

Lewis Holdway Pty Ltd  
ACN 117 414 132  
ABN 76 099 695 279

20 Queen Street  
Melbourne  
Victoria 3000

PO Box 138  
Collins Street West  
Victoria 8007

DX 650 Melbourne  
T > [+613] 9629 9629  
F > [+613] 9629 9630  
E > office@lewisholdway.com.au  
W > www.lewisholdway.com.au

# Lewis Holdway

L A W Y E R S

Submission Type – Published Submission

**Please note: The material in this submission may be published.**

## Background

<b>Name</b>	Lewis Holdway Lawyers
<b>Address</b>	20 Queen Street Melbourne VIC 3000 PH 96299629
<b>Responsible Church Authorities</b>	Catholic Archbishop of Melbourne, Various Provincials of Catholic Religious Orders, Catholic Bishops of Victorian Dioceses, Salvation Army; Anglican Church; Seventh Day Adventist; Exclusive Brethren; Mormon Church, Uniting Church
<b>Length of Time in field of Religious Sexual Assault</b>	17 years
<b>Time Taken to Resolve Client Complaints</b>	From 3 months through to 13 years

## Introduction

Our firm has been working with victims of sexual assaults by members of religious organisations for 17 years. To date, we have assisted over 200 victims to seek justice through a number of church protocols, the majority of which have been through the "Melbourne Archdiocese Response" and "Towards Healing". In 2010, Paul Holdway, a principal of our firm, was awarded the Law Institute of Victoria President's Award for Access to Justice for his work with victims of clergy abuse. The material we present to the Committee in this Submission is therefore based on our long-term experience in this field.

Our clients have encountered many barriers to seeking redress, both from within the legal system and Religious Organisations. It is our strong contention that many of the current church complaint processes that exist are deeply flawed and are in need of significant reform. As such, many clients have been significantly further damaged as a result of going through a church internal complaints process (a dynamic which we refer to as 'systemic abuse'), and we remain concerned that this is likely to discourage victims from coming forward in the future.

We therefore welcome the decision of the Victorian Government to hold an Inquiry into the Handling of Child Abuse by Religious and Other Organisations; this is an outcome which we have been advocating strongly for in recent years.

We also welcome the opportunity to make a submission to the Family and Community Development Committee about these very important issues. We are hopeful that this Inquiry

21538\d\template.final.draft.doc

LEWIS\_21538\_028.doc

# Lewis Holdway

L A W Y E R S

will be an important step in introducing widespread change. The importance of such change from a victim's perspective was powerfully explained in one of our client's submissions as follows:

*"I have not yet made a statement to police, although I would like to do so. In the current situation in Australia, however, the Catholic Church makes its own rules, and the sheer amount of pain and misery involved in going through a legal process is simply not worth it in my view.*

*I have become quite sickened also over the years, that in this country – a nation which I love – the representatives of my government are willing to let this situation continue. On the other hand, I am extremely heartened about the current State inquiry, and as an optimist, can only hope that it leads to a future society where religious clergy of the Catholic church who abuse children are not protected by a set of special conditions set up by and for themselves."*

We have assisted a number of our clients to prepare Submissions and from time to time in our Submission we will refer to examples from their individual cases in order to demonstrate and highlight the difficulties and issues that we have observed in church complaint processes.

We acknowledge that religious organisations other than the Catholic Church have been subject to sexual and other criminal assault allegations against their members. However, as the majority of our clients' cases relate to complaints against Catholic clergy and various Catholic hierarchies, our focus is on the two protocols of the Catholic Church, 'Towards Healing' and the 'Melbourne Response'. Our comments relate to these protocols unless otherwise stated.

We have categorised the issues reported to us by clients and observed by us as practitioners into three phases: Initial Contact with the religious institution, Investigation by the religious institution and Outcomes. In our opinion, each phase demonstrates different systemic issues and we set these out in dot points below. Some points are supplemented with specific examples but where this is not the case, the point is provided as a generic observation from our practice.

We then draw the attention of the Committee to some of the consistent and recurring issues that emerge from our clients' submissions. These include the lack of independence of the investigating authority, the inadequacy of the skills and training of the staff, the inadequacy of support offered, the power imbalance, invasion of privacy, lack of transparency and lack of accountability.

We then offer our recommendations for change for the Committee's consideration.

## 1. The Handling of Allegations of Abuse

### 1.1 Initial Contact

When making initial contact, our clients experienced the following:

#### **A. Clients were unable to get help as no-one was available to assist them**

For example, one of our clients who was suicidal after making his disclosure called Carelink for immediate help and was told to call back in four days time. Another, whose child was in real and present danger from the paedophile priest was told she would have to wait until she got a letter from the Independent Commissioner. In both of these cases, the church's lack of response put lives at risk.

