

PART H

CIVIL JUSTICE REFORM



The Committee identified that for many victims of criminal child abuse, the option of pursuing a claim through civil litigation is critical. However, significant barriers prevent victims from achieving justice through this avenue. This part of the Report proposes ways to improve the path to civil litigation for victims of criminal child abuse in organisational settings. It also considers the civil liability of organisations for such abuse and identifies potential areas for legislative reform.

The Committee is aware that the civil justice system has many limitations that the recommendations of this Report will not overcome. These include practical barriers such as the financial and psychological position of victims of criminal child abuse, evidentiary issues relating to historical events, the difficulty in creating rights or obligations under the civil law retrospectively and the sometimes limited outcomes that the civil litigation system offers. For this reason, despite the civil law reforms recommended in this part of the Report, a number of victims of criminal child abuse in organisational settings will not be in a position to pursue a civil claim. Therefore, the Committee considers that it is important to develop an alternative justice approach alongside the existing traditional civil justice avenues.

Victims, justice and the importance of civil litigation

Many victims told the Committee that the option of commencing civil proceedings is an important part of their search for justice. Victims recognised the significant barriers to civil litigation, but many perceived that civil judgements were critical for achieving justice, including public acknowledgement of wrongdoing by organisations.

In the words of one of the victims who gave evidence to the Inquiry:

The wrongs of the present also include the multiple legal barriers for survivors and victims in finding justice.¹

Victims felt strongly that non-government organisations should not stand in their way in pursuing justice through the courts. A victim who went through the Catholic Church's Towards Healing process told the Committee that:

Towards Healing should allow the victims to seek justice through the legal system at the same time as their process is running. This gives the appearance of the church running its own legal system behind closed doors.²

Inquiry participants made a strong call for governments to make laws that would ensure that organisations could be held vicariously liable for criminal child abuse perpetrated by their members. As one victim explained:

I think the laws of vicarious liability should be amended in Victoria so that priests and religious are treated as employees and church authorities are held responsible for breaches committed by the church personnel. If that were the case, my section 85B would have been paid. But they have denied any liability.³

1 *Transcript of evidence*, Ms Judith Courtin, Ballarat, 28 February 2013, p. 2.

2 *Submission S477*, Name withheld.

3 *Submission S462*, Name withheld. Section 85B of the *Sentencing Act 1991* (Vic) is about sentencing orders. It provides that application can be made at the time of the sentencing for a Court order that an offender pay compensation to the victim.

Many victims told the Committee that ensuring organisations have a legal entity that can be sued by victims of child abuse is fundamental to the exercise of their rights. The following quotes represent the views of many victims on this issue:

One of the things I would like to say is that I think the Church should be forced to become a legal entity. It should be able to be sued over abuses by people in its employ. As it is, the institution of the church is under no real threat—it is just a real inconvenience that they have had to suffer this—and therefore I do not think they will change.⁴

Basically at the end of the day, there was nothing. You could not sue anyone. There was no such thing as the Catholic Church. We could not sue anyone.⁵

The wealth of the church and other organisations must be readily accessible to victims through our legal system. Victorian legislation currently allows the church to segregate its wealth in ways that deny victims access to just compensation. Officeholders should be able to be held liable in relation to the sexual abuse of children occurring during the period of their predecessors in office. Unlike the managers of other entities, the Archbishop of Melbourne, for example, is able to deny responsibility for any wrongdoings done by his predecessor.⁶

The importance of alternative justice avenues

Despite the importance of reforms to civil litigation, Inquiry participants told the Committee that many victims will never be in a position to pursue civil claims in the courts (see Chapter 25 and Chapter 26 for a discussion of the practical, evidentiary and legal barriers to civil litigation). Accordingly, many victims considered that alternative forms of achieving justice were important.

Victims of child abuse emphasised a broad range of concerns in relation to achieving justice, particularly the need to be heard and believed and for the organisation to take responsibility for what happened to them. While acknowledging that financial compensation is important to victims, Ms Angela Sdrinis of Ryan Carlisle Lawyers explained:

More than the money, there also has to be a real acknowledgement of the wrongdoing and apology—restorative justice, if you like—where the organisation is able to say, ‘We recognise what happened to you, we apologise for it. Here is an offer of compensation which is a gesture which expresses a belief that you suffered at our hands.’ That all has to be part of the process.⁷

Many victims told the Committee that they sought justice through processes established by some non-government organisations. While many received financial compensation, pastoral support and counselling through these processes, most did not feel they achieved justice. Many victims told the Committee that they felt that they had not been heard, had not been adequately supported, or had not received genuine acknowledgement of the role of the organisation in allowing the abuse to occur. Some perceived the responses as adversarial and others perceived them as designed

4 *Transcript of evidence*, Ms Anne Murray, Ballarat, 28 February 2013, p. 10.

5 *Submission S478*, Name withheld.

6 *Transcript of evidence*, Mr Anthony & Mrs Chrissie Foster, Melbourne, 23 November 2012, pp. 7–8.

7 *Transcript of evidence*, Ryan Carlisle Thomas Lawyers, Melbourne, 17 December 2012, p. 8.

to limit the accountability of the organisation. For a more detailed discussion of these processes, refer to Part F.

