

Civil Litigation

Obstacles in the way of bringing common law claims

Submission of the Australian Lawyers Alliance to the
Royal Commission on Institutional Responses to Child Sexual Abuse
Response to *Issues Paper 5 – Civil Litigation*

28 February 2014

CONTENTS

Who we are	3
Introduction.....	4
Summary of recommendations	4
The Current Law.....	6
Terms of reference	16
1. Elements of the civil litigation systems which raise issues for conduct of litigation brought by people who suffer child sexual abuse in institutional contexts	16
2. Other elements that raise issues for conduct of litigation.....	26
3. Early dispute resolution/mediation processes in civil litigation systems for people who suffer sexual abuse in institutional contexts	27
4. What changes should be made to address the elements of the civil litigation systems that raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts?	27
5. Do people who suffer child sexual abuse in institutional contexts want forms of redress in addition to, or instead of, damages through financial compensation? Can these other forms of redress be obtained through civil litigation?.....	28
Conclusion.....	34

For all enquiries regarding this submission, please contact Dr Andrew Morrison RFD SC at (02) 9231 3133.



WHO WE ARE

The Australian Lawyers Alliance ('ALA') 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 across 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 ALA 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 ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA is well placed to provide commentary to the Committee.

Members of the ALA regularly advise clients all over the country that have suffered injury or disability as a consequence of the wrongdoing of another.



INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Royal Commission into Institutional Responses to Child Sexual Abuse in response to the release of *Issues Paper 5 – Civil Litigation*.

The membership of the ALA retains specialist expertise in the laws governing, and the conduct of, relevant civil litigation.

SUMMARY OF RECOMMENDATIONS

Incorporation

Legislative change should ensure that all institutions with responsibility for children must be incorporated so that they can be sued at common law, as proposed by the Victorian Legislative Council Family and Community Development Committee Inquiry.²

Insurance

All institutions with responsibility for children should be required to have appropriate insurance.

Liability

All institutions with responsibility for children should be vicariously liable for the conduct of those who undertake their work, whether employed by them or not.

Institutions bearing a non-delegable duty should have the English test³ imposed so that they are liable if they choose to delegate their particular responsibilities, whether at fault in the choice or supervision of the delegate or not.

Limitation periods

The limitation period for institutional child abuse should be lifted throughout Australia.

Class actions

There should be a uniform system of class actions in all Australian jurisdictions.

Record keeping

Major institutions with responsibility for children should be required to create and maintain appropriate records.

Evidence

Evidence in these cases should be exchanged between the parties in writing, prior to hearing but with a right to supplement with oral evidence, and the right to cross-examine.

Assessment of damages

There should be a uniform system of assessment of damages for institutional abuse cases, employing the 3 per cent discount rate recommended by the Ipp Inquiry, and applicable in all Australian jurisdictions.

Cost of litigation, access to funding and legal services

There should be appropriate costs recommendations to permit victims to obtain and use appropriate legal assistance.

Early dispute resolution and mediation

Alternative dispute resolution, including mediation, should continue to be encouraged, as is the case in most Australian jurisdictions. Apologies are a helpful part of dispute resolution, but a genuine apology cannot be mandated.



Other forms of redress

Victims' compensation rights are so variable and subject to such constraints that they form no satisfactory basis for compensating victims Australia wide.

A national compensation fund is broadly attractive to abusive institutions, but not to victims. Experience has been that government will have to contribute to such a fund and in times of financial stringency, compensation will need to be restricted. Non-governmental institutions will want to get the benefits of restricted payouts to protect their assets. A national compensation fund will inevitably be an undercompensation fund.

THE CURRENT LAW

The following background analysis of the current legal position addresses a number of the issues raised.

In *State of NSW v Lepore* (2003) 212 CLR 511, the plaintiff was a seven year old pupil in a government school, assaulted by a teacher in a storeroom adjoining a classroom in 1978. The assault had a sexual element. His action against the education department failed at first instance but his appeal to the NSW Court of Appeal was successful on the basis of a non-delegable duty of care. On appeal by the State of NSW to the High Court, it was held that non-delegable did not amount to strict liability. However, relevant findings had not been made at first instance and a re-trial was ordered. The case was enlivened by recent superior court decisions in Canada and England. In *Bazley v Curry* (1999) 174 DLR (4th) 45 and *Jacobi v Griffiths* 174 DLR (4th) 71, the Canadian Supreme Court expressed the view that the Salmond test for vicarious liability of employers for employee acts did not preclude liability for criminal actions and sexual assaults. The traditional test was that vicarious liability was 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 authorised acts. Thus, employers for more than 100 years have been held liable for thefts by employees from customers. The fundamental question traditionally was



whether the wrongful act was sufficiently related to the employer's aims. The Canadian Supreme Court espoused a close connection test, which said that it was relevant whether power, intimacy and vulnerability made it appropriate to extend vicarious liability even for acts which were manifestly criminal. This approach was adopted by the House of Lords in England in *Lister & Ors v Hesley Hall Ltd* [2001] 2 All ER 769, where the plaintiffs 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 below, the House of Lords unanimously held the plaintiff should succeed, applying the close connection test, and found the defendant vicariously liable for the acts of criminal and sexual assault by its employee.

In *Lepore* in the High Court, 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 to commit sexual abuse may provide a sufficient connection between the sexual assault and the 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 the 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 re-trial was required.

Accordingly, there was a majority of 4:3 for the proposition that the plaintiff could succeed in respect of criminal acts, but no clear agreement as to why. The action was

sent back for re-trial but ultimately settled on satisfactory terms.

In *Trustees of the Roman Catholic Church for the Diocese of Sydney and Pell v John Ellis* [2007] NSWCA 117, [2007] HCA 697, the plaintiff alleged that from about 1974, when he was 13, until about 1979, when he was 18, he was engaged as an altar server in the Roman Catholic Church at Bass Hill. He alleged (and the Church in its Towards Healing process accepted) that he was subject to frequent sexual assaults 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) (subsequently amended in 1986) (NSW). It is noted that there is similar but not identical legislation in other states.

