TRANSCRIPT

FAMILY AND COMMUNITY DEVELOPMENT COMMITTEE

Inquiry into the handling of child abuse by religious and other organisations

Melbourne — 17 December 2012

Members

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Mr M. Holcroft, President, and

Ms A. Palmer, Lawyer, Administrative Law and Human Rights Section, Law Institute of Victoria.

The CHAIR — Good afternoon. In accordance with the guidelines for the hearings, I remind members of the public gallery that they cannot participate in any way in the committee's proceedings. Only officers of the Family and Community Development Committee secretariat are to approach committee members. Also, could you please ensure that your mobile phones are turned off before we commence.

On behalf of the committee, I welcome from the Law Institute of Victoria Mr Michael Holcroft, president; and Ms Alice Palmer, lawyer, from the administrative law and human rights section.

All evidence taken by this committee is taken under the provisions of the Parliamentary Committees Act, attracts parliamentary privilege and is protected from judicial review. Any comments made outside the precincts of the hearings are not protected by parliamentary privilege. Witnesses may be asked to return at a later date to give further evidence. All evidence given today is being recorded. Witnesses will be provided with proof versions of the transcript. Please note that these proceedings are not being broadcast.

Following your presentation, the committee members will ask questions relating to the inquiry. I would like to now invite you both to give a brief presentation, and then, as I said, the remainder of the hearing will be allocated to questions. Welcome again, and thank you for being here.

Mr HOLCROFT — Thank you very much. I am Michael Holcroft: I am the President of the Law Institute of Victoria. The Law Institute of Victoria is a voluntary membership organisation representing over 15 000 lawyers and people working in the legal sector. The rule of law and access to justice, as it applies to child abuse by personnel in religious and other organisations, is of great importance to the Law Institute of Victoria, and we welcome this opportunity to address the committee. As a membership organisation, our submission necessarily addresses issues on a broad basis, with a view to making proposals for systemic reform. We do not claim to have all of the answers but do wish to contribute to the inquiry in an effort to identify solutions. I would also ask that you acknowledge the tireless, and often voluntary, efforts of individual lawyers who represent victims of child abuse by personnel in religious and other organisations, and encourage the committee to invite more of them to give evidence, based on their firsthand experience, at this hearing. We do not want the evidence of the Law Institute of Victoria viewed as a proxy for the experience and views of all lawyers.

The Law Institute of Victoria has provided a submission, dated 21 September 2012, and I do not intend to repeat the content of that the submission here. What I would do, however, is, if I may, take a moment to highlight a couple of the major points of our submission. The first is that we do support recommendation 47 of the Cummins report that there be mandatory reporting as a separate offence created under the *Crimes Act* and that that mandatory reporting extend to ministers of religion and other persons within religious or spiritual organisations. We would accept a limited exception to the obligations in relation to religious confessions, and we support the position as set out by the Australian Law Reform Commission in that area. We would also support protections from reprisals and defamation actions to those reporting suspected child abuse to the police.

We would highlight that there is no such requirement at the moment on any person in Victoria to report child sex abuse to the police. There is a regime where certain people, under the *Children, Youth and Families Act*, are required to report suspected child abuse to the Department of Human Services, but, as I said, we would support the Cummins report in requiring mandatory reporting to the police. We also accept that if a mandatory reporting requirement was to be put into the *Crimes Act*, then you would also need to consider changes to the *Evidence Act*, in particular section 127 of the *Evidence Act*, which currently allows people in religious organisations to claim a privilege against giving evidence. We see little point in having a mandatory requirement to report matters to the police if the people reporting to police cannot then give evidence in a court of law.

We also would support more flexibility in laws to facilitate civil actions, and we note that there needs to be consideration of capacity to sue statutory trusts. We need a review of vicarious liability options, and perhaps deeming members of religious organisations to be employees of those organisations if the sexual abuse is sufficiently connected to that person's role. We would also support more flexible time limitations to bring civil actions and would support statutory funds being set up that are earmarked to provide adequate compensation. Further, we would support an oversight body to oversee the internal complaints processes of religious organisations and possibly to receive direct complaints and mediate those complaints in accordance with restorative justice principles.

With your permission, we would also like to elaborate on some aspects of the submission, and I will be asking Alice Palmer, who is a Law Institute of Victoria policy lawyer in the Administrative and Human Rights Section, to speak of those shortly.

Our concerns basically come down to two aspects. One is that we are concerned about the integrity of our legal system and do not want it circumvented or compromised by any private or partial processes internal to religious or other organisations or because of fear amongst personnel of reporting crimes that they become aware of. Secondly, we are concerned about access to justice for victims of abuse, including appropriate remedies. We must ensure that people have redress and that we take steps to prevent further abuse. I am happy to take any questions in relation to the submission that we have provided.