The Committee considered that the difficulties victims have faced in accessing justice under the civil law is one of the primary reasons that victims seek out remedies directly through non-government organisations. For example, the Committee heard many examples of non-government organisations accepting that abuse took place or paying compensation where no such entitlement would have existed under civil law.

Inquiry participants delivered a strong message to the Committee that Victoria needs a government-run justice process that supports victims and that is paid for by non-government organisations. Such an avenue could give recourse to victims where civil litigation is not available or appropriate. For example, Mr Peter Blenkiron told the Committee:

People have had enough. Healing does not have to take place just for us survivors; it has to take place in the community as well. Unless we can put something in place, run by the government and paid for by the Church or the responsible religious body, then the healing will not happen.⁸

The role of non-government organisations

Not only do non-government organisations hold out members, employees, volunteers and others who represent their organisation in the community as credible and trustworthy individuals, but with the knowledge of the organisation, the individuals possess their status and respect by reason of their association with it. The Committee considers that, because of its contribution to this special relationship of trust, an organisation has a duty of care to take reasonable steps to protect children from abuse by employees, volunteers and others whom it has engaged. This is discussed further in Chapter 26.

A matter of great concern to the Committee and participants in the Inquiry was the extent to which some non-government organisations rely on technical legal defences accorded by the traditional civil justice system. For example, although Cardinal George Pell insisted that ‘we have never relied on a legal technicality—I have not’, from the Committee’s perspective this has not been the approach. Cardinal Pell went on to explain in relation to the case of *Trustees of the Roman Catholic Church v Ellis & Anor* (discussed in more detail in Section 26.2) that:

If he had sued the right person, if he had sued the archbishop at the time, there might have been some possibility of that, but even there in law the archbishop was not aware of that offence and therefore he is not legally liable.⁹

In that case, the Catholic Church relied on the inability of the plaintiff/claimant to identify an appropriate defendant who was responsible for appointing and monitoring the perpetrator. Cardinal Pell did not indicate whether the Catholic Church was willing to identify a nominal defendant against whom a claim could be made—one that would allow claimants to argue the substantive issues of liability in the court and that would have sufficient funds to meet any judgement.

⁸ *Transcript of evidence*, Ballarat & District Group, Ballarat, 28 February 2013, p. 5.

⁹ *Transcript of evidence*, Catholic Archdiocese of Sydney, Melbourne, 27 May 2013, p. 55.

The Committee acknowledges that, in common with all other individuals and bodies in the community, non-government organisations have a right to argue their case in a court of law. However, it considers that there is an obvious tension between such reliance on technical legal defences (particularly by religious organisations) and a real commitment to ensuring justice for victims of criminal child abuse. Indeed, the Committee saw this lack of commitment as part of the reason that government intervention has become necessary.

At a minimum, the Committee considers that a non-government organisation party to a court case should nominate an entity to act as a nominal defendant to enable the courts to determine the substantial merits of the case.

The Committee is encouraged by the cooperation of non-government organisations throughout the Inquiry and notes that most undertook to comply with the Committee's recommendations. Cardinal George Pell, for example, stated, 'whatever we are compelled to do, we will do'.¹⁰ He further indicated:

I am certainly totally committed to improving the situation; I know the Holy Father is too. I know there are significant persons in the community and in the Church who believe, rightly, that we have failed ... We have done quite a deal. I commit myself to doing whatever further is required and appropriate so that we can bring a bit more peace.¹¹

Br Julian McDonald from the Christian Brothers stated:

I know that we will never fully comprehend the extent and depth of the pain carried by all of you out there who have been victims of abuse by Christian Brothers. I can only extend to you our profound apologies, beg your forgiveness and assure you that the Christian Brothers will do their best to right the wrongs that have been done to you.¹²

Similarly, Sr Angela Ryan from Towards Healing indicated:

We are open to suggestions as to how to improve the process, and we look forward to this Inquiry and the Royal Commission making recommendations in relation to such improvements.¹³

Furthermore, in their evidence before the Inquiry, non-government organisations have acknowledged that the financial compensation awarded through existing traditional and alternative avenues does not, of itself, adequately meet the needs of victims. For example, Mr David Curtain QC, Chairman of the Melbourne Response Compensation Panel, made this point clearly in his evidence to the Inquiry:

Can I tell you this: that is nowhere near enough and [victims who have pursued litigation] would also say the money that was achieved at settlement in litigation was not enough. That is my point: it is never full compensation. So when you talk to me about full compensation, please understand I accept fully it is never enough, but I never suggested that this was full compensation in the *Melbourne Response*.¹⁴

Similarly, Archbishop Philip Freier of the Anglican Archdiocese of Melbourne told the Committee:

10 *Transcript of evidence*, Catholic Archdiocese of Sydney, p. 26.

11 *Transcript of evidence*, Catholic Archdiocese of Sydney, p. 57.

12 *Transcript of evidence*, Christian Brothers, Melbourne, 3 March 2013, p. 36.

13 *Transcript of evidence*, Towards Healing, Melbourne, 3 May 2013, p. 25.

14 *Transcript of evidence*, Compensation Panel, Melbourne Response, Melbourne, 3 May 2013, p. 9.