John Ellis approached the Catholic Church with his complaint. The Church took more than a year to appoint an investigator, 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. However, on the first day of hearing of the application, another former altar boy came forward and said he had also been abused by Father Duggan as successor to John Ellis. He said he knew that John Ellis was his predecessor and would also have been abused and would have disclosed this if asked. Steven Smith gave evidence (unchallenged) that in 1983 he gave Father McGloin, Dean of the Cathedral in Sydney, a statutory declaration detailing the sexual assaults upon him. Instead of investigating this claim, Father McGloin confronted him with the perpetrator and left them alone and Mr Smith did not pursue the matter further. The Church produced no records of the statutory declaration or of any investigation. The Church did not call Father McGloin. It did not challenge the allegations of sexual abuse, which in any event had been accepted in the Towards Healing investigation. It simply argued there was no-one to sue because the Trustees merely held the property of the Church, which was itself not a legal entity. At first instance, it was held that because the membership of the Church was so ill-defined, no representative order could be made against Cardinal Pell but there was an arguable case that the Trustees could be

sued. The failure to investigate in 1983 overcame the claims 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. 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 only liable in respect of property matters, at least for the period prior to legislative amendment in 1986 and the Church has argued even after legislative change in 1986. If this argument is correct, then not merely is there no-one to sue in respect of negligence or misconduct by priests, but nor is there anyone to sue in respect of negligence or misconduct by teachers in Roman Catholic parochial schools, at least in NSW and arguably in the rest of Australia. In any event, the Court held that priests are not employees of the Church and there is no vicarious liability. In part, this is because their stipends are paid by the parish (for the most part) rather than directly by the Church. The Church maintains that whether or not the Trustees who hold all the assets can be sued is a matter for the discretion of the bishop in each individual diocese, who may offer up the Trustees as a defendant or decline to do so.

In practice and in a number of dioceses such as Newcastle Maitland, a number of bishops have made that concession. Notably, however, in the Archdiocese of Sydney, no such concession is made to this day. The lawyers acting on behalf of the Catholic Church continue in discussions and negotiations to threaten that any litigation will fail if a nominal amount offered is not accepted.

The High Court refused special leave to appeal from the decision of the NSW Court of Appeal [2007] HCA 697.

Meanwhile the law has moved on in other countries. In *Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256, the plaintiff, aged about 12 or 13 in 1975 and 1976, was sexually abused by Father

Clonan. The claimant's father complained to another priest and the Archdiocese was found negligent in not pursuing the matter. However, at first instance it was held that the Archdiocese owed the claimant no duty of care and was not vicariously liable for Father Clonan's sexual abuse of the claimant.

On appeal, Lord Neuberger MR in the Court of Appeal upheld the trial judge's finding that the claimant was not out of time to sue and held that the finding of sexual abuse was supported by the evidence. However, he followed the *Lister v Hesley Hall Ltd* approach in the House of Lords, which in turn followed the Canadian Supreme Court approach, and this meant the appropriate test was whether the wrongful conduct was 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 dressed in clerical garb and developed his relationship under the cloak or guise of performing his pastoral duties in youth work. It was relevant that the claimant was young, and it was Church activities including discos on Church premises which gave Father Clonan the opportunity to pursue the sexual relationship. 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 found that the Church owed a duty of care to the claimant and that it was wrong (as had been done at first instance) to characterise it as an allegation of a duty of care to the world in general. In addition, he found that in failing to investigate the complaint the Church was directly liable. Longmore and Smith LJJ, also applying the close connection test, agreed.

On the other hand, in *PAO, BJH, SBM, IDF and TMA v Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Ors* [2011] NSWSC 1216, Hoeben J had to consider whether actions by various plaintiffs against 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 Archdiocese Trustees operated and managed Patrician Brothers Primary School Granville (they certainly held the property of the school) when in 1974, each plaintiff was sexually assaulted by

Thomas Grealy (also known as Brother Augustine) whilst young students. Associate Justice Harrison had earlier declined to strike out or summarily dismiss the five proceedings. The plaintiffs submitted there was evidence before the Court showing some involvement of the Archdiocese Trustees in the running of schools and in particular, some responsibility for the financial management of funds collected by the schools by way of fees, donations and the like. Hoeben J concluded 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. The plaintiffs' cases 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. Applying the *Ellis* decision, Hoeben J struck out all five claims.

However, in England in *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 (QB), 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 conducted by an arm of the Church. 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 arise. Significantly, however, the Roman Catholic Church in England and Wales accepted that its Trustees stood in the shoes of the bishop for present purposes, accepted that for the purposes of litigation its Trustees holding its property were its secular arm and were a proper defendant if vicarious liability arose.

MacDuff J noted that the test for vicarious liability had changed to give precedence to function over form and that the old approach in *Trotman v North Yorkshire County Council* [1999] LGR 584 (CA) had been replaced in relation to vicarious liability and the scope of employment by the House of Lords decision in *Lister v Hesley Hall Ltd*, applying a close connection test. This approach had been followed in *Maga*.

MacDuff J added that 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.

However, he noted that in Canada, the Supreme Court in *Doe v Bennett & Ors* [2004] ISCR 436, 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 sufficient to make the bishop vicariously liable. MacDuff J dismissed the strike-out application.

On appeal to the English Court of Appeal, Ward LJ referred to *NSW v Lepore* and quoted the views of Gaudron J at [123-125]. Applying the organisation test, the priest was part of the Church’s organisation and wholly integrated into the organisational structure of the Church’s enterprise. The priest was not an independent contractor and was more like an employee. He concluded the defendants were vicariously liable for misconduct, including criminal misconduct by a priest. Davis LJ took a similar view, Tomlinson LJ dissenting. The defendants were refused leave to appeal to the Supreme Court (replacing the House of Lords) because another case was about to deal with these issues.

That case was the decision in *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 institution for boys in need of care 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 challenged on appeal. However, the Middlesbrough defendants challenged the findings below that the De La Salle order was not vicariously liable for the actions of its brothers and therefore liable to contribute in damages. 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*.
- (iv) It is possible for two different defendants to be each 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.

Whilst 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* (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 *Ellis* is surprisingly not mentioned.

Applying the Canadian close connection test in *Bazley v Curry* and *Jacobi v Griffiths* as well as *John Doe v Bennett* and *Blackwater v Plint*, as well as the House of Lords decision in *Lister v Hesley Hall*, he also noted that in a commercial context the House of Lords had taken a similar view in *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48; [2003] 2 AC 366, 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 [86] (with the concurrence of the balance of the Supreme Court) said:

“Vicarious liability is imposed where a defendant, whose relationship with the abuser put 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.”