Ms PALMER — Thank you for the opportunity to be here today. As Michael Holcroft indicated, we will, with your permission, make a supplementary submission, which is primarily aimed at elaborating on a number of points in the September submission that we made. I will not go into any detail right now, but I just want to touch on two important aspects of that.

We will elaborate on our proposal for an independent statutory body to oversee internal processes, and we want to make it very clear that that overview body — the statutory body — is not a substitute for the existing criminal and civil law systems. It might run alongside those systems, but it is not a substitute for those systems. We have proposed many reforms that could be made to those systems to make them more effective for victims of abuse. We would like to see those reforms implemented. Having said that, we recognise that mainstream law is just not up to the task in all cases of dealing with claims from victims of child abuse. In light of that, we are proposing that we look at alternative paths to addressing those claims. It, if you like, would constitute a safety net for victims of abuse, and they would have the ability to have the internal processes that they go through within an organisation reviewed to ensure that they conform with procedural fairness and that proper procedures are followed in reaching a settlement under those procedures. As Michael mentioned, it might also be a separate complaints body as well, so it would possibly have those two functions.

With respect to limitation periods, this was one of those issues that we touched on in our suggestions for reforms to civil actions and making it easier for victims of abuse to bring civil claims. We will have a further recommendation to make in that respect. At present where a victim is statute barred — that is, where their time for bringing civil action has run out under the Victorian statute of limitations — they can apply for an extension of time. That extension of time is at the judge's discretion. At present the victim has to convince the judge of the reasons for granting that extension of time. That process is difficult; it is arduous on the victim and also presents several evidentiary barriers. Our proposal is that we introduce into the requirements for applying for an extension of time a presumption in favour of victims of sexual abuse and possibly of child abuse to ensure that the onus is not on them to make a case for the extension but instead is on the perpetrator or the respondent in proceedings to explain why an extension should not be granted.

As I said, we will include a lot more detail in our supplementary submission on those points. We are going to touch on some other aspects as well, and we will address any questions that we take on notice today in that submission. Thank you very much.

The CHAIR — Thank you. We will open up to questions now. Can I just come back to your point, Mr Holcroft. Obviously in the submission you provided to us prior to the hearing today you talked about financial assistance for victims, and you just mentioned access to justice and appropriate remedies, so you are talking about a compensatory mechanism. In your view and from the view of members that you represent, are there any other things that need to be done for victims in relation to justice?

Mr HOLCROFT — There certainly needs to be clarification of the status of the churches. As I understand it, the Catholic Church is not a body corporate; it is a series of property trusts. It is extremely difficult for anyone to have confidence that they are suing the right person. Clearly members of the clergy take a vow of poverty, so even if they are still alive, the chances of recovery are very small. What we are suggesting is that there may be able to be established a fund possibly similar to the fund in the James Hardie case and that victims be compensated out of that fund and religious organisations be required to contribute to the fund.

The CHAIR — So the fund would apply to any domination and any victim that had been subject to abuse.

Mr HOLCROFT — We would support that.

Mr McGUIRE — Thank you very much for the submissions today; they are greatly appreciated. I will just elaborate on the chair's line of questioning. If you could just, for the record, explain why the Law Institute believes it is important to have the capacity to sue statutory trusts, if I can put to you it as simply as that.

Mr HOLCROFT — It is really a case now that anyone who is attempting to bring an action against, or claim compensation from, the Catholic Church, has a risk that the Catholic Church will claim that they do not employ the members of the clergy, that they do not have assets — the assets are held in independent property trusts — and hence any compensation or settlement arrangements will be prejudiced in light of that. So there is another uncertainty added to any litigation. What we are suggesting is that by setting up a statutory fund and allowing the fund to be a respondent, with contributions from the religious organisations, that would take away that uncertainty and provide a higher level of compensation for any victims.

Mr McGUIRE — So you would regard this as a fairer and more just process and system.

Mr HOLCROFT — Most certainly, and it is taking out some of the risk that people who have been sexually abused who are seeking compensation face.

Mr McGUIRE — Just to follow up on another issue raised, as a legal body why does the Law Institute believe there should be a proviso for confessions to be exempt from mandatory reporting? Can you just explain and elaborate on your thinking behind that?

Mr HOLCROFT — We have suggested that the Law Reform Commission position, which is a balancing test, should be adopted. We are conflicted between the sanctity of the confessional and protecting further victims of sexual abuse. If the sanctity is to be removed, then the best reason for removing it is to protect victims from ongoing abuse, as distinct from abuse that may have occurred many years ago. That is my understanding of why we have taken that position. But likewise, we are not actually saying there needs to be an exception; we are saying that if there is an exception, then that is what we think it should be.