#### **B. Clients in crisis failed to receive a crisis response (e.g. immediate counselling or intervention)**

As above

#### **C. Clients were asked to put their complaint in writing before any action could be taken;**

Clients who sometimes take many years to feel strong enough to speak of the assaults committed against them need an immediate face to face compassionate response from a qualified professional. To be requested to put their complaint in writing can be a difficult task for those whose impacts include the inability to read and write, and can also (albeit unintentionally) give a message that they are not being taken seriously.

#### **D. Clients were misinformed regarding the history of the accused person in their case;**

Some of our clients were devastated to learn from non-church sources that the perpetrators in their cases had a track record of offending. For these clients, it would have affirmed them greatly if such information had been transparent and provided by the Church when they made a report. Others have reported to us that they were told that there had been no other complaints about a particular offender and later found this information to be incorrect.

#### **E. Clients were not offered psychological support or counselling;**

#### **F. The church authority refused to fund counselling for clients when it was requested;**

We are aware of victims who are in dire need of professional therapy but are not provided it through the Church until they are found to be a victim according to the

# Lewis Holdway

L A W Y E R S

protocol; for some clients the process of making such a finding is long and stressful and they are required to fund their own counselling during this period.

**G. Clients were not provided clear information about the complaint process;**

Clients have consistently reported to us that they did not understand what the process was and what would happen next.

**H. Clients were confused about the role of the Independent Commissioner of the Melbourne Response, some thinking that he worked for them, not the church;**

We refer the Committee to the section below entitled 'Lack of Independence'

**I. Clients were not encouraged to seek independent legal advice;**

This is consistently reported to us by clients, many of whom initially confuse the lawyers for the religious authorities with lawyers who are there for their benefit.

**J. The families of clients were not offered support.**

We wish to draw the Committee's attention to the plight of the secondary victims – the parents, partners, children and siblings of the primary victims. These people are consistently overlooked and no consideration is given to the psychological and financial burdens they bear. A client has reported to us and has noted in her individual submission the particular burdens of being a secondary victim including having to take on the role of being a carer for her victim spouse as well as having to become the main breadwinner for their family.

## 1.2 Period of Investigation

During the period of investigation by the responsible authority, our clients reported to us that they experienced the following issues:

**A. Clients were further traumatised due to inappropriate questions about their sex lives;**

Multiple clients reported being questioned by the Psychiatrist appointed to Carelink about their level of sexual activity, sexual experiences and preferences in cases where we did not see the relevance of these questions to an assessment of their need for counselling to be funded by Carelink.

**B. Investigations were commenced without their knowledge;**

A client has reported to us that his siblings were contacted by the Independent Commissioner without his consent to see if his story 'checked out.'

**C. Clients were visited by church authority representatives who did not explain their role or why they were visiting them;**

# Lewis Holdway

L A W Y E R S

One client has described to us that he had no idea of the role of those who visited him or of the purpose of the meetings. He was left feeling confused and frustrated.

**D. Client information was passed to separate organisations without their knowledge or consent;**

In one of our client's cases, our client's complaint was passed on to a separate church organisation without his knowledge or consent which caused significant distress to the client. This action has never been explained, neither has he received an apology for such a breach of privacy.

**E. Clients were pressured to attend a church authority internal hearing before their claim was accepted;**

Some clients have reported to us that they feel strongly pressured to submit to the internal hearing processes held by the Independent Commissioner, and found the process to be traumatic and akin to a formal trial, such that they felt that they were the guilty party, not the perpetrator.

**F. Minors were pressured to attend a church authority internal hearing against their parent's wishes;**

Please see submission of Angela Read

**G. Clients were distressed by third parties who worked for the church authority sitting in on meetings without their consent;**

Please see submissions of Angela Read and Noreen Wood. A number of our clients have reported this concern to us and have felt deeply uncomfortable yet obliged to go along with it if they wish their complaint to progress.

**H. The accused in a case actively sought support from parishioners whilst the complaint progressed;**

Please see submission of Angela Read

**I. Clients were told to remain silent about their concerns about the alleged perpetrator;**

Please see submission of Angela Read

**J. Clients were not told they could have a support person with them during interviews and meetings;**

Clients have consistently complained about this, see Mike Scull's Submission for a specific example of this.

