



3 July 2012

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

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

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

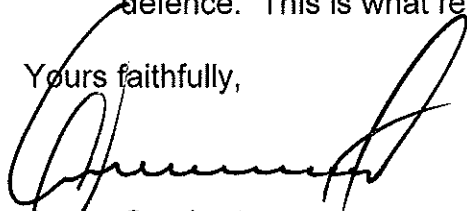
sued. The very considerable property of the Church is held by Trustees who are not liable either for misconduct by priests or, the Church would argue, even for misconduct by teachers in Roman Catholic parochial schools. The NSW Court of Appeal held that the Church has so constituted itself as to effectively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

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

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

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

Yours faithfully,



Inana Gumbert
NSW Branch President
Australian Lawyers Alliance

AUSTRALIAN LAWYERS ALLIANCE

NSW STATE CONFERENCE

23 - 24 MARCH 2012

CLAIMS AGAINST RELIGIOUS INSTITUTIONS

by

DR ANDREW MORRISON RFD SC

16th Floor Wardell Chambers

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

DR A.S. MORRISON RFD, SC

CURRICULUM VITAE

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

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

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

consultation draft

Introduced by Mr David Shoebridge, MLC

consultation draft

New South Wales

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

Explanatory note

Overview of Bill

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

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

consultation draft

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

Explanatory note

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

Outline of provisions

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

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

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

Schedule 1 makes the amendments described in the above Overview.

consultation draft

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

Clause 1

The Legislature of New South Wales enacts:

1 Name of Act

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

2 Commencement

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

consultation draft

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

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

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

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

Part 1 Preliminary

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

Part 2 Church property

- [3] Part 3
Insert after section 16:

Part 3 Sexual abuse claims paid from Trust funds

17 Definitions

- (1) In this Part:

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

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

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

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

consultation draft

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

Amendment of Roman Catholic Church Trust Property Act 1936 No 24

Schedule 1

member of the Church's clergy includes the following:

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

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

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

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

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

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

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

consultation draft

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

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

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

consultation draft

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

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

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

consultation draft

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

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

21 Regulations

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

**AUSTRALIAN
LAWYERS
ALLIANCE**

**Australian Lawyers Alliance
NSW State Conference**

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

**STREAM B
Claims Against Religious
Institutions**

**Andrew Morrison SC
Barrister, Wardell Chambers**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

DR A.S. MORRISON RFD, SC

CURRICULUM VITAE

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

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

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

C



LEGAL PROFESSIONAL PRIVILEGE

CONFIDENTIAL REPORT

INVESTIGATION REPORT

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

Client: CHRISTIAN BROTHERS

Dated: 2 AUGUST 2011

TABLE OF CONTENTS

1. Introduction
 - 1.1 Objective of Report
 - 1.2 Executive Summary of Findings
 - 1.3 Background
 - 1.4 Investigation Process – Methodology
2. What is the Evidence in Relation to each Allegation?
 - 2.1 Evidence: Robert Neil ROSEWORNE
 - 2.2 Evidence: Brother John Vincent ROBERTS
 - 2.3 Evidence: Brother Anthony Peter WHELAN
 - 2.4 Evidence: Denis John O'BRIEN
 - 2.5 Evidence: Thomas Gerard KEADY
3. Standard of Proof
4. Weighing the Evidence
 - 4.1 Analysis: Robert ROSEWORNE
 - 4.2 Analysis: Thomas Gerard KEADY
 - 4.3 Analysis: Brother John Vincent ROBERTS
 - 4.4 Analysis: Denis John O'BRIEN
 - 4.5 Analysis: Brother Anthony Peter WHELAN
5. Recommendations
6. Conclusions