Ms PALMER — Yes. I was just going to clarify that that is the case. We have not taken the position that the exemption should be included; we have acknowledged that the Cummins recommendation 47, which we support in part, provides for an exemption. And we say if an exemption is going to be included in accordance with the Cummins inquiry recommendation, it should be not termed as an absolute privilege, as it is currently termed in section 127 of the *Evidence Act*, but it should be a balancing test, which was proposed by the Australian Law Reform Commission and the Victorian Law Reform Commission at the time that the Evidence Act was being reviewed around the country. That balancing test specifically says that they will look at the need for confidentiality against the need for disclosure, so it will be up to the judge making an assessment as to where that balance should fall, and that balance will be assessed on the basis of the evidence and the circumstances of each case.

Mrs COOTE — Thank you both very much indeed, and thank you also for the comprehensive recommendations that you have given. They touch on much of what we have heard from various people coming to speak with us. But there are a couple of areas that I would like to just tease out with you in person, if I may, from your submission made in September. In regard to the corporate and organisational structure of religious orders and entities, your recommendation 16 talks about confined-purpose statutory corporations established for ownership and property reasons; I imagine the religious organisations. Have you got any examples of those that you can share with us that you would be concerned about in the structures that are currently in place?

Mr HOLCROFT — That is the structure that is in place in relation to the Catholic Church primarily: it is not a corporate organisation. Perhaps Alice will help me with the case that actually established that. Was that the Pell case, Alice?

Ms PALMER — Yes, the *Ellis* case is what you are referring to in terms of looking at the status of statutory trusts. In that case it dealt with the archdiocese in Sydney and there was a relevant statutory trust there that was one of the defendants in the case. It was found that that the statutory trust could not be liable because the narrow nature of its purpose dealt with property, and the leap could not be made to say that a statutory trust with the confined purpose of dealing with property could be found to have been responsible for the appointment of a priest who subsequently abused children.

Mrs COOTE — Given that we have not got a lot of time and this is obviously very complicated, because we have had the Ellis defence mentioned on a number of occasions, is that something you can come back to us on, and the type of recommendation you would propose here in Victoria that would deal with precisely that Ellis defence? If you could back to us on that, that would be extremely helpful.

But in comparison and rolling on from that is the issue of vicarious liability. Your recommendation 17 is:

> … that the committee considers options for legislative reforms to clarify when a religious organisation will be vicariously liable for criminal abuse of children by its personnel.

We have had many organisations and individuals as well coming to us to suggest that this is a major hurdle. Do you have any specifics about how you would go about recommending a specific law on this?

Mr HOLCROFT — We can probably put forward a short further paper in relation to some of the options that are available in other jurisdictions.

Mrs COOTE — That would be extremely helpful. Thank you both very much indeed.

Ms HALFPENNY — I have two questions. One is about the statutory trust. Why would an organisation build itself based on — what is the purpose of the statutory trust in terms of an organisation?

Mr HOLCROFT — It is not the organisation. A couple of things can happen. The Catholic Church has a different organisational structure, as I understand, from other religious organisations in Australia. One option is it could be deemed, or an act of Parliament could be passed to say, 'The Catholic Church is now this'. The alternative is that you set up a trust fund and require organisations to contribute to that trust fund. The problem then is that you will probably still then need to go back and define the Catholic Church if you are going to require that the Catholic Church contributes to the fund.

Ms PALMER — Can I just clarify, too, because I was not sure exactly what your question was aimed at, that in terms of the existing statutory trusts that exist, for example, in Victoria — and it is not just the Catholic Church; there are other religions that have these property trusts established — this is in recognition of the fact that religious organisations are unincorporated associations, which are by the nature of their legal identity unable to hold property in perpetuity. So the statutory trusts were created by Parliament in order to create a body to hold church property so that property could be held forever by that entity and get around the issues associated with having a number of different members of an unincorporated association over a period of time.

Ms HALFPENNY — So the purpose was not to avoid financial obligations?

Ms PALMER — No, the purpose was to get the benefit of a law that would enable them to hold onto property. The problem that we see is that they get the benefit of holding onto property without then dealing with the flip side of that benefit, which is liability in the event that it is impossible to bring a claim against the church or any religious organisation and the property trusts effectively take advantage of that in denying liability or association.

Ms HALFPENNY — Yes, that was more what I was asking.

Mr HOLCROFT — So it was not the purpose that they were set up for.

Ms HALFPENNY — But it is a consequence.

Mr HOLCROFT — But it is now the consequence that recovery has become nigh on impossible against those assets.

