requests - ANNEXURE O
- Letter dated 3 October 1979, from the Principal, St Patrick's College, Brother Anthony WHELAN, to Mr P. Slattery, Catholic Building & Finance Commission that he had dismissed Thomas KEADY from the staff at St Patrick's College on 2 October 1979 – ANNEXURE P
  - Statement of Service, "To Whom it May Concern" dated 31 October 1979, from Mr P. Slattery, Sydney Catholic Schools Building Fund to Mr Thomas Gerard KEADY. CC to the Principal, Christian Brothers College Sutherland – ANNEXURE Q
  - Email from Assessor to Catholic Education Office Sydney seeking further information regarding the work history of Thomas KEADY – ANNEXURE R
  - Email dated 1 November 2010, lists staff attached to St Patrick's College, Sutherland during the period 1966/1979 – ANNEXURE S
  - Email dated 22 June 2010 from Brother Dominic Obbens to Brother Brandon with information re St Patrick's College staff – ANNEXURE T
  - Email from Professional Standards Office dated 3 August 2010 to Robert ROSEWORNE re decision to place on hold the Towards Healing investigation – ANNEXURE U
  - Email dated 17 March 2011 request from Assessor regarding background check of Brother John Vincent ROBERTS and reply dated 18 March 2011 – ANNEXURE V
  - Email reply dated 18 March 2011, reply from Brother Brandon re request of 17 March 2011 and notes he made re conversation with Robert ROSEWORNE on 11 June 2010 – ANNEXURE W
  - Information relating to former student Phillip PENDLEBURY – ANNEXURE X
  - Email dated 16 June 2011 from NCPS to PSO received by Assessor on 17 June 2011. ANNEXURE Y
  - Email to Victoria Police (FOI request) dated 6 July 2011 and their reply dated 8 July 2011. Email to Catholic Education Office Sydney, dated 12 July 2011 requesting information regarding Thomas KEADY and others. Email dated 27 July 2011 from Brother Brian Brandon instructing the Assessor to forthwith cease the Assessment relating to Robert ROSEWORN and Daniel GAFFNEY. ANNEXURE Z
  - Emails and notes dated 25/26 July 2011 relating to Ernest Anthony JOHNS aka JONES ANNEXURE Z(i)

## 2.0 WHAT IS THE EVIDENCE IN RELATION TO THE ALLEGATIONS?

### 2.1 EVIDENCE

#### ROBERT ROSEWORNE – Complainant (Annexure K, PART B and Annexure L)

The complainant was not interviewed by the Assessor at the direction of the complainant's lawyer, Mr Jason Parkinson of Porters Lawyers (Telephone conversation with Assessor on 6 October 2010).

- i. Allegations contained in Towards Healing Statement of Complaint, 16 June 2011  
ANNEXURE K
- ii. Statement to NSW Police on 2 August 2010 ANNEXURE L

On 16<sup>th</sup> June 2010, the Complainant, Robert ROSEWORNE, made a written complaint under the Towards Healing process of the Catholic Church, in which he alleges that whilst he was a student at St Patrick's College, Sutherland and during the years 1976 and 1977, his Science teacher Thomas KEADY, sexually and indecently assaulted him on a number of occasions and his complaints were ignored by the Principal, Brother Anthony WHELAN and Brother John ROBERTS his Year Master. It is noted that in Mr ROSEWORNE'S police statement ANNEXURE L, paragraph 21, he refers to Brother John Christopher ROBERTS (all evidence indicates that the Brother in question is Brother John Vincent ROBERTS) – written progress notes ANNEXURE E

Mr ROSEWORNE states that during that period he was physically abused at home, receiving a broken nose, bruises and cuts to the body and face. He discussed his family situation with his Year Master, Brother John ROBERTS, who at the time, arranged for Sister Cleophas from Monte Sant'Angelo College to visit the family for the remainder of 1976 and 1977.

Towards the end of 1976, Robert ROSEWORNE discussed his home problems with the Science lay teacher, Thomas KEADY, the person of interest. The discussions continued on a regular basis between the two, "innocently on many occasions but always with an open door and within the view of other students." ANNEXURE K, PART B, page 1

On one occasion during this period, Thomas KEADY invited Robert ROSEWORNE to his caravan which he had based at Windang, south of Sydney. Robert ROSEWORNE'S mother gave permission for Robert to go with Thomas KEADY to the caravan, as there was another student named Phillip PENDLEBURY who was also travelling with them.

It was during the 1976/1977 Christmas school holidays that the three of them travelled in Thomas KEADY'S combi van to the caravan at Windang, it was located on the northern entrance to Lake Illawarra.

Robert ROSEWORNE states in his 'Statement of Complaint' that the arrangement was that each of the boys, Robert ROSEWORNE and Phillip PENDLEBURY would have alternate nights in the caravan, in which Mr KEADY slept, and in the combi van. ANNEXURE K, PART B, page 2

On the first night, Robert ROSEWORNE slept in the caravan with Thomas Keady. During the night he was awoken by Thomas KEADY having his arm across Robert's chest and holding him down, with his hand in the front of Robert ROSEWORNE'S pyjamas, Robert resisted and attempted to scream. Thomas KEADY continued to hold him down,

"...I didn't have the physical strength to push this grown man off, when I attempted to scream, he put his hand over my mouth and said that he would kill me if I screamed. He continued trying to masturbate while holding me down. Such force was used that my penis felt swollen and bruised, not a sensual arousal ie., no erection."

ANNEXURE K, PART B, page 3

Robert ROSEWORNE states that prior to this assault by Mr KEADY he had never carried out any sexual experimentation/exploration of a sexual nature. His swollen and bruised penis did not abate for three days. He believed that the assault by Thomas KEADY went on for a period of about an hour. ANNEXURE K, PART B, page 3.

Robert ROSEWORNE was afraid and embarrassed to confide to Phillip PENDLEBURY as to what had occurred in the caravan.

The following day, Robert ROSEWORNE did not associate with Mr KEADY and stayed away from the area until about lunch time. The three of them then went out onto the lake in Mr KEADY'S boat and on the return leg Thomas KEADY told Robert ROSEWORNE to steer the vessel. Robert stood in front of him at the steering wheel and Thomas KEADY again placed his hand down the front of Robert ROSEWORNE'S pants and fondled him.

Robert wanted to tell Mr KEADY to stop assaulting him, however he did not, he felt embarrassed and scared that if he had said anything then, Phillip PENDLEBURY would have known what Thomas KEADY had done. Robert was unsure if Phillip PENDLEBURY was a friend of Thomas KEADY.  
ANNEXURE K, PART B, page 4 and ANNEXURE L, paragraph 39

There were no further assaults committed upon Robert Roseworne by Thomas KEADY whilst he was at the Windang caravan park.

During the stay at Windang, another lay teacher, Hugh Dowdell visited the caravan site. This was on the third day that Thomas KEADY, Phillip PENDLEBURY and Robert ROSEWORNE had been at the site and after the assaults had occurred.

Robert ROSEWORNE, "The following day we had a visit from another teacher (Hugh DOWDELL – now a Reverend Father in Wollongong Diocese) There was nothing inappropriate from Mr Dowdell at any point; no problems. We had curried prawns that night."

No complaint has been made by Robert against Hugh DOWDELL, who is now a priest in the Wollongong Diocese. ANNEXURE K, PART B, page 5

Robert ROSEWORNE, continues in his 'statement of Complaint' under Towards Healing, that when school recommenced, he would have been in Year 8, the calendar year being 1977. Mr KEADY, whilst in the classroom, would rub his body against the complainant and at times, when the opportunity arose, attempt to molest him, this occurred on numerous occasions during Year 8, in 1977. On the occasions he was assaulted by Thomas KEADY in the Science Prep. Room, he would tell Mr KEADY that he would "dob" him in and Thomas KEADY replied, "that he would ensure that the other students would kill him as 'they don't like poofers at this school or the Sutherland Shire." Mrs Scrymenjour, the Laboratory Assistant "came in as I was screaming and asked about the noise." Mrs Scrymenjour's son, Mark was a student in the complainant's year at the college.

ANNEXURE L, paragraphs 48 & 49 and ANNEXURE K, PART B, page 6

The Complainant alleges that during this period he attempted to bring Thomas KEADY'S actions to the attention of the Year Master, Brother John ROBERTS who told Robert that,

"I had to be joking." ANNEXURE K, PART B, page 6

"You've got to be joking." ANNEXURE L, page 3 of COPS Report

"You have to be joking, and was waved away." ANNEXURE L, paragraph 51

The Complainant then states that he made an appointment to see the Principal.

The complainant then goes into detail about how he made an appointment to inform the Principal of the incidents involving Thomas KEADY, including speaking with the 'office lady', a Mrs Hannan, or Hanna and informing her that he wanted to "report an assault by a teacher, Mr KEADY." The following day the complainant describes being taken from class to speak with the Principal, "Brother WHEALAN(sic)". ANNEXURE L, paragraphs 52 and 53 and ANNEXURE K, PART B, page 6

The complainant's Towards Healing Statement dated 16 June 2010 sets out;

"I made an appointment to see the Principal, but the office lady asked me what it was about, I told her a very small amount of what had happened and when I meet with the Principal he told me I had to be exaggerating and things like that didn't happen at this school." ANNEXURE K, PART B, page 6. (Statement of Complaint)

His Police statement, dated 2 August 2010, which is recorded in more detail, states:

"As Brother Roberts did not want to hear, I went to the main office and spoke to the office lady to arrange an appointment with the Principal Brother WHEALAN 9sic) (elderly lady with glasses that always wore a mid length brown skirt, possibly Mrs. Hannan or Hanna). She asked about what and I advised to 'report an assault by a teacher, Mr Keady'. She advised I would be called from class when he is ready." ANNEXURE L, paragraph 52

"The following day I was collected from class and waited for (what) seemed an eternity in the main waiting room. When I entered the Principal's office, I was told by the Principal, 'I have investigated your claim and I do not believe you are telling the truth, I had to be exaggerating, and things like this did not happen at this school, further that as I had been in trouble before for fighting that he did not believe me. Further it would be in my interest to never mention this again.' I cried and went to the toilet immediately outside the office before returning." ANNEXURE L, paragraph 53

Records indicate that the Principal at the time, 1976-1977, was Brother Anthony Peter WHELAN.

Robert ROSEWORNE In his Towards Healing Statement of Claim states, states that Thomas KEADY,

"...seemed to disappear mid-term' from the school." ANNEXURE K, PART B, page 7.

The contents of ANNEXURE L, paragraphs 57 to 62 indicate the effects the sexual assault and indecent assaults had on the complainant's life.

#### COMMENT REGARDING THE COMPLAINANT'S STATEMENTS.

If one accepts that the complainant is a credible person, the evidence in his police statement at paragraph 52, suggests that either Brother ROBERTS, Mrs Hanna/Hannan or some other person informed Brother WHELAN of the allegations, as Brother WHELAN'S conversation with the complainant commences, "I have investigated your claim....." At that point this was the first occasion that the complainant had spoken to Brother WHELAN about the sexual/indecent assaults.



In relation to the complainant's comment, that Thomas KEADY "seemed to disappear mid-term" from the school. Brother WHELAN dismissed Thomas KEADY from teaching at St Patrick's College on 2 October 1979 as a result of complaints from four students who alleged that they had been sexually/indecently assaulted by Thomas KEADY.

## 2.2 EVIDENCE

### Brother John Vincent ROBERTS – Former Year Master (Annexure J)

Brother John Vincent ROBERTS was born on 4 April 1942.

Record of interview between the Assessor and Brother John Vincent ROBERTS dated 21 December 2010.  
ANNEXURE J

Brother ROBERTS stated the following in his record of interview:

- He was a teacher at St Patrick's College, Sutherland from 1975 leaving towards the end of 1977.
- He was Robert ROSEWORNE'S/LIPARI'S teacher/Year Master during 1976 and 1977, whilst the complainant was in Years 7 and 8.
- \* He did not recall the complainant attending school with bruises and cuts to his body and face and discussing his problems with Brother ROBERTS. He stated,

"I don't recall seeing that". ANNEXURE J, page 4

Assessor, "Did he complain to you about his treatment at home?"

Reply, "It seems going on the record "D" Year 8-1977, that Robert's grandmother, Mrs Marshall may have brought to my attention the mal-treatment of Robert by his father. I don't recall Robert actually discussing it with me."

- A written record in the "Progress Comments by Year Masters" sheets of Robert ROSEWORNE, was written by Brother ROBERTS in 1977 when Robert ROSEWORNE was in Year 8. Reference is made to Robert's grandmother, Mrs Marshall, having discussions with Brother ROBERTS regarding mal-treatment of the complainant at home by his father and that "Sister Cleophas has been working on this 1976-1977". This written record was made by Brother ROBERTS. ANNEXURE J, page 3, attachment "D"
- He did not recall Robert ROSEWORNE reporting that he had been sexually assaulted by Thomas KEADY.

Assessor, "When Robert Roseworne was in Year 8, at the College, he states that he tried to bring to the notice of the Year Master that he had been indecently assaulted by Mr Keady. Do you know anything about this?" ANNEXURE J, page 5

Reply, "No".

Assessor, "Had you ever discussed with any staff member at St Patrick's College, any inappropriate behaviour by Tom Keady towards any students"?  
ANNEXURE J, page 6

Reply, "No".

- Brother ROBERTS was asked the following question;

Assessor, "Did you or any staff member, to your knowledge, have complaints made against them of a sexual nature, whilst you were a teacher at St Patrick's College, Sutherland?" ANNEXURE J, page 6

Reply, "No."

- Brother ROBERTS denied that Robert ROSEWORNE approached him and attempted to bring to his notice that he had been sexually and/ or indecently assaulted by Tom KEADY. He replied, he "had to be joking". ANNEXURE J Page 5
- Brother Anthony WHELAN was the Principal of St Patrick's College during the relevant period 1975 to 1977, whilst Brother ROBERT'S was there.
- Brother ROBERTS recalled the name Lipari and when shown a school photograph of the complainant, "...I recognize the photograph as a student, I remember the name, the name Lipari and photograph seem to match in my mind." ANNEXURE J, page 2, attachment "A"
- Brother ROBERTS relied on the written record in the "Progress Comments by Year Masters" sheets, and completely relied on what was written, without recalling the contents. He did not recall visiting the complainant's home, nor did he recall speaking with the complainant's family regarding the family environment. He stated that he had some memory of talking to Sister Cleophas and that the entry was written by him.  
ANNEXURE J, page 3, attachment "D"
- He did recall the name of a teacher, Tom KEADY, however he did not "have any immediate recall of the man." ANNEXURE J, page 4
- He did not recall which classes Thomas KEADY taught at St Patrick's College. ANNEXURE J, page 4. He thought he was "technical".
- He left St Patrick's College, Sutherland around the Christmas period 1977 and commenced duties at St Edmund's, Canberra, ACT. (Brother WHELAN believed he transferred to Wollongong)
- He was not aware of any previous complaints of inappropriate behaviour made against Thomas KEADY prior to Mr KEADY arriving to teach at St Patrick's College.

Brief Summary/comment of Brother John Vincent ROBERTS evidence

Brother John Vincent ROBERTS, was a teacher at St Patrick's College between 1975 and 1977, inclusive. Brother ROBERTS was the complainant's Year Master, teaching him in Years 7 and 8. These were the same years that the Person of Interest, Thomas KEADY also taught the complainant in Years 7 and 8. Brother ROBERTS did not readily recall Thomas KEADY nor could he recall the classes Thomas KEADY taught in 1976/1977. ANNEXURE J, page 4 Brother ROBERTS and Thomas KEADY shared the classes. ANNEXURE J, attachment 'C' Brother ROBERTS did not name Thomas KEADY when asked to recall the names of the teachers who were at the college at that time. He named eight other teachers including the Principal.

Assessor, "Do you recall a lay teacher at that time at St Patrick's College, named Tom Keady"?

Reply, "He was a teacher at the school. I don't have any immediate recall of the man".

Assessor, "Do you recall what classes he taught during that time"?

Reply, "No". ANNEXURE J, page 4

The complainant stated that Brother ROBERTS spoke to him about what was taking place in his home. Teachers observed the physical injuries incurred to the complainant, "ie., broken nose, bruises, cuts to the body and face." Brother ROBERTS did not see any injuries or signs of physical abuse displayed on the complainant's body.  
ANNEXURE J, page 4.

Brother ROBERTS does not recall the complainant having difficulties at home, or difficulties attending school. Brother ROBERTS did write in the 'Progressive Comments by Year Masters' – that the complainant's grandmother, Mrs Marshall had discussions with Brother Roberts, being concerned about the mal-treatment of the complainant by his "father" and the complainant's mother being concerned at the complainant's resentment of parental control. Brother ROBERTS noted that "Sister Cleophas had been working with the family "1976-1977".  
ANNEXURE J, page 4, attachment 'D'

The complainant states that Brother ROBERT'S initiated a visit by Sister Cleophas and "contact went on for remainder of 1976 and over the next year (1977)". The complainant further stated that his grandmother had contact with Brother ROBERTS. Robert's mother and his grandmother had severed contact with each other.  
ANNEXURE K, PART B, page 1

The complainant states that he "tried to bring this to the attention of the Year Master (Brother ROBERTS- 1977), but was told, "I had to be joking....."

It could also be noted that the complainant states in his Police statement, ANNEXURE L, paragraph 53, that when he went to report the matter to Brother WHELAN, Brother WHELAN informed him that he had investigated the complainant and that he did not believe the complainant. This would indicate that someone who had knowledge of the complaint had informed Brother WHELAN prior to the complainant entering his office and reporting the matter. If this conversation did occur, it would indicate, if one accepted this evidence, that it

would be either Brother ROBERTS or the 'office lady' Mrs Hannan or Hanna, or some other person with that knowledge.

### 2.3 EVIDENCE

#### Brother Anthony Peter WHELAN – Former Principal, St Patrick's College Sutherland (Annexure H)

Record of interview between the Assessor and Brother Anthony WHELAN dated 18 November 2010. ANNEXURE H

Brother Anthony Peter WHELAN was born on 11 February 1941.

Brother WHELAN is the Director of the Catholic Schools Office, Broken Bay. He stated the following in his record of interview with the Assessor: ANNEXURE H

- He was a staff member at St Patrick's College, Sutherland, from 1970 to 1980, inclusive. The first five years he was the Deputy Principal and from 1975 to 1980 he had the responsibility of being the Principal of the College.
- He did not recall the complainant either by the name of LIPARI or ROSEWORNE.
- The teacher Thomas KEADY taught through Year 7 to 10. He was the Science Master at St Patrick's College. ANNEXURE H, page 2.
- He was not aware if Thomas KEADY owned a motor vehicle or caravan, nor was he aware if students or staff travelled with him outside of school hours.
- He was not aware, whilst he was at the college, that Thomas KEADY was alleged to have sexually and /or indecently assaulted the complainant Robert ROSEWORNE/LIPARI.