In England, Canada, Ireland and the United States, the Roman Catholic Church accepts or has been held to be liable through the trustees who hold its property if lawfully sued for the misconduct of priests or teachers. 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. In each of those countries it is now established through the close connection test that the Church and its trustees are liable for the criminal conduct of clergy, including sexual abuse of children, which occurs in the course of their duties.

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 then) 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 through the fault of a teacher or in respect of sexual abuse by a teacher depends upon the whim of the bishop in the particular diocese. In some diocese, the *Ellis* point will not be taken. In the Archdiocese of Sydney, experience suggests that it is always taken as a means of generating settlement leverage.

In the Victorian Legislative Council Family and Community Development Committee Inquiry “Portrayal of Trust” Report of 13 November 2013, the Committee recommended important civil law reforms, including:

1. requiring all churches to have incorporated legal status so they can be sued;
2. making churches vicariously liable for their personnel (including clergy and teachers);

3. removing the limitation period, which restricts access to justice.

It has recommended legislative change to remedy the issues of legal identity available to be sued, access to the assets of the Church, as well as removing the limitation restrictions making an extension of time extraordinarily difficult. In NSW, draft legislation, the *Roman Catholic Church Property Amendment (Justice for Victims) Bill 2012 (NSW)*, has been circulated in the NSW Legislative Council but not introduced [copy annexed]. That legislation would have the effect of making the trustees in each archdiocese vicariously liable for the actions of priests and opening a window of time during which the limitation restrictions applicable in NSW would not apply to prevent claims.

Nor is it acceptable that in Australia, as distinct from the rest of the common law world, any church can effectively be immune from suit in respect of child sexual abuse due to its structure.

That a religious body can employ teachers, accept taxpayer funds, and have charitable status, all whilst legally non-existent, defies common sense.

TERMS OF REFERENCE

Turning then to the specific questions asked, the remedies would seem to be as follows.

1. Elements of the civil litigation systems which raise issues for conduct of litigation brought by people who suffer child sexual abuse in institutional contexts

(a) There needs to be legislative change in respect of any churches that is currently unincorporated under individual state laws to give it legal form. That may mean making it liable through the trustees holding its assets or by some other means. Any church or institution with care for or a role in the care of children should be compelled to be incorporated and insured.

(b) All institutions which care for or have a role in the care of children should be

required to hold insurance policies against liability, which should include liability for the sexual misconduct of employees, clergy and those given access to children under its auspices. This may require in respect of sporting organisations some form of overall insurance cover to which such organisations are required by law to contribute in return for indemnity.

- (c) It is submitted that absent a case in which the High Court has the opportunity to adopt the close connection test, there should be legislative change mandating that test in respect of vicarious liability for the conduct of those in employment-like circumstances, such as clergy.

Institutions generally owe a non-delegable duty of care to victims. However, in *State of NSW v Lepore* [2003] 212 CLR 511, it was said that the duty was only to take reasonable steps when delegating responsibility to others.

In *Woodland v Essex County Council* [2013] UKSC 66, it was held that where an organisation delegated part of its own duties, it could not avoid liability merely because it had no reason to suppose the delegate would abuse its trust. That higher level of non-delegable care should be mandated by law in Australia in institutional abuse cases.

- (d) It is difficult to envisage situations in which regulators of organisations or institutions involved in or with the care of children could be held liable for failures within those institutions. Nor is it the circumstance where legislative change to that position seems appropriate. Making government responsible for misconduct within private operators is a very poor second-best to requiring those operators to be responsible for the conduct of those they employ or those to whom they give access to children and requiring those organisations to have appropriate insurance.
- (e) This is not the place for a detailed discussion of the limitation regimes which vary widely amongst the Australian states and territories. Suffice it to say that there is a wide variety of regimes but in general, the normal limitation period for tortious

claims is three years. Time may not run in respect of infants and those under disabilities but even this is not universal if, as in NSW, there is an adult who could have brought the proceedings on behalf of the infant or disabled person. There are provisions for extensions of time in all jurisdictions but these vary widely from the very limited rights in Queensland to the far more liberal regime in South Australia. In general, however, it is very difficult and expensive to obtain an extension of time if a substantial period is involved.

A 2009 survey by the Anglican church found that the average time from abuse to first complaint was 23 years.⁴ That accords with our experience as legal practitioners in this field.

Not merely does the injured person have to qualify in respect of the specific extension of time provisions in the particular state or territory where the cause of action arose, but the overarching question is compliance with the decision in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, where the High Court requires that a fair but not perfect trial still be possible. Where significant witnesses are no longer available or records destroyed through lapse of time, this will frequently preclude an extension of time to which a plaintiff would otherwise be entitled and even though there is no fault on the part of the claimant.

The Victorian Legislative Council Inquiry has recommended and the draft legislation circulated in the NSW Legislative Council has suggested a waiving of the limitation restrictions, at least for a period of time. Given that the institutionally abused have generally been in the weakest position to protect their rights and interests and frequently the action in suing should have been instituted by the very organisation responsible for their care, legislative reform along the lines suggested by the Victorian Legislative Council Committee or in the draft bill, the *Roman Catholic Church Property Amendment (Justice for Victims) Bill 2012* (NSW), would be an appropriate remedy.

(f) As to class actions, again, this is not the place for an extensive treatise on the varying state, federal and territory legislative schemes for class actions. There are significant differences between them. A single provision to be universally adopted

in all states and territories in respect of institutional child sexual abuse, perhaps adopting the Federal Court provisions, might be a way forward.

- (g) Access to relevant records which are often many decades old, is frequently a challenging problem. The worst problem in this regard is usually in respect of the Roman Catholic Church, where identifying a legal entity to which a subpoena might be issued becomes extremely challenging.

For example, there are a large number of claims of historic abuse in the 1980s at St Stanislaus school operated by the Roman Catholic Church in NSW. The school's records for the period have been seized by the police and are not available at present whilst criminal proceedings are ongoing. The current school and the Vincentian Order, the Church itself and Roman Catholic Church Insurance say that they do not know what legal entity it was that operated the school at the relevant time. This is despite the fact that the school would have been receiving grants from the State and Commonwealth government (presumably paid to the non-legal entity Catholic Education Office and then paid on to an unknown legal entity at the school), staff were employed by some legal or non-legal entity, group certificates issued, wages records issued, tax deducted and paid to the Commonwealth and appropriate records kept for compliance with the various obligations, including workers' compensation insurance and the like.