Ms PALMER — But in terms of the legal status of those organisations, we have not done a comprehensive review of the legal status of all religious organisations. We know that there are examples — and the Catholic Church in Sydney in particular is an example through the *Ellis* case that we referred to — where this has occurred, but we would not say that that is necessarily the case for all religious organisations, and what we have recommended to you is that you undertake some sort of review of that so that you have a better understanding of the whole range of legal entities that can be created within religious organisations throughout Australia, or in particular in Victoria for the purposes of your mandate.

Ms HALFPENNY — Just one other question. You talk about mandatory reporting in the *Crimes Act*, and other people have come to the committee and talked about legislation for, say, concealment of a crime, such as in New South Wales, and I think in Victoria until 20 years ago there was a similar type of law: have you considered that as well, or do you think that mandatory reporting is enough as opposed to a law that makes a criminal offence of someone who covers up a crime, such as moving priests from one place to another?

Ms PALMER — We have not taken a specific position on whether new crimes are required.

Mr HOLCROFT — With the exception of the mandatory reporting, which we have called for.

Ms PALMER — I beg your pardon; I will rephrase that. We have not taken a position on whether new crimes for concealing offences should be introduced. We would say that we have some existing offences in the *Crimes Act* already. We have referred to those: section 49A about facilitating crimes against children, and then you have the aiding and abetting and concealing crimes for benefit in sections 325 and 326 of the *Crimes Act*.

There are existing crimes that could be employed in the cases of concealing sexual abuse. We would say we need to understand why those provisions have not been employed to date. We need it confirmed that they have not been employed; we have not been able to find any reported cases where they have been in Victoria. We need to understand why they are not being used and then perhaps, as a result of that, there might be recommendations for further offences. But our position is, as you said, that if we have mandatory reporting, that will at least ensure that these crimes are coming to light and that will get us over the hurdle of then being able to prosecute under the *Crimes Act* and the existing offences that are there.

Ms HALFPENNY — Thanks.

Mr WAKELING — Michael and Alice, thank you very much for your presentation and your comprehensive submission. I just have a couple of questions, if I may. Firstly, in regard to the parallel investigation process that you discussed, there have been a number of people who have presented to us. With the greatest respect to your profession, I know many have been very admirable, but certainly the evidence has been that the solicitors and lawyers have actually made the process more difficult than it could be in terms of improving it. Obviously many of those were people who were engaged by religious institutions to try to stymie the process and make it difficult for victims.

Given that, how do you propose to see this new body established in terms of the role of legal expertise? Would there be less involvement, do you see, for people such as yourselves, or do you believe that both parties should have equal access to representation? Because there has been a perception that victims are facing QCs and they have nobody to represent them, and that has been part of the problem with the process for many of the organisations. I would be interested in your opinion on that.

Mr HOLCROFT — I certainly think that the victims should be able to avail themselves of legal representation. They are obviously individuals. They are, by definition, people who are claiming that they have been harmed by organisations which were supposed to protect their spiritual wellbeing. I think it would be very dangerous to leave them by themselves.

Mr WAKELING — I certainly understand that there is a need for representation, but it is that balance in making it friendly enough for people to actually have faith in the system.

Ms PALMER — I think the idea is that the statutory body would ensure that procedural fairness is being followed. Procedural fairness would include issues like being properly legally represented. It would also require an independent person undertaking the complaints handling process. In our view someone in the employ of the church who has obligations as the advocate and lawyer for the church and to the church — that is where their professional responsibility lies — is not an independent person able to properly negotiate that regime.

Having said that, if the statutory body is created, it could establish guidelines and those guidelines could speak to procedural fairness and speak to the nature of the independence of the person conducting the inquiry and how that would be undertaken, and to the extent that any existing internal processes do not fulfil those requirements, they would have to be reconstituted.

Mr WAKELING — If I may, through this process, if a matter is settled between the parties as opposed to a decision being handed down, there have been lots of examples of deeds of release, with release from further claims and confidentiality provisions. Do you see them playing a role in terms of settlements that have been reached by the parties?

Mr HOLCROFT — We also have a concern that those settlement deeds are not used to thwart any mandatory reporting requirements as well. There should not be a clause in a settlement deed that says, 'This matter will not be reported to the appropriate authorities'.

Ms PALMER — It should be everyone's right to negotiate what is essentially a contract, which is what a deed of release is. People should be able to do that. What we are concerned about is that they do it in an independent context where they are getting independent advice and where there is no undue influence, if you like, on their decision and the outcome. Provided the deed of release conforms to procedural fairness, it could well release the perpetrator or the institution that employs the 'perpetrator' from further civil action. But it would not, as Michael pointed out, absolve them of their mandatory reporting requirements that we have proposed. Nor would it, of course, enable them to circumvent the criminal justice system.