**K. Clients were approached by the church authority to seek information about other victims' situations;**

# Lewis Holdway

L A W Y E R S

A client has reported to us that he was contacted by the Independent Commissioner for the express purpose of obtaining information about another victim's situation. It appeared to this client that the information was being sought so as to defend the Melbourne Response's dealings with that victim.

**L. Clients were denied access to transcripts of their interviews with the church authority;**

Please see submission of Angela Read

**M. Clients experienced significant time delays before resolution was reached, in some cases, several years;**

The majority of our clients complain about time delays. The longest time recorded between complaint and settlement was 13 years. We are aware of a number of clients whose cases are unresolved after more than 5 years.

**N. The process became unnecessarily legalistic - the burden of proof in practice was 'beyond reasonable doubt';**

The Melbourne Response in the first instance requires a victim to submit to a tape-recorded interview with a QC which is traumatising and inappropriate. Towards Healing requires victims to undergo an 'Assessment' usually conducted by two Catholic ex-police officers who are very forensic in their approach.

**O. Clients were refused pastoral care and meetings when requested;**

**P. Clients were refused psychological care;**

**Q. Clients were refused reimbursement for medical expenses which arose as a result of their injuries;**

Please see submission of Noreen Wood

**R. Clients were refused the opportunity to meet with the Catholic Archbishop of Melbourne until they had signed a Deed of Release.**

This has been consistently reported to us by many clients.

## 1.3 Outcomes

The outcomes of the church authority's investigations were at the very least unsatisfactory, and in some cases, caused further significant systemic damage to our clients, many of whom felt strongly that:

**A. Their complaints were not properly investigated by the church authority, resulting in the alleged perpetrator remaining in ministry;**

**B. Requirements to make a finding that a client was a victim were not consistently applied; and**

# Lewis Holdway

L A W Y E R S

- C. Clients felt re-traumatised as a result of going through the church authority's complaint process.

## **2. Long term impacts on victims**

We take this opportunity to point out to the Committee members that sexual assaults perpetrated by a religious offender are devastating in terms of the impacts. Many of our clients' submissions demonstrate this.

The majority of victims battle with psychological illness (and in many cases so do their family members by association), they suffer the breakdown of family relationships, they encounter a significant financial toll in terms of lost opportunities for careers or career advancement and due to the cost of psychological support services. Many also develop addictive behaviours to cope with the pain. This is a particularly disadvantaged group.

When they approach the very institution that harmed them for assistance with their recovery usually they are hopeful of a compassionate response. Many are further damaged by the legalistic and uncompassionate response they receive.

## **3. Systemic practices that discourage reporting of criminal behaviours to State authorities**

We have observed the following systemic practices, which directly or indirectly discouraged victims from reporting assaults to the State authorities:

- A. Clients were not informed of their right to report to the police at the outset or part-way through their process; - see Case Study below
- B. Clients were discouraged from making a police report;
- C. Clients were told their complaint was not a crime;
- D. Clients were not encouraged to seek independent legal advice;
- E. Clients' reports to the church authority were used to try to discredit them in the criminal proceedings against the perpetrator;
- F. Clients experienced bias when they were the first complainant with the apparent presumption that if there were no other reported victims of that offender then the first reporting victim was not believed unless the priest or brother confessed; and
- G. Clients were effectively required to prove their complaint beyond reasonable doubt rather than on the balance of probabilities.

# Lewis Holdway

L A W Y E R S

## Case studies

Luke's (not his real name) story is typical of the problems inherent in the Church's reporting system.

When Luke reported his complaint of child abuse to the Church, he was referred to the Independent Commissioner. The Independent Commissioner did not inform him of his right to report to the police until after he had given his statement. Nor did he adequately explain the complaint process to Luke.

Luke subsequently contacted the police and pressed charges against the Priest who had sexually assaulted him. At trial, however, Luke was horrified to discover that the transcript of his initial statement to the Independent Commissioner was used against him by the defence in an attempt to discredit him:

*"I had been told by Mr O'Callaghan that what we had discussed was to be kept confidential. You can imagine my utter surprise and distress when these very matters were used to try to trip me up during cross-examination."*

Another client, Angela Read had the experience of her son being interviewed without her being present, a most inappropriate and unprofessional response. Moreover, the child's disclosure was not revealed to Angela for some weeks. Please see Angela's submission for further detail.

We also refer the Committee to our Submission to the Towards Healing Review in 2009 in the Supporting Documents section. In this document we point out a number of difficulties with both the Towards Healing protocol and the practice of the protocol.