By maintaining in respect of that school that no-one can identify the legal entity which conducted at the relevant time in the 1980s, Catholic Church Insurance delays claims by multiple victims of abuse in respect of clergy/teachers who have already been the subject of criminal conviction.

It is also common for it to be asserted that the cost of retrieving records and sorting them, particularly when they are from a considerable period, perhaps many decades earlier, is very high. Again, it is unfair that that expense be required to be met upfront by the victim, with the possibility of recovering some portion (but not a complete indemnity) under costs and disbursements on a successful action on a much later date. It is submitted that all major institutions with responsibility for children should be

required to keep appropriate records, maintain them, at least electronically, for upwards of 30 years and make them accessible. Access should be at either nominal or no cost. Otherwise the interests of justice may be precluded by costs and by efforts to have subpoenas struck out because the amount of work involved is said to be excessive for the institution.

(h) There can be no doubt that the ordinary court process of giving evidence, being cross-examined and being in the public gaze can be traumatic and stressful for many victims. The following matters however, are also relevant considerations. Organisations and institutions sued are entitled to test the evidence and it cannot simply be assumed that an allegation is true because it has been made. Courts have the power to make orders restricting access of the public in appropriate cases or even where access is permitted, not permitting the publication of information such as anything which would identify the name, family or location of a person making a claim of abuse. These are very important safeguards in the current legal system which, it is submitted, are generally effective, albeit that there is some variation in the way in which these things are done from jurisdiction to jurisdiction.

Increasingly, courts are inclined to prefer that lay witnesses' evidence be substantially put in writing, which can then be supplemented by some much briefer oral evidence and cross-examination. Whilst not universal in the varying court systems, this does have the effect, when used, of greatly reducing the stress on those required to give evidence. Greater use of this as a tool in these cases is accordingly commended. It should not, however, it is submitted, be used to replace evidence in-chief entirely because if it were to, then the judge or judge and jury hearing the case (dependent on jurisdiction) would only see the plaintiff in cross-examination, which may paint a false picture of the witnesses' evidence.

The other matter which needs to be borne in mind is that the overwhelming majority of cases settle before getting to court. Mediation, arbitration, informal and formal settlement conferences are normal in all jurisdictions under different formats adapted to local needs. Only a small minority of cases are actually heard in court.

It is submitted that we should be very hesitant to replace well-established and relatively effective systems of justice in the ordinary court system in these circumstances. There is a real risk of simply creating a parallel system at vast public expense and without many of the safeguards existing in an independent judicial system.

- (i) The difficulties of proving that a victim's injuries and losses were caused by the abuse can be exaggerated. As was pointed out in *Shorey v PT Ltd* (2003) 77 ALJR 1104 by the High Court, all a plaintiff has to establish is that the tortious act was "a cause" not "the cause" of the loss. It was also said in that case that the law as laid down in *Watts v Rake* (1960) 108 CLR 158 and *Purkess v Crittenden* (1965) 114 CLR 164 remains settled law applicable to judicial reasoning whether at first instance or on appeal.

In *Watts v Rake*, Dixon CJ said (160):

"If the disabilities of the plaintiff can be disentangled and one or more traced to causes in which the injuries he sustained through the accident play no part, it is the defendant who should be required to do the disentangling and to exclude the operation of the accident as a contributory cause. If it be the case that at some future date the plaintiff would in any event have reached his present pitiable state, the defendant should be called upon to prove that satisfactorily and moreover to show the period at the close of which it would have occurred. For myself I do not think that he has proved more than that at an earlier time than other men the plaintiff would have reached a stage of disability but not the same disability."

Referring to this passage in *Purkess v Crittenden*, Barwick CJ, Kitto and Taylor JJ said (at 168 to 169) that:

"We understand that case to proceed upon the basis that where a plaintiff has, by direct or circumstantial evidence, made out a prima facie case that incapacity has resulted from the defendant's negligence, the onus of adducing evidence that his incapacity is wholly or partly the result of some pre-existing condition or that incapacity, either total or partial, would, in any

event, have resulted from a pre-existing condition, rests upon the defendant. In other words, in the absence of such evidence the plaintiff, if his evidence be accepted, will be entitled to succeed on the issue of damages and no issue will arise as to the existence of any pre-existing abnormality or its prospective results, or as to the relationship of any such abnormality to the disabilities of which he complains at the trial. ...

[I]t is enough for the defendant merely to suggest the existence of a progressive pre-existing condition in the plaintiff or a relationship between any such condition and the plaintiff's present incapacity. On the contrary it was stressed that both the pre-existing condition and its future probable effects or its actual relationship to that incapacity must be the subject of evidence (i.e. either substantive evidence in the defendant's case or evidence extracted by cross-examination in the plaintiff's case) which, if accepted, would establish with some reasonable measure of precision, what the pre-existing condition was and what its future effects, both as to their nature and their future development and progress, were likely to be. That being done, it is for the plaintiff upon the whole of the evidence to satisfy the tribunal of fact of the extent of the injury caused by the defendant's negligence. In the present case the evidence accepted by the learned trial judge by no means established with any reasonable degree of precision the extent of the appellant's pre-existing affliction or what its future effects, apart from the result of the defendant's negligence, were likely to be. That being so we think it was proper for him to deal with the case on the basis that the defendant's negligence was the cause of the appellant's permanent disability and, accordingly, we propose to deal with this appeal on the same basis."

In other words, whilst the legal onus is on the plaintiff, there is an effective shift of evidentiary onus to the defendant if it is to be asserted that the plaintiff's problems are caused by some pre-existing condition. Relevantly, that condition could often be some previous abuse prior to that within an institutional context. Whilst the *Civil Liability Acts* and their equivalents generally place the onus in law permanently on the plaintiff, there does not appear to have been a decision in any jurisdiction to indicate that the shift of evidentiary onus has changed. In these circumstances, a correct application of the current law makes proof of causation based upon appropriate

medical evidence indicating that the institutional abuse was a cause of the condition, relatively easy. Unless some court was to take a different view of the law, the situation as laid down in the High Court in the leading authorities referred to earlier, seems, it is submitted, to be quite satisfactory.