Assessor, "It appears that at the end of 1976, in the December school holidays, Mr Roseworne was offered a break from his home circumstances by Tom Keady, who invited him to his caravan which was in a caravan park at Windang, south of Wollongong. Mr Roseworne alleges that whilst he was in the caravan with Mr Keady, he was sexually assaulted on two occasions by him. Do you know anything about the allegations"?

Reply, "No. Not at all." ANNEXURE H, page 3

- \* Brother WHELAN also denied any knowledge of Thomas KEADY assaulting the complainant in a classroom during that period. ANNEXURE H, page 4

Assessor, "Did any member of staff or student for that matter who was at St Patrick's College, inform you that Robert Roseworne had complained about being sexually assaulted by Tom KEADY"? ANNEXURE H, page 5

Reply, "No."

- He was not aware that Robert ROSEWORNE attempted to bring his complaints of sexual and/or indecent assaults by Thomas KEADY to the attention of Brother John ROBERTS and being told he "had to be joking."
- He did not recall being informed by Brother ROBERTS that Robert ROSEWORNE had been sexually and/ or indecently assaulted by Thomas KEADY, stating,

"I have absolutely no recall of that, consistent with my practice and experience had represented, I would have taken formal advice and acted accordingly."

ANNEXURE H, page 4

- Brother WHELAN stated that Brother ROBERTS reputation as a teacher at St Patrick's College was "reasonably good." ANNEXURE H, page 5.
- He did not recall Robert ROSEWORNE coming to see him at his office regarding the allegations of sexual and/ or indecent assaults by Thomas KEADY;

Assessor, "Mr Roseworne alleges that at the time, he had made an appointment to see the Principal and informed the Principal of his complaints against Mr Keady and the Principal told him that he had 'to be exaggerating and that, things like that didn't happen at this school.' Do you recall him coming to see you and informing you of his complaints of sexual and physical assaults being committed upon him by Tom Keady"?

Reply, "No. I don't recall him coming to see me, to the best of my knowledge I would not have said that and I would have been very concerned about such a matter and taken some action." ANNEXURE H, page 5

- No staff member or student, who was at St Patrick's College at the time, reported to to the Principal that Robert ROSEWORNE had been sexually and/or indecently assaulted by Thomas KEADY. ANNEXURE H, page 5
- Brother WHELAN denied saying to the complainant when referring to the sexual and/or indecent assaults reported by the complainant that he had, "...to be exaggerating and that, things like that didn't happen at this school." ANNEXURE H, page 5
- Brother WHELAN was not aware that Thomas KEADY had been charged by Police with indecent assault on a minor in 1963, prior to being employed at St Patrick's College.

Brother WHELAN was asked by the Assessor if he had occasion to speak with Thomas KEADY about any inappropriate behaviour by him involving students at St Patrick's College. Brother WHELAN stated that he had spoken to Mr KEADY about his inappropriate behaviour about 1978. (records indicate 2<sup>nd</sup> October 1979). Apparently not related to this matter, referred to below. ANNEXURE H, page 6 and ANNEXURE P

Brother WHELAN informed the Assessor that on one occasion, probably in 1978 (1979), four students from the college complained to him about "sexual misconduct" by Thomas KEADY. Brother WHELAN stated that he could not recall what type of assaults occurred on the boys, he was asked,

Assessor, "Do you recall what type of assaults occurred to the boys who complained to you about Mr Keady?"

Mr KEADY, "I am not sure at this time, the general pattern from the four stories was that he was acting sexually inappropriately." ANNEXURE H, page 6

Brother WHELAN stated that he interviewed four students from the then Year 8. He went on to say,

"..On a specific occasion, most likely in 1978, I do recall a matter was drawn to my attention. Subsequently, I interviewed four students from the then Year 8. Essentially, they together presented allegations of Mr Keady involved in sexual misconduct with them in a non school setting, that is, activities not formally authorized as a school excursion. I requested each student to inform his parents of the matter. As a result I contacted the relevant officer in the Catholic Education, Sydney – I think his name was Paul Slattery, who assisted Ms Bev Hassett, she was a lawyer with the Catholic Education Office. Paul advised me to summarily dismiss Mr Keady. On the same day, in the later afternoon, at the end of school business, I interviewed Mr Keady in my office, in attendance was the then school Assistant Principal, Mr Denis O'Brien. I put the allegations to Mr Keady and sought his response. As a matter of procedural fairness it was essential that the teacher was given the opportunity to respond. Mr Keady declined to formally answer the allegations. I subsequently learnt that any person in such a situation may choose to exercise a right of silence whilst seeking independent legal advice. This occurred on this occasion. However, notwithstanding Mr Keady's choice, that is not to respond, I believed that the risk of harm even to the four students required prompt and decisive action. I was further concerned, that while parents of the boys had the right to take the matter up with the police, I had an obligation to take the necessary measures to prevent Mr Keady to continue to teach at this school or any other school. I therefore, formally dismissed him. His conduct subsequently towards me was amicable and it was agreed that he could quietly return on the school weekend to remove his personal effects and surrender his school keys, which he did. I have not heard of Tom Keady since that day." ANNEXURE H pages 5 and 6

Brief summary/comment regarding Brother WHELAN'S responses

Brother WHELAN was the Principal of St Patrick's College, Sutherland during the period the sexual and/or indecent assaults were committed upon Robert ROSEWORNE/LIPARA.

Brother WHELAN has been involved in the education of young people for the past 46 years. He is currently the Director of the Catholic Schools Office, Broken Bay.

Brother WHELAN was not aware of Thomas KEADY's employment or background prior to his employment at the college in 1966 as he was not at the college during that time.

Brother WHELAN was not aware throughout the relevant period, of any complaint being made by the complainant in relation to the sexual and/or indecent assaults committed upon him by Thomas KEADY.

Brother WHELAN was not informed by Brother ROBERTS that he had received a complaint from Robert ROSEWORNE regarding the sexual and/or indecent assaults committed upon him.

When four students reported to Brother WHELAN in October 1979 of being Indecently and/or sexually assaulted by Thomas KEADY, Brother WHELAN took immediate action resulting in the dismissal of Thomas KEADY from his position at the college. At that time Robert ROSEWORNE was in Year 10C, he was not one of the students involved in this particular complaint, and it occurred approximately 3 years after he was assaulted by Thomas KEADY.

Brother WHELAN was unable to recall the extent of assaults which were committed upon the four students in the 1979 incident, he stated,

“I am not sure at this time, the general pattern from the four stories was that he was acting sexually inappropriately.”

Brother WHELAN did not inform the Police of the allegations by the four students nor did he inform their parents of the allegations they had made against Thomas KEADY. He advised each student to inform his parents of the assaults. ANNEXURE H, page 5 and 6

## 2.4 EVIDENCE

### Denis John O'BRIEN – Former Assistant Principal, St Patrick's College, Sutherland (Annexure I)

Record of interview conducted between the Assessor and Denis John O'BRIEN on 8<sup>TH</sup> December 2010.  
ANNEXURE I

Denis O'BRIEN, was born on 24 January 1947,

Denis O'BRIEN, has been involved with the education of young people for the past 41 years, he is currently the Professional Officer with Edmund Rice Education Australia.

Mr O'BRIEN was a teacher at St Patrick's College, Sutherland between 1972 and 1983. In 1978 he was appointed the Assistant Principal. Between 1970 and 1980, Brother Anthony WHELAN was the College Principal. Mr O'BRIEN stated the following:

- Mr O'BRIEN was the Science Co-ordinator and taught students in Years including 10, 11 and 12.
- He was not aware of any complaints made by Robert ROSEWORNE against Thomas KEADY in relation to any sexual and/or indecent s committed upon the complainant.
- Brother John ROBERTS did not discuss with Mr O'BRIEN any complaints of sexual and/or indecent assaults committed upon the complainant by Thomas KEADY. ANNEXURE I page 2
- Brother WHELAN requested Mr O'BRIEN be present in his office. Thomas KEADY was also present. (1979) ANNEXURE I, page 3

Assessor, "Did you attend a meeting with Brother Tony Whelan where Tom Keady was present and dismissed from the College?"

Reply, "Yes. I recall a meeting. Brother Whelan asked me to be present with him while he spoke to Mr KEADY. As I remember it, Brother Whelan had put to Tom Keady that he had complaints from some of the students who accompanied Tom on a trip to New South Wales country, in the west. It was about molestation, interfering with the boys".

Assessor, "Do you recall the detail of the allegations the students made against Tom Keady"?

Reply, "Not really, I was just a witness to the fact that Tom was going to be dismissed.

Assessor, "Were you present when the students made the complaints to Brother Whelan"?

Reply, "No."

Assessor, "Do you recall the names of the students who complained about Mr Keady"?

Reply, "No. I don't know if I ever knew".

Assessor, "Were they serious assaults"?

Reply, "I don't know the details, I assume they were because Brother Tony took them very seriously". ANNEXURE I, page 3

Assessor, "Are you aware of what occurred after Brother Whelan spoke to Tom Keady about the inappropriate behaviour of Mr Keady in relation to the students"?

Reply, "He told him that he could not continue as a teacher any more. As far as I recall Tom left that day and I never saw him again. My recollection of the meeting, Tom did not fight the complaint". ANNEXURE I, page 3

Assessor, "Are you aware if the parents of the students who complained about Tom Keady were informed of the incidents"?

Reply, "No. Tony looked after that?"

Assessor, "Were you aware if the police were informed of the allegations by the students"?

Reply, "Not as far as I know".

- Brother WHELAN put to Thomas KEADY that he had complaints from some of the students, "who accompanied Tom on a trip to New South Wales country, the west, it was about molestation, interfering with boys". ANNEXURE I, page 3



- Mr O'BRIEN later heard that Thomas KEADY was living in a caravan at Windang, New South Wales.

Mr O'BRIEN stated to the Assessor:

"...The first time I knew about it was when Brother Tony told me that he was going to dismiss Tom and wanted me as a witness. Early in my time at St Pat's I did spend some time with Tom and we would go out on his boat, which was a small fishing boat he owned. We would fish in Port Hacking. There were never any students with us during that time." ANNEXURE I, page 4

#### **Brief summary/comment of Denis O'BRIEN'S evidence**

Mr O'BRIEN could not assist in this matter. He appeared to have very little recollection of being present with Brother WHELAN when the allegations of sexual/indecent assaults against the students were put to Thomas KEADY in 1979. He basically stated that the Principal was handling the matter and that he was only a witness in the Principal's office when he dismissed Thomas KEADY from the college. Although he does say that he assumed the assaults were serious as "Brother Tony took them very seriously."

## **2.5 EVIDENCE**

### **Thomas KEADY – Former Teacher, ST Patrick's College, Sutherland – The Person of Interest**

Thomas Gerard KEADY was born on the 1<sup>st</sup> March 1927; he is 84 years of age.

*Thomas KEADY was not interviewed* by the Assessor as information from the Sutherland Police indicated that he is 84 years of age and has a medical condition and is in care. It was the intention of the Police to interview Mr KEADY; however, they declined because of his condition.

*The Assessor will comment on and refer to various records and statements of witnesses where reference is made to the activities of Thomas KEADY.*

Thomas KEADY was born 1 March 1927; he was a science teacher at St Patrick's College, Sutherland from the 9 February 1966 until his dismissal from the college on the 2 October 1979. ANNEXURE Q & S

St Patrick's College employment records indicate that prior to his employment as a teacher at Sutherland, he was a Science teacher at State Technical schools in Victoria from 1950 to 1957 and a teacher in Primary schools in Victoria between 1958 to 1963. The schools in Victoria have not been identified. ANNEXURE F

The Principal of St Patrick's College, the late Brother KILLIAN, wrote in the Employment document on the 1 June 1966, that he had sighted Thomas KEADY'S Leaving Certificate (Victoria) and Teacher's Certificate. He also wrote the following when referring to Thomas KEADY;

"An experienced and strong certificated teacher-very satisfactory." ANNEXURE F

On 2 October 1979, the Principal of St Patrick's College, Sutherland, Brother Anthony WHELAN, dismissed Thomas KEADY from his employment with the college as a result of complaints from four unknown students who alleged that Thomas KEADY had indecently/sexually assaulted them whilst they were on a non-school excursion with him in a country area. No further information has come to light, at this time relating to the alleged assaults nor the identification of the students.

**ANNEXURE P**

On 3 October 1979, Brother WHELAN wrote to Mr P. Slattery, Industrial Officer, Catholic Building & Finance Commission, seeking advice if Thomas KEADY was entitled to receive a statement of Service. If so, would Mr Slattery draw up a document and forward it to Thomas KEADY at his home address in Cronulla. **ANNEXURE P**

On 31 October 1979, a Statement of Service was forwarded to Thomas KEADY by Mr Slattery and copied to Brother WHELAN, which read,

"TO WHOM IT MAY CONCERN – TEACHER SERVICE - This is to confirm that Mr Thomas Gerard Keady of 22 Girrilang Road, Cronulla NSW 2230, has been employed as a full time teacher from 9/2/66 to 2/10/79 at Christian Brothers College, Sutherland, a school within our administration." A copy was forwarded to Brother WHELAN. **ANNEXURE Q.**

**COMMENT REGARDING THOMAS KEADY – FURTHER EVIDENCE**

***Daniel GAFFNEY – FORMER STUDENT OF ST PATRICK'S COLLEGE – COMPLAINANT AGAINST THOMAS KEADY***

The Assessor must refer to a complaint made by another former student at St Patrick's College, Sutherland, Daniel GAFFNEY, this matter is being dealt with in a separate report. Daniel GAFFNEY alleges that between 1976 and 1978, he was sexually/indecently assaulted by Thomas KEADY, whilst a student at the college. Briefly, he alleges that one incident occurred when he was on Thomas KEADY's boat, the two of them on a **fishing trip in Port Hacking**. Thomas KEADY invited the former student to sit on his lap and steer the boat, which he did. At that time Thomas KEADY then placed his hand on the boy's stomach and "moved down to my genitals". The student declined to drive the boat again.

On another occasion during the period 1976 and 1978, the former student Daniel GAFFNEY and a number of other students were invited by Thomas KEADY to go on an "adventure" to Newnes in the Lithgow area. They travelled to Newnes in Thomas KEADY's combi van. Daniel GAFFNEY felt safer with having the other boys with him on the trip. The former student put up his tent as did another boy. Thomas KEADY came to his tent and attempted to convince him to go into his combi van with him. There was possibly another boy in the van. The former student was scared and refused to go with Thomas KEADY, who then left.

It could be noted that the former Deputy Principal, Denis O'BRIEN, in his record of interview with the Assessor refers to **fishing with Thomas KEADY in his boat in Port Hacking**. **ANNEXURE I, page 4**

Reference is made in **ANNEXURE F** relating to the employment record of Thomas KEADY, prior to his employment at St Patrick's College, Sutherland in 1966.

It might also be noted that Thomas KEADY'S employment as "self employed – taxi truck driver – 1963 to 1966" as set out in **ANNEXURE F**, does not correspond with information received from the Police which

indicates that in all probability, at that time, he was serving a prison sentence in Victoria for indecent assault on a minor.

### **3.0 STANDARD OF PROOF**

Briginshaw v Briginshaw High Court (1938) 60 CLR 336 (Findings on the Balance of Probabilities)

".....reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the 'reasonable satisfaction' of the tribunal'....."

### **4.0 WEIGHING THE EVIDENCE – ANALYSIS OF THE EVIDENCE**

#### **4.1 ANALYSIS**

##### **Robert Neil ROSEWORNE/LIPARI – Complainant**

On 27 July 2010, the Assessor was formerly requested by the Professional Standards Office, on behalf of the Provincial of the Christian Brothers, to investigate complaints made by Robert ROSEWORNE against "Mr Tom KEADY, Br Whelan (the Principal in 1977-1978) and Br ROBERTS (the Form Master in Yr 7, 1976 and Yr 8, 1977) who are subject of the complaint under Towards Healing". **ANNEXURE A**

On 14 September 2010, the Assessor was formerly requested by the Professional Standards Office on behalf of the Provincial of the Christian Brothers, to make an assessment as to whether the church authority had any knowledge of Mr KEADY'S prior conviction. **The Church authority has accepted the complaint made by Robert ROSEWORNE against Thomas KEADY as substantiated. ANNEXURE D**

The Assessor has taken into account all of the information available to him and agrees strongly with the Church Authority that the complaint by Robert ROSEWORNE is substantiated.

The Assessor is of the view that the complainant is an honest and credible person and that he was sexually/indecently assaulted by Thomas KEADY as he has stated, and further, on the balance of probabilities he informed Brother John Vincent ROBERTS, of the complaint against Thomas KEADY.

The complainant in his statement to Police, stated that when he went to Brother WHELAN'S office to make his complaint, Brother WHELAN informed him that he had 'investigated his complaint and did not believe he was telling the truth.' This would indicate that someone had already advised Brother WHELAN of the complaint prior to the complainant informing him.

The assessment of the complaint that the complainant informed the Principal, Brother Anthony WHELAN has not been completed owing to the matter being suspended.

## 4.2 ANALYSIS

### Thomas Gerard KEADY – Person of interest

Although the Church Authority has accepted the complaint made by the complainant, the Assessor will refer briefly to supporting information;

The Assessor came to the conclusion, without difficulty, on the balance of probabilities, and the written evidence of the complainant, Robert ROSEWORNE and other evidence, including similar facts that:

- Robert ROSEWORNE is a credible person and his version of events as far as the assaults are concerned should be taken as truth. There may be some minor discrepancies in his written reports, which are understandable considering the void in time between 1976 and 2010, being 35 years when the offences first occurred, and the time of the complaints being accepted by the Church Authority. These do not affect his credibility as an honest witness.
- \* Prima facie evidence - information received from the Sutherland Police, that Thomas KEADY was convicted in 1963, in Victoria, for sexually assaulting a minor and sentenced to imprisonment. This being prior to commencing employment at St Patrick's College, Sutherland in 1966. The information has not been formally received.
- Prima facie evidence - information received from the Sutherland Police, that Thomas KEADY was convicted in 1994, at Wyong Local Court, New South Wales, for sexually assaulting a minor. There are no further details. This information has not been formally received.
- \* Allegations made by another former student, Daniel GAFFNEY, that between the period 1976 and 1978, he was sexually assaulted by Thomas KEADY whilst he was on his boat in the Port Hacking river, at the time, Thomas KEADY rubbed the former student's stomach and fondled his genitals whilst the student was steering the vessel and sitting on Thomas KEADY's lap. These are similar facts to the incidents involving the complainant, Robert ROSEWORNE. The Assistant Principal, Denis O'BRIEN, had on prior occasions been fishing with Thomas KEADY on the Port Hacking River. No students were on board the boat during those times.
- On a trip to Newnes between 1976 and 1978, with three or four other students, the former student, Daniel GAFFNEY, travelled with Thomas KEADY, in his combi van. During the night KEADY visited the tent where the former student was and attempted to entice the boy into his combi van, which the boy refused to do.
- In 1979 Thomas KEADY was dismissed from St Patrick's College, Sutherland by Brother WHELAN as a result of complaints by four students which were of a sexual nature, against Thomas KEADY.