Mr WAKELING — Just one more question, if I may. You talked about the statute of limitations and the possible introduction of reverse onus. Have similar arrangements been established in other areas or in other jurisdictions that we might be able to look at by way of example?

Ms PALMER — No, not to my knowledge; however, there are examples. I cannot remember off the top of my head, I will have to come back to you, but there is an act in New South Wales that includes a presumption in the context of getting compensation. Where there is a claim for compensation as the result of a criminal act there is a presumption in favour of the victim in those cases. We will provide you with the details of that act as a possible model that could apply by analogy in this situation.

Mr WAKELING — Thank you; that would be useful.

Mr O'BRIEN — Thank you for your evidence today, your submission and the very interesting perspective you provide. From my personal background as a lawyer and now as a legislator the relationship between the law of the country as well as legislation is an important issue in this space. Specifically we have heard evidence about problems in the legal system, and some of the solutions are said to require greater independence, particularly the response, for example, that has been provided by the Catholic Church. Obviously the most independent places we have in this state are the independent courts, and that is why you are suggesting the James Hardie model, where you are using existing court proceedings but effectively necessitating a way for the parties to come to an agreement as to how such a fund or litigation process would operate, and that is something worthy of consideration to my mind.

Have you given consideration to the present state of any proceedings in Victoria in relation to issues such as the status of the Ellis defence? For example, the decision of JGE and Portsmouth in England has broadened the concept of vicarious liability and specifically how Ellis relates to property trust cases for the reasons you say: benefit and burden. As an equity lawyer, if someone had received the benefit of funds over many years, given the realms of unconscionability et cetera there was the old doctrine of 'You don't get the benefit without the burden'. But these issues have not been tested in the Victorian courts.

The last document I would refer you to would be the extensive Catholic Church submission to this inquiry, 'Facing the Truth'. I do not know if you have seen that yet. On pages 80 to 81 they explain their defence, and at this stage it occurs to me that they do incorporate in the property trust issue an element of vicarious liability. There seems to be a relationship there, particularly having regard to the English case, which talks about the control exhibited by the church. That can be both an employment and a property issue, one would say. That is an argument.

My point to you is: if we are to draft legislation, we would not want to then have a whole lot of arguments further on down in the courts about whether a particular church falls in this or not. So it may be that we need to encourage the church and the parties in present proceedings or contemplated proceedings to proceed by way of an agreed set of declarations or judgements that the existing courts can agree to, to help set up a fund or a proper body of legal accountability on those issues of structure, vicarious liability and a statute of limitations.

Have you given thought — and if you haven't in your response to Mrs Coote's question could you please give thought — to the specifics and legalities within those issues? I know that is a long question, but there is a bit in it.

Mr HOLCROFT — The English cases we have looked at, and we will include that notion of vicarious liability as it fits in England into our further submission. The others we are just going to have to take on notice and get back to you.

Mr O'BRIEN — I appreciate that; that is why I put it in a detailed way. For example, in the *Ellis* defence the church in its submission to us seems to be saying that it would accept moral accountability — and I am reading from the second-last paragraph:

> Importantly, the church accepts moral responsibility for abuse matters regardless of the legal position in any particular case, and even where the liability is not clear.

They indicate that Archbishop Pell was not the defendant there because he was not the right entity. That is what they say. They do not tell us who was. If they are accepting moral liability — and this perhaps is something that this inquiry can have a role in — the question is: will they bite the bullet and accept legal responsibility whatever the structure is, for example? But you have to go right through the actuals in every individual case, and in my mind you cannot divorce the role of the courts from this in an individual case.

Could you give us any information in relation to how the James Hardie litigation was set up and what role, if any, the Law Institute had in relation to that?

Mr HOLCROFT — We are happy to take that on notice. My anecdotal position is that we have been told by some of our individual lawyers who deal with these matters that the defence in every case is not the same and that despite what the church says about its moral obligations, the legal uncertainty is sometimes put up as a risk factor facing people who are claiming compensation.

Mr O'BRIEN — I suspect that is right. I suspect because it has been regarded as so difficult there have not been many claims instituted, because the legal advice provided would have been, 'It's going to be difficult for you'.

Mr HOLCROFT — And the difficulty with requiring the courts to make declarations, of course, is that such a small number of these matters actually get before the court. Generally more than 95 per cent of cases settle before reaching Court, or before a judgement is given There have been very few successful prosecutions that we are aware of, of civil actions in the courts, and certainly against the Catholic Church.