Where there are omissions or where we have had something we have not seen, we are eager to learn from that and certainly look forward to the deliberations of your Committee.¹⁵

All the non-government organisations which appeared before the Committee confirmed their commitment to righting the wrongs of the past, and many acknowledged the need for a victim-centred approach.¹⁶

Finding

Non-government organisations that appeared before the Committee undertook to comply with any Committee recommendations that would improve their processes for responding to child abuse claims.

15 *Transcript of evidence*, Anglican Diocese of Melbourne, Melbourne, 22 April 2013, p. 17.

16 See, for example, *Transcript of evidence*, Salesians of Don Bosco, Melbourne, 29 April 2013.

Chapter 24

What are the different forms of civil justice?

AT A GLANCE

Background

There is a range of traditional and alternative justice avenues in Victoria for victims of criminal child abuse in organisations:

Each of the existing avenues of civil justice has its strengths and weaknesses.

There is a role for non-adversarial justice avenues that provide an alternative to traditional forms of justice.

- civil litigation, including court-ordered mediation
- victims of crime tribunal
- non-government organisation protocols.

Key finding

- There is no existing independent avenue in Victoria for the resolution of claims by victims of criminal child abuse in organisational settings that is paid for by non-government organisations.

24.1. Relevant justice approaches in Victoria

The Committee identified the following justice approaches in Victoria that are relevant to criminal child abuse in organisations:

- civil litigation, including court-ordered mediation
- Victims of Crime Assistance Tribunal (VOCAT)
- non-government organisation protocols.

The Committee's aim is to improve all three forms of dispute resolution through its recommendations.

The importance of civil court judgements in providing public acknowledgement and vindication is discussed in detail in Chapter 25. Victims who commence civil proceedings can also request or be directed to court-ordered mediation, which is an alternative dispute resolution avenue for resolving civil claims. While court-ordered mediation may provide some cost savings and efficiency, the Committee considered that it may not go far enough in achieving justice for victims.

VOCAT provides state-funded compensation for victims of crime, including child abuse victims in organisational settings, even if the perpetrator cannot be found or has no money. VOCAT focuses on supporting and hearing victims of crime and addressing their needs. The ability to have a case heard before a magistrate contributes to the acknowledgement of the harm, a key feature of justice sought by victims. However, this avenue does not require non-government organisations to contribute financially or otherwise assist victims of criminal child abuse in non-government organisations. VOCAT is discussed in more detail in Chapter 27.

Protocols established by non-government organisations vary greatly. These protocols generally respond to claims with some form of alternative dispute resolution. For example, in its submission to the Inquiry, the Catholic Church described the Melbourne Response Compensation Panel as a dispute resolution process.¹⁷ Most non-government organisations provided apologies to victims of criminal child abuse, and some sought to address their pastoral and counselling needs. For example, Archbishop Freier of the Anglican Archdiocese of Melbourne told the Committee:

We remain very conscious that there are real people behind each of these numbers, and I hope our engagement with them has been of some assistance in their recovery of hope and confidence. We have wanted most of all to have restorative outcomes for people who have reported abuse.¹⁸

However, the Committee found that many victims did not perceive that these processes established by non-government organisations achieved justice for them. For a detailed discussion of processes adopted by non-government organisations, see Part F.

Based on the range of views presented to the Inquiry about what justice means to victims, the Committee heard that victims expect justice avenues to provide:

- independent acknowledgement of both the abuse and the role, if any, of the non-government organisation in the occurrence of that abuse

¹⁷ *Submission S185*, Catholic Church in Victoria, p. 57.

¹⁸ *Transcript of evidence*, Anglican Diocese of Melbourne, p. 26.

- acknowledgement by the organisation itself of its role in contributing to the abuse
- financial compensation and other supports paid for by the organisation.

The Committee determined that there is currently no existing justice avenue in Victoria that provides all these outcomes. For example, one victim told the Committee about her frustration at the lack of appropriate avenues:

If it were not for VOCAT or this Parliamentary Inquiry, I would have no alternative other than to carry this knowledge on my own. I would like to add that the VOCAT award was made at the taxpayers' expense, not at the Church's.¹⁹

Table 24.1 summarises the strengths and weaknesses of justice avenues available in Victoria for victims of criminal child abuse in organisational settings.

Table 24.1: Strengths and weaknesses of current Victorian justice approaches relevant to child abuse in organisational settings

Justice approach	Strength	Weakness
Courts—litigation	Court judgements provide public acknowledgement and vindication.	<ul style="list-style-type: none"> • Few cases are determined, due to legal and practical barriers (most are settled privately). • Legalistic and adversarial. • Time consuming. • Costly.
Courts—mediated settlements	<p>Can save costs.</p> <p>Can reduce the time required to achieve resolution.</p> <p>Provides an avenue for non-government organisations to fund compensation.</p>	<ul style="list-style-type: none"> • Can still be legalistic and adversarial, because mediation generally focuses on parties reaching agreement within the legal parameters of the case, rather than focusing on the needs of victims. • Usually no public acknowledgement of wrongdoing.
VOCAT—state-funded compensation	<p>Less legalistic.</p> <p>Victims support services provided.</p> <p>Legal representation funded.</p> <p>Cases heard before a magistrate.</p>	<ul style="list-style-type: none"> • Limited compensation. • Time limits apply. • Does not provide an avenue for non-government organisations to fund compensation and other supports.
<p>Non-government approaches:</p> <ul style="list-style-type: none"> • private settlement negotiation • private settlement determination 	<p>Many provide compensation where none would have been available through legal avenues.</p> <p>Many provide or fund counseling.</p> <p>Many provide apologies.</p> <p>Some are less legalistic.</p> <p>Some provide pastoral support.</p>	<ul style="list-style-type: none"> • Actual and perceived independence is lacking. • Limited compensation (less than that achievable through successful litigation). • Some are legalistic. • Apologies not always seen as genuine. • Legal representation is not funded.