## 4. Legal Technical Difficulties for Clergy Abuse clients

Many clients choose not to take civil court action against the church authority or the accused due to the fact that there is little chance of making a successful civil claim against the Catholic Church. The primary legislative impediments are the following:

- A. The Statute of Limitations; - in practice this means that the victim must issue proceedings within three years of the events; at age 21 if the assaults occurred when the victim was under 18, or within three years of becoming aware of the impacts. This restrictive law is completely out of step with current psychological research which indicates that victims of sexual assault usually remain silent about the assaults for a decade or two before disclosing.



# Lewis Holdway

L A W Y E R S

- B. The church not being a legal entity; - in practice the church cannot be a defendant in civil proceedings, only the Archbishop at the time of the offences and only if they can be made vicariously liable.
- C. The church's assets being protected by property trusts; in practice this prevents victims from seeking compensation.
- D. Church personnel not being considered employees; - in practice, this means that bishops and archbishops cannot be held accountable for the actions of offending priests, or for moving offending priests from parish to parish,
- E. The accused often having no assets due to a vow of poverty; - in practice this prevents victims from seeking compensation.

For a detailed examination of the key legal issues, we refer the Committee to an article we wrote for the Law Institute Journal in Victoria – a copy is attached as Appendix 1.

We also take the opportunity to endorse the various legal submissions of COIN (Commission of Inquiry Now) who have addressed many of the legal technical difficulties for victims of religious sexual assault in detail.

## 5. Consistent Issues as Reported by Clients:

### 5.1 Lack of Independence

Many clients experienced significant confusion about the role of the Independent Commissioner in the complaint process. Some clients, for example, felt that the Independent Commissioner was meant to be working for them as victims:

*"My experience of the Independent Commissioner was such that I formed the impression that he worked for me. I was shocked and confused to discover that he actually worked for the church authority, even though he claims that he was truly independent. I thought that he was like a Royal Commissioner and had no idea that he was the church's barrister. If I had known that he was the church's barrister I would never have spoken with him. When I realised that he was not an Independent Royal Commissioner, I was enormously distressed that I had spoken with him."*

By contrast, others stated that they had formed the impression that he was working for the Church. Neither of these impressions supports a view of the Commissioner as an independent third party.

A number of clients reported calling the Catholic Cathedral for help and being referred straight to the Independent Commissioner.

## 5.2 Inadequate skills and training

The Director for 'Towards Healing' is based in Mildura, which has given rise to many difficulties to our clients when trying to seek support. In one instance, a client described arranging to meet with the Director in Melbourne, but that the meeting occurred in a café at Southern Cross Railway Station. This was very traumatising for our client, who describes having broken down and having to walk away during this meeting while his wife continued to explain the situation to the counsellor.

These sorts of occurrences clearly point to a lack of sufficient skills, training and understanding on the part of the personnel employed by 'Towards Healing', they fail to appreciate the trauma suffered by victims of sexual abuse.

Many clients also felt that some of the 'Towards Healing' staff, such as mediators and counsellors, were chosen for these positions due to their connection with the Church, not their particular qualifications. As one client observed:

*"I found that the TH staff failed to follow the protocol correctly and while mostly well-meaning, they were simply not adequately trained, not adequately aware of the need for a positive victim-mentor dynamic, and are operating on a religious framework (many of the TH staff are religious personnel or were once religious personnel) and support the church first and foremost – as a result they were highly defensive of each other and the church."*

## 5.3 Inadequate support

From our experience, victims experience the trauma of abuse differently. While some victims want to completely cut themselves off from the Church, others desire to remain part of their religious community. For those who wish to maintain a relationship with the Church, the availability of pastoral care is very important to them. However, this support has often not been forthcoming. Indeed, some of our clients have reported feeling deliberately excluded from the Church. One of our clients, Angela Read says in her submission:

*"I was prevented from receiving pastoral care when the replacement parish priest started [the previous parish priest was the offender]. This priest...was told by the Archdiocese to stay away from me and my family. He was also told that I was a troublemaker by the other parishioners, and so he would not meet with me. I am aware of this because later he apologised to me for his behaviour. I got the opposite of pastoral care, I got deliberate attempts to exclude me. I was made the scapegoat while the criminal was given the benefit of the doubt."*

Furthermore, many of our clients have been denied their requests for healing services; a measure that in our experience can be a very important step in a victim's ability to move forward in their lives. Many of our clients have also voiced an interest in meeting with the Archbishop; however, this has been mostly refused.

# Lewis Holdway

L A W Y E R S

Another client had the horrific experience of being wrongly placed in Encompass, a catholic organisation established to treat paedophile priests. The trauma and damage caused to this person was so significant that he became suicidal. This was professional negligence at its worst.