Mr O'BRIEN — Just so I am not misunderstood, I was not saying in isolation with any law reform, but it may need to be done in conjunction, given the intricacy of the various defences that could be applied across any time period, and that is where our challenge may lie. We, as legislators and committee members making recommendations, would obviously like to know what problems we are going to anticipate in advance, and there is nothing like the view of the courts on that. That is why I ask if you are aware of anything going before the courts or potentially going before the courts, we would appreciate that knowledge.

Mrs COOTE — We have heard a number of people allude to canon law and talk about the conflict between canon law in the Catholic Church and civil law here in Victoria. In your experience do you know of any direct conflict with any of the canon law situations, particularly in dealings with reparation or redress or indeed with confidentiality? Have you come across this with the Law Institute?

Mr HOLCROFT — I am not aware of any Australian University teaching canon law at the moment, so the short answer is no, I am not aware.

Ms PALMER — I am not sure where you are headed with the question — maybe you could elaborate — but if you are referring to the claims, for example, that any effective repeal of the privilege for religious confessions would be contrary to canon law and the seal of the confessional under canon law, I can speak to that briefly.

Mrs COOTE — That is a specific one. We have heard other issues of canon law coming into conflict, but that is specifically something, because that is a major concern. We have heard from church officials about the

sanctity of the confessional and that that relates to a canon law which is entrenched in the Catholic Church. But you spoke of mandatory reporting before, and canon law would come into conflict with civil law and the mandatory reporting element of what you were suggesting before. Could you make some comments?

Mr HOLCROFT — With respect, what we are suggesting is that the mandatory reporting be part of the criminal law, not the civil law. What we were saying was that there should be a criminal law offence, which in this state would override any canon law. Whether or not it would be complied with by members of the clergy is another issue.

Mrs COOTE — Right; thank you.

Ms PALMER — We have not addressed canon law or conflicts between canon law and mainstream law in our submission. I would not hold us out as being experts in the area of canon law and capable of undertaking that kind of analysis. Having said that, with respect to the seal of the confessional, we recognise that there is the claim that, in the case of a mandatory reporting requirement, if there were no exemption for confessions, priests would simply flout the rules, because under their own professional responsibility code, if you like, the seal is inviolable. They are not able to disclose any information received in confessions, and as such they would not comply with the law. We understand what has been said there, and we have tried to address that through our balancing proposal.

Having said that, we also understand that people have said that the removal of the absolute privilege of the seal of the confessional would be a violation of the freedom of religion. We think it is very important to stress that freedom of religion is not an absolute right. Like many human rights under international law, and certainly in Victorian law under the *Charter of Human Rights and Responsibilities*, freedom of religion is subject to limits, and it can be subject to reasonable limits that are demonstrably justified in a free and democratic society. We would argue that in this case the limits are justified in this situation.

Mrs COOTE — Perfect. Thank you very much indeed.

The CHAIR — Could I seek some clarification for understanding? Is there any evidence in relation to the confessional that knowledge of abuse is heard within the confessional that you are aware of?

Ms PALMER — We are not aware of any. We have not conducted an inquiry in that respect. I have read what other people have said, but I do not know the answer to that.

The CHAIR — And just from reading, is it anecdotal evidence that you have read in relation to hearing of abuse that occurs within the confessional?

Ms PALMER — In very general terms there are different views. There are some that say they have heard confessions and that they would not reveal that. There are others who claim that it is a moot point: that crimes of this nature would not be revealed in a confession. So we understand there are different views taken and we do not have any evidence one way or the other.

Mr HOLCROFT — I certainly have had people say to me that there have been complaints made to the hierarchy of the church, which has then moved people to other organisations to take the pressure of them and not deal with the allegations, but whether any discussion has taken place in confessionals we cannot say.

The CHAIR — So civil law will usurp any canon law in that respect then? Is that what you are saying?

Mr HOLCROFT — What we are saying is if the changes to the *Crimes Act*, which is criminal law, were brought in, then from a legal point of view — maybe not from a spiritual point of view, but from a legal point of view — that would take precedence over any canon law most certainly.

The CHAIR — Thank you.

Ms HALFPENNY — We heard in earlier hearings from a principal who was at a college in Healesville. I think as part of her being a principal her responsibilities had raised issues about abuse at that school. Also I think there were reports in the paper about another principal who had raised issues. In both cases those people were basically on workers compensation and never to return to their work. I know you talk a bit about protection to encourage individuals who come forward and provide information, but do you think the legislation

you were talking about or what is here at the moment is enough in terms of a person employed by an organisation? Are there enough protections for them to freely be able to speak out without fear of bad consequences?