Source: Compiled by the Family & Community Development Committee.

19 *Submission S465, Name withheld.*

Based on these strengths and weaknesses, the Committee identified a number of reforms to civil litigation (Chapter 26), improvements to VOCAT (Chapter 27) and the need to expand the role of VOCAT to encompass an avenue for the resolution of claims by victims of criminal child abuse in organisational settings (Chapter 28).

Finding 24.1

There is no existing independent avenue in Victoria for the resolution of claims by victims of criminal child abuse in organisational settings that is paid for by non-government organisations.

Chapter 25

Why is access to civil litigation important?

AT A GLANCE

Background

The importance of civil litigation for victims of criminal child abuse was strongly emphasised in the evidence provided to the Committee. Many victims saw civil litigation not only as an avenue to seek compensation, but also as a form of acknowledgement and accountability for the harm they have suffered.

However, there are significant practical and evidentiary barriers that can prevent victims of child abuse from pursuing civil litigation against organisations.

Key findings

- Victims of criminal child abuse have a fundamental right to sue non-government organisations for damage they have suffered at the hands of representatives of that organisation. This course is an important avenue for some victims of criminal child abuse to achieve justice.
- Court judgements provide a valuable and practically available form of public condemnation for criminal child abuse, and create a powerful incentive for organisations to change their practices to prevent child abuse.
- No civil claims of criminal child abuse made against organisations have been decided by the Victorian courts. Instead, civil litigation in such cases is usually resolved by private settlements.
- Victims can be at a disadvantage in private settlement negotiations, due to their lack of resources and the evidentiary, legal and practical barriers of challenging an organisation in court. The emotional impact of an adversarial battle also acts as a deterrent to litigation for already suffering victims of criminal child abuse.
- Barriers to litigation for victims of criminal child abuse in organisational settings include:
 - ♦ lack of financial means
 - ♦ lack of emotional resources
 - ♦ practical limitations associated with the typically lengthy delay in bringing cases to court
 - ♦ family considerations.

The Committee identified civil litigation as an important part of some victims' search for justice. As discussed in Part B of this Report, victims saw civil litigation not only as an avenue to seek compensation, but also as a form of acknowledgement and accountability for the harm they have suffered.

The Committee found that a number of practical and legal barriers prevent victims from pursuing civil litigation against perpetrators of criminal child abuse, and against organisations for failing to take reasonable care to prevent the abuse from occurring.

Evidence provided to the Committee strongly emphasised the importance of law reform to remove barriers so that victims could issue and succeed in civil proceedings against organisations. Linked to the reforms is the Committee's view that improving a victim's access to litigation may act as a powerful incentive for organisations to be proactive in preventing criminal child abuse. In the words of Dr Tom Keating, who spoke about his experience with the Catholic Church:

Were church resources seriously under threat through civil suit, I believe that church authorities would quickly take action to limit their exposure. They would become vigilant and act to ensure that children were not placed at risk. At present they have very little to lose.²⁰

The Committee heard that because of the perceived barriers to civil litigation, many victims of criminal child abuse in Catholic Church organisations feel their only alternative is to seek compensation through the internal processes of the organisation concerned. For example, Dr Joseph Poznanski told the Committee:

In fact, my clients are advised by their lawyers that civil litigation or going through the County Court is not going to result in any compensation. At the end the Melbourne Response and Towards Healing are the only processes where the clients can achieve some compensation, so they are somewhat cornered into this situation.²¹

The Committee concluded that organisations have an important role to play in allowing civil cases relating to organisational child abuse to be tested on their merits in a court of law. This is discussed further in Chapter 26.

The Committee acknowledges that law reform is important in this area.

Finding 25.1

Victims of criminal child abuse have a fundamental right to sue non-government organisations for damage they have suffered at the hands of representatives of that organisation. This course is an important avenue for some victims of criminal child abuse to achieve justice.

25.1. What does civil litigation achieve for victims of child abuse?

Civil litigation is an avenue through which victims of criminal child abuse can seek financial compensation ('damages') in a court of law for the harm they have suffered. The process for pursuing civil litigation for victims of criminal child abuse in organisational settings is outlined in Figure 25.1.

However, the Committee found that because of the significant barriers to civil litigation, many victims do not pursue this avenue. Victims who do pursue civil claims invariably discontinue proceedings or settle out of court.

²⁰ *Transcript of evidence*, Dr Tom Keating, Melbourne, 10 December 2012, p. 4.

²¹ *Transcript of evidence*, Dr Joseph Poznanski, Melbourne, 1 March 2013, p. 7.

Figure 25.1: Civil litigation process for victims of child abuse



Source: Compiled by the Family and Community Development Committee.