Clients have also expressed deep dissatisfaction with the system of Carelink. For example, one of our clients reports feeling continually anxious that the provision of free counselling may be withdrawn. This sort of uncertainty can greatly add to the distress of victims.

Clients have also reported that Carelink was withdrawn from them while the police were conducting an investigation into their case. There have also been concerns about the level of control shown by the Church over the victim's choice of counsellor (please see 'invasion of privacy' below).

Beyond counselling help, victims have been hard pressed to get assistance from the Church in relation to their other areas of need. Many clients have noted that they have not been provided with any childcare or cleaning assistance, which would be of particular assistance to victims suffering from psychological illnesses as a result of the abuse.

## 5.4 Power imbalance

Almost all of our clients reported not having been advised to seek legal advice. Many clients related that during meetings with the Church authority, they were not allowed to have a support person accompany them, although the Church had brought a Lawyer. This clearly creates a vast power imbalance, one which some clients compared to the dynamic of being a victim of an authoritative religious figure.

The power imbalance was exacerbated for many victims by the religious character of the panel. As one of clients, Tony Hersbach has described:

*"It was very unhelpful for me that the Panel hearing was held literally in the shadows of the cathedral. When I went into the room it was me and my wife on one side and a whole lot of people on the other side of the table, some wearing clerical garb. The whole experience was very intimidating."*

## 5.5 Invasion of privacy

As we have discussed above, many of our clients were confused about the role and the powers of the Independent Commissioner. Some of them reported feeling upset about the Independent Commissioner's intervention into their personal lives. For example, one of our clients described the shock that he felt when the Independent Commissioner made unsolicited inquiries of his new pastoral priest, and also when

# Lewis Holdway

L A W Y E R S

he received a "cold call" from another victim, who had been given his contact details by Mr O'Callaghan.

Another client Marie Cogan has reported that Peter O'Callaghan authorised Carelink to pay her psychologist to write her disclosure over a two year period. The psychologist was paid a total of \$13,446 during this period and the therapeutic relationship was terminated by our client upon her discovering that the psychologist had breached confidentiality by disclosing her personal information to Carelink without her consent.

Many clients were also upset about the lack of privacy received by them in counselling from Carelink. The 'Consent to Carelink Form' clearly states that victims may "authorise Carelink and anyone to whom Carelink has referred you to provide information about you to the Compensation Panel to assist the Panel in formulating its recommendations about the ex gratia compensation you receive" and that "Carelink will not disclose any information about you to the panel unless you consent". However, in practice, there has been a large amount of confusion amongst victims about this.

There are serious questions around the disclosure of information by a counsellor in this way, whether the victim has consented or not. Further, the linking of ex gratia compensation with the victim's consent to disclose in the Carelink form places covert pressure on victims to consent to this practice.

As a firm, we would therefore call for specialist funding to be provided to ensure that the counselling received by victims of clergy abuse is independent of the Church Authority. It is our view that the provision of counselling by an in-house organisation such as Carelink has compromised the quality of support given and has led to a blurring of the boundaries between the counsellor and the Church Authority. This situation has led to a level of distrust on the part of the victim towards their counsellor, which may have detrimental affects on their mental health.

There has also been a case of sharing of material between the Melbourne Response and Towards Healing, which led to one of our clients making a complaint to the Privacy Commissioner.

## **5.6 Lack of accountability**

For many victims, the most compelling reason for coming forward about their abuse is to have the offender removed from a position of power within the Church. However, as is apparent from a large number of our clients' submissions, this all too commonly does not happen. Not only have offenders not been 'stood down' after a complaint is made, but bafflingly, they have often been allowed to continue to conduct public functions.

# Lewis Holdway

L A W Y E R S

For example, Mike Scull tells in his submission of learning from a Texan journalist that the offender in his case was listed as a teacher in Samoa for a Catholic primary school. This was despite being told by 'Towards Healing' that he had been sent there as a retiree, and despite the religious order being put on notice of the allegations of abuse.

Another client has reported to us that he has firsthand knowledge of the church hierarchy exposing parishioners to risk of significant harm by moving priests who they knew to be offenders into parishes and failing to either warn families or to closely monitor those priests. As a result more catholic children were sexually assaulted.

## 5.7 Lack of transparency

In our opinion, the privilege that is afforded to priests in confession is out of step with requirements for transparency in almost all other modern professions where criminal activity has been divulged. Some of our clients reported feeling shocked that offenders had been permitted this privilege.