- (j) There are significant variations in the way damages are assessed. Given the extent to which they vary from one state and territory to another, it is beyond the scope of these submissions to provide a treatise on the complexities in this regard.

It is, however, possible to point out the major discrepancies and injustices. The first is the discount rate. The High Court at common law in *Todorovic v Waller* (1981) 150 CLR 402 compromised on a 3% discount rate on lump sum compensation. The discount rate is meant to reflect the advantages of an upfront sum which can be invested in relatively secure investments and the return which might be expected after inflation and taxation are taken into account. In England, the current rate is 2½% and there is significant pressure to reduce it further. However, NSW adopted a 5% discount rate in all cases except where there is an intentional tort or sexual abuse and where the perpetrator is being sued. See s 3B of the *Civil Liability Act* 2002. In simple negligence cases, the discount rate is 5%. That is the same in all other jurisdictions but without the exception for intentional injuries and sexual misconduct and except in Western Australia and the Northern Territory, where the discount rate is 6%.

The requirement that monies be conservatively invested so as to produce on average over a lengthy period of time a return of 6% after tax and inflation is simply laughable. Experience has indicated that for someone with a long-term disability and a reasonably long life expectancy, the reduction in the allowance for future care and future economic loss brings the overall damages down in a 5% case by between 25% and 30% by comparison with a 3% case. The discount in a 6% case by comparison with a 3% in similar circumstances will be more like 35% or 40%.

It is not possible to be precise in respect of these figures given that they will vary significantly according to the length and cost of future care and length and extent of future diminution of economic capacity and future medical needs. However, long

experience has indicated that whereas a 3% discount rate is a high discount but may be achievable, 5% and 6% discount rates are simply punitive.

The Ipp Report and a NSW Legislative Council Report unanimously recommended a 3% discount rate, and it is submitted that the Royal Commission should take the same approach.

In this regard the Ipp Committee stated:

“...in the Panel’s opinion, using a discount rate higher than can reasonably be justified by reference to the appropriate criteria would be an unfair and entirely arbitrary way of reducing the total damages bill. Furthermore, we have seen that the group that would be most disadvantaged by doing so would be those who are most in need — namely the most seriously injured. It would be inconsistent with the principles that have guided our thinking in this area to reduce the compensation recoverable by the most seriously injured by increasing the discount rate, simply because damages awards in serious cases could thereby be significantly reduced. In this context, it should be noted that although an increase in the discount rate can yield large reductions in awards in serious cases, such cases represent only a relatively small proportion of the total compensation bill...”

This... suggests to the Panel that 3 per cent remains a reasonable rate, and does not appear to be any good reason to go above 4 per cent. We therefore recommend a nationally uniform discount rate of 3 per cent.”⁶⁵

The NSW Legislative Council Report relevantly stated:

“On a separate issue, the Committee also notes that all areas of personal injury law in New South Wales apply a discount rate of 5% to future economic loss damages paid as a lump sum. This discount rate is intended to acknowledge that a plaintiff awarded a lump sum gains control of that money straight away, allowing the plaintiff to invest the money and gain interest. However, the Committee is concerned that the 5% discount rate is simply too high, meaning that many permanently injured people who receive a lump-sum will not have sufficient income on which to live in the future, and believes that a 3% discount rate would be more appropriate, in line with the recommendation of the Review of the Law of Negligence Report. Importantly, while other Government reforms to personal injury compensation law, notably the use of the thresholds, have sought to limit

*the amount of damages payable to the less seriously injured, the 5% discount rate affects the most seriously and catastrophically injured, who are most in need of assistance.*⁶

There are wide variations in the way in which damages for non-economic loss/general damages for pain and suffering and loss of amenities of life are assessed. One way of looking at it would be to say that those in Western Australia and Queensland appear to feel pain only half as much as those in NSW. Victoria is somewhere in-between. That is unsatisfactory in circumstances where activities, abuse and failings can occur even in a single case across multiple jurisdictions. Some attempt to standardise the approach, as well as the method of assessment, would seem appropriate.

In some jurisdictions there are caps on compensation for economic loss and caps on compensation by way of interest and for compensation for gratuitous services. Those caps will inevitably result in under-compensation in some cases, albeit that the economic loss caps will rarely apply to child sexual abuse victims in practice.

The Ipp Inquiry recommended a 3% discount rate and a single set of principles for compensation. The different states and territories have very much gone their own way in the various *Civil Liability Acts* and equivalent legislation, leaving compensation a mess of common law modified by statute differently in every jurisdiction. Given that these matters are largely for state and territory law, a single recommended approach would seem appropriate.

(k) Litigation is undoubtedly expensive, particularly if it goes to hearing. Except for Aboriginals and Torres Strait Islanders, civil legal aid is extremely rare throughout Australia. Even in the very exceptional case where it is granted, it does not adequately fund the expert reports required, let alone pay for a reasonable quality of legal services.

Litigation funding in Australia (unlike England) is quite rare. In general, the only effective form of legal aid available is from relatively well-resourced firms of lawyers (practising as solicitors), who fund litigation on a no win/no fee basis in most cases,

and hope to recover their fees at the conclusion of the case.

Again, this is not the place for a detailed description of the different costs regimes in the different states and territories. Suffice it to say that there are very wide variations in respect of what entitlement exists on any costs order following assessment or taxation. In general, however, it would be fair to say that whereas an order for costs in the 1960s or early 1970s might have produced something close to the market cost of lawyer's services and the market cost of expert medical, engineering and like expert reports, that is no longer the case. Cost pressures meant that those who had the responsibility of updating costs and disbursements to be allowed could appear to be restraining inflationary pressures by keeping increases well below the true cost of inflation. The effect, however, was that the shortfall has increasingly been met out of the ultimate damages. The result is that an order for costs in a jurisdiction such as NSW is now worth about 60% to two-thirds of the reasonable costs and disbursements assuming competent and moderately charging legal practitioners. The balance comes out of the successful plaintiff's damages.

By comparison, in England, 100% of the reasonable costs and disbursements are recovered. It is submitted that in justice, that ought to be the situation here. Restricting costs and disbursements benefits insurers but harms the victims. In the exceptional case, an order for indemnity costs still only compensates about 90% of the reasonable costs and disbursements and not 100%.