Only a small number of civil cases alleging criminal child abuse in an organisational setting have been decided in Australia, and the Committee is not aware of any cases that have proceeded to trial in Victoria.²² Accordingly, only a few reliable precedents exist regarding the civil liability of organisations in Victoria.

Some victims told the Committee that organisations have favoured resolving civil litigation claims by settlement (although under the present law, there was only a small prospect the organisation would not succeed in defending itself against the claim). Some Inquiry participants considered that the organisation followed this course not out of concern for victims, but in order to avoid the public exposure of a civil litigation trial. Had there been any such concern for the victims, it is reasonable to assume that organisations would have been prepared to act as a nominal defendant (as discussed in Chapter 26). Ms Pam Krstic of In Good Faith and Associates, for example, told the Committee:

The church needs to nominate a legal church entity for civil litigation—these victims deserve the right to be able to sue. And they should agree to be a model litigant, as the Victorian state government has agreed in cases of sexual abuse in government institutions.²³

Mr Michael Holcroft, President of the Law Institute of Victoria, supported this view. He indicated that the Law Institute would not encourage churches to make aggressive use of legal defences in cases where the church's own inquiries have found that criminal child abuse has taken place. Mr Holcroft stated:

If they [the churches] have formed the view through their own inquiries that it is likely that the abuse took place, I would say it is inappropriate to then plead to the court in any court proceedings elsewhere. In fact they may in fact be misleading the court if that is the case, and there is an obligation by the lawyers and by the participants of litigation not to mislead the court.²⁴

Although victims recognised clearly the barriers to achieving a civil judgement, many perceived that civil judgements could deliver some aspects of justice that private settlements could not. The Committee therefore drew a distinction between the outcomes that victims can hope to achieve through a civil court judgement and outcomes through a private settlement.

Civil litigation—a court process for victims of criminal child abuse to sue the perpetrator of the abuse (or possibly another party for failing to prevent the abuse, for example the organisation of which the perpetrator is a representative) for 'damages' or financial compensation for the harm suffered.

Civil litigation can either proceed to trial and be resolved by a court judgement, or can proceed to private settlement.

A civil case that proceeds to trial is heard before a judge or in some cases a jury. Once liability is established, the quantum of damages to be paid is assessed.

The standard of proof under civil litigation is the 'balance of probabilities'. This is a lower standard of proof than the one applied in criminal proceedings.

22 Archbishop Denis Hart of the Melbourne Catholic Archdiocese, for example, confirmed that there have been no judgements against the Catholic Church in Victoria: *Transcript of evidence*, Catholic Archdiocese of Melbourne, Melbourne, 20 May 2013, p. 47. In Australia, notable decisions relating to civil claims against organisations relating to child abuse include *State of New South Wales v Lepore* [2003] 212 CLR 511. *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117.

23 *Transcript of evidence*, In Good Faith and Associates, Melbourne, 12 November 2012, p. 19. See also, for example, *Submission S203*, Waller Legal, p. 7.

24 *Transcript of evidence*, Law Institute of Victoria, Melbourne, 17 December 2012, p. 12.

25.2. Civil litigation court judgements

Court judgements in civil litigation trials focus on ‘damages’ (financial compensation) as the legal remedy for harm. Although there have not been court judgements favourable to victims of criminal child abuse in organisations in Victoria, there are signs that the courts are willing to award substantial damages in cases of child abuse generally. For example, in the recent Victorian Supreme Court decision of *GGG v YYY*, a victim of criminal child abuse perpetrated by a relative was awarded \$267,000 in total damages.²⁵

Many Inquiry participants saw a court judgement as an avenue for the public acknowledgement of wrongdoing that many victims sought. For example, Dr Jane Wangmann, although noting the many barriers to civil litigation, told the Committee:

One of the things the [civil litigation] system does do well if you get a judgement is the judge actually writes a decision saying why you got the compensation that you did. Often those judges go through that process of saying, ‘I acknowledge that this can never compensate’.²⁶

The Committee heard extensively from victims about the importance of acknowledgement. For example, Mr Chris Pianto expressed his views on the importance of this type of acknowledgement:

I desperately needed a judgement to prove that I was telling the truth as there were some sceptics as to whether or not I was telling the truth amongst the Catholic community.²⁷

Furthermore, the Committee heard that court judgements provide a valuable and practically available form of public condemnation for criminal child abuse, which can serve as acknowledgement of the harm caused not only to the victim but to the community. Furthermore, potential exposure of financial assets is a powerful incentive for organisations to change their practices to prevent criminal child abuse. The Committee recognises, however, that the vast majority of civil litigation claims against organisations do not result in publicly available court reports or judgements, but are instead resolved through private settlements.²⁸

Finding 25.2

Court judgements provide a valuable and practically available form of public condemnation for criminal child abuse, and create a powerful incentive for organisations to change their practices to prevent child abuse.

25 *GGG v YYY* [2011] VSC 429.

26 *Transcript of evidence*, Dr Jane Wangmann, University of Technology, Sydney, Melbourne, 12 November 2012, p. 7.

27 *Transcript of evidence*, Mr Chris Pianto, Geelong, 15 February 2013, p. 3.