In particular, clients were critical of the effect of such a privilege on the conduct of the Church's response. For example, in relation to the 'Towards Healing' response, a client stated:

*"In [a] meeting I was astounded to be told by Fr Murdoch that the offender ...had been to confession with him and that therefore Fr Murdoch couldn't discuss any crimes Ayers had committed prior to that confession, which was the period he had sexually assaulted [my husband]."*

There is also no appeal or review:

Another client comments: "I think the Panel system is unjust because it treats victims very differently and there is no right of appeal. In my case I tried to have the offer reviewed and the Panel would not disclose the 'extenuating circumstances' in which a victim may ask for a review. Also the Panel do not publish their findings and it is impossible to know on what basis one victim may get a better payment than another"

Many clients also voiced their frustration about not knowing the criteria used by the Church to determine the amount of compensation (really just an ex-gratia payment) that is offered to victims. This often compounded their sense that the compensation offered was "hush money", rather than an amount assessed according to the particular damage suffered by the victim or in view of the victim's ongoing support needs.

## 6. Recommendations

### 6.1 Recommendations for Systemic Change

It is our considered view that the current protocols are flawed and damaging to victims.

We make the following recommendations for change to improve the church complaints processes:

- A. The church authority's response organisations should be locally based and have a public profile such that they are approachable to the public and professionals. At present, the Victorian office of Towards Healing is situated in Mildura and is staffed part-time. There is no provision for crisis response which is more often than not required when a victim finally takes the step to make a report.
- B. The church authority's organisations should include complainant representatives to ensure that their services appropriately target the needs of complainants. Victims have complex and multiple needs and would be well served by having victim representatives on the Boards of any response organisation.
- C. Recognition and Inclusion of spiritual damage as a critical element in the harm caused. Neither protocol allows for an ongoing pastoral relationship with victims after the claim has been settled, yet many clients report to us that they desperately require this to continue their healing journey.
- D. Recognition and practical response and support to family members of the complainant – the secondary victims. At present the families of victims face an uphill battle to have their needs recognised and attended to by either protocol. Settlement figures fail to address the needs of a victim's family when s/he is unable to work due to the impacts of the abuse.
- E. The relationship between Canon Law and civil and criminal law should be transparent and Canon Law should be subject to the law of the State. We do not know of any other organisation which has permission to conduct its own investigations according to its own laws into allegations of criminal behaviour by its own staff. While we acknowledge that Canon law is important to the Catholic church, we consider that it has been invoked to avoid taking responsibility for criminal behaviour of paedophile priests and has allowed crimes against children to continue to be perpetrated with minimal consequences for the offenders.
- F. There should be psychiatric screening of all current church personnel including those currently in training for religious life to minimise risk to children.
- G. There should be funding for complainants who seek a holistic casework approach, (spiritual/medical/legal/psychological). In our experience the majority of clients failed to finish school or obtain a tertiary qualification. Many have developed addictions

# Lewis Holdway

L A W Y E R S

and have suffered from long term unemployment and fractured family relationships. They simply are unable to afford to access the assistance they need.

- H. An acknowledgement that the required pastoral care in this field is specialised and should be provided to victims by appropriately qualified professionals at no cost to the complainants. It is sadly the case in our experience that the professionals involved have acted defensively of the church to the detriment of our clients and have failed to grasp the enormity of the impacts, such that, albeit perhaps unintentionally, they have created a further level of systemic harm to clients. Some of our clients have described their experience of the protocols as being worse than the actual assaults.

## 6.2 Recommendations for Legal Changes

In our view the following changes to the law would improve access to justice for victims:


- A. Amendment to the Statute of Limitations to allow for historical abuse claims;
- B. Amendment to the corporations law so that the church authority is legally a corporation (e.g. making the Archbishop of Melbourne a Corporation Sole) and capable of being sued over time;
- C. Amendment to the property trust legislation in each state to prevent the church authority from protecting its assets from civil suits by making the property trust liable for claims arising from activities of the Archdiocese; and
- D. Amendment to the law on vicarious liability so that priests and religious are treated as employees and therefore church authorities can be held responsible for breaches committed by church personnel.
- E. Clarification of aiding and abetting offences for those concealing child sexual assaults by clergy, perhaps by the introduction of a child endangerment offence or such like.

Many of our clients have expressed support for these changes, as can be seen from their individual submissions.

## 6.3 General Recommendations

Other matters which we consider will assist victims to have better access to just outcomes include:

- A. Unfettered access to church records



# Lewis Holdway

L A W Y E R S

At present, unless a civil case is on foot (which is unusual given the legal impediments in this area of law) church records are unavailable to victims and their lawyers. This is a significant disadvantage for victims.