Ms PALMER — It would obviously depend on the actual content of the protections that were provided. We have pointed to a couple of examples in existing law under the *Equal Opportunity Act* victimisation provisions that provide protection to people who make complaints under the *Equal Opportunity Act* and ensure that they cannot be subject to reprisals in an employment context, for example. That is an example of one model. Another example is the whistleblowers legislation, although that is repealed, effectively, as of last week, but as it did stand there were protections in there for whistleblowers which have been passed on now through the new *Protected Disclosure Act* to whistleblowers, and we would suggest that we could look at some of those protections as a possible model as well. Hopefully you could design a regime that would provide adequate protections.

Mr O'BRIEN — At page 18 of your submission — and you have done this in a number of places, where you have gone to other references overseas — you helpfully make reference to the recent Irish act, the *Criminal Justice (Withholding of Information on Offences against Children and Vulnerable Persons) Act 2012*, which implements the Ryan commission and the Murphy and Cloyne reports. Could you take us through how that act operates and what parallels and recommendations you would have arising for Victoria as a consequence of it?

Mr HOLCROFT — As I said, there is no law in Victoria which requires people to report any child sex abuse to the police. The Irish act, which has only just come into being, does make it an offence for any person to withhold information, so it goes far beyond members of the clergy and the members of religious organisations. It does have some defences where there is reasonably suspected to be sexual abuse against children over 14. It gives those children an ability to have a say in whether or not the abuse is reported to police, and for people under 14 it allows the guardian to have a say, although the guardian must exercise that discretion taking into account the reasonable best interests of the child. But this is a fairly ground-breaking Act, on which we are not aware of any prosecutions that have yet occurred. It is an Act regarding which I have made inquiries with my counterparts at the Law Society of Ireland and received limited responses from them, but it is yet to be tested, and so they are basically going on their reading of legislation.

Mr O'BRIEN — You will keep us informed if you receive any more, if you could?

Mr HOLCROFT — Most certainly.

Mr O'BRIEN — Thank you.

Mr WAKELING — I have just a couple of questions. Firstly, in regard to the parallel process can I seek clarity? Are we talking about the establishment of one body that will deal with all non-government organisations — Catholic and Uniting churches, the Salvation Army, the scouting movement and others — or are we talking about effectively an independent body but one that may, for example, just deal with complaints to do with the Catholic Church, and another body that may deal with complaints dealing with the Salvation Army? If it is one body, then I am assuming if a claim is handed down against the Catholic Church then the Catholic Church would effectively be invoiced for that claim. Is that how that would effectively work?

Mr HOLCROFT — Can we just separate the two issues? One issue is someone to oversee the process and to issue, for example, best practice guidelines, and that might not even be the same body that deals with the compensation aspect. We are certainly very much in favour of having an overriding body for procedural fairness and for receiving the complaints. That does not need to be the same body that would deal with the compensation aspects and the fund — the James Hardie-type fund that we are talking about — and handing out money. I do not think we are envisaging that they be the same organisation.

Ms PALMER — Having said that, we are not saying it could not be; so in terms of those two functions it is potentially within one body or two separate bodies. In terms of your question about the scope of its jurisdiction and whether it covers religious organisations or particular religious organisations and whether it covers non-governmental organisations, we have not taken a position on that as such. We have respected the committee's mandate in saying that it should extend to all religious organisations and all non-governmental organisations as covered by your mandate. But we would be open to policy considerations that might warrant

restricting the scope of the jurisdiction, for example, to religious organisations where it is determined that there are peculiar barriers to justice for victims of abuse by personnel of religious organisations.

Similarly, it could go the other way, and I know this will not be within the scope of your mandate, but again from a policy perspective it might be that it should actually be broader than your mandate and cover state institutions as well. That is open for discussion. We have not taken a view one way or the other.

Mr WAKELING — I raise that because a number of people have talked about this body, but obviously we are keen to seek from people such as yourselves a more specific example of how that may look.

Just one other question, if I may. In your submission at page 30, which deals with access to evidence, you are talking about the evidence of files being potentially destroyed, and we have had evidence today and in previous hearings about the lack of information and accessibility to evidence, and you recommend that consideration be given to specific strategies for case management of claims, which is obviously dealing with the discovery and availability of evidence. Have you got any specific ideas or thoughts around what those specific strategies may be?

Ms PALMER — Not as yet. We would consult with lawyers who have actually been involved in litigation to have a better understanding of those issues.

Mr WAKELING — That is certainly a question on notice; that would be useful because, again, it is certainly a live issue for us, and feedback, particularly from those members of your organisation who are dealing with this issue, would be very useful. Any information that you could provide to the secretariat would be helpful in regard to that issue.