28 The lack of court judgements is not limited to Australia. The Committee is aware of several cases in the United States where large amounts of damages were awarded to victims of child abuse in religious organisations. However, the vast majority of claims in the United States have been settled out of court. As at 2010, as few as 43 of the thousands of civil cases filed were resolved in a court of law. BishopAccountability.org, *Documenting the abuse crisis in the Roman Catholic Church*. Accessed on 29 May 2013 from www.bishopaccountability.org/.

25.3. Civil litigation settlements

Victims who commence civil proceedings can request or be directed to court-ordered mediation, with a view to resolving the civil claim.

Where civil litigation proceeds to mediation, an independent mediator is appointed by the court or agreed to by the parties. Mediators are approved by the Victorian Bar and the Law Institute of Victoria and are generally accredited specialists in mediation. If the dispute is resolved, parties enter into a written agreement and apply to the court to finalise the case. Court-ordered mediation is generally faster and cheaper than full litigation, and the cost of mediation is shared by the parties.²⁹

In contrast to civil court judgements, mediated private settlements focus on facilitating a negotiation between the parties. Mediators can consider options that are broader than those that can be considered by the court. Therefore, mediated settlements can address a broad range of victims' needs. These needs include, but are not limited to, financial compensation. However, because these settlements are private, it is difficult to know to what extent victims are able to successfully negotiate the outcomes they seek. Furthermore, the Committee notes that court-ordered mediation is generally focused on parties reaching agreement within the legal parameters of the case, rather than focusing on the needs of victims outside the litigation. Therefore, court-ordered mediation can still be legalistic and adversarial in nature, and may not go far enough in achieving justice for victims.

The Committee found that victims can be at a disadvantage in settlement negotiations. As well as being hindered by the legal impediments outlined in Chapter 26, victims rarely have the money needed for lengthy legal proceedings against a wealthy organisation. Some victims may also have dysfunction in their life that can weaken their apparent credibility and their ability to present evidence in a court of law. Others have missed out on learning the basic literacy skills needed to participate in legal action (the effects of abuse on the confidence, education and other aspects of victims' lives are discussed in Part B). Additionally, many of the complaints of criminal child abuse are historical and there are obvious evidentiary problems in proving matters relevant to events that occurred many years ago.

Out-of-court settlements generally do not enable the wider community to recognise or acknowledge the harm that victims have suffered. Victims told the Committee that this was an important aspect of justice and redress.

On the other hand, the Committee heard that civil claimants who settle out-of-court can achieve higher compensation amounts than those who seek redress through statutory or private avenues.³⁰

One victim also commented on the Catholic Church's approach:

If one were to look back at the different stages of this crisis and compare it to other scandals throughout the decades, the Church's response would appear to be straight from a corporate handbook on how to deal with scandals, with the primary goal of limiting legal and financial liability and damage to reputation.³¹

²⁹ Supreme Court of Victoria Mediation. Accessed on 27 July 2013 from <http://www.supremecourt.vic.gov.au/home/support+services/mediation/>; County Court of Victoria Mediation. Accessed on 27 July 2013 from <http://www.countycourt.vic.gov.au/mediation>.

³⁰ *Transcript of evidence*, Compensation Panel, p. 10.

³¹ *Submission S468*, Name withheld.

The following statement by Cardinal George Pell suggests that, historically, concern for the reputation of the Catholic Church outweighed concerns about the Church's exposure to financial claims:

Money is a factor. In my mind it was never the primary factor, and I suspect that was the case in many other instances of church leadership. There was a greater fear of scandal, a greater concern for the reputation of the church.³²

In spite of evidence that civil litigation achieves several types of justice as identified in Section 25.1, the Committee heard that the practical and legal barriers to civil litigation prevent it from being an effective avenue of achieving justice for many victims.

Finding 25.3

No civil claims of criminal child abuse made against organisations have been decided by the Victorian courts. Instead, civil litigation in such cases is usually resolved by private settlements.

Finding 25.4

Victims can be at a disadvantage in private settlement negotiations, due to their lack of resources and the evidentiary, legal and practical barriers of challenging an organisation in court. The emotional impact of an adversarial battle also acts as a deterrent to litigation for already suffering victims of criminal child abuse.

25.4. Practical and evidentiary barriers to civil litigation

Many victims told the Committee that they are not in a financial or emotional position to undertake civil litigation. For example, Ms Sandra Higgs, a victim in a criminal trial that stalled after the death of the accused priest, told the Committee that she did not pursue civil litigation because she was not in a financial position to do so.³³ Many victims rely on lawyers willing to take on their case under a 'no win, no fee' basis. It is reasonable to assume that, however well motivated such practitioners may be to help victims, there will be practical limitations on how far they will be prepared or able to pursue cases.

Furthermore, the very nature of claims relating to criminal child abuse means that cases are more likely to be strenuously defended in the courts in order to protect the reputation of individuals and organisations against which allegations are made. Non-government organisations, on the other hand, may have considerably more funds available for defence lawyers. This can give rise to substantial inequality between the parties in civil litigation and in the negotiation of settlements.

Ms Phyllis Cremona of the Care Leavers Australia Network (CLAN) explained that prosecuting a claim can also be very emotionally difficult for victims:

We should not underestimate the degree of trauma involved in prosecuting a claim, even if it results in a successful outcome. After having to prove their case of childhood abuse many times, documenting their abuse and finally being believed, survivors

³² *Transcript of evidence*, Catholic Archdiocese of Sydney, p. 19.