We also believe that all of Mr O'Callaghan's (the Commissioner of the Melbourne Response) records and the records of the Archdiocese should be made available to the Committee and the police for perusal so that if there is any intentional cover-up of either offending priests, or their superiors failing to remove them or reassigning them, then this can be identified and addressed.

## B. Inconsistent settlement amounts must cease

Settlement figures appear to be inconsistent across the cases and some cases are dealt with outside the protocols while other complaints are simply ignored.

Also, the maximum payment available to victims by the Compensation Panel is \$75,000. We call for this cap to be lifted and appropriate compensation levels granted based on the long term and ongoing impacts suffered by victims.

## C. Unspeakable silence - the suicides

The crimes of priests and religious are often referred to as "unspeakable". We know of a number of victims who cannot bring themselves to speak of the terrible assaults they have suffered at the hands of trusted religious figures in their lives. They continue to live and suffer in silence.

We are aware of many of our clients who have made multiple suicide attempts and are also aware that in general, many victims have taken their own lives. We call for an investigation into the multiple suicides of clergy abuse victims.

## D. All Deeds of Release should now be reviewed.

We are aware of many clients who have settled for low settlement sums, which fail to effectively assist them to recover from the impacts of the assaults. After they have signed Deeds of Release they are barred from issuing civil proceedings.

We believe that these cases should be reviewed and where appropriate the Deeds overturned such that victims are able to seek and obtain proper compensation.





# Lewis Holdway

L A W Y E R S

## E. Serial Paedophile priests

We are aware that in some Victorian Catholic parishes there have been a 'series' of paedophile priests in succession. Such parish communities require significant intervention and support, which has not been forthcoming to date. These include Doveton, Healesville and Ballarat.

Some clients have also reported to us their concerns that in some cases a paedophile ring of priests may have been operating in some parishes. We ask the Committee to obtain Catholic Church records to identify any such activities and call for resources to be provided to appropriately address these serious matters.

## Final Comments

We are grateful for this opportunity to inform the Committee of the issues we have identified in our legal practice with victims and in our dealings with church protocols.

We wish to acknowledge the courage and tenacity of our clients in making their own submissions, some of whom have become psychologically unwell when re-visiting these experiences.

We would welcome the opportunity to speak in person to the Committee.

## Supporting Documents

November Law Institute Journal 2010 "Acting for Victims of Religious Sexual Assault" by Paul Holdway and Ruth Baker, pp 50-55.

January 2009 Submission to Towards Healing review by Lewis Holdway Lawyers.

## Witnesses

Paul Holdway  
Ruth Baker

Signed:



Dated: 21 September 2012

# ACTING FOR VICTIMS OF RELIGIOUS SEXUAL ASSAULT

## CHALLENGES FOR VICTORIAN LAWYERS

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

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

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

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

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

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

### CRIMINAL PROCEEDINGS

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

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

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



... many adult survivors tend not to report the assaults until the limitation periods have been passed by a substantial period of time.

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

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

## VOCAT

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

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

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

## CIVIL PROCEEDINGS AGAINST THE OFFENDER

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

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

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

### Correct legal entity – who to sue?

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

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

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

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

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

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

### Limitation periods

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

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

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

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

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

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

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



Some victims prefer to approach the church directly, and can instruct lawyers to approach the institution itself to hold it accountable for the behaviour of the alleged offenders.

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

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

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

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

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

## CHURCH COMPLAINTS PROCESSES

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

### "Towards Healing"

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

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

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

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

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

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

### The "Melbourne Archdiocese Response"

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

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

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

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

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

## AN ALTERNATIVE APPROACH

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

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

# **Lewis Holdway Lawyers**

## **Submission to Towards Healing Review 2009**

### **Introduction**

The Towards Healing document ("the Protocol") establishes "public criteria" according to which the community may judge the resolve of Church leaders to address issues of abuse within the Church. It states that if the principles and procedures are not followed, then "we (the Bishops and Church leaders) will have failed according to our own criteria."

It is our view that, unfortunately, the principles and procedures outlined in the Protocol have in many cases, not been followed. We therefore welcome this opportunity to provide feedback to the National Committee for Professional Standards and Church leaders.

Our submission offers examples of how failure to follow the principles and procedures of the Protocol has impacted, in some cases most severely, on the well being of complainants who have approached Towards Healing and relied on its rhetoric.

Our submission comes from our case experiences with Towards Healing (about 120) since 1996 with an emphasis on cases in the last year to keep it as relevant to the Review as possible.