### **ALLEGATION NO 1 – Thomas KEADY**

*That Thomas Gerard KEADY between October 1976 and February 1977, in his caravan at Windang, in the State of New South Wales, did by force, restrain (hold down) a young person, Robert Neil ROSEWORNE, also known as Robert Neil LIPARI, and did sexually assault him by holding Robert ROSEWORNE'S penis*

and masturbating him. The assault went on for approximately one hour with the complainant attempting to prevent the assault. **FINDING – SUBSTANTIATED**

**ALLEGATION NO 2 – Thomas KEADY**

*That Thomas Gerard KEADY between October 1976 and February 1977, on his boat on Lake Illawarra, during a fishing trip, did indecently assault Robert Neil ROSEWORNE, also known as Robert Neil LIPARI, by placing his hand down the front of the complainant's shorts and fondling his penis. FINDING – SUBSTANTIATED*

**ALLEGATION NO 3 – Thomas KEADY**

*That Thomas Gerard KEADY between December 1976 and January 1978, in a classroom on multiple occasions, at St Patrick's College, Sutherland, did indecently assault Robert ROSEWORNE, also known as Robert Neil LIPARI by standing behind him and in so doing, attempted to place his hand down the front of the complainant's shorts. FINDING – SUBSTANTIATED*

**4.3 ANALYSIS**

**Brother John Vincent ROBERTS – Former Year Master**

The Assessor is of the view, on the balance of probabilities, that Brother John Vincent ROBERTS was informed by the complainant in 1976/1977, that he had been sexually and/or indecently assaulted by Thomas KEADY, and that the following occurred, "...I specifically remember telling him (Brother ROBERTS) that I needed to report an 'assault' by a teacher on me. Brother Roberts asked which teacher and when I advised Mr KEADY, his answer was 'you have to be joking' and was waved away."

**ANNEXURE L, paragraph 51**

The reasons which have influenced the Assessor to come to his conclusions regarding Brother ROBERTS include;

- Brother ROBERTS appears to have demonstrably had a close association with the complainant's family in 1976/1977, however, during the interview with the Assessor he appeared to be quite vague with his answers. Specific evidence taken into account to come to this decision include the following;
- The Church Authority had accepted that the complaint against Thomas KEADY was substantiated prior to having the matter investigated by this Assessor. Therefore by extension, prima facie, the complainant must be viewed as a credible and honest witness.
- Brother ROBERTS was the Year Master for Years 7 and 8, being 1976 and 1977, with direct pastoral care of the complainant during that period. His verbal evidence is inconsistent with contemporaneous written records of his close involvement with the complainant and his family in relatively dramatic circumstances, which prompted Brother ROBERTS to arrange for Sister Cleophas, who was from outside the Sutherland area to visit the home of the family. When shown the "Progressive Comments by Year Masters – Year 8, 1977," his comment was,

"Based on this record there is some memory of talking to Sister Cleophas."

- Brother ROBERTS wrote in the "Progressive Comments by Year Masters – Year 8, 1977"

"Grandmother (Mrs Marshall) has had discussions with Y/M (year master) – concerned at mal-treatment of Robert by father. Robert's mother concerned at Robert's resentment of present parental control. Sr. Cleophas has been working on this 1976-1977."

- Brother Paul WHELAN, the Principal, in his interview with the Assessor described the role of the Year Master as,

"Following a common practice of that period, all students in a cohort, for example, Year 7 would be managed by a Year Master, with the assistance of designated classroom teachers. They were responsible for the pastoral welfare and discipline, conduct or behaviour of the students."

The Assessor also noted in making this determination, that Brother ROBERTS was;

- Lucid during the interview, however, he appeared to be evasive with his answers. Therefore, the Assessor considered it perplexing that when Brother ROBERTS was vague that his memory was triggered when a photograph was shown to him of the complainant.
- The Assessor is not aware that Brother ROBERTS, who is 69 years of age, suffers from any medical condition which might impair his memory.

With further reference to this analysis;

- Brother ROBERTS was vague with his answers to questions by the Assessor regarding his knowledge of Thomas KEADY, particularly as it appears that Thomas KEADY was part of Brother ROBERTS team, teaching the same classes, with Brother ROBERTS being the Year Master.
- Brother ROBERTS, early in the interview, when asked if he recalled the names of the teachers who were at the college whilst he was there, named 8 teachers, however, he did not include the name of Thomas KEADY. Subsequently in the interview the Assessor referred to the name Thomas KEADY, Brother ROBERTS replied,

"He was a teacher at the school. I don't have any immediate recall of the man."

- He had no independent recollection of the student Robert Neil ROSEWORNE/LIPARI.
- The complainant states that Brother ROBERTS spoke to the complainant about what was happening at home however he was "too busy with other duties". ANNEXURE K, PART B, page 1
- Brother ROBERTS was asked by the Assessor if anything was done to assist the complainant in his welfare and wellbeing?" Brother ROBERTS replied,

"It appears that I was not in a position to offer any more assistance and it appears that I have referred him to Sister Cleophas. The record seems to show that it was a continuing support by Sister Cleophas".

Having already established that the complainant is a credible person, it is reasonable to assume that the complainant would seek Brother ROBERTS help and that he would feel confident to approach him for support as Brother ROBERTS had previous contact with his grandmother and family and had arranged for Sister Cleophas to assist them.

Taking into account all of the circumstances relating to Brother ROBERTS, the Assessor has found, on the balance of probabilities, the following;

#### **ALLEGATION NO 4 – BROTHER JOHN ROBERTS**

*That Brother John Vincent ROBERTS, between October 1976 and January 1978, whilst a teacher and Year Master at St Patrick's College, Sutherland between October 1976 and January 1978, was informed by a student, Robert Neil ROSEWORNE, also known as Robert Neil LIPARI, that he had been sexually and/or indecently assaulted by a teacher, Thomas KEADY. FINDING – SUBSTANTIATED*

#### **4.4 ANALYSIS**

##### **Denis John O'BRIEN – Former Assistant Principal**

Denis O'BRIEN, was a teacher at the college from 1972 to 1983, between 1978 and 1983 he was the Assistant Principal.

- He was not aware of any complaints made by Robert ROSEWORNE against Thomas KEADY in relation to acts of indecency/sexual assaults committed upon him.
- In 1979, Mr O'Brien WAS requested by Brother WHELAN to be present in HIS office as a witness whilst he spoke with the teacher Thomas KEADY. It related to complaints by students who had accompanied Mr KEADY on a trip to country New South Wales.
- When interviewed by the Assessor, he could not recall the detail of the allegations made by the students. He was not present when the students made the complaint. He does not know their identity, and he believes that he never knew their names.
- The meeting was about "molestation, interfering with the boys." He was asked by the Assessor if the assaults were serious and he replied that he assumed they were, "...because Brother Tony took them very seriously."
- He recalled that Brother WHELAN informed Mr KEADY that he could not continue as a teacher, Mr KEADY did fight the complaints and he left the college that day.
- He was not aware if the parents had been told of the assaults committed on the students, he stated that "...Tony (Brother WHELAN) looked after that."

- \* When asked by the Assessor if the Police were informed, he replied, "Not as far as I know."
- \* The first occasion that Mr O'BRIEN was aware of the allegations was when Brother WHELAN informed him that he intended to dismiss Mr KEADY and wanted Mr O'BRIEN to be a witness.
- \* Earlier in his time at the college, Denis O'BRIEN would go fishing with Thomas KEADY on the Port Hacking River. No students were with them at the time.

#### 4.5 ANALYSIS

##### Brother Anthony Peter WHELAN – Former Principal

Brother WHELAN was the Principal at the college from 1975 to 1980, this period being during the time of the alleged assaults committed upon the complainant by Thomas KEADY. Because of the substantiated finding relating to Brother ROBERTS, the Assessor has found himself in a conundrum when considering the position of the Principal, Brother Anthony WHELAN in this matter.

Having already established that Robert ROSEWORNE is a credible witness, prima facie, and being aware that two of his complaints relating to Thomas KEADY and Brother ROBERTS have now been substantiated, it is almost an imperative to substantiate that element of complaint against Brother WHELAN. However, the Assessor must consider the following factors regarding any premature finding at this stage in relation to this issue.

- Brother WHELAN, during his interview with the Assessor readily answered the questions and did not appear to be evasive in his replies to the questions.
- He has been involved in the education of young people for the past 46 years and is currently the Director of the Catholic Schools Office, Broken Bay, New South Wales. He is a man who is widely respected in the Catholic Education community.
- His evidence is that the complainant did not inform him at any time that he had been sexually/indecently assaulted by Thomas KEADY.
- It is a matter of record that Brother ROBERTS (Br ROBERTS record of interview) did not inform Brother WHELAN of any sexual/indecency committed upon the complainant by Thomas KEADY.
- In response to a separate situation, in 1979, where there was no ambiguity that he was informed of a complaint, there is evidence that Brother WHELAN acted promptly and robustly on being informed by four unknown students of St Patrick's College that they had been sexually/indecently assaulted by Thomas KEADY. He immediately dismissed Mr KEADY from teaching at the college and informed the Catholic Education Office of the decision.
- Brother WHELAN contacted Mr P. Slattery, Assistant Industrial Officer at the Catholic Education Office immediately in relation to the 1979 incident and was advised to summarily dismiss Thomas KEADY, which he did.



- On 31<sup>st</sup> October 1979, a "Teacher Service" document was signed by Mr Slattery and copied to Brother WHELAN. ANNEXURE Q
- Whilst the Assessor has had the opportunity of interviewing Brother WHELAN, there has been no opportunity to interview Robert ROSEWORNE which the Assessor considers to be an essential action to assist him to help resolve the conundrum in dealing with this complaint.

The Assessor intended to carry out further inquiries in relation to the information supplied by the complainant in regard to the alleged reporting of the matters to Brother WHELAN, however, on 27 July 2011, the Assessor was advised by Brother Brian Brandon to cease the assessment and prepare a final report.

Outstanding inquiries relating to Brother WHELAN include, location and interview of:

- the "Office lady" to whom the complainant states he spoke to when arranging an appointment with Brother WHELAN, possibly a Mrs Hannan or Hanna. He says he had informed her that he wanted to "report an assault by a teacher, Mr KEADY". Further, he states the following day he was collected from class and taken to Brother WHELAN'S office and after complaining to him, he left the office crying and went to the toilet immediately outside the office. ANNEXURE L, paragraph 52 and ANNEXURE K, PART B, page 6
- Any other person who may be identified prior to the inquiry being finalised.

#### **ALLEGATION NO 5**

*That Brother Anthony Peter WHELAN, between October 1976 and December 1980, whilst the Principal at St Patrick's College, Sutherland, was informed by a student, Robert Neil ROSEWORNE, also known as Robert Neil LIPARI, that he had been sexually and/or indecently assaulted by a teacher, Thomas KEADY.*  
**FINDING – INVESTIGATION INCOMPLETE**

#### **5.0 RECOMMENDATIONS**

As a result of receiving instructions from Brother Brian Brandon to cease this inquiry, the Assessor is not in a position to make considered recommendations regarding this matter as there are a number of relevant persons who should be interviewed and further records to be considered, if available.

***However, the Assessor does recommend that the matters listed below be considered for further attention when appropriate:***

On 2 February 2011, Detective Edwards of the Sutherland Police Station, during a telephone conversation, although the information was scant, informed the Assessor that Thomas KEADY was charged at the Portland Magistrates Court, Victoria on or about 30 June 1963 with Indecent Assault on a male under 16 years of age and gross indecency. There were a number of charges. It appears that he was sentenced to three years imprisonment, to serve 2 years before being eligible for parole. There was also information that he appeared at the Wyong Local Court on 26 October 1994, charged with indecent assault where he was placed on a good behaviour for 18 months

- Thomas KEADY was sentenced, possibly on 21 October 1963 in Victoria to 3 years imprisonment for the offences, requiring him to serve 2 years minimum detention. This would have his release date sometime towards the end of 1965. He commenced employment at St Patrick's College, Sutherland in February, 1966.

**ACTION:**

The Assessor applied to the Victoria Police on 8 July 2011 under Freedom of Information, for any criminal history of Thomas KEADY, however this request was denied. ANNEXURE Z

- On 25 February 2011, the Assessor requested information regarding Thomas KEADY'S court appearances in Victoria. Correspondence continued with the Court and a fee was requested and paid, however, it was subsequently returned, and the Assessor advised that a further request be made to the Victorian Government.

**ACTION:**

Information from the department indicated that court records would be not able to be retrieved because of the time frame, being 1963/1966. ANNEXURE M

- On 25 February 2011, 28 March 2011 and subsequently on 5 July 2011, the Assessor requested information from the Wyong Local Court in relation to an alleged offence/offences committed by Thomas KEADY in 1994.

**ACTION:**

There is no result at this stage. ANNEXURE N

- Identify the schools where Thomas KEADY was employed in Victoria prior to being employed in New South Wales. Were the charges in Victoria relating to sexual assaults on students at one of the schools he had been teaching at the time of the assaults occurring?

**ACTION:**

Insufficient information available at this stage; request forwarded to CEO Sydney. ANNEXURE F and Z

- Were inquiries made by either the Christian Brothers Sutherland or The Catholic Education Office, Sydney regarding Thomas KEADY'S previous teaching positions in Victoria. Were his previous employers spoken to by CEO Sydney or St Patrick's College, Sutherland? The completed employment particulars signed by Thomas KEADY and the Principal Brother KILLIAN in 1966, indicate that he commenced teaching at Sutherland on 9<sup>th</sup> February, 1966. However he sets out in the document that between 1963 and 1966 he was a self employed, taxi truck operator.

**ACTION:**

Thomas KEADY was possibly in prison in Victoria during part of this period) ANNEXURE F and Z

- Inquiry be made with the Victoria Probation and Parole Service as it appears that Thomas KEADY served the minimum sentence of 2 years of the 3 years sentence, which would in all probability have him released on parole in October 1965. On 9 February 1966, in all probability, he would have been on probation when he commenced employment at St Patrick's College.

**ACTION:**

Should be followed up.

- Interview Father Hugh DOWDELL, who was a lay teacher at the time and who visited Windang on the weekend that the complainant was assaulted by Thomas KEADY.  
**ACTION:**  
Assessor intended to make arrangements to interview Father Hugh DOWDELL during the week of Monday 1 August 2011. He should be interviewed. ANNEXURE K, PART B, page 5
- Mr Bert Franzen/Frazen, a teacher/former teacher.  
**ACTION:**  
Locate and interview. ANNEXURES K, PART B, page 7 and L, paragraph 55
- \* "Mrs Scrynjour"/Scrymenjour. Laboratory assistant who heard noise in classroom.  
**ACTION:**  
Locate and interview. ANNEXURE K, PART B, page 6 AND ANNEXURE L, paragraph 48
- Brother M.D Shanahan who was the Principal at the college in 1981-1982 whilst the complainant was a student.  
**ACTION:**  
Locate and interview.
- Mrs Hannan or Hanna, the 'office lady' at St Patrick's College, Sutherland during the period in question.  
**ACTION:**  
Locate and interview. ANNEXURE K Part B & ANNEXURE L Paragraph 52
- To be kept in mind that Daniel GAFFNEY, a former student, was sexually assaulted by Thomas KEADY between 1976 and 1978 whilst a student at the college.
- Further inquiries from CEO Sydney re historical records which may be available to assist the inquiry.  
**ACTION:**  
On 12 July 2011, the Assessor wrote to Dr Dan White, Executive Director, Catholic Education Office Sydney and requested the following: ANNEXURE Z

The Assessor made reference to the investigation relating to separate allegations by two former students, Robert ROSEWORNE also known as Robert LIPARI, the complainant in this matter, and Daniel GAFFNEY:

- a. Is there a written record of the CEO Sydney carrying out character reference checks with the schools in Victoria where Thomas KEADY was employed prior to 1966, prior to him being accepted as a teacher at St Patrick's Sutherland, if so, are the records available. (see Attachments A & B. Included in ANNEXURE Z,
- b. Seeking a comprehensive, written record held at CEO Sydney of the reasons why Thomas KEADY was dismissed by the Principal on the 2 October 1979 as recorded. (This did not involve the ROSEWORNE/LIPARI and GAFFNEY matters). It is noted that the date typed under the "Salaries Officer" is 22.08.1975. (see Attachment C) Included in ANNEXURE Z

- c. Contact details of Mr. Paul SLATTERY, document attached. (see attachment D) Included in ANNEXURE Z
- d. Contact details of Ms Beverley HASSETT, who was the CEO Sydney solicitor in 1979.
- e. Any other information concerning the four students who made the complaint against Mr. KEADY on 2<sup>nd</sup> October 1979, and he was summarily dismissed by Brother Tony WHELAN, on that day on the advice of the CEO Sydney.
- f. Were there any other complaints made against Thomas KEADY whilst he was a teacher at St Patrick's College, Sutherland, or at any other Catholic school where he may have taught?
- g. Is there a written record of action taken by CEO Sydney regarding informing parents/Police, relating to the four students?
- h. Any other records held at CEO Sydney regarding the dismissal of Thomas KEADY.
- i. Thomas KEADY received a certificate of service dated 31<sup>st</sup> October 1979, signed by P. Slattery, setting out that he was a full time teacher at St Patrick's College, from 9<sup>th</sup> February 1966 to 2<sup>nd</sup> October 1979. Did he work at any other school, Catholic or State, after being dismissed from Sutherland?
- j. Does CEO Sydney hold any record of a complaint of a sexual nature being made by students at St Patrick's college, Sutherland between 1966 and 1979 against any staff member?
- k. The full name and date of birth of former teacher, Mr Mark FOGGARTY who was at the college during the same period. Any record of information of Mr. Mark FOGGARTY informing relevant persons of concern about any teacher or staff?
- l. Any record of information of Brother John Vincent ROBERTS informing relevant persons of concern about any teacher or staff during the period 1975 to 1978.
- m. The full name and previous address of an office assistant at the College between 1976 and 1979 named Mrs. HANNA or HANNAN.

As a result of the above queries, other inquiries would have had to be considered if the assessment continued.