The regimes which offer indemnity costs by way of benefit for a successful costs offer vary but in general favour insurer/defendants. Whereas a plaintiff who does not beat a defendant's offer goes from receiving costs to paying costs, the insurer that does not beat a successful plaintiff's offer only goes from paying standard costs to paying indemnity costs. The penalty is vastly less. Yet in general, plaintiffs have little financial capacity and institutions and their insurers tend to have vastly greater capacity to fund and fight litigation. The imbalance is clearly an injustice.

2. Other elements that raise issues for conduct of litigation

The above comments adequately set out the elements of the civil litigation systems that raise issues for the conduct of litigation in these circumstances.

3. Early dispute resolution/mediation processes in civil litigation systems for people who suffer sexual abuse in institutional contexts

In general, early dispute resolution and mediation processes work well. The overwhelming majority of cases never reach court. That is as it should be. It should be the exceptional case which either through extraordinary complexity or through the unreasonableness of one side or the other, needs to be litigated.

The difficulties set out above should be addressed in the way earlier specified. The Victorian Upper House Inquiry raised the possibility of a specialist tribunal. Sometimes these can be effective, for example, the Dust Diseases Tribunal in NSW, but the multiplicity of different systems of justice is generally undesirable as well as expensive. Our members have appeared before many different tribunals as well as regularly in the courts. Our overwhelming preference in the interests of justice is to retain the right of hearing before an independent judge (or judge and jury) as the final resort if a matter does not resolve in the ordinary course of early dispute resolution.

4. What changes should be made to address the elements of the civil litigation systems that raise issues for the conduct of litigation brought by people who suffer child sexual abuse in institutional contexts?

Creating a separate system or systems in relation to compensation of victims is broadly unattractive and likely to be ultimately less just than access to the independent judiciary.

Within all the states and territories there are various criminal injury compensation regimes with different limitation restrictions and different criteria for compensation, as well as different amounts permitted to be awarded. In NSW, the maximum award has recently been reduced to \$15,000 and those proffering legal assistance by way of obtaining expert reports and the like will receive only nominal amounts. The limitation period precludes the use of this system in most cases in any event. For all practical purposes it is useless in terms of access to reasonable compensation.

It is submitted that a proper and standardised legal regime in respect of liability and compensation applicable in all states and territories to be administered by the ordinary courts is, in our view, ultimately the fairest and most just alternative.

5. **Do people who suffer child sexual abuse in institutional contexts want forms of redress in addition to, or instead of, damages through financial compensation? Can these other forms of redress be obtained through civil litigation?**

Apology

The main other form of redress that is desired by a large number of victims is a genuine apology by the institution where the abuse has occurred. Experience has been that many of the apologies proffered, for example by the Towards Healing process, have been perfunctory rather than heartfelt and have failed to meet the real needs of the victim. On the other hand, some apologies have been clearly genuine and effective. Experience in the medico-legal field as well as in the field of sexual abuse victims suggests that a genuine apology does a great deal to assuage the feelings of the victim. Such apologies can be part of a resolution by way of settlement in all jurisdictions now. It is, however, hard to see how they could be mandated and remain genuine. Apologies should, it is submitted, be encouraged but not required.

Other forms of assistance

The only other forms of assistance likely to be desirable would be by way of interim damages or early payments for medical assistance, counselling and the like. These are available in some but not all jurisdictions. A standardised scheme of interim

awards and of entitlement to seek early assistance in this regard would be desirable.

The inadequacy of a compensation fund

We note that there have been suggestions from various institutions, and from survivor associations, that a national compensation fund should be established to provide compensation to victims of abuse.⁷

With respect, we do not believe that calls for a compensation fund are purely motivated by a wish to demonstrate justice, but rather a wish to curtail liability and to avoid the higher cost of compensating people appropriately. Rather than a compensation fund, we believe that this will act as an undercompensation fund.

The processing of compensation funds has proven to lack an appropriate degree of trust and victims will want to know that justice has been done: to them, to their abusers, and to the institution. A compensation scheme may deny victims the solace of that transparency.

The following examples are illustrative:

Victims Compensation Scheme NSW

In NSW, in 2013, the statutory compensation scheme set up for victims of crime was radically slashed, with maximum payments reduced from \$50,000 to \$15,000, with only nominal payments for legal assistance. There had been no increase to compensation payments, not even for inflation, in 25 years.

As of June 2011, the waiting period for a victims compensation decision was, on average, 25 months.

In 2013, the Australian Lawyers Alliance was a signatory to a joint letter of over 30 organisations lodging an urgent complaint regarding the changes, to the UN Special rapporteur on violence against women, Ms Rashida Manjoo.

Compensation for Stolen Generations in Australia

We note that the Australian Human Rights Commission's 1997 report, *Bringing Them Home*, made 54 recommendations regarding the treatment of the Stolen Generation; 34 addressing reparations, and 11 specifically addressing monetary compensation. In the report, the AHRC also recommended the establishment of a National Compensation Fund.⁸ This proposal has faced a distinct absence of political will, with bills introduced in the Federal parliament on a number of occasions, but not proceeding.

We note that despite calls for a national compensation fund for Indigenous Australians that were part of the stolen generation, most Indigenous Australians who suffered grievous impacts to their lives, health and relationships, continue to go uncompensated.

The first member of the Stolen Generation to be awarded compensation was Mrs Valerie Linlow, in the NSW Victims Compensation Tribunal in 2002. Mrs Linlow was awarded \$35,000 in compensation.⁹

In 2007, in the leading case of *Trevorrow v State of South Australia (No. 5)* [2007] SASC 285 (1 August 2007) Mr Bruce Trevorrow was awarded \$525,000 in damages for compensation for a lifetime of sorrow and pain, plus \$250,000 interest.¹⁰

Canada

In Canada, residential schools were run for First Nations peoples in the 19th and 20th century, the last school closing in 1983 or 1984. Children were often separated from their families, experienced physical and sexual abuse and lost their culture and language.¹¹ In 2000, the Canadian government requested the Law Commission of Canada ("LCC") to investigate institutional child abuse.

Compensation became accessible for survivors via the Independent Assessment Process or the Common Experience Payment. Compensation was available up to \$275,000.00 for the most serious physical and sexual abuse. A further amount of up to \$250,000 could be sought for lost income due to the consequences of abuse, and up to \$15,000.00 for the cost of future care.¹²

The Common Experience Payment deadline passed in 2012.¹³ The Independent

Assessment Process deadline also passed in 2012.¹⁴ The sustainability of the fund remains to be seen.