³³ *Transcript of evidence*, Ms Sandra Higgs, Geelong, 15 February 2013, p. 6.

often find that opening up their old wounds and scars and recounting their abuse contributes to their life spiralling out of control, for some a considerably long time after the legal process has finished. One man well known to us did receive a payout through the process ... However, despite the outcome, it took three years to get his life back into some order where he could function on a day-to-day basis. This litigant commented, 'There has to be a better way than this. It is just too traumatic.'³⁴

As described throughout this Report, the Committee heard extensive evidence that the vast majority of criminal child abuse victims do not tell anyone about their experiences for years or even decades. This delay can result in loss of evidence.

In some cases, the delay in bringing cases to court may mean that the perpetrator cannot be sued because they are no longer alive. In other cases, the perpetrator may lack the financial means to pay damages. Some religious personnel, for example, have taken a vow of poverty. Often the only viable litigant in these cases is the organisation itself.

Finding 25.5

Barriers to litigation for victims of criminal child abuse in organisational settings include:

- lack of financial means
 - lack of emotional resources
 - practical limitations associated with the typically lengthy delay in bringing cases to court
 - family considerations.
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³⁴ *Transcript of evidence*, Care Leavers of Australia Network (CLAN), Melbourne, 17 December 2012, p. 11.

Chapter 26

Legal barriers to claims against non-government organisations

AT A GLANCE

Background

There are a number of legal barriers to claims of criminal child abuse in non-government organisations:

Key findings

Victims of criminal child abuse find it difficult to:

- find an entity to sue because of the legal structures of some non-government organisations
- initiate action within the limitation period for child abuse cases specified in the statute of limitations
- establish that an organisation has a legal duty to take reasonable care to prevent child abuse by its members
- identify a legal relationship between the perpetrator and the entity
- convince courts that organisations should be subject to vicarious liability for criminal acts.

Recommendations

That the Victorian Government consider:

- Requiring non-government organisations to be incorporated and adequately insured where it funds them or provides them with tax exemptions and/or other entitlement.
- Working with the Australian Government to require religious and other non-government organisations that engage with children to adopt incorporated legal structures.
- Amending the *Limitation of Actions Act 1958 (Vic)* to exclude criminal child abuse from the operation of the limitations period under that Act.
- Undertaking a review of the *Wrongs Act 1958 (Vic)* and identify whether legislative amendment could be made to ensure organisations are held accountable and have a legal duty to take reasonable care to prevent criminal child abuse.

Victims and other Inquiry participants were strongly in favour of the Victorian Government removing legal barriers to civil litigation. For example, Mrs Chrissie Foster told the Committee:

I want to see victims given access to that legal system ... I think that is probably the best way. Our laws, our civil laws, need to be the overriding laws in regard to compensation and dealing with victims, but the cost of that needs to go back to whatever organisation caused the problem in the first place.³⁵

Similarly, Ryan Carlisle Thomas, a legal firm representing many victims of criminal child abuse in organisational settings, commented:

The legal barriers to claimants pursuing claims for compensation and/or criminal prosecution are significant and contribute to the sense of rage and powerlessness that many victims experience when trying to deal with the crimes against them.³⁶

This Inquiry identified five layers of defence that have been relied upon by various non-government organisations in responding to legal claims by victims of criminal child abuse:

- difficulty finding an entity to sue, because of the legal structures of some non-government organisations
- application of the statute of limitations to child abuse cases. This can disadvantage victims, who often delay reporting and acting on abuse for many years
- inability to establish that organisations have a legal duty to take reasonable care to prevent child abuse by their members difficulty identifying a legal relationship between the perpetrator and the entity
- the courts' exclusion of criminal acts from the notion of vicarious liability.

Inquiry participants suggested that non-government organisations that profess to act in the public good and receive charitable and tax exemptions should act as 'nominal defendants'. This would mean not relying on the difficulties that the organisation's own complex structures and lines of accountability create for a victim, or on the delay in commencing proceedings that is often a consequence of the abuse itself. In this way the court could authoritatively determine the substantive questions—has there been criminal child abuse for which the organisation can be reasonably held accountable as a consequence of its breach of duty to the victim and, if so, what is the appropriate measure of damages?³⁷

Evidence presented to the Inquiry revealed that some non-government organisations had threatened to use all available defences to defeat the civil claims of victims. For example, Mrs Chrissie and Mr Anthony Foster explained that an apology from Archbishop Denis Hart of the Catholic Archdiocese of Melbourne arrived with a letter from the Catholic Church's lawyers stating that compensation is offered in the hope that it will provide 'a realistic alternative to litigation that will otherwise be strenuously defended.'³⁸ Although the apology recognised the abuse and, as far as the Committee is aware, the credibility of members of the Foster family was never questioned, later court documents filed in

35 *Transcript of evidence*, Mr Anthony & Mrs Chrissie Foster, Melbourne, 23 November 2012, p. 14.

36 *Submission S195*, Ryan Carlisle Thomas Lawyers, p. 2.