## 6.0 CONCLUSIONS

The Assessor is of the opinion that Thomas KEADY committed the sexual/indecent assaults as stated by the complainant Robert ROSEWORNE/LIPARI and that prima facie, on the evidence forthcoming in relation to Thomas KEADY, it could be said that he was a sexual predator who sought out vulnerable children for his own sexual pleasure.

The Assessor is also of the opinion that there is sufficient evidence available to say, on the balance of probabilities, that Brother John Vincent ROBERTS was informed by Robert ROSEWORNE/LIPARI that he was sexually/indecently assaulted by Thomas KEADY. Whatever was then done with that information can only be supposition at this stage.

Unfortunately as far as Brother Anthony Peter WHELAN, the former Principal is concerned, the Assessor is not in a position to make a final finding because of the cessation of the inquiry.

Yours Sincerely,

  
Norm Maroney  
Assessor  
Commercial & Private Inquiry Agents NSW  
Licence No. 40546933 – Master Licence

3 July 2012

Cardinal George Pell  
Catholic Archbishop of Sydney  
St Mary's Cathedral  
Sydney

Dear Cardinal Pell

I write on behalf of the NSW Branch of Australian Lawyers Alliance. We are concerned that the "Towards Healing" process conducted by the Church appears in one particular case to have been subverted. The Church claims that Towards Healing is intended to assist victims and not clergy or teachers in Church schools.

An Assessor's Investigation Report dated 2 August 2011 was procured by Christian Brothers in respect of a complaint by Robert Neil Roseworne (Lipari) against former teacher, Thomas Gerard Keady, Brother John Vincent Roberts CFC and Brother Anthony Peter Whelan CFC. The report was prepared by Norm Maroney, a retired Assistant Police Commissioner from the NSW Police Force. It related to complaints of sexual and indecent assaults committed upon the complainant between 1976 and 1977, when a student at St Patrick's College, Sutherland. The complaint was expressly to be dealt with under the Towards Healing process.

Mr Maroney upheld the complaints against Thomas Keady and Brother John Vincent Roberts. That left for determination the question of an alleged complaint to the Headmaster, Brother Anthony Whelan to be determined. The complaint alleged that he went to the Headmaster's office, spoke to the Headmaster's secretary and saw the Headmaster whilst very upset, complaining about sexual abuse of him. After the complaint, the abuser, Thomas Keady "seemed to disappear mid-term from the school".

There had been other complaints to Brother Whelan about sexual misconduct by Thomas Keady. The police were not informed of any of the complaints.

The Assessor found the complainant an honest and credible witness. He expressly found that the former Year Master, Brother John Vincent Roberts, was informed of the sexual assaults by Thomas Keady and ignored the complaint.

He noted that having established that the complainant was a credible witness and having upheld his complaints in relation to Thomas Keady and Brother Roberts, "it is almost an imperative to substantiate that element of complaint against Brother Whelan." However, he "found himself in a conundrum" in this regard.

The Assessor was given no opportunity to interview Robert Roseworne, an essential action to resolve the complaint against the former principal, Brother Anthony Peter Whelan. He was not given the opportunity to locate and speak to the former Headmaster's secretary, who could potentially have substantiated the complaint and the interview between the distraught complainant and the former Headmaster.

This was because he was told to stop the investigation at that point.

“As a result of receiving instructions from Brother Brian Brandon to cease this inquiry, the Assessor is not in a position to make considered recommendations regarding this matter as there are a number of relevant persons who should be interviewed and further records be considered, if available.”

Brother Brian Brandon instructed him to cease the assessment on 27 July 2011, at a time when the Assessor intended to carry out further inquiries so that he would be in a position to make findings in relation to the conduct of Brother Anthony Peter Whelan. Moreover, the Assessor complained that he had no opportunity to interview Robert Roseworne “which the Assessor considers to be an essential action to assist him to help resolve the conundrum in dealing with this complaint.”

It is noteworthy that Thomas Keady had a history of criminal conviction and incarceration prior to commencing employment at St Patrick's College, Sutherland in 1966. The inquiry was stopped before the nature of the previous criminal conviction could be ascertained. Nor was there an opportunity to ascertain the names of previous schools with which Thomas Keady had obtained employment, which might also have thrown light on the matter.

The inference of interference with an inquiry is overwhelming. The lack of genuine intent to reveal the truth is highly disturbing.

This organisation would value your response and in particular, your explanation as to why the inference should not be drawn that the Assessor's investigation was stopped to protect Brother Whelan, former Principal of St Patrick's College, Sutherland.

Unless some satisfactory explanation is available, it would seem that the Towards Healing process can be interfered with at will and offers no real justice for victims.

Incidentally, when we wrote to you previously in relation to the complaint of sexual abuse by Stephen Smith, that in 1983 he gave Father McGloin, then Dean of the Cathedral in Sydney, a statutory declaration detailing sexual assaults upon him by Father Duggan, that evidence was not challenged in Court by your representatives in the John Ellis case. You said, by letter of 1 May 2009, that the conduct of Father McGloin was being followed up. You have not told us what, if any, investigation has been undertaken or what the outcome was. We look forward to your response.

Attached for your assistance is the Towards Healing Report by the Church Assessor, Mr Norm Maroney dated 2 August 2011.

Yours faithfully,

Jnana Gumbert  
NSW Branch President  
**Australian Lawyers Alliance**





## Victims' compensation in Australia – an overview

### SUMMARY OF LIMITATION OF TIME IN CLAIMING VICTIMS' COMPENSATION

- **NSW:** Victims Compensation Scheme under the *Victims Rights and Support Act 2013*.
  - An application for financial support must be duly made within 2 years after the relevant act of violence occurred or, if the victim was a child when the act of violence occurred, within 2 years after the day on which the child concerned turns 18 years of age (**s40 (1)**).
  - An application for a recognition payment must be duly made within 2 years after the relevant act of violence occurred or, if the victim was a child when the act of violence occurred, within 2 years after the day on which the child concerned turns 18 years of age (**s40 (4)**).
  - An application for a recognition payment in respect of an act of violence involving domestic violence, child abuse, or sexual assault, must be duly made within 10 years after the relevant act of violence occurred or, if the victim was a child when the act of violence occurred, within 10 years after the day on which the child concerned turns 18 years of age (**s40 (5)**).
- **Victoria:** Victims of Crime Assistance Tribunal (VOCAT) under the *Victims of Crime Assistance Act 1996*.
  - An application must be made within 2 years after the occurrence of the act of violence (**s29 (1)**).
    - The Tribunal may extend the time limit if it considers it appropriate to do so, taking into account age (**s29 (3)(a)**), intellectual disability (**s29 (3)(b)**), or mental illness (**s29 (3)(b)**), whether the perpetrator was in a position of power, influence, or trust in relation to the applicant (**s29 (3)(c)**), the physical or psychological effect of the act of violence on the applicant (**s29 (3)(d)**), whether the delay threatens the capacity of the Tribunal to make a fair decision (**s29 (3)(e)**), whether the applicant was a child at the time of the occurrence of the act of violence and the application was made within a reasonable time after he or she reached the age of 18 (**s29 (3)(f)**), and all other circumstances it considers relevant (**s29 (3)(g)**).
- **QLD:** Victim Assist Queensland under the *Victims of Crime Assistance Act 2009*.
  - An Application for victim assistance for an act of violence must be made within 3 years after the act of violence happens (**s54 (1)(a)**), or, for a victim who is a child, the day the child turns 18 (**s54 (1)(c)**).

- The scheme manager may, on application by a person, extend the time for the person making an application or victim assistance if the scheme manager considers it would be appropriate and desirable to do so, having regard to age (**s54 (2)(a)**), impaired capacity (**s54 (2)(a)**), whether the person who allegedly committed the act of violence was in a position of power, influence, or trust, in relation to the person (**s54 (2)(c)**), the physical or psychological effect of the act of violence on the person (**s54 (2)(d)**), whether the delay undermines the possibility of a fair decision (**s54 (2)(a)**), and any other matter the scheme manager considers relevant (**s54 (2)(f)**).
- **WA:** Criminal Injuries Compensation Scheme under the *Criminal Injuries Compensation Act 2003*.
  - A compensation application must be made within 3 years after the date on which the offence to which it relates was committed (**s9 (1)(a)**), or if it relates to more than one offence, the last of them was committed (**s9 (1)(b)**).
    - An assessor may allow a compensation application to be made after the 3 years if he or she thinks it is just to do so and may do so on any conditions that he or she thinks it is just to impose (**s9 (2)**).
- **SA:** Victims of Crime Compensation (VOCC) under the *Victims of Crime Act 2001*.
  - The initial application period is, for an application by a victim, 3 years after the commission of the offence (**s18 (2)(a)**).
    - The court may, for any proper reason, extend a period of limitation fixed by this section (**s18 (7)**).
- **Tasmania:** *Victims of Crime Assistance Act 1976*.
  - An application for an award is to be made within 3 years after the date of the relevant offence (**s7 (1A)**).
  - If a primary victim, secondary victim, or related victim is less than 18 years old at the time of the relevant offence, his or her application for an award must be made no later than 3 years after he or she turns 18 (**s7 (1B)**).
    - The Commissioner may extend the 3-year period if satisfied that there are special circumstances which justify the extension (**s7 (1C)**).
- **ACT:** *Victims of Crime (Financial Assistance) Act 1983*.
  - Applications for financial assistance must be filed within 12 months after the day when the relevant injury was sustained (**s27 (2)**).
    - The magistrates Court may, on application made at any time, extend the time of the filing of an application if the court considers it just to do so (**s27 (3)**).
- **NT:** *Victims of Crime Assistance Act*.
  - An application for an award must be made for an application relating to a compensable violent act, within 2 years after the occurrence of the violent act



**(s31 (1)(a))**, or, for another application, within 2 years after the occurrence of the injury or death to which the application relates **(s31 (1)(b))**.

- The Director may accept a late application, if the Director considers the circumstances justify it, having regard to whether the death or injury occurred as a result of sexual assault, domestic violence, or child abuse **(s31 (3)(a))**, age **(s31 (3)(b))**, whether the offender was in a position of power, influence, or trust in relation to the applicant **(s31 (3)(c))**, mental incapacity **(s31 (3)(d))**, whether the delay will affect the assessor's ability to make a proper decision **(s31 (3)(e))**, whether the violent act was reported to a police officer within a reasonable time after it occurred or at any time before the application is made **(s31 (3)(f))**.
- **BUT, in the UK: Criminal Injuries Compensation Scheme 2012.**
  - An application must be sent by the applicant so that it is received by the Authority as soon as reasonably practicable after the incident giving rise to the criminal injury to which it relates, and in any event within two years after the date of that incident **(s87)**.
  - Where the applicant was a child under the age of 18 on the date of the incident giving rise to the criminal injury, the application must be sent by the applicant so that it is received by the Authority, in the case of an incident reported to the police before the applicant's 18<sup>th</sup> birthday, within the period ending on their 20<sup>th</sup> birthday **(s88 (1)(a))**, or, in the case of an incident reported to the police on or after the applicant's 18<sup>th</sup> birthday, within two years after the date of the first report to the police in respect of the incident **(s88 (1)(b))**.
    - A claims officer may extend the period where the claims officer is satisfied that, due to exceptional circumstances the applicant could not have applied earlier **(s89 (a))**, and, the evidence presented in support of the application means that it can be determined without further extensive enquiries by a claims officer **(s89 (b))**.
  - As stated in 'A guide to the Criminal Injuries Compensation Scheme 2012':
    - Para 10: If you, or someone for whom you have responsibility, has been injured because of a period of physical or sexual abuse, you can make a claim for compensation.
    - Para 11: If you were abused as a child, we appreciate that you may not have felt able to report the incident for some time after the abuse happened. No matter how long ago the abuse took place, you should report it to the police before you make a claim. We need to check with



the police that the crime has been reported. If you have not reported the incident to the police, we will refuse your claim.

## SUMMARY OF COMPENSATION AMOUNTS

- **NSW:** Victims Compensation Scheme under the *Victims Rights and Support Act 2013*.
  - A direction for compensation under this Division must not be given in respect of the conviction of a person for an offence if the aggregate of the sum specified in the direction and of all sums specified in a direction for compensation previously given under this Division:
    - (a) on the conviction of any other person for that offence, or
    - (b) on the conviction of that or any other person for a related offence, exceeds \$50,000 (**s95 (1)**).
- **Victoria:** Victims of Crime Assistance Tribunal (VOCAT) under the *Victims of Crime Assistance Act 1996*.
  - A primary victim may be awarded by the Tribunal assistance of up to \$60,000, plus any special financial assistance awarded in accordance with section 8A (**s8 (1)**).
- **QLD:** Victim Assist Queensland under the *Victims of Crime Assistance Act 2009*.
  - A primary victim of an act of violence may be granted assistance of up to \$75,000 (**s38 (1)**).
  - Also, in addition to the assistance mentioned in subsection (1), the primary victim may be granted assistance of up to \$500 for legal costs incurred by the victim in applying for assistance under this Act (**s38 (2)**).
- **WA:** Criminal Injuries Compensation Scheme under the *Criminal Injuries Compensation Act 2003*.
  - Subject to sections 32, 33 and 34, the maximum amount that may be awarded in aggregate under sections 30(1) and (3) in favour of one person for a single offence committed on a date in a period set out in the Table to this subsection is set out in the Table opposite that period (**s31 (1)**).

**Table**

<b>Item</b>	<b>Period</b> (all dates inclusive)	<b>Maximum amount</b>
1.	22 January 1971 to 17 October 1976	For an indictable offence: \$2, 000 For a simple offence: \$300
2.	18 October 1976 to 31 December 1982	\$7, 500
3.	1 January 1983 to	\$15, 000

Item	Period (all dates inclusive)	Maximum amount
	31 December 1985	
4.	1 January 1986 to 30 June 1991	\$20, 000
5.	1 July 1991 to the day before the day on which this Act comes into operation	\$50, 000
6.	On or after the day on which this Act comes into operation	\$75, 000

- **SA:** Victims of Crime Compensation (VOCC) under the *Victims of Crime Act 2001*.
  - In awarding statutory compensation, the court must observe the following rules (**s20 (3)**):
    - In any case – where an amount arrived at to compensate financial loss, or the aggregate of amounts arrived at to compensate financial loss and non-financial loss, would, but for this subparagraph, exceed \$50, 000, the amount awarded will be \$50, 000 (**s20 (3)(a)(iii)**).
    - Subject to the following qualifications, statutory compensation amounting in aggregate to more than \$50, 000 cannot be awarded to any single claimant (**s20 (3)(c)**).
      - **Qualifications –**
        - 1 If the claimant claims both as a dependant or representative of the dependants of a deceased victim and in some other capacity, the limitation applies separately to each capacity in which the claimant claims.
        - 2 An amount to which an applicant is entitled by way of funeral expenses will not be brought into account in determining whether the limitation has been exceeded.
- **Tasmania:** *Victims of Crime Assistance Act 1976*.
  - The maximum amount that can be awarded to a primary victim for a single offence is \$30,000, and \$50,000 for more than one offence (<http://www.legalaid.tas.gov.au/factsheets/PDF/Criminal%20Injuries%20Compensation.pdf>).
- **ACT:** *Victims of Crime (Financial Assistance) Act 1983*.
  - On an application by a primary victim who has sustained a criminal injury, the Magistrates Court may, by order, award financial assistance to the victim in an amount equal to the sum of the following amounts (**s10 (1)**):
    - If the criminal injury was sustained as a result of a violent crime consisting of an offence against the *Crimes Act 1900*, sections 51 to

- 62 (in part 3 'Sexual offences')—special assistance by way of reasonable compensation for pain and suffering in an amount of no more than \$50, 000 **(s10 (1)(f))**.
- The maximum aggregate financial assistance that may be awarded under this division in relation to a criminal injury is \$50,000 (including any award of special assistance and any award to a person responsible for the maintenance of the primary victim) **(s14)**.
  - **NT: *Victims of Crime Assistance Act***
    - The maximum financial assistance that may be awarded to a primary victim of a violent act is \$40, 000, even if the victim's financial loss and the standard amount for the compensable violent act or the victim's compensable injuries exceed \$40, 000 **(s38 (1))**.
  - **But, in the UK: *Criminal Injuries Compensation Scheme 2012***
    - The maximum award which may be made under this Scheme to a person sustaining one or more criminal injuries directly attributable to an incident, before any reduction under paragraphs 24 to 28, is £500,000 **(s31)**.
      - Note that on 2 September 2013, this equated to approximately \$852,000 AUD.

Australian Lawyers Alliance, *Victims' compensation in Australia – an overview*, (September 2013).

**Dr Andrew Morrison RFD SC, 'Compensation for Child Sexual Abuse in Religious Institutions,' (2013) 116 *Precedent* (May/June 2013).**

Only one body in Australia claims legal immunity from suit in respect of civil claims for compensation by victims of the clergy and employees of the church, such as teachers. That body is, of course, the Roman Catholic Church. The need for reform is evident. The situation in Australia contrasts remarkably with the position of the same church in the rest of the common law world, as this summary of cases indicates.

**CASE SUMMARIES**

***State of NSW v Lepore* (2003) 212 CLR 511**

Angelo Lepore was a pupil in a government school aged seven in 1978. Together with other pupils, he allegedly misbehaved and was taken from the classroom into a storeroom adjoining it and made to remove his clothes. He was struck and the assault had a sexual element. As a result of his complaint, action was taken against the teacher, who was convicted of four counts of common assault. At first instance, Downs DCJ concluded that the teacher had assaulted the plaintiff. This was unsurprising, since no one asserted otherwise. However, he made no useful findings as to the nature of the assault or the number of assaults so as to render this finding useful. He did, however, conclude that the Education Department was not negligent. On appeal to the Court of Appeal, the majority held that strict liability arose from the non-delegable duty of care owed by an education authority to a pupil (*Kondis v State Transport Authority*<sup>1</sup> and *Commonwealth v Introvigne*<sup>2</sup>). Mason P and Davies AJA found a breach of the non-delegable duty of care. Heydon JA dissented, but thought vicarious liability was open, although it had not been argued in the lower court. This was on the basis that the trial judge's finding left open the argument that an unauthorised or unlawful form of chastisement could be said to fall within the scope of the teacher's duties.

