

# ACTING FOR VICTIMS OF RELIGIOUS SEXUAL ASSAULT

## CHALLENGES FOR VICTORIAN LAWYERS

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

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

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

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

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

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

### CRIMINAL PROCEEDINGS

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

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

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



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

**By Paul Holdway  
and Ruth Baker**



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

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

## VOCAT

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

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

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

## CIVIL PROCEEDINGS AGAINST THE OFFENDER

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

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

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

### Correct legal entity – who to sue?

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

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

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

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

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

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

### Limitation periods

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

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

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

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

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

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

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

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

## THE DOCTRINE OF VICARIOUS LIABILITY

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

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

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

### ELLIS V PELL

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

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

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

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

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

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

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

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

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

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

## CHURCH COMPLAINTS PROCESSES

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

### "Towards Healing"

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

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

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

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

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

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

### The "Melbourne Archdiocese Response"

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

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

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

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

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

## AN ALTERNATIVE APPROACH

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

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

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

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

## CONCLUSION

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

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

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

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

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



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