Mr O'BRIEN — Just following on from my earlier question, I have a question that I have asked of some other witnesses, both on their specific cases and also victims groups. It relates to those issues of statutory limitations, vicarious liability and the Ellis defence — in other words, the generalised defence, if you like. Do you think it would be of assistance to the work of this inquiry and also lawyers in general and particularly victims if the Catholic Church and the non-government institutions were to make public statements and/or waive formal defences — that they would not rely on those defences in existing or future cases before the courts?

Mr HOLCROFT — They could certainly provide a public undertaking not to rely on the statute of limitations, because the statute of limitations provides a defence which no-one is obliged to take up, and certainly there are some parts of government that do not raise that defence. The issue of whether they could say that they will not take up the *Ellis* defence is a little more difficult at law because either an entity does exists or it does not exist. To deem that it exists would cause problems, especially in relation to recovery and how you can get an order against that organisation, but if the organisation does not actually exist, it would still be very difficult to receive satisfaction of that order. So that part is a bit more complex.

Mr O'BRIEN — Could they, for example, identify — a bit like when you have a number of defendants within your sphere of knowledge — the appropriate defendant who would take accountability, and it may be this fund, for example, if that is how that is negotiated. It would of course have to have a legal basis, and that is where legislation might have to do some confirmatory work, but they could then engage in a process of identifying that, couldn't they?

Mr HOLCROFT — They could do that. We have to have a bit more of a think about the process involved. It would be a lot easier if the legislation actually identified it.

Mr O'BRIEN — And the legislation would need to know, again, which body it heads to. So it is a chicken and egg that needs to be followed up, in a sense, simultaneously there.

Mr HOLCROFT — With appropriate goodwill from the religious organisations I am sure it is something that could be overcome.

Mr O'BRIEN — That is what I am seeking to draw out, because we have the statements of that, and we do not want it broken down into individual cases. If I could, I will give one more specific example, and this is an example that has been provided. We had the Fosters give us evidence of the church in the proceedings that they

took some years not only after the allegations had been raised but after they had been through the Melbourne Response process. At that stage Archbishop Pell had acknowledged that abuse had occurred. They took a practice — the church's formal pleading — of not admitting that the abuse had occurred. Perhaps it was within their legal rights, but obviously it caused significant distress. Would it be, probably, comparable to a model litigant response that governments are expected to operate under now? Does the Law Institute have a view of that sort of practice of practitioners in those cases — it is hard with specific examples; I understand that — of churches and other bodies playing hardball in these sorts of cases, if I could put it this way?

Mr HOLCROFT — We certainly would not encourage churches to do that. If they have formed the view through their own inquiries that it is likely that the abuse took place, I would say it is inappropriate to then plead to the court in any court proceedings elsewise. In fact they may in fact be misleading the court if that is the case, and there is an obligation by the lawyers and by the participants of litigation not to mislead the court.

I will also just add on your point about the statute of limitations. The Law Institute of Victoria would support a position whereby the clock stops running once a complaint has been made to the religious organisation. One of the reasons the statute of limitations prevails is that it is thought that the respondent is disadvantaged by the delay. If, or once there is, a complaint made to that organisation, then they are in a position to investigate it, and the reason for the statute of limitations period continuing to run would seem to be to be gone or seem to be removed.

Mr O'BRIEN — Just to be accurate on one thing you said, the church put them to that proof; they did not admit it. It might not be regarded as a positive misleading, but it might have been regarded as an unduly onerous exercise. Would your general comments still apply?

Mr HOLCROFT — My general comments would apply, and there are obligations under the *Civil Procedure Act* in Victoria that require the truth in pleadings. If they know something has occurred, then it is not appropriate, in my view, that they fail to admit it has occurred.

Mr O'BRIEN — Thank you.

Ms PALMER — Could I just add, too, that to the extent that we have referred to restorative justice principles as being a mechanism or basis upon which the independent statutory body could operate, the restorative justice principles include, for example, an acknowledgement of guilt. So part of getting everyone around the table to talk about things is that the party at fault acknowledges that fault as the beginning to that process.

The CHAIR — Thank you. Before we conclude, are there any final remarks you would like to make?

Mr HOLCROFT — I just have one: that whilst it may be strictly outside the committee's mandate we would consider that the recommendations we are making in relation to children who are the subject of abuse should also apply to cases of abuse of vulnerable persons, whether those persons are over the age of 18 but may have had a disability or whether they are people who are elderly. We see no reason why abuse should be limited to children as distinct from other vulnerable persons.

The CHAIR — Thank you for those final remarks, and on behalf of the committee I thank the both of you for your submission and for being before us this afternoon. We appreciate your time. Your evidence has been most helpful.

Mr HOLCROFT — Thank you.

Witnesses withdrew.