With two Queensland cases, the NSW Department of Education appealed to the High Court. The appeal was enlivened by recent superior court decisions in Canada and England. In *Bazley v Curry*<sup>3</sup> and *Jacobi v Griffiths*,<sup>4</sup> the Canadian Supreme Court said that the *Salmond* test was not definitive as far as liability of employers was concerned. That test posits that employers are vicariously liable for employee acts authorised by an employer, or unauthorised acts so connected with authorised acts that they might be regarded as modes (albeit improper modes) of doing authorised acts. Thus, employers have been held liable for thefts by employees from customers. The fundamental question is whether the wrongful act is sufficiently related to the employer's aims. However, the close connection test says that it is relevant whether power, intimacy and vulnerability made it appropriate to extend vicarious liability, even for acts which were manifestly criminal. In England, *Lister & Ors v Hesley Hall Ltd*,<sup>5</sup> involved plaintiffs who were residents at a school for boys with emotional and behavioural difficulties. The defendant employed a warden who systematically sexually abused them. Overturning the Court of Appeal decision, the House of Lords unanimously held that the plaintiffs should succeed and, applying the close connection test, found the defendant was vicariously liable for the acts of criminal and sexual assault.

In *Lepore* in the High Court, the appeal of the state of NSW was allowed in part and a retrial was ordered. The reasoning of Heydon JA in the NSW Court of Appeal was adopted in part. Gleeson CJ said that vicarious liability was open and intentional wrongdoing, especially intentional criminality, was relevant but not conclusive as to whether or not it was proper to hold the Education Department liable. He referred to the sufficient connection test. Where there is a high degree of power and intimacy, the use of that power and intimacy to commit sexual abuse may provide a sufficient connection between the sexual assault and employment to make it just to treat such contact as occurring in the course of employment [74].

Gaudron J held that where there is a close connection between what was done and what that person was engaged to do, vicarious liability might arise and an employer may be estopped from denying liability for deliberate criminal acts of an employee. McHugh J took the approach of the majority in the Court of Appeal – that a non-delegable duty meant strict liability. Kirby J agreed with the approaches in Canada and United Kingdom and would have found for the plaintiff on the basis of vicarious liability on the close connection test.

Gummow, Hayne and Callinan JJ would not extend vicarious liability to deliberate criminal acts. However, Gummow and Hayne JJ agreed with the majority that a retrial should occur.

Accordingly, there was a majority of four for the proposition that the plaintiff could succeed in respect of criminal acts, but no clear agreement as to why. (It is noted that none of that majority is now sitting on the Court.)

The action went back to the District Court and ultimately settled on satisfactory terms. The position in regard to vicarious liability has been left in significant doubt in Australia. It is clear, however, that the non-delegable duty of care is a duty to do no more than is reasonable in employing someone, so that it is not clear that the content of the duty is any greater than a delegable duty of care.

***John Ellis v Pell and the Trustees of the Roman Catholic Church for the Diocese of Sydney***  
**[2007] NSWCA 117; [2007] HCA 697**

From about 1974, when he was 13, until 1979, when he was 18, John Ellis was engaged as an altar server in the Roman Catholic parish at Bass Hill. He alleged that he was subject to frequent sexual assaults by a priest, Father Duggan. He became a partner in a major commercial firm of solicitors in NSW, Baker & McKenzie. He married, but his marriage and his employment broke down because his interpersonal skills were seriously deficient.

John Ellis approached the Catholic Church with his complaint. The Church took more than a year to appoint someone to investigate it, by which time Father Duggan was no longer capable of saying anything useful. He subsequently died. The Church opposed an extension of time in which to sue on the basis that it was prejudiced by the death of Father Duggan.

Mr Ellis sought a representative order against Cardinal Pell on behalf of the Church as an unincorporated association. He also sought to sue the Trustees of the Church, who held its property under the *Roman Catholic Church Trust Property Act* 1936 (subsequently amended in 1986).

However, after the first day of hearing of the application, another former altar boy, Stephen Smith, came forward and said he had also been abused by Father Duggan. He was the successor to John Ellis. More significantly, he said that he knew that John Ellis was his predecessor and would also have been abused. Had he been asked, he would have disclosed this. Stephen Smith gave unchallenged evidence that in 1983 he gave Father McGloin, Dean of the Cathedral in Sydney, a statutory declaration detailing sexual assaults upon him. Instead of investigating this claim, Father McGloin confronted him with the perpetrator and left them alone. Understandably, Mr Smith did not pursue the matter further. The Church produced no records of the statutory declaration or of any investigation. At first instance, Patton AJ noted:

“It is rather chilling to contemplate that he is the same Father McGloin referred to in the judgment of the Court of Appeal delivered 18 September 2005, against whom allegations were made similar to those made against Father Duggan by Mr Smith and the plaintiff.”

The Church did not call Father McGloin, who is no longer practising as a priest but still lives in Sydney.

The Church did not challenge the allegations of sexual abuse. Indeed, a ‘Towards Healing’ investigation ultimately admitted that the abuse had occurred. It argued, however, that there was no one to sue in respect of the pre-1986 legislation because the Trustees merely held the property of the Church, which was itself not a legal entity. Patton AJ found that because the membership of the Church was so ill-defined, he could not make a representative order against Cardinal Pell, but found there was an arguable case that the Trustees could be sued. He found the failure to investigate in 1983 overcame the complaints of prejudice, which were in effect caused by the Church’s own misconduct.

The Trustees appealed to the Court of Appeal. It held on 24 May 2007 that neither the current Archbishop nor the Trustees were amenable to suit in respect of the alleged negligence and supervision of a priest in the 1970s. The Church is an unincorporated association, as is the Catholic Education Office, and its membership is too uncertain to permit a representative order to be made. The Trustees who hold the property of the Church in each diocese are liable only in respect of property matters, at least for the period prior to legislative amendment in 1986. At least until 1986 there is, therefore, no one to sue for negligence or abuse by teachers in Roman Catholic parochial



schools in NSW. In respect of priests, there is no one to sue after 1986 either, because priests are not employees of the Church. Vicarious liability for the conduct of priests was therefore rejected. The Church maintains that even after the legislative amendments in 1986, it is not liable to suit (except in property matters) even in respect of the conduct of teachers. Leave to appeal to the High Court was refused in November 2007. The Court of Appeal rejected the argument that the Church could be treated as incorporated as a *Corporation Sole*, an approach that has found favour in Canada and the United States.

The Roman Catholic Church in NSW and the ACT seems to have so organised its affairs that it has no liability for the conduct of its priests and no liability in its parochial schools for the conduct of its teachers, at least prior to 1986 and, the Church argues, even after that. The Church has taken a similar but slightly differing legislative position in every other state and territory. The implications are obviously very serious for those who suffered injury through abuse or negligence by agents of the Church.

***Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church [2010] EWCA Civ 256***

The claimant alleged he had been sexually abused by a priest of the Birmingham Archdiocese of the Roman Catholic Church when aged about 12 or 13 in 1975 and 1976. At first instance, Jack J held that the claim was not time-barred because the claimant had always lived with a disability and he would, if necessary, have extended time in any event. He found the claimant had been sexually abused by Father Clonan substantially as alleged. He found the claimant's father had complained to another priest who shared Father Clonan's accommodation and the Archdiocese had been negligent in not pursuing the matter. However, he found that the Archdiocese owed the claimant no duty of care and the Archdiocese was not vicariously liable for Father Clonan's sexual abuse of the claimant.

Lord Neuberger MR in the Court of Appeal found that the trial judge's finding on the limitation period was open to him and that the finding of sexual abuse was supported by the evidence. However, he held that the test laid down by the House of Lords in *Lister v Hesley Hall Ltd*,<sup>6</sup> which was consistent with the approach of the Supreme Court of Canada in *Bazley v Curry*<sup>7</sup> and *Jacobi v Griffiths*,<sup>8</sup> meant that the appropriate test was that the wrongful conduct must be so closely connected with acts the employee was authorised to do, that for the purpose of the liability of the employer to third parties, the wrongful conduct may fairly and properly be regarded as having been done in the ordinary course of the employee's employment. Although the claimant was not himself a Roman Catholic, Father Clonan was normally dressed in clerical garb and he developed his relationship with the claimant under the cloak or guise of performing his pastoral duties. The claimant's youth was relevant and it was Church activities, including discos on Church premises, which gave Father Clonan the opportunity to develop his sexual relationship. In the circumstances, and applying the close connection test, the Master of the Rolls was of the view that vicarious liability was properly made out against the Archdiocese.

He also accepted that there had been complaints by the claimant's father to another priest and that that those complaints had not been pursued or investigated, a matter for which the Archdiocese would be vicariously liable. The Master of the Rolls was also of the view that the Archdiocese owed a duty of care to the claimant. To treat it, as had been done at first instance, as a duty to the world in general, was to mischaracterise the duty alleged. He noted that in the Canadian Supreme Court in *Jacobi*, although vicarious liability did not apply there, the case was remitted for determination as to whether there had been a direct breach of duty through failure to supervise. Accordingly, the Master of the Rolls was of the view that the claimant's appeal should be upheld and the Archdiocese's cross-appeal dismissed. Longmore and Smith LJ, also applying the close connection test, agreed.

***PAO, BJH, SBM, IDF and TMA v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Ors [2011] NSWSC 1216 (Hoeben J)***

In this case, Hoeben J had to consider whether actions by the various plaintiffs against the Trustees of the Roman Catholic Church for the Archdiocese of Sydney and various members of the Patrician Brothers religious order should be struck out. It was alleged that the Archdiocese Trustees operated and managed Patrician Brothers Primary School Granville when, while young students in 1974, each plaintiff was sexually assaulted by Mr Thomas Greal (also known as Brother Augustine). Associate Justice Harrison in *PAO v Greal*<sup>9</sup> had refused to strike out or summarily dismiss each of the five proceedings.

Before Hoeben J, there was additional evidence. The plaintiffs submitted that there was evidence before the court showing involvement of the Archdiocese Trustees in the running of schools. It was submitted that the Trustees exercised control over the Catholic Education Office and Catholic Building and Finance Commission. They were responsible for the financial management of funds collected by the schools by way of fees, donations and the like.

Hoeben J concluded that there was no evidence before the court connecting the Archdiocese Trustees directly or indirectly to the conduct of the Granville school and no indication that such evidence was likely to arise in the future. There was no evidence that the Patrician Brothers handed over control of the school to the Archdiocese Catholic Education system or that the Archdiocese Trustees exercised control over the Catholic Education Office. The plaintiffs' cases as against the Trustees were held to be hopeless and should not be permitted to go further. It was not suggested that there was any legal entity in respect of the Roman Catholic Church which might be sued in respect of the abuse at the school. Hoeben J applied the decision of the CA in *Trustees of the Roman Catholic Church for the Archdiocese of Sydney v Ellis*.<sup>10</sup>

***JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 (QB) (MacDuff J)**

The preliminary issue was whether the Trustees of the Roman Catholic Church could be liable to the plaintiff for sexual abuse and rape by a Roman Catholic clergyman now deceased. This occurred when the plaintiff was in a children's home in Hampshire between 1970 and 1972. The defendant contended that the clergyman was not its employee and nor was the relationship akin to employment. It argued that the action should be struck out because vicarious liability could not arise. Relevantly, the Trustees stood in the shoes of the bishop for present purposes. The Church (first respondent) accepted for the purposes of the litigation that its trustees holding its property were its secular arm and were a proper defendant if vicarious liability arose.

Referring to *Viasystems (Tyneside) Ltd v Thermal Transfer Ltd & Ors*,<sup>11</sup> MacDuff J noted that the test of vicarious liability had gradually changed to give precedence to function over form as to its application. Thus, the approach in *Trotman v North Yorkshire County Council*,<sup>12</sup> which held that sexual abuse of a pupil by a schoolmaster fell outside the scope of employment, had been overtaken by *Lister v Hesley Hall Ltd*,<sup>13</sup> applying a close connection test importing vicarious liability. Most recently, this has been applied in *Maga* and he followed the approach taken there.

Vicarious liability does not depend upon whether employment is technically made out. The relationship between the Church and priests contains significant differences from the normal employer/employee relationship. The differences include the lack of the right to dismiss, little by way of control or supervision, no wages and no formal contract.

He noted that in *Doe v Bennett & Ors*,<sup>14</sup> the Canadian Supreme Court held a bishop vicariously liable for the actions of a priest who had sexually abused boys within his parish. Employment was not conceded, but the priest had taken a vow of obedience to the bishop and the bishop exercised extensive control over the priest, including the power of assignment, the power of removal and the power to discipline him. In these circumstances, the Canadian Supreme Court held that the relationship was 'akin to employment' and that, in the circumstances, making the bishop vicariously liable.

In all the circumstances, MacDuff J held that, applying the close connection test, vicarious liability can arise whether or not a strict relationship of employer-employee arises. By appointing Father Baldwin as a priest and thus clothing him with all the powers involved, the defendants created a risk of harm to others, namely the risk that he could abuse or misuse those powers for his own purposes. In the circumstances, the defendants should be held responsible for the actions, which they initiated by the appointment and all that followed it. The strike-out application was accordingly dismissed by the majority in the English Court of Appeal.

Ward LJ referred to authorities supporting the proposition that a non-employer with sufficient control over the system of work could have vicarious liability extended to it. He noted the varying opinions in *NSW v Lepore*<sup>15</sup> and quoted the views of Gaudron J at [123-125]. Ward LJ thought the question of control should be viewed in terms of whether the employee is accountable to his superior for the way

in which he does the work and, in this sense, a priest is accountable to his bishop. Applying the organisation test, the priest is part of the Church's organisation and on the integration test, the role of the parish priest is wholly integrated into the organisational structure of the Church's enterprise. The priest is not an independent contractor and is more like an employee. He concluded, therefore, that the defendants were vicariously liable for misconduct, including criminal misconduct, by a priest. Davis LJ took a similar view, but Tomlinson LJ dissented.

The defendants sought leave to appeal to the English Supreme Court, which was declined, in part because this was a trial only on a preliminary issue and in part because the Supreme Court was then hearing the case of *Various Claimants v The Catholic Child Welfare Society and The Institute of Brothers of the Christian Schools & Ors*,<sup>16</sup> which would traverse some of these issues.

***The Catholic Child Welfare Society & Ors (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools & Ors (Respondents) [2012] UKSC 56***

At issue was who, if anyone, was liable for a large number of alleged acts of sexual and physical abuse of children at a residential care institution for boys originally operated by the De La Salle Institute, known as Brothers of the Christian Schools and operating as St William's School. The appeal to the English Supreme Court required a review of the principles of vicarious liability in the context of sexual abuse of children. The claims were brought by 170 men in respect of abuse between 1958 and 1992. The Middlesbrough defendants took over the management of the school in 1973, inheriting the previous liabilities. They used a De La Salle brother as headmaster and contracted four brothers as employee teachers. The Middlesbrough defendants were held vicariously liable for the acts of abuse by those teachers, and this was not in challenge. However, the Middlesbrough defendants challenged the findings that the De La Salle Order was not vicariously liable for the actions of its brothers. The Middlesbrough defendants' appeal seeking contribution had been rejected in the Court of Appeal; but leave was granted to appeal to the Supreme Court.

Lord Phillips (with whom the other members of the Court agreed) noted the views on vicarious liability expressed in the Court of Appeal in *JGE* and the impressive leading judgment of Ward LJ [19]. The following propositions were said by Lord Phillips to be well-established:

- (i) It is possible for an unincorporated association to be vicariously liable for the tortious acts of its members.
- (ii) One defendant may be vicariously liable for the tortious act of another defendant even though the act in question constitutes a violation of the duty owed and even if the act in question is a criminal offence.
- (iii) Vicarious liability can even extend to liability for a criminal act of sexual assault. *Lister v Hesley Hall*.<sup>17</sup>
- (iv) It is possible for two different defendants to each be vicariously liable for the single tortious act of another defendant.

There were two issues before the Supreme Court. The first was whether the relationship between the De La Salle Institute and the brothers teaching at St William's was capable of giving rise to vicarious liability. The second was whether the alleged acts of sexual abuse were connected to that relationship in such a way as to give rise to vicarious liability.

While it was relevant that the brothers who taught at the school were not contractually employed by the De La Salle Institute but rather by the Middleborough defendants, this did not preclude the De La Salle Order being vicariously liable. As in *JGE*, the relationship was so close in character to one of employer/employee that it was just and fair to hold the employer vicariously liable. The relationship between teaching brothers and the Institute had many of the elements, and all the essential elements, of the relationship between employer and employee. It was relevant that the brothers passed on their wages to the De La Salle Institute and were there to promote the purposes of the De La Salle Institute.

Lord Phillips then turned to the argument that sexual abuse can never be a negligent way of performing duties under an employment-like relationship. He referred to *JGE*, *Maga* and *NSW v Lepore*,<sup>18</sup> where the majority in the High Court left such liability open, although he described the four different sets of reasons in the majority as having 'shown a bewildering variety of analysis'. The NSW Court of Appeal decision in *Trustees of the Roman Catholic Church for the Diocese of Sydney v Ellis*<sup>19</sup> is surprisingly not mentioned.

Applying the Canadian close connection test in *Bazley v Currie* and *Jacobi v Griffiths* as well as *John Doe v Bennett*<sup>20</sup> and *Blackwater v Plint*<sup>21</sup>, as well as in the House of Lords in *Lister*, he also noted that in a commercial context the House of Lords had taken a similar view in *Dubai Aluminium Co Ltd v Salaam*,<sup>22</sup> where dishonest conduct by a solicitor was held to involve the firm in liability because such conduct was part of the risk of the business.

Lord Phillips (with the concurrence of the balance of the court) said [86]:

‘Vicarious liability is imposed where a defendant, whose relationship with the abuser puts it in a position to use the abuser to carry on its business or to further its own interests, has done so in a manner which has created or significantly enhanced the risk that the victim or victims would suffer the relevant abuse. The essential closeness of connection between the relationship between the defendant and the tortfeasor and the acts of abuse thus involves a strong causative link.

[87] These are the criteria that establish the necessary ‘close connection’ between the relationship and abuse.’

## CONCLUSION

Australia would appear to be alone in the common law world in denying a remedy for victims of abuse in one church (the Roman Catholic Church) and in holding that the relationship between priests and bishops does not give rise to vicarious liability. In countries such as the United States and Canada, the church is treated as a *Corporation Sole*, giving it a corporate entity, which can be sued, rendering its trustees liable to compensate victims. In England, the Roman Catholic Church accepts that its trustees are its secular arm and are liable to compensate victims. In the United States, Canada, Ireland and England, it is now clearly established that the Roman Catholic Church is liable for the criminal conduct of priests, including sexual abuse of children, which occurs in the course of their duties, applying the close connection test so as to give rise to vicarious liability.

Only in Australia in the common law world has a contrary view been taken. Only in Australia are the assets of one church invulnerable to claims because the church is said to have no relevant corporate entity and its trustees (at least prior to 1986 and the Church would argue even since) are immune from suit. The families of children attending Catholic parochial schools would be appalled to learn that whether or not they have a remedy in negligence against the school for injury occurred through the fault of a teacher depends upon the whim of the bishop in the particular diocese. In some dioceses, the *Ellis* point will not be taken. In Cardinal Pell’s Archdiocese, experience suggests that it is always taken as a means of forcing claimants to take a pittance.