1 August 2011

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

Dear Brother Brian,

RE: Assessment in the matter of Robert Neil ROSEWORNE

Background of Independent Assessor

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

1. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.1 OBJECTIVE OF REPORT

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

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

1.2 EXECUTIVE SUMMARY OF FINDINGS

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

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

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

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

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

ALLEGATION NO 1

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

ALLEGATION NO 2

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

ALLEGATION NO 3

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

ALLEGATION NO 4

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

ALLEGATION NO 5

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

1.3 BACKGROUND

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

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

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

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

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

1.4 INVESTIGATION PROCESS – METHODOLOGY

Investigation Plan

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

Record of interviews

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

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

Statements/written records

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

Correspondence/Emails/Records:

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

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

2.0 WHAT IS THE EVIDENCE IN RELATION TO THE ALLEGATIONS?

2.1 EVIDENCE

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

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

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

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

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

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

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

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

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

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

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

ANNEXURE K, PART B, page 3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMENT REGARDING THE COMPLAINANT'S STATEMENTS.

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

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

2.2 EVIDENCE

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

Brother John Vincent ROBERTS was born on 4 April 1942.

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

Brother ROBERTS stated the following in his record of interview:

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

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

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

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

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

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

Reply, "No".

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

Reply, "No".

- Brother ROBERTS was asked the following question;

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

Reply, "No."

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

Brief Summary/comment of Brother John Vincent ROBERTS evidence

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

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

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

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

Reply, "No". ANNEXURE J, page 4

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

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

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

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

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

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

2.3 EVIDENCE

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

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

Brother Anthony Peter WHELAN was born on 11 February 1941.

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

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

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

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

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

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

Reply, "No."

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

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

ANNEXURE H, page 4

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

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

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

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

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

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

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

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

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

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

Brief summary/comment regarding Brother WHELAN'S responses

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

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

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

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

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

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

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

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

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

2.4 EVIDENCE

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

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

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

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

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

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

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

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

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

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

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

Reply, "No."

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

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

Assessor, "Were they serious assaults"?

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

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

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

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

Reply, "No. Tony looked after that?"

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

Reply, "Not as far as I know".

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

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

Mr O'BRIEN stated to the Assessor:

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

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

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

2.5 EVIDENCE

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

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

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

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

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

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

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

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

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

ANNEXURE P

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

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

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

COMMENT REGARDING THOMAS KEADY – FURTHER EVIDENCE

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

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

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

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

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

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

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

3.0 STANDARD OF PROOF

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

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

4.0 WEIGHING THE EVIDENCE – ANALYSIS OF THE EVIDENCE

4.1 ANALYSIS

Robert Neil ROSEWORNE/LIPARI – Complainant

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

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

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

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

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

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

4.2 ANALYSIS

Thomas Gerard KEADY – Person of interest

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

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

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

ALLEGATION NO 1 – Thomas KEADY

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

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

ALLEGATION NO 2 – Thomas KEADY

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

ALLEGATION NO 3 – Thomas KEADY

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

4.3 ANALYSIS

Brother John Vincent ROBERTS – Former Year Master

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

ANNEXURE L, paragraph 51

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

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

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

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

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

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

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

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

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

With further reference to this analysis;

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

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

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

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

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

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

ALLEGATION NO 4 – BROTHER JOHN ROBERTS

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

4.4 ANALYSIS

Denis John O'BRIEN – Former Assistant Principal

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

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

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

4.5 ANALYSIS

Brother Anthony Peter WHELAN – Former Principal

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

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

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

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

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

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

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

ALLEGATION NO 5

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

5.0 RECOMMENDATIONS

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

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

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

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

ACTION:

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

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

ACTION:

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

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

ACTION:

There is no result at this stage. ANNEXURE N

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

ACTION:

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

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

ACTION:

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

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

ACTION:

Should be followed up.

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

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

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

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

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


6.0 CONCLUSIONS

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

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

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

Yours Sincerely,


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

3 July 2012

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

Dear Cardinal Pell

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Yours faithfully,

Jnana Gumbert
NSW Branch President
Australian Lawyers Alliance