Attempts to obfuscate compensation

There have been further international examples of institutions taking extensive action to prevent paying compensation. We pay reference to some of these below:

United States

- In 2007, America's most senior Roman Catholic cleric obtained permission from the Vatican to move US\$57 million of church funds into a trust to shield it from sexual abuse victims seeking compensation.¹⁵
- In 2013, over 400 survivors of sexual abuse were slated to receive compensation totalling \$16.5 million, after acting as a committee of unsecured creditors, and after approving the terms of a bankruptcy by the North American branch of the 'Irish' Christian Brothers.¹⁶ The North American branch of the Christian Brothers filed for bankruptcy "in the face of ever mounting sexual abuse claims made against its U.S. and Canadian members."¹⁷
- In 2014, the Milwaukee diocese of the Roman Catholic Church in the US, proposed setting aside \$4 million to compensate victims. In 2011, the Milwaukee diocese filed for bankruptcy, saying pending sexual abuse lawsuits could leave it with debts it couldn't pay.¹⁸

Northern Ireland

- In Northern Ireland, the Historical Institutional Abuse Inquiry (HIA) is examining allegations of child abuse in children's homes and other residential institutions from 1922 to 1995.¹⁹ We note that the Inquiry aims to establish if there were "systemic failings by institutions or the state in their duties towards those children in their care". It will also determine if victims should receive an apology and compensation.

We note that the HIA inquiry is due to complete its hearings by June 2015 and deliver its final report to the Northern Ireland Executive in January 2016.²⁰

UN Committee on the Rights of the Child

- In 2014, the UN Committee on the Rights of the Child released a scathing report into the decades of abuse of girls and women at the Magdalene laundries in Ireland.²¹ While Ireland set up a state compensation fund for survivors, no religious orders contributed to the compensation fund; no religious orders offered an apology to survivors, and refused to accept ‘unanimous survivor testimony that they were imprisoned and subjected to forced labour, torture as well as other cruel, inhuman or degrading treatment’.²²

The UN Committee on the Rights of the Child urged that, in this instance, the Holy See ensure that full compensation be paid to the victims and their families, either through the congregations themselves or through the Holy See as supreme power of the Church and legally responsible for its subordinates in Catholic religious orders placed under its authority.²³

Furthermore, the Committee also expressed ‘its deepest concern about child sexual abuse committed by members of the Catholic churches who operate under the authority of the Holy See, with clerics having been involved in the sexual abuse of tens of thousands of children worldwide.’²⁴

The Committee noted that it was ‘gravely concerned that the Holy See has not acknowledged the extent of the crimes committed, has not taken the necessary measures to address cases of child sexual abuse and to protect children, and has adopted policies and practices which have led to the

continuation of the abuse by and the impunity of the perpetrators.²⁵

Institutions in Australia

Anglican church

- The Anglican church gave evidence to the Royal Commission previously that it has a policy of providing a maximum of \$75,000 in compensation.²⁶
- A 2009 study conducted by the Anglican Church analysed 191 alleged cases of child sexual abuse, reported from 17 dioceses throughout Australia between 1990 and 2008. This represented most, (but not all) of the reported cases across Australia in that period. The report noted that:

‘Of the 44 cases that were known to go to court, 53% ended in the accused person being convicted. Nineteen percent of cases resulted in dismissal, license removal or deposition from Holy Orders by the Church; whilst the transfer of an accused person subsequent to the complaint was uncommon. Counselling was offered to complainants in 52% of cases and compensation or other reparation by the church in 36% of cases.’²⁷

Catholic Church

- The Catholic Church’s Melbourne Response scheme currently caps victims’ compensation in Victoria at \$75,000.²⁸ While media report that the national equivalent, Towards Healing, has an unlimited cap,²⁹ in reality, legal practitioners’ experiences are different.
- Within the Roman Catholic Church, the negotiations surrounding compensation are entrusted to each diocese; a person’s access to compensation therefore effectively depends on the whim of each archbishop. Legal practitioners have commonly experienced the *Ellis* defence being alluded to or directly raised to push persons into settlements that are much less than they would otherwise have been. This is particularly the experience

in the Sydney archdiocese.

Findings of the Victorian Legislative Council Family and Community

Development Committee Inquiry

The Victorian Inquiry noted in their report, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations*, (2013), that the approach of institutions to financial compensation ‘often does not provide a clear explanation of the basis on which an organisation makes a financial payment, how the amount awarded is determined and obligations regarding confidentiality.’³⁰

The Committee also noted that institutions ‘rarely encourage participants in the process to seek independent legal advice before reaching an agreement that might affect their subsequent legal rights.’³¹

The Committee also noted that ‘for many victims of criminal child abuse, the option of pursuing a claim through civil litigation is central to their desire for justice. Many told the Inquiry that civil litigation is not only an avenue to seek compensation, but also a form of acknowledgement and accountability for the harm they have suffered.’³²

However, no civil claims of criminal child abuse against religious organisations have been decided by the Victorian courts to date. Civil litigation in these cases is generally resolved through private settlements.³³

CONCLUSION

The specialised knowledge and experience of our members in these areas makes us peculiarly qualified to offer assistance should the Royal Commission desire it. If any of the above matters need elucidation, we would be very happy to assist in any way we can.

REFERENCES

¹ Australian Lawyers Alliance (2012) <www.lawyersalliance.com.au>

² Victorian Legislative Council Family and Community Development Committee Inquiry, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations*, (2013). Accessed at http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Report/Preliminaries.pdf

³ This refers to the decision in *Woodland v Essex County Council* [2013] UKSC 66.