In the light of the clear differences with the Canadian Supreme Court, the House of Lords and English Supreme Court, it would seem that reconsideration of the decisions in *Lepore*, *Ellis* and *PAO* only await a suitable test case.

It is understood that the Victorian Legislative Council inquiry into sexual abuse in religious institutions is likely to recommend legislative change in that state to render the Roman Catholic Church vicariously liable and give it a legal status, making its trustees capable of being sued. Draft legislation has already been circulated in NSW and is likely to be introduced to the NSW Legislative Council during 2013. However, the powerful hold of the Roman Catholic Church within all major political parties suggests that getting legislative change in NSW will be distinctly challenging. The current Commonwealth Royal Commission Terms of Reference are wide enough to encompass submissions and findings on these important issues.

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<sup>1</sup> (1984) 154 CLR 672 at 686.

<sup>2</sup> (1982) 150 CLR 258.

<sup>3</sup> (1999) 174 DLR (4th) 45.

<sup>4</sup> (1999) DLR (4th) 71.

<sup>5</sup> [2001] 2 All ER 769.

<sup>6</sup> [2002] 1 AC 215.

<sup>7</sup> (1999) 174 DLR (4th) 45.

<sup>8</sup> (1999) 174 DLR (4th) 71.

<sup>9</sup> [2011] NSWSC 355.

<sup>10</sup> (2007) 70 NSWLR 565 (CA).

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- <sup>11</sup> 2005] EWCA Civ 1151 (per Rix LJ).  
<sup>12</sup> [1999] LGR 584 (CA).  
<sup>13</sup> [2001] 2 All ER 769; [2002] 1 AC 215.  
<sup>14</sup> [2004] ISCR 436.  
<sup>15</sup> (2003) 212 CLR 511.  
<sup>16</sup> ) [2012] UKSC 56.  
<sup>17</sup> [2001] UKHL 22; [2002] 1 AC 215.  
<sup>18</sup> [2003] HCA 4; 212 CLR 511.  
<sup>19</sup> [2007] NSWCA 117; [2007] HCA 697.  
<sup>20</sup> [2004] 1 SCR 436.  
<sup>21</sup> (2005) 258 DLR (4th) 275.  
<sup>22</sup> [2002] UKHL 48; [2003] 2 AC 366.

Dr Andrew Morrison RFD SC appeared for the plaintiff in the *Lepore* and *Ellis* cases and has practised extensively in the personal injury field in NSW and in other states since 1976. He has appeared in a significant number of appellate cases in the High Court and NSW and WA Courts of Appeal. He has been an ALA media spokesperson on these issues.

## Dr Andrew Morrison SC, 'Reporting the Failures of the Catholic Church in regard to Father 'F', (2013) *Precedent* (to be published December 2013).

In January 2013 the Catholic Bishops of Armidale and Parramatta released a report of an inquiry into 'processes related to the management'<sup>1</sup> of a priest who had sexually abused children.

The report by Antony Whitlam QC into the failures of the Catholic Church in regard to Father 'F'<sup>2</sup> is yet another example of why organisations should not be left to investigate serious criminal allegations against themselves.

The report was commissioned by the present Bishops of Armidale and Parramatta. Mr Whitlam QC had the advantage of speaking to most of the clergy involved, examining records and speaking to some victims and the families of victims.

He details a long history of very serious allegations against Father 'F' and does not doubt those allegations.

In 1987 Father 'F' was arrested and charged with serious sexual offences against a young boy, Damian Jurd. It appears from the report<sup>3</sup> that the parish paid the fees of Chester Porter QC (defence barrister for Father 'F') at the suggestion of the then Bishop of Armidale, Bishop H.J. Kennedy, with the result that Damian Jurd, who made serious (and well-founded) allegations of abuse, was effectively demolished<sup>4</sup> in the witness box and the prosecution went no further.

Mr Whitlam QC makes no comment upon the appropriateness of the Church spending significant sums of money to protect a priest but not one of its altar boys. Mr Whitlam QC does not doubt that Damian Jurd (who later committed suicide) was abused.

There are many surprising instances where Mr Whitlam QC makes no clear adverse findings.

Father 'F's continued attempts to be alone with children led Father Usher, Director of Centacare in the Archdiocese of Sydney, to write a letter to Father Wayne Peters, who had served as the Armidale representative on committees of the Church concerned with the sexual abuse of children. In the letter, dated 16 September 1990, Father Usher wrote that although Father 'F' had been acquitted:

'His personal manner and his ongoing need to spend time with children is a matter of grave concern to me. During my interview with him I gained the impression that he was unable to understand the seriousness of the matters with which he had been charged and was arrogantly dismissing the whole affair as a figment of other people's imagination. The events, serious as they were alleged to be, did not seem to distress him greatly. His behaviour, therefore, indicated that his feelings were repressed and that he had developed certain defence mechanisms which enabled him to cope with

such stressful events by denying that they had any basis of truth at all. Of course, denial is a trait of many child sexual assault offenders and it is not uncommon to witness complete disinterest in such people in relation to their behaviour. I am not suggesting that the priest in question is guilty of such behaviour but his personality traits indicate some deep-seated disorder. During the single interview I had with him I was in no position to make any comprehensive assessment nor would it ... [be] appropriate for me to do so.<sup>5</sup>

Father Usher recommended a further assessment before any decision about whether Father 'F' be given a pastoral appointment.

Bishop Manning took office as the Bishop of Armidale in July 1991. In late 1991 he made a typewritten note of advice that he had received from Father Peters. The note records Father Peters saying that there 'are still children around who were silenced at the time of the court case'. Both Bishop Manning<sup>6</sup> and, it appears, Father Peters had a failure of memory when interviewed by Mr Whitlam QC as to this silencing of witnesses. Yet there are no critical comments in Mr Whitlam's report about such an extremely disturbing allegation.

Bishop Manning had a meeting with Father 'F' on 9 October 1991. Afterwards the Bishop summarised the meeting for his files. He wrote that he had mentioned to Father 'F': 'incidents with boys in Moree', the court case in Narrabri and 'the silencing of witnesses in Moree by Rev Monsignor Ryan.', widespread knowledge of these matters and 'potential damage to the diocese and the priesthood'. There is concern about 'the danger to children if a cure had not been effected' but no expression of concern whatsoever for existing victims. Yet Mr Whitlam QC makes no clear adverse finding in respect of such serious matters. Bishop Manning had a failure of memory in relation to this matter,<sup>7</sup> which again goes without adverse comment. Similarly, there is no adverse comment about the fact that serious allegations in relation to abuse of a 12-year-old boy, Daniel Powell, in the Parramatta area were played down by the vicar-general Father Richard Cattell.<sup>8</sup>

Father 'F' was suspended by Bishop Manning and ultimately referred to the committee of Fathers Usher, Peters and Brian Lucas. Brian Lucas was a senior member of the clergy and also a lawyer, and like Father Usher, one of the leaders in developing for the bishop's conference the protocols that became called 'Towards Healing'.<sup>9</sup> The committee of Fathers Usher, Peters and Lucas first met with Father 'F' on 3 September 1992.

Two days before that, on 1 September 1992, Bishop Manning met with Father 'F'. Bishop Manning's handwritten file note on that meeting stated that father 'F' claimed complete innocence in respect of the Damian Jurd charge but 'referred to three other incidents which could have brought him "14 years apiece". I didn't question him about these'.<sup>10</sup>

The failure to explore such serious potential criminal conduct is not explained by Bishop Manning nor criticised by Mr Whitlam QC.

Despite subsequent comments by Cardinal Pell, there is no contemporaneous record of the meeting between Father 'F' and Fathers Usher, Peters and Lucas at the Cathedral presbytery in Sydney on 3 September 1992. The meeting, which lasted nearly three hours, was the subject of a report from Father Peters to Bishop Manning dated 11 September 1992 (eight days later). I set out that letter at some length:

'After opening remarks from Rev. Brian Lucas, 'F' indicated that he wished to make certain admissions.

He admitted that there had been five boys around the age of ten and eleven that he had sexually interfered with in varying degrees in the years approximately 1982 to 1984 while he was the assistant priest at Moree.

He had placed his hand on the leg of one boy who had indicated that he did not want that to happen. 'F' maintains he never attempted any advances again to that particular child.

It was a similar story with another boy. He made advances by touching the second child on the leg and the child indicated he did not want that to happen. 'F' maintains he made no such further advances to that child.

A third child was the boy who eventually brought criminal charges against 'F' in the civil courts. Although the magistrate did not send the matter to formal trial because of a lack of evidence, while denying most of the charges, 'F' did admit that he fondled the boy's genitals during a car trip from Moree to Narrabri.

The situations of boys four and five were the occasion of more serious admissions on the part of 'F'. He admitted that over a period of approximately twelve months he fondled the genitals of each of these boys and to quote 'sucked off their dicks'. As far as 'F' can remember this was done on about a monthly basis over a period of twelve months. It was done only when each boy was alone with him. The boys were never together when an offence took place. After the allegations of this behaviour were made, 'F' was transferred to another parish. He alleges he then became sexually involved with a woman ...<sup>11</sup>

After recording these matters, Father Peters then noted that what was considered was laicisation and a program of therapy.<sup>12</sup>

Curiously, Bishop Manning could not remember that letter. Neither Fathers Lucas nor Usher remember any such admissions. However, Father Usher made a note soon after the meeting that "'F" is unrepentant about his sexual misconduct with children in my opinion'.<sup>13</sup>

There was a further meeting between the three priests and Father 'F' on 24 September 1992 and a third meeting on 12 November 1992.<sup>14</sup>

Ultimately, in 1996, an action was brought on behalf of Damian Jurd against Father 'F', Bishop H.J. Kennedy, the Trustees for the Diocese of Armidale, Cardinal Clancy and the Trustees for the Archbishop of Sydney, Kelvin Canavan of the Catholic Education Office and Monsignor Ryan. Those



proceedings were settled in January 1999 by a deed of release and upon payment of an undisclosed sum.<sup>15</sup>

Mr Whitlam QC is critical of the magistrate's reasons in dismissing the original charges (in 1987), saying that his reasons are 'plainly unsatisfactory and provide no support for his stated conclusion.'<sup>16</sup> In addition, he is critical of the decision not to continue the prosecution of 'F' on an *ex officio* indictment.<sup>17</sup> Mr Whitlam QC does go on, however, to say that:

'For my purposes, the real significance of the proceedings is that a good deal of the evidence cried out for investigation by the Church authorities.'<sup>18</sup>

Father 'F' was charged with sexually assaulting a 15-year-old girl in 1998. This charge was dismissed in Armidale on 4 February 1999.<sup>19</sup>

Also in 1998, Father 'F' appears to have had further dealings with Daniel Powell. During that year, Father 'F' and Mr Powell met several times and various sums of money, totalling about \$22,000, were paid by Father 'F' to Mr Powell. Father 'F' then alleged those sums were paid as a result of blackmail, because Mr Powell threatened he would otherwise go to the police and accuse Father 'F' of sexually assaulting him as a young boy. After a further alleged request for \$18,000, Father 'F' spoke to 'a friend in the police'<sup>20</sup> and Daniel Powell was arrested and charged with 12 counts of demanding money with menaces.<sup>21</sup>

Two further complaints of sexual abuse by Father 'F' during his time in Moree were received by the Church. One was received by Fathers Lucas and John Davoren in Sydney in June 2001 and another in 2002 by Cardinal Pell while he was in Melbourne.<sup>22</sup> Neither of these complaints (it appears) were referred to the police. Cardinal Pell has subsequently said that he advised the victim to go to the police but there is no adverse comment about the obvious failure of senior clergy in the Church to refer these matters to the police themselves.

In October 2003, Daniel Powell, while being interviewed by police, made very serious allegations of sexual assault by Father 'F'.<sup>23</sup> When Father 'F' was cross-examined at Parramatta Local Court on 14 October 2003, counsel for Mr Powell asked about the allegations of sexual abuse and Father 'F' objected on the grounds of self-incrimination. The solicitor from the Office of the DPP told the magistrate that no charges were to be laid against Father 'F' in relation to those allegations 'at this time'. Mr Powell was committed for trial.<sup>24</sup> At that trial in June 2004, it appears that Father 'F' admitted sneaking Mr Powell into the presbytery when he was 12 years of age and giving him cigars and alcohol, allowing him to drive his car on private land and giving him firearms to play with. He regarded the boy as a great 'mate' whom he 'loved', but declined to answer questions in relation to a sexual relationship on the grounds of self-incrimination.<sup>25</sup>

The report from Father Peters to Bishop Manning of 11 September 1992 was tendered but not admitted into evidence. However, the trial judge said that counsel could show the document to Father 'F' and ask questions based on it. Father 'F' was then asked about the meeting of 3 September 1992 in these terms:

- 'Q. And ... I suggest to you that at that meeting you made certain admissions to those priests that you had had oral sex with young boys, what do you say about that?  
A. Yes.  
Q. And that's the reason why they won't let you carry out your duties as a priest isn't it?  
A. That's part of it, yes.'<sup>26</sup>

The trial concluded on 18 June 2004 and the jury returned verdicts of not guilty on all counts.<sup>27</sup>

On 27 June 2012, in relation to the meeting of 3 September 1992, Father Lucas told a producer with the ABC's *Four Corners* program that Father 'F' did not say anything that he felt should be reported to the police.<sup>28</sup> Monsignor Usher went further when he told the producer on 29 June 2012, 'I can state that "F" made no personal disclosures of criminal behaviour during the meeting in September 1992. There was, therefore, nothing that could be reported to the NSW Police and hence no report was made by us.'<sup>29</sup>

Those, of course, are not statements of lack of recollection but flat statements that nothing was said.

Father Peters, when asked by the producer, said that in his report to Bishop Manning:

"F" conceded that there had been instances of misconduct but deliberately would not give any details or say anything that would incriminate him or amount to an admission in the legal sense. He persisted in denying the charges in the case which had gone to court. However, we concluded that he should be removed from ministry.'<sup>30</sup>

How does Mr Whitlam QC deal with the clear conflict in the material? He says it is unsurprising that after 20 years the three men have different recollections of the 1992 meeting. That is so, but what is surprising is that Mr Whitlam QC prefers the present and self-serving recollection of the three senior clergy to the express terms of a report to the Bishop on the meeting written only eight days later.<sup>31</sup>

In the *Four Corners* program Cardinal Pell referred to a 'file note' of the meeting on 3 September 1992 that, he said, 'does not show that [F] made any admission'.<sup>32</sup> About this, Mr Whitlam QC says only:

'It would be unfortunate if that statement gave the impression that Father Usher's briefing note was a contemporaneous record of the meeting in question.'<sup>33</sup>

Mr Whitlam QC was being extraordinarily charitable. There was no record of the meeting other than the report of 11 September 1992 by Father Peters. The so-called 'file note' was merely a note of 6 June 2012 (20 years later) saying 'He made no admissions'. It was Monsignor Usher's then recollection of events. For Cardinal Pell to represent this as a file note of the meeting is clearly seriously misleading. The absence of clear criticism of Cardinal Pell in respect of this and in respect of his failure to deal appropriately with the complaint by a victim in 2002 is, at the least, disturbing.

Mr Whitlam QC accepts the very specific admissions contained in the report of 11 September 1992 cannot be reconciled with what the ABC was told. Nor do they accord with what Father Lucas and Monsignor Usher recalled to Mr Whitlam QC.<sup>34</sup>

Mr Whitlam QC concludes there is nothing sinister in the conflict between the admissions and does not accept that the earlier document must necessarily be accepted as a more accurate record. He thinks Father Peters prepared a report for his Bishop which drew on information not available to Fathers Lucas and Usher.<sup>35</sup> He therefore concludes that 'notwithstanding the honest differences in recollection, I do not disbelieve Father Lucas and Monsignor Usher. Accordingly, if 'F' made no admissions that either of them considered could and should be reported to the police, then there was no 'cover-up' back in 1992.'<sup>36</sup>

However, the terms of Father Peters report of 11 September 1992 suggest that Father 'F' made express admissions, when during the meeting he made them, and purport to quote his precise words, at least in part.<sup>37</sup> To suggest that this might be information gathered from some other source is on the face of it desperate speculation to explain the inexplicable. It does not amount to a logical or rational explanation for the terms of that report. Mr Whitlam QC does not say that Father Peters says the information came from other sources. That is Mr Whitlam QC's explanation.

Moreover, even if that information came to Father Peters from a different context, where is the criticism of Father Peters for not going to the police? The failure of Mr Whitlam QC to grapple seriously with the conduct of Fathers Peters, Usher and Lucas, as well as the very tender treatment of the conduct of Cardinal Pell, inspires no confidence in the conclusions in the report.

Mr Whitlam QC omits to mention here that Father Usher noted soon after the meeting that "'F" is unrepentant about his sexual misconduct with children in my opinion.'<sup>38</sup>

Even more seriously, he fails to mention that Father 'F' was said by Father Lucas to have admitted being 'a bad boy' and Father Lucas described it as 'criminal and wicked behaviour'. Father Lucas conceded that admissions were made at that meeting but did not think it useful to report them to police because the names of the altar boys involved were not disclosed.<sup>39</sup> Of course, one was expressly identified in Father Peters' report of 11 September 1992 – 'the boy who eventually brought

criminal charges against “F” in the civil courts’ – Damian Jurd. The others would have been readily obtainable by the simplest enquiry in Moree.

Mr Whitlam QC’s failure to analyse this material makes his conclusion in respect of the three senior clergy worthless. The evidence is damning against the suggestion that no admissions were made. His failure to criticise three senior clergy or in particular Father Peters who wrote the letter, or Bishop Manning who received it, is extraordinary and inspires no confidence whatever in his report.

Mr Whitlam QC reserves his most serious criticism for Bishop H.J. Kennedy’s failures. It seems perfectly clear that Bishop H.J. Kennedy continued to support Father ‘F’ despite medical evidence that seemed to assume a history of abuse of children.<sup>40</sup> Mr Whitlam QC regards his failures<sup>41</sup> to look into the various matters as ‘utterly inexplicable’. He refers to ‘the silencing of the witnesses’ by Monsignor Ryan as having been accepted as fact by Bishop H.J. Kennedy, but fails to make the obvious comments or express the need for further investigation into that conduct.<sup>42</sup> He is critical of the ability to have a 12-year-old drinking and smoking in a house shared by Father ‘F’ with the parish priest.<sup>43</sup>

Mr Whitlam QC has no doubt that Father ‘F’ was guilty ‘of the most vile sexual abuse of Damian Jurd and Daniel Powell’, both of whom subsequently committed suicide. When the Jurd family approached Bishop H.J. Kennedy with the allegation that a priest had abused their son, the Bishop did not ask who the priest was and said, ‘There’s nothing I can do for you’. Mr Whitlam QC says this conduct was ‘a disgrace’, and it is easy to agree with that. It is also easy to make such comments about someone who is dead.