We note the Principles outlined in Part One of the Protocol and support these. It is the failure to implement the Procedures in the context of these Principles that has, in our opinion, led to Towards Healing being less than satisfactory in a number of cases for our clients and we except the overwhelming majority of Victims who engage with it.

We offer this document as constructive feedback and in the hope that improvements will be made to benefit all parties involved in the Towards Healing process.

### **Response regarding the Principles (Clauses 1-32)**

#### *Clauses 1-5*

We affirm the Principles outlined in Clauses 1-5 of the Protocol regarding Sexual Abuse, Physical and Emotional Abuse.

However, we see a gap in that the very critical areas of Spiritual Abuse and Damage are not included in the Principles section. Such an omission fails to fully grasp the gravity of sexual assaults in a religious context. The acknowledgement and inclusion of Spiritual Abuse and Damage would add greatly to a more comprehensive consideration of victims' welfare and needs.

#### *Clause 10*

We affirm the acknowledgment in Clause 10 of the Protocol that offenders frequently present as caring and good and that "exemplary public lives can be used as an excuse for a private life that contradicts the public image."

We ask however, given such an acknowledgement, why in practice does the Protocol demonstrate a reluctance to accept a complaint which happens to be the first or sole complaint against an accused? We respectfully suggest that this practice is not only

### *Clause 34*

We suggest that the definition of Pastoral Care in Clause 34 of the Protocol requires expansion to include a range of care that is specific to victims of religious sexual assault. Pastoral care is a difficult concept to define and can be so broad that it can lose any practical application and meaning. In our view, it requires an acknowledgement that pastoral care in the area of assisting victims of clergy/religious assault is a specialised field, and should be promptly provided for victims by those suitably qualified.

### *Clauses 35 & 36*

While Clause 35 outlines Structures and Personnel, it has been our experience that the State Professional Standards Resource Group (PSRG) does not have a public profile. As such, the PSRG is not approachable to professionals or to the public, making communications and establishing a positive relationship difficult.

A further difficulty is that PSRG members are appointed by Bishops, with the criteria for such appointments being unknown. In addition, to our knowledge there are no victim representatives on the PSRG. This is a concerning omission as such a role would clearly assist in ensuring that the service offered by the PSRG adequately meet the needs of victims.

Clause 35.3.1 states that "the Director shall manage the process." We regret to inform that our experience of the management of the process, in particular over the past four years, has been inadequate to say the least.

This is in part due to the Victorian Director being based six hours out of the Melbourne CBD, making it logistically difficult for victims and their representatives to receive an adequate service. You will appreciate that face to face contact can provide reassurance to victims who often are injured psychologically in such a way as to become dislocated.

It has also been due to a significant number of avoidable issues which our clients have experienced. These issues and errors have made client victim experiences of the Towards Healing process highly stressful at best and damaging at worst. We offer the following specific examples, noting that this is not an exhaustive list:

1. Insistence that victims make the 1800 call themselves to enter their complaints. In Clause 36: Receiving a Complaint, it does not state that victims have to ring the 1800 number. It is our view that it is not ethical to expect a victim of sexual abuse to report their experiences to complete strangers over the phone as a pre-requisite to entering the Protocol. Written entry or entry via a representative should be expressly permitted in the Protocol.
2. Failure to keep telephone appointment to enter complaint.
3. Inadequate preliminary investigations.
4. Significant and ongoing time delays in management of process.
5. Ongoing lack of Communication from Towards Healing office.
6. Appointments of inadequate or inappropriate Contact Persons - e.g. not caring/compassionate, unable to record claim clearly/accurately.
7. Inadequate Contact Reports - not complying with Protocol requirements
8. Inadequate Assessor and Assessment - e.g. not interviewing Victim but still making a finding.
9. Unnecessarily Legalistic process - e.g. cross-examination type approach/questioning of everything/requiring Court level evidence to prove each allegation/referring for Psychiatric testing to a medico-legal therapist unskilled in Pastoral Care.
10. Refusal to engage in a pastoral meeting.

The protocol further states at Clause 17 that a compassionate response to the complainant must be a priority. Again, for many of our clients, the response of Towards Healing has unfortunately been anything but compassionate.

Despite this, we are committed to continuing to work within the protocol to the best of our ability to meet the needs of our clients.

We greatly appreciate this opportunity to contribute to discussions for a better process for victims.

We look forward to receiving a copy of your report in due course.

A handwritten signature in black ink, appearing to read "Paul Holdway". The signature is written in a cursive, flowing style.

for Paul Holdway & Ruth Baker  
Australian Lawyers  
Lewis Holdway Lawyers  
Melbourne, January 2009.