⁴ The report analysed 191 alleged cases of child sexual abuse, reported from 17 dioceses throughout Australia between 1990 and 2008. See Patrick Parkinson, Kim Oates, Amanda Jayakody, *Study of Reported Child Sexual Abuse in the Anglican Church*, (May 2009), at 5. Accessed at

<http://www.anglican.org.au/docs/Study%20of%20Reported%20Child%20Sexual%20Abuse%20in%20the%20Anglican%20Church%20May%202009%20Full%20Report.pdf>

⁵ Commonwealth of Australia, *Review of the Law of Negligence, Final Report* (2 October 2002), ('Ipp Report'), at 13.105, 13.106. Accessible at

http://www.amatas.com.au/assets/ipp_report.pdf

⁶ Parliament of NSW, NSW Legislative Council, General Purpose Standing Committee No. 1, *Report on personal injury compensation legislation*, (Report No. 28) (2005) page xxii. Accessible at

[https://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/6deb694c553e0db8ca2570d10000c9a/\\$FILE/Final%20Personal%20Injury%20Report%208%20Dec%202005.pdf](https://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/6deb694c553e0db8ca2570d10000c9a/$FILE/Final%20Personal%20Injury%20Report%208%20Dec%202005.pdf)

⁷ For example, see CLAN, cited in 'Child sex victims call for compensation: Royal Commission,' *The Newcastle Herald*, 17 September 2013. Accessed at <http://www.theherald.com.au/story/1779811/child-sex-victims-call-for-compensation-royal-commission/>. This approach has also been supported by the Catholic Church, see Jane Lee, 'Catholic Church backs sex abuse compensation scheme,' *The Age*, 14 November 2013. Accessible at <http://www.theage.com.au/victoria/catholic-church-backs-sex-abuse-compensation-scheme-20131114-2xi2y.html>.

⁸ Australian Human Rights Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, April 1997, at Recommendation 15. Accessible at

<http://www.humanrights.gov.au/publications/bringing-them-home-report-1997>

⁹ Debra Jopson, 'First compensation win for the Stolen Generation,' *The Age*, 18 October 2002. Accessible at <http://www.theage.com.au/articles/2002/10/17/1034561266360.html>

¹⁰ See the judgment on costs and interest: *Trevorrow v State of South Australia* (No. 6) [2008] SASC 4 (1 February 2008) (Gray J)

¹¹ 'Residential Schools Canada: Alberta, NWT Bishops Latest To Apologize,' *Huffington Post Alberta Canada*, 24 February 2014. Accessed at

http://www.huffingtonpost.ca/2014/02/24/residential-schools-canada_n_4848585.html

¹² BisLaw Personal Injury Trial Lawyers, *Information for Survivors*. Accessed at <http://bislaw.ca/indian-residential-school-claims/information-for-survivors/>

¹³ Service Canada, *Common Experience Payment*,

<http://www.servicecanada.gc.ca/eng/goc/cep/index.shtml>

¹⁴ Aboriginal Affairs and Northern Development Canada, *Independent Assessment Process*,

<https://www.aadnc-aandc.gc.ca/eng/1100100015632/1100100015633>

¹⁵ Jon Swaine, 'Cardinal Dolan asked Vatican to hide millions from sexual abuse victims,' *The Telegraph UK*, 2 July 2013. Accessed at

<http://www.telegraph.co.uk/news/worldnews/northamerica/usa/10155673/Cardinal-Dolan-asked-Vatican-to-hide-millions-from-sexual-abuse-victims.html>

¹⁶ 'Abuse victims to receive \$16.5m as Christian Brothers declare US bankruptcy,' *The Journal IE*, 23 May 2013. Accessed at <http://www.thejournal.ie/christian-brothers-us-bankruptcy-922771-May2013/>

¹⁷ Dara Kelly, 'Mounting sexual abuse claims causes U.S. Christian Brothers to file for bankruptcy,' *Irish Central*, 30 April 2011. Accessible at <http://www.irishcentral.com/news/mounting-sexual-abuse-claims-causes-us-christian-brothers-to-file-for-bankruptcy-121020724-237384971.html#ixzz2uJ9tNcJx>

¹⁸ 'Milwaukee Catholic Archdiocese proposes \$4m fund for abuse victims,' *The Guardian*, 13 February 2014. Accessed at <http://www.theguardian.com/world/2014/feb/12/milwaukee-catholic-archdiocese-4m-fund-abuse-victims>

¹⁹ 'Historical Abuse Inquiry – the Background,' *BBC News Northern Ireland*, 13 January 2014. Accessible at <http://www.bbc.co.uk/news/uk-northern-ireland-25637486>

²⁰ 'Historical Abuse Inquiry – the Background,' *BBC News Northern Ireland*, 13 January 2014. Accessible at <http://www.bbc.co.uk/news/uk-northern-ireland-25637486>

²¹ UN Committee on the Rights of the Child, *Concluding observations on the second periodic report of the Holy See*, (31 January 2014), at 8. Accessible at http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/VAT/CRC_C_VAT_CO_2_1_6302_E.pdf

²² 'UN demands Vatican compensate Magdalene laundry victims,' *Breaking News IE*, 5 February 2014. Accessed at <http://www.breakingnews.ie/ireland/un-demands-vatican-compensate-magdalene-laundry-victims-621851.html>

²³ UN Committee on the Rights of the Child, *Concluding observations on the second periodic report of the Holy See*, (31 January 2014), at 8. Accessible at http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/VAT/CRC_C_VAT_CO_2_1_6302_E.pdf

²⁴ *Ibid*, at 9.

²⁵ *Ibid*.

²⁶ Lucy McNally, 'Anglican Church offers compensation to NSW victims of abuse at children's home in Lismore,' *ABC News*, 17 February 2014. Accessible at <http://www.abc.net.au/news/2014-02-17/anglican-church-offers-compensation-to-nsw-victims-of-abuse-at-5265430>

²⁷ Patrick Parkinson, Kim Oates, Amanda Jayakody, *Study of Reported Child Sexual Abuse in the Anglican Church*, (May 2009), at 34. Accessed at <http://www.anglican.org.au/docs/Study%20of%20Reported%20Child%20Sexual%20Abuse%20in%20the%20Anglican%20Church%20May%202009%20Full%20Report.pdf>

²⁸ Jane Lee, 'Catholic Church backs sex abuse compensation scheme,' *The Age*, 14 November 2013. Accessible at <http://www.theage.com.au/victoria/catholic-church-backs-sex-abuse-compensation-scheme-20131114-2xi2y.html>

²⁹ *Ibid*.

³⁰ Victorian Legislative Council Family and Community Development Committee Inquiry, *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations*, (2013) at xxxv. Accessed at http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Report/Preliminaries.pdf

³¹ *Ibid*.

³² *Ibid*.

³³ *Ibid*, at xxxix.