However, the failure to make a similar analysis of Fathers Usher, Lucas and particularly Father Peters, let alone the late Monsignor Ryan, is highly disturbing. The terms of Father Peters’ report and the concessions by Father Lucas leave little room for the suggestion that admissions were not made at the meeting of 3 September 1992. Father ‘F’ subsequently in sworn evidence conceded that they were made. The failure to criticise senior clergy for failing to go to the police is utterly inexplicable.

A suggestion that Father Usher would have gone to the police if he had known and because he did not go to the police he did not know is an exercise in *post hoc ergo propter hoc* and as a form of reasoning beggars description. The unchallenged evidence of the police in the Victorian Legislative Council Inquiry that no-one in the Church in that state has ever reported a priest for misconduct to the police belies Father Usher’s words. In NSW, Cardinal Pell says he has reviewed the files in his archdiocese and cannot say whether any of the matters in respect of which adverse findings were made against priests were reported to the police. Father Usher does not appear to have ever reported any of the aberrant priests he has dealt with.

The suggestion that the procedures put in place during the 1990s known as the ‘Towards Healing’ process would have made a real difference if implemented<sup>44</sup> ignores the fact that in practice no-one in

Australia can point to any case in which the Church has referred a priest in respect of whom adverse findings of a criminal nature have been made by internal inquiry, to the police. It follows that there is no basis for any inference that the Church has in substance changed its ways. There is certainly no basis for Cardinal Pell's assertion, when criticising the desirability of a Royal Commission, when he suggested that these problems were all historic. The failure to investigate and expressly criticise the silencing of witnesses, and the failure to criticise the failure to report Father 'F' to the police by Bishop Manning, Father Usher, Father Peters and Father Lucas suggest that Mr Whitlam QC himself failed to grapple with the real issues in this matter.

Internal reports are no substitute for external scrutiny and the failures in this report merely emphasise the need for examination of this conduct by the Royal Commission as part of its enquiries.

**Dr Andrew Morrison RFD SC** has practised as a barrister in NSW since 1976 and was appointed Senior Counsel in 1993. He is the author of a number of articles in the Journal of the RAHS, principally in the area of constitutional history and the Reserve Powers of the Crown.

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<sup>1</sup> 'Report by the Hon Antony Whitlam QC released', media release from the dioceses of Armidale and Parramatta, 17 January 2013.

<sup>2</sup> Report Commissioned by the Bishops of Armidale and Parramatta into Processes Related to the Management of "F", released 17 January 2013, <[www.parra.catholic.org.au/news---events/latest-news/latest-news.aspx/report-by-the-hon-antony-whitlam-qc-released.aspx](http://www.parra.catholic.org.au/news---events/latest-news/latest-news.aspx/report-by-the-hon-antony-whitlam-qc-released.aspx)>

<sup>3</sup> *Ibid*, [22].

<sup>4</sup> *Ibid*, [25].

<sup>5</sup> *Ibid*, [45].

<sup>6</sup> *Ibid*, [58].

<sup>7</sup> *Ibid*, [60].

<sup>8</sup> *Ibid*, [73].

<sup>9</sup> *Ibid*, [77].

<sup>10</sup> *Ibid*, [90].

<sup>11</sup> *Ibid*, [92].

<sup>12</sup> *Ibid*, [93].

<sup>13</sup> *Ibid*, [94].

<sup>14</sup> *Ibid*, [99].

<sup>15</sup> *Ibid*, [107].

<sup>16</sup> *Ibid*, [113].

<sup>17</sup> *Ibid*, [114].

<sup>18</sup> *Ibid*.

<sup>19</sup> *Ibid*, [118].

<sup>20</sup> *Ibid*, [120].

<sup>21</sup> *Ibid*, [122].

<sup>22</sup> *Ibid*, [126].

<sup>23</sup> *Ibid*, [129].

<sup>24</sup> *Ibid*, [130].

<sup>25</sup> *Ibid*, [134].

<sup>26</sup> *Ibid*, [135].

<sup>27</sup> *Ibid*, [136].

<sup>28</sup> *Ibid*, [145].

<sup>29</sup> *Ibid*, [146].

<sup>30</sup> *Ibid*, [147].

<sup>31</sup> *Ibid*, [152].

<sup>32</sup> *Ibid*, [149].

<sup>33</sup> *Ibid*.

<sup>34</sup> *Ibid*, [156].

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid*, [157].

<sup>37</sup> *Ibid*, [92].

<sup>38</sup> *Ibid*, [94].

<sup>39</sup> 'Lucas: no case to refer "Father F" to police in 1992', ABC AM, 6 July 2012.

<sup>40</sup> *Op. cit*, [30].

<sup>41</sup> *Ibid*, [164].

<sup>42</sup> *Ibid*, [169].

<sup>43</sup> *Ibid*, [169].

<sup>44</sup> *Ibid*, [177].

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# consultation draft

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Introduced by Mr David Shoebridge, MLC

consultation draft

New South Wales

## **Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2012**

### **Explanatory note**

#### **Overview of Bill**

The NSW Court of Appeal has held that property held on trust under the *Roman Catholic Church Trust Property Act 1936* for the use, benefit or purposes of the Roman Catholic Church in New South Wales cannot be used to satisfy legal claims associated with sexual abuse by Roman Catholic clergy, officials or teachers. The object of this Bill is to amend that Act:

- (a) to allow a person suing a member of the Church's clergy, a Church official or a Church teacher in relation to sexual abuse to join the following as defendants in those proceedings (and to make them liable for any damages awarded):
  - (i) the body corporate established by the Act to hold property on trust for the dioceses in which the relevant abuse allegedly occurred,
  - (ii) the trustees that make up that body corporate,
  - (iii) if the regulations so provide, any body corporate established under the *Roman Catholic Church Communities' Lands Act 1942* by which the relevant member of the clergy, official or teacher was employed or that was established as trustee of community land of any community of which the relevant member of the clergy, official or teacher was a part, and

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Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2012

Explanatory note

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- (b) to allow a person who is owed a judgment debt in respect of civil liability arising as a result of sexual abuse by a member of the Church's clergy, a Church official or a Church teacher to recover the debt from any of the following (as an alternative to pursuing the clergy member, official or teacher concerned):
  - (i) the body corporate established by the Act to hold property on trust for the dioceses in which the relevant abuse allegedly occurred,
  - (ii) the trustees that make up that body corporate,
  - (iii) if the regulations so provide, any body corporate established under the *Roman Catholic Church Communities' Lands Act 1942* by which the relevant member of the clergy, official or teacher was employed or that was established as trustee of community land of any community of which the relevant member of the clergy, official or teacher was a part.
- (c) to suspend the operation of the *Limitation Act 1969* for 2 years in relation to such causes of action that would otherwise be out of time.

### Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on the date of assent to the proposed Act.

### **Schedule 1      Amendment of Roman Catholic Church Trust Property Act 1936 No 24**

**Schedule 1** makes the amendments described in the above Overview.



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# consultation draft

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Introduced by Mr David Shoebridge, MLC

## **Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2012**

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consultation draft

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# **Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2012**

No. , 2012

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## **A Bill for**

An Act to amend the *Roman Catholic Church Trust Property Act 1936* to provide for the ability of victims of sexual abuse where the abuser is found to be a member of the Catholic clergy and or another official and or officer in the Church to satisfy judgments awarded against such abusers as a judgment debt payable from the assets of the Trust and for other related purposes.

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Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill  
2012

Clause 1

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Act 2012*.

**2 Commencement**

This Act commences on the date of assent to this Act.

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Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill  
2012

Schedule 1      Amendment of Roman Catholic Church Trust Property Act 1936 No 24

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## **Schedule 1      Amendment of Roman Catholic Church Trust Property Act 1936 No 24**

**[1] Part 1, heading**

Insert before section 1:

### **Part 1 Preliminary**

**[2] Part 2, heading**

Insert after section 2:

### **Part 2 Church property**

**[3] Part 3**

Insert after section 16:

### **Part 3 Sexual abuse claims paid from Trust funds**

#### **17 Definitions**

(1) In this Part:

***Church official*** means any person who acts as a representative of the Church and includes, but is not limited to, any of the following:

- (a) an official, officer or member of staff of the Church or of a diocese of the Church,
- (b) a lay assistant for the Church or for a diocese of the Church,
- (c) a volunteer for the Church or for a diocese of the Church,
- (d) a Provincial-General for New South Wales of a community,
- (e) a Provincial, Superior, Leader or President of a community.

***Church teacher*** means a teacher or member of staff of a theological college, school, orphanage or children's home operated under the auspices of the Church or of a diocese of the Church.

***community*** means a community within the meaning of the *Roman Catholic Church Communities' Lands Act 1942*.

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Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill  
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Amendment of Roman Catholic Church Trust Property Act 1936 No 24

Schedule 1

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***member of the Church's clergy*** includes the following:

- (a) an Archbishop or Coadjutor Archbishop of the Church,
- (b) a Bishop or Coadjutor Bishop of the Church,
- (c) a Vicar Capitular of the Church,
- (d) an Administrator of the Church,
- (e) a Vicar-General of the Church,
- (f) a priest or assistant priest of the Church,
- (g) a sister, nun, brother, monk or seminarian of the Church,
- (h) any other member of a religious order of the Church.

***sexual abuse*** means sexual conduct, or conduct that includes sexual conduct (whether or not there was apparent consent to that conduct and whether or not that conduct would, at the time of the relevant conduct, have constituted a sexual offence) perpetrated by a person who was, at the time of the relevant conduct, a member of the Church's clergy, a Church official or a Church teacher, while acting in his or her capacity as such a member, official or teacher.

- (2) For the purposes of this Part, a person was ***under the care of the Church*** if the person was owed a duty of care or fiduciary duty by the Church, a member of the Church's clergy, a Church official or a Church teacher and includes, but is not limited to, having been owed such a duty in the following capacities:
  - (a) as a member or parishioner of the Church,
  - (b) as a nun, monk or seminarian of the Church,
  - (c) as an altar server or other assistant in a church or diocese of the Church,
  - (d) as a student of a theological college, school, orphanage or children's home operated under the auspices of the Church or of a diocese of the Church.

### **18 Conduct of proceedings relating to sexual abuse by Church clergy, officials or teachers**

- (1) The plaintiff in civil proceedings relating to sexual abuse by a member of the Church's clergy, a Church official or a Church teacher of the plaintiff who was, at the time of the sexual abuse, under the care of the Church, may join as a defendant in those proceedings:
  - (a) the body corporate established under this Act for the diocese of the Church in which the abuse, or the majority of the abuse, is alleged to have occurred, and

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## consultation draft

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Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill  
2012

Schedule 1      Amendment of Roman Catholic Church Trust Property Act 1936 No 24

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- (b) the Bishop, and the Diocesan Consultors, of the diocese of the Church in which the abuse, or the majority of the abuse, is alleged to have occurred, in their capacity as trustees of Church trust property in that diocese, and
- (c) if the regulations so provide, a body corporate established under the *Roman Catholic Church Communities' Lands Act 1942*:
  - (i) by which the relevant member of the clergy, official or teacher was employed, or
  - (ii) that was established as trustee of community land of any community of which the relevant member of the clergy, official or teacher was a part.
- (2) In respect of any such proceedings, the relevant body corporate and its trustees are jointly and severally liable as if they were the member of the Church's clergy, the Church official or the Church teacher against whom the proceedings were also brought.
- (3) The court hearing such proceedings may extend the application of subsections (1) and (2) to a person who alleges sexual abuse by a member of the Church's clergy, a Church official or Church teacher and who was not at the time of the abuse under the care of the Church, but was so closely connected with the Church that the court believes it would be just to render the Church liable for the abuse, if proven.
- (4) A plaintiff who intends to joint any body corporate, Bishop or Diocesan Consultor as defendant in proceedings in reliance on subsection (1) must give notice of that intention to the body corporate, Bishop and Diocesan Consultor concerned within 28 days after the filing of the statement of claim in relation to the relevant proceedings.
- (5) This section extends to a cause of action arising before the commencement of this section.

**19 Judgments relating to sexual abuse by Church clergy, officials or teachers may be required to be paid from Trust funds**

- (1) A person who is owed an unpaid judgment debt in respect of civil liability arising as a result of sexual abuse by a member of the Church's clergy, a Church official or Church teacher against a person who was, at the time of the abuse, under the care of the Church, may bring an action for the recovery of the debt against:
  - (a) the body corporate established under this Act for the diocese of the Church in which the abuse, or the majority of the abuse, is alleged to have occurred, and

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## consultation draft

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Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill  
2012

Amendment of Roman Catholic Church Trust Property Act 1936 No 24

Schedule 1

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- (b) the Bishop, and the Diocesan Consultors, of the diocese of the Church in which the abuse, or the majority of the abuse, is alleged to have occurred, in their capacity as trustees of Church trust property in that diocese, and
  - (c) if the regulations so provide, a body corporate established under the *Roman Catholic Church Communities' Lands Act 1942*:
    - (i) by which the relevant member of the clergy, official or teacher was employed, or
    - (ii) that was established as trustee of community land of any community of which the relevant member of the clergy, official or teacher was a part.
- (2) In respect of any such action, those bodies corporate and those trustees are jointly and severally liable as if they were the member of the Church's clergy, the Church official or the Church teacher against whom the judgment was given.
  - (3) The court hearing such proceedings may extend the application of subsections (1) and (2) to a person found to have been sexually abused by a member of the Church's clergy, a Church official or Church teacher and who was not at the time of the abuse under the care of the Church, but was so closely connected with the Church that the court believes it would be just to render the Church liable for the abuse.
  - (4) This section extends to a cause of action arising before the commencement of this section.

### **20 Suspension of bar to actions on basis of limitation period having elapsed**

- (1) Despite any provision of the *Limitation Act 1969*, an action on a cause of action for Church sexual abuse is maintainable if it commences during the suspension period, regardless of the date on which the cause of action first accrued.
- (2) In this section:
  - Church sexual abuse*** means sexual abuse by a member of the Church's clergy, a Church official or a Church teacher in relation to a person who was, at the time of the sexual abuse, under the care of the Church.
  - suspension period*** means the period commencing on the date of assent to the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Act 2012* and ending on the second anniversary of that date.

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# consultation draft

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Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill  
2012

Amendment of Roman Catholic Church Trust Property Act 1936 No 24

Schedule 1

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## **21 Regulations**

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that is permitted to be prescribed by this Part.





# J

## USTICE for VICTIMS

SEEKING REMEDY  
FOR VICTIMS OF ABUSE  
BY THE  
CATHOLIC CHURCH

# A MESSAGE FROM DAVID SHOEBRIDGE



Friends,

*A core principle of any modern, responsible democracy is that no individual or organisation is beyond the law.*

*Tragically, this principle does not apply when victims of sexual abuse by Catholic clergy pursue civil claims.*

*This means that victims of abuse by members of the Catholic clergy are barred from an important means of obtaining justice, and the organisation responsible for their pain and suffering escapes accountability.*

*Given the historical failure of the Church to address claims of abuse, and the mounting evidence of mismanagement within the organisation, it is imperative for lawmakers to close legal loopholes which enable the Church to escape accountability on technicalities.*

*In consultation with victims, support groups, lawyers and other stakeholders, The Greens have drafted the Justice for Victims Bill, which will allow victims to sue the Catholic Church's property trusts.*

*This will mean that civil claims by victims of sexual abuse against the Catholic Church will be decided on their merits, not a legal technicality.*

*This is a matter of justice that extends beyond those who were abused or who are the family of those who suffered abuse. There are people of goodwill within the Church, as well as a growing support base outside the Church, who are demanding change.*

*I urge you to support this legislation and to join the campaign to force the Catholic Church out of the shadows where it can face real justice and genuine accountability.*

David Shoebridge

Greens NSW MP  
Justice spokesperson

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Get involved

“ States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child. ”

*Article 39, UN Convention on the Rights of the Child, 1989*



# DOES THE CATHOLIC CHURCH EXIST?

IF YOU'RE A PRIEST,  
FINANCIAL  
**Yes** PLANNER OR  
REAL-ESTATE  
AGENT

IF YOU'RE A  
VICTIM OF  
SEXUAL  
ABUSE **no**

*“Timid state officials have often let shrewd bishops and their cunning lawyers devise and exploit countless legal technicalities. If kids are to be protected, secular authorities must reduce this callous, hurtful legal hairsplitting.”*

**David Clohessy,  
Director, Survivors Network of those Abused  
by Priests (SNAP)**

Many people believe the Catholic Church to be an extraordinarily wealthy organisation, with one of the largest land holdings in the country. To an extent this is true. However, the property that is owned by ‘the Catholic Church’ in this state is held by a series of property trusts<sup>1</sup>, established under a law of the NSW Parliament that dates back to 1936.

At law, the entity known to the general population as ‘the Catholic Church’ is said to be an unincorporated association with no independent legal identity. Basically, this means that the Catholic Church in NSW<sup>2</sup> does not exist and cannot be sued.

This legal structure has very important and ongoing consequences for victims of abuse.

In a 2007 decision of the NSW Court of Appeal, affirmed on appeal to the High Court,<sup>3</sup> John Ellis sought compensation for sexual abuse he suffered at the hands of an assistant priest at Bass Hill Parish between 1974 and 1979.

Mr Ellis could not sue the deceased assistant priest. Neither could he sue ‘the Church’. Mr Ellis therefore sued the current Church leadership, in the form of Cardinal Pell, and the property trust that holds the Church’s assets.

In Court, the Church never disputed the fact that Mr Ellis had been sexually abused. Instead they persuaded the Court that the present leaders of the Catholic Church could not be held responsible for breaches of care by former members of the unincorporated association that is ‘the Catholic Church’.

The Church also argued, and the Court agreed, that the property trust could not be sued by victims of abuse as the trust was solely responsible for property matters and therefore not liable for any sexual abuse by members or officials of the Church.

Mr Ellis’ case was dismissed. Not only that, he was ordered to pay the Church’s legal costs. John Ellis like countless of victims, was left with no legal remedy.

Victims, and the Church, now simply refer to this case as the ‘Ellis Defence’.

1. A trust is a legal construction that allows one entity to own an asset but to then apply that asset’s income and resources to a third party. Here the trusts hold the property and apply it to the needs of the Church.

2. This problem is not limited to NSW, but the specific legal structures considered are those applicable in NSW.

3. Trustees of the Roman Catholic Church v Ellis & Anor [2007] NSWCA 117 leave to appeal to the High Court was refused in Ellis v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney [2007] HCATrans 697 (16 November 2007)

# THE SCALE OF THE PROBLEM

An accurate assessment of the number of Australian clergy involved in the sexual abuse of children is difficult to obtain. The Church in Australia has undertaken no publicly available research.

At the same time victims groups are often small, underfunded and struggling to cope with the reality of the abuse suffered by survivors, and are not in a position to undertake a nationwide study.

However there are overseas studies that provide some guide. The most widely recognised data comes from a 2004 report by the John Jay College

of Criminal Justice of the City University of New York. This was a report undertaken for the United States Conference of Catholic Bishops.

The report relied primarily on data supplied by the Church in the United States. It found that in the period from 1950 to 2002, there were 10,667 allegations of child sexual abuse, 6,700 of which were substantiated. Over that period a total of 4,392 priests stood accused of offences, representing around 4% of the priests in the US at the time.<sup>4</sup>

It is highly likely that the prevalence of abuse is significantly higher than the numbers recorded by the Church. It is well established that child sexual abuse and sexual abuse generally continue to be chronically underreported.

# SURVIVORS OF ABUSE FIND A VOICE

For decades, if not centuries, sexual abuse by members of the clergy was a taboo subject. Shame and stigma together with spiritual and emotional pressure silenced many victims. The Church, like many other institutions, developed its own internal structures of governance and accountability, potentially contributing to this cultural silence.

But this taboo has begun to break down. Over the past few decades, more and more survivors of abuse have gone public. Around the world - notably in America, Ireland, Italy, Canada, Belgium, France, and Australia - victims have begun telling their stories and demanding real justice from the Church.



**Given the historical failure of the Church to address claims of abuse, and the mounting evidence of mismanagement within the organisation, it is imperative for lawmakers to close legal loopholes which enable the Church to escape accountability on technicalities**

Many victims have also revealed that they, or their family, reported the abuse to the Church when it was happening. Time and time again victims tell of receiving no emotional, financial or spiritual support from the Church. They tell of their abusers simply being “moved on” to another parish to commit further crimes. Many victims, and their families, felt intimidated into silence.

There is substantial evidence to suggest that this systematic failure by the Church to take action to prevent abuse has been so serious and so widespread that urgent action is required from governments to hold the Church to account.

4. <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/The-Nature-and-Scope-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-and-Deacons-in-the-United-States-1950-2002.pdf>

# WHY VICTIMS MAKE CIVIL CLAIMS FOR FINANCIAL COMPENSATION

## HAVING A DAY IN COURT

For many victims the opportunity to face their abuser and the organisation that failed to protect them is a fundamental part of their conception of justice.

A civil claim provides victims with a chance to tell their story and have an independent judge address their claim.

Not every victim wants or needs their day in court, but for those that do it can be an empowering moment where they finally meet, as genuine equals, the Church that abused them.

## COMPARING COMPENSATION

For compensation to be just, most people believe it must be consistent so that like cases receive similar damages. Yet the practice for the Church, both in NSW and other jurisdictions, is so disparate that even a cursory view shows it is not delivering just outcomes.

In the **Netherlands** victims are generally awarded around €100,000.<sup>6</sup>

In **Canada** payments are estimated to fall between C\$10,000 and a C\$250,000.<sup>7</sup>

In the **United States**, figures vary. Some estimate the average payment to

## FINANCIAL COMPENSATION AND RECOGNITION OF HARM DONE

For those who feel the Church failed to protect them, seeking direct compensation from the Church is an important part of obtaining justice.

Financial compensation for victims is not about greed, it is about justice and fair recompense for the damage caused by the Church's failings. Abuse can affect a person's self-esteem, relationships, employment and financial situation. In these circumstances compensation payments can have a marked effect on a person's financial resilience.<sup>5</sup>

The needs of victims are very different. While one person may need counselling and some medical expenses paid, another person may need a bond to move away from where the crime took place.

Financial compensation enables these differing needs to be met.

be in the tens of thousands of dollars<sup>8</sup>, others cite a figure of US\$330,000<sup>9</sup>, but the highest recorded settlement was \$5.2 million.



In the **Sydney** Diocese of the Catholic Church the maximum payment that is authorised under the Towards Healing process is \$50,000 and anecdotal reports are that most payments are well below this.

Other dioceses such as **Maitland-Newcastle** do not limit payments and explicitly do not rely on the Ellis Defence and therefore have provided more substantial settlement sums to victims.

5. More information on the importance of civil claims and victims compensation is available from the International Organization for Victims Assistance, <http://www.iovahelp.org/About/MarleneAYoung/RoleOfVictComp.pdf>

6. <http://www.rnw.nl/english/bulletin/abuse-compensation-too-little-too-late>

7. <http://www.cbc.ca/news/canada/montreal/story/2011/10/06/montreal-church-abuse.html>

8. <http://www.bishop-accountability.org/ma-bos/settlements/SettlementLADiMaria.html> More information on settlements in the USA is available here: <http://www.bishop-accountability.org/settlements/>

9. Submission 17.

# TOWARDS HEALING CREATES FURTHER 'ABUSE'

## THE FAILURE OF THE CHURCH TO ADEQUATELY ADDRESS CLAIMS OF ABUSE

The Towards Healing program was created by the Catholic Church in 1996 to deal with the large numbers of victims of clerical sexual abuse coming forward. It sets out principles that are said to form the basis of the Church's response to complaints of abuse and the procedures to be followed in responding to individual complaints. In the Church's words:

"The Church makes a firm commitment to strive for seven things in particular: truth, humility, healing for the victims, assistance to other persons affected, a just response to those who are accused, an effective response to those who are guilty of abuse and prevention of abuse."

However, victim after victim who have been through Towards Healing tell a different story. They speak of it being a process that is indifferent to the rights of victims and designed to privilege the rights of the alleged perpetrators. In fact many victims of abuse have described the Towards Healing process as little more than "re-abuse" by the Church.

Lawyers who have worked with victims of abuse report that it is standard practice for the Church's lawyers to reference the Ellis Defence and tell victims to either accept a low settlement offer or inevitably lose their case in Court. As a result, these victims have accepted settlement offers from the Church that represented only a tiny fraction of the true damage they have suffered at the hands of the Church.

In short, Towards Healing is a failed process designed more to protect the interests of the Church than the rights of victims.

### **Towards Healing fails**

It is not truly independent of the Church

By its nature it cannot be transparent

It does not have substantial experience in criminal investigation

The Church in NSW places an artificial monetary cap of \$50,000 on compensation

## CASE STUDY - The story of one family's experience with Towards Healing.

"My son had made allegations of abuse against a member of the Christian Brothers in Victoria. These allegations were managed through the 'Towards Healing' process. As part of this process, my son told the story of his abuse at the hands of a member of the clergy.

The Melbourne Archdiocese which was tasked with adjudicating this matter decided that the allegations were unfounded. The Christian Brothers also rejected his claims.

The perpetrator of this abuse later pleaded guilty to criminal charges in regards the abuse of my son and another 11 other victims. He was subsequently sentenced to 14 years' gaol.

At the trial, Victim Impact Statements written by the young men affected were read out, each detailing a common thread and pattern in the abuse.



Despite the abuser being convicted as charged, my son was then told that it was only the Church's 'good faith' that allowed him to receive any compensation at all."

To be sexually abused was the first insult, to not be believed was the second, and to then be told your token compensation was an indulgence was the final humiliation at the hands of the Church.

*"Until an impartial third party is given the responsibility to oversee a compensation scheme, and there are other avenues for victims to obtain justice, the Towards Healing process will never provide true justice for victims of Catholic Church abuse."*

**CLAN Australia**

# THE WEALTH OF THE AUSTRALIAN CATHOLIC CHURCH

According to Business Review Weekly (BRW), in 2005 the Catholic Church in Australia was not only the biggest religious group in the country in financial terms, but also the richest non-profit organisation with an **annual turnover of \$16.2 billion**. It runs hospitals, schools, universities and hospices around the country.

In the 2010 financial year the Church received more than **\$400 million in government subsidies** in NSW alone, and more than **\$1.1 billion across the nation**. The Church also has substantial property holdings with assets believed to be worth over \$100 billion.

In the words of BRW: "If the Catholic Church were a corporation, it would be one of the top five in the country"<sup>10</sup>.

It is not poverty that prevents the Church from meeting the legitimate claims of victims – it is pure and simple self-interest.



## ONGOING

# ABUSE OF THE ELLIS DEFENCE

Since the decision in *Ellis*, the Catholic Church has continued to use the *Ellis* Defence to deny justice to victims of abuse.

Victims seeking justice from the Church continue to be told by the Church's lawyers that: *if you take this to Court you cannot win—have you heard of the case of Ellis?*

There is little doubt that the existence of this defence has reduced the number of cases brought before the courts.

In the face of these serious legal impediments many victims either give up, or accept heavily discounted settlements that do not come close to properly compensating them for their distress, hurt and loss.

*Ellis* has been followed in a number of cases including:

*PAO v Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Ors*; *BJH v Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Ors*; *SBM v Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Ors*; *IDF v Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Ors*; *PMA v Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Ors* [2011] NSWSC 1216 (19 October 2011)<sup>11</sup>; *Uttinger v The Trustees of the Hospitaller Order of St John of God Brothers* [2008] NSWSC 1354 (16 December 2008)<sup>12</sup>.

10. <http://blogs.theage.com.au/business/executivestyle/managementline/archives/brw2906p042-046.pdf>

11. <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWSC/2011/1216.html?stem=0&synonyms=0&query=NSWCA%202007%20117%20or%202007%20NSWCA%20117>

12. <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWSC/2008/1354.html?stem=0&synonyms=0&query=NSWCA%202007%20117%20or%202007%20NSWCA%20117>

# THE SOLUTION: JUSTICE FOR VICTIMS

The Justice for Victims Bill aims to do a very simple thing. It proposes to allow victims of sexual abuse to sue the property trusts as though they were the Church. It aims to force the Church to defend sexual abuse claims on their merits, not on legal technicalities, and in doing so the Bill attempts to give victims a real remedy.

The long title of the Bill describes its intention and function:

*An Act to amend the Roman Catholic Church Trust Property Act 1936 to provide for the ability of victims of sexual abuse where the abuser is found to be a member of the Catholic clergy and or another official and or officer in the Church to satisfy judgments awarded against such abusers as a judgment debt payable from the assets of the Trust and for other related purposes.*

## CREATING THE JUSTICE FOR VICTIMS BILL

In late 2011 the office of David Shoebridge produced a draft private members bill which had the express purpose of overriding the Ellis Defence in NSW law.

The draft bill - called The Roman Catholic Property Church Trust Property Amendment (Justice for Victims) Bill 2011 - was sent out for public consultation in December 2011.

More than 20 formal submissions were received during the consultation process, as well as dozens of informal messages of support.

Despite being provided with the consultation paper and Bill, Cardinal George Pell, as head of the Catholic Archdiocese of Sydney, failed to respond.



## THE ROMAN CATHOLIC PROPERTY CHURCH TRUST PROPERTY AMENDMENT (JUSTICE FOR VICTIMS) BILL

**By Greens NSW MP  
David Shoebridge  
will override the Ellis  
Defence in NSW law.**



### SUBMISSIONS RECEIVED

All submissions to the Justice for Victims Bill indicated that, in their opinion, the current law did not provide justice for victims of abuse of the Catholic Church. Many respondents cited the Ellis Defence as the main obstacle to justice for victims. One respondent summed it up as “profoundly unjust”.

In the absence of any clear indications by the Church that it proposes to restructure its affairs to meet claims of sexual abuse on their merits, there was universal support for a legislative change.

This change will allow the Church’s property trusts to be joined as defendants in civil claims where the plaintiff is alleging clerical sexual abuse. It gives the trusts the right to defend these claims on their merits and the obligation to pay those claims that are proven.



# CHANGES TO THE BILL FOLLOWING CONSULTATION

Changes proposed to the Justice for Victims Bill fell into four broad categories.

**Proposed change 1:** The Bill should be expanded to cover claims other than sexual abuse.

**Response:** Following feedback, The Greens have determined not to expand the scope of the Bill to include claims of clerical abuse other than sexual abuse. The question of sexual abuse is a matter that is best addressed squarely, and separately, in the Justice for Victims Bill. If the Bill passes it can be a model for further legislative reform.

**Proposed change 2:** The Bill should be expanded to allow the Church to be held accountable where there is a “close connection” between the abuse and the Church.

**Response:** This change was recommended to overcome the narrow interpretation of vicarious liability in Australia. In both Canada and the United Kingdom the courts have expanded the scope of vicarious liability to include cases where a wrongdoer has such a close connection with an organisation that it is just to hold that organisation liable for the wrongdoing. This approach has been adopted in the amended Bill.

**Proposed change 3:** The Bill should allow other statutory Church trusts to be joined as defendants, such as The Trustees of the Jesuit Fathers, Trustees of the Patrician Brothers and The Trustees of Boys’ Town, Engadine NSW.

**Response:** The Bill has been amended to allow these trusts to be covered by the Bill, as and when necessary, through a regulation-making power being granted to the government.

**Proposed change 4:** The Bill should be amended to allow for a suspension of the Statute of Limitations to allow historic cases of sexual abuse to be more easily contested. As the law presently stands most claimants are required to bring any claim for compensation within three years of their abuse<sup>13</sup>. Claims made after this time are generally only allowed to proceed if the Court grants the claimant ‘leave’.

**Response:** Following this feedback, The Greens have amended the Bill to allow a two year window for historic abuse claims to be brought to Court without being affected by the Statute of Limitations. This will allow victims to have more ready access to the Courts for compensation for the damage they suffered.

## FEEDBACK ON THE JUSTICE FOR VICTIMS BILL

### Artemis Legal

“The cost of sexual abuse is considerable. Currently, by far the majority of those costs are borne by the community and not the Church. Government bears the cost via direct cost to police services, the criminal justice system and health services and the indirect costs such as the support of the Victims Compensations Tribunal, criminal justice systems, social welfare and other institutional costs for the support of victims of preventable abuse.

“Further, where compensation is not paid to a victim of Clergy Abuse, the victim or the community pays the cost of providing and caring for those people. This Bill will assist in shifting many of these costs to the Church.”

### John A Turner

“The James Hardie asbestos case made it quite clear that a board and management should not be permitted to set up a structure which allowed the overall business to protect assets from genuine claims for damages.”

### Nicky Davis

“Nothing has so far prevailed to force this organisation to comply with the law or to cease endangering children, but the threat of being forced to be financially responsible for even a portion of the damage it has caused is likely to speak to the Catholic Church in the only language it understands – money.”

### Judy Courtin

“The church, like any other company or business organisation, must take responsibility for its actions.”

### Australian Lawyers Alliance

“The ALA welcomes this draft bill as an important step towards ensuring the many victims are able to seek compensation for the pain, suffering and loss they have endured.”

<sup>13</sup> The period is for 6 years for some claimants and for other claimants the period runs, not from the time of the abuse, but from the time they first received legal advice about their claim.

There are **TWO OPTIONS** for getting the Justice for Victims Bill passed.

1. **Obtaining the support of the Government** for the passage of the Bill
2. **Securing a commitment from both major parties** to a conscience vote.

Both of these options require members of the Government and Opposition to be aware of the strong public support to change the law and abolish the Ellis Defence.

## ONLINE

[justiceforvictims.org.au](http://justiceforvictims.org.au)

*download the petition and a sample letter;  
keep up to date and get involved*

## PHONE

*Follow up your  
letter with a call*

**SIGN**  
*the petition*

**HERE'S HOW  
YOU  
CAN HELP**

## WRITE

*to the Attorney General, Shadow Attorney  
General, Minister for Women, Archbishop  
George Pell and your local MP.*

### Key contact details

NSW Attorney General Greg Smith

Level 31, Governor Macquarie Tower  
1 Farrar Place, Sydney NSW 2000 (02) 9228 5246  
[office@smith.minister.nsw.gov.au](mailto:office@smith.minister.nsw.gov.au)

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Macquarie St, Sydney NSW 2000 (02) 9230 2604  
[office@lynch.minister.nsw.gov.au](mailto:office@lynch.minister.nsw.gov.au)

NSW Minister for Women Pru Goward

Level 34, Governor Macquarie Tower  
1 Farrar Place, Sydney NSW 2000 (02) 9228 5413  
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Cardinal George Pell

c/o Catholic Church Offices Polding Centre  
133 Liverpool St, Sydney NSW 2000 9390 5100  
[cathcomm@sydneycatholic.org](mailto:cathcomm@sydneycatholic.org)



# THE need FOR AN INQUIRY

*Legislative change requires more people becoming aware of the problem. This means more people speaking up for the victims of sexual abuse and all of us placing greater pressure on political and Church leaders to address this glaring injustice.*

**So get involved and become your own voice for justice.**

In April 2012 the Victorian Government announced that it would hold a Parliamentary inquiry into sexual abuse in religious and other organisations. This move came following a long-running, and sometimes bitter, campaign from survivors of sexual abuse and associated advocacy groups for an open and public inquiry.

Sadly, the inquiry in Victoria was announced only after the tragic effects of the failure to recognise and deal with the legacy of past abuse became publicly known. Those effects have included the suicide of some 40 survivors of abuse.

Survivors in NSW have many of the same experiences and needs as those in Victoria and deserve to have their elected representatives take the matter every bit as seriously.

The Greens in NSW have called on the Attorney General to support, at a minimum, a NSW Parliamentary inquiry and recognise that sexual abuse, especially in the Catholic Church, is not limited to Victoria. This inquiry would work together with legislative reform to address systematic institutional failures in the Church's response to sexual abuse claims.

To date the NSW Attorney General has failed to respond to these calls for an inquiry.



# NEED HELP OR SUPPORT?

*If you or someone you know is feeling suicidal or just needs help, there are many people who will gladly assist you if you let them know you have a problem.*

## CALL:

Lifeline 24 hour crisis support -13 11 14

## CONTACT

### ADULTS SURVIVING CHILD ABUSE

[counsellors@asca.org.au](mailto:counsellors@asca.org.au)  
(02) 8920 3611

### BRAVEHEARTS

<http://www.bravehearts.org.au/>  
1800 272 831

### BROKEN RITES AUSTRALIA

[www.brokenrites.alphalink.com.au](http://www.brokenrites.alphalink.com.au)  
(03) 9457 4999

### CLAN: CARE LEAVERS AUSTRALIA NETWORK

[www.clan.org.au](http://www.clan.org.au)  
1800 008 774

### PROJECT KIDSAFE AUSTRALIA

<http://www.projectkidsafe.org.au>

### SNAP: SURVIVORS NETWORK OF THOSE ABUSED BY PRIESTS

[www.snapnetwork.org/australia](http://www.snapnetwork.org/australia)  
0411 390 850



### CONTACT DETAILS:

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