37 *Transcript of evidence*, Law Institute of Victoria, p. 13; *Transcript of evidence*, In Good Faith and Associates, p. 19. See also, for example, *Submission S203*, Waller Legal, p. 7.

38 *Submission S037*, Mr Anthony & Mrs Chrissie Foster. (Appendix 9). In its review of the Melbourne Response files, the Committee observed that the wording indicating that litigation would be 'strenuously defended' appeared to be taken out in later correspondence. It did not appear in offers of compensation after July 2000.

proceedings on behalf of the Catholic Church indicated that the defendant did not admit the abuse.³⁹

Similarly, Ms Vivian Waller of Waller Legal indicated that she had acted for a number of victims who had been ‘forced’ to abandon civil litigation because Catholic Church entities had taken ‘strict technical legal defences based on the expiration of the limitation period.’⁴⁰

Organisational responses to compensation claims, including the Compensation Panel that is part of the Melbourne Response, are discussed in more detail in Chapter 21 of Part F.

In contrast, evidence from some organisations indicated that not all of them rely on the statute of limitations. Captain Malcolm Roberts of the Salvation Army, for example, told the Committee:

We have never relied on limitations of action to avoid anything. In fact in Victoria I think there have been only two or three times that proceedings have been issued. Limitations of action has a relevant place in our law because its position is to make sure that things come to an end, and it is a relevant factor to be taken into account. What we would say, if there were proceedings issued, is that it is for the presiding judge to decide about the relative detriment to the victim and the detriment to the organisation because people are dead or the evidence is not there. It is just a factor that may or may not be taken into account, but we do not rely heavily on that. We have never said, ‘You can’t claim because you’re out of time’. We try to deal with the victims who make claims upon us in a caring and compassionate manner.⁴¹

There are also some examples of organisations which have not sought to rely on the inability of victims to identify a legal entity to sue. For example, the Committee is aware of a New South Wales criminal child abuse case perpetrated on a student at a Jesuit school by a member of the Society of Jesus. Publicity surrounding the case prompted the head of the Jesuit order to change the Jesuits’ previous approach of contesting claims in court. In an appearance on the 7.30 Report in 2003, Fr Mark Raper SJ commented:

It’s a clear legal defence, to attempt to fight this matter at every point, if I understand it, to attempt to block it and until the point either that the complainant gives up from exhaustion or that we win the case or that we lose it ... I’m not content with that approach at all ...

Our assets are not as important as the people we serve. What is the point of doing what we are doing if that is not the case?⁴²

During the course of the Committee’s hearings, some non-government organisations made concessions regarding their position on civil law issues and their approach to technical legal defences. For example, Archbishop Hart acknowledged that an extended statute of limitations period is needed for victims of criminal child abuse in organisations, as noted in Chapter 26.3.

39 *Files relating to the Foster family*, provided to the Family and Committee Development Committee by the Catholic Archdiocese of Melbourne.

40 *Submission S203*, Waller Legal, p. 7.

41 *Transcript of evidence*, Salvation Army, Melbourne, 11 April 2013, p. 16.

42 David Hardaker (2003) *Mark Raper breaks his silence*, 7.30 Report (Australian Broadcasting Corporation). Accessed on 8 August 2013 from <http://www.abc.net.au/7.30/content/2003/s892572.htm>.

Finding 26.1

The Victorian Government has an important role to play in reforming the law to reduce the barriers to litigation faced by victims of criminal child abuse.

26.1. Legal structures of non-government organisations in Victoria

In order to successfully establish a civil claim against a non-government organisation, a victim of criminal child abuse needs to identify a legal entity that can be sued for failing to take reasonable care to prevent the abuse.

The Committee heard that some religious or non-government organisations whose representatives had perpetrated criminal child abuse are not incorporated entities, and cannot be sued in their own name. As a consequence (particularly when the abuse occurred many years ago and office bearers in the organisation have changed), a victim is left with no defendant to sue. The office bearer who might have been held responsible for supervising the perpetrator (and is therefore arguably liable) invariably no longer holds the same position in the organisation by the time proceedings are issued. Neither the subsequent office bearer nor the organisation itself can be held liable for the perpetrator's actions.⁴³ For this reason the assets of the organisation are not available to settle civil claims.

Box 26.1: Hypothetical case—inability to sue

In 1962, M, then aged 10 years, was sexually abused by Fr X at the presbytery in South Yarra. In 2013, M wants to issue proceedings against the Catholic Church in respect of the abuse. Fr X is deceased. In 1962, Archbishop A was responsible for supervising and monitoring all priests in the archdiocese, including Fr X. Archbishop A had long been aware of the criminal propensities of Fr X and had moved him from parish to parish, effectively concealing his activities and exposing the victim to abuse by him. Archbishop A is now also deceased, replaced by Archbishop B.

As the law currently stands, M could not sue either Archbishop B (the relevant office bearer's successor) or the Catholic Church (an unincorporated entity).

Source: Compiled by the Family and Community Development Committee.

In Victoria, most not-for-profit non-government organisations are incorporated. This means they have a legal identity independent of their members and can be sued in their own name. Incorporation also gives members some protection from personal liability.

The most common form of not-for-profit organisation in Victoria is the incorporated association. Incorporated associations are regulated by the *Associations Incorporation Reform Act 2012* (Vic).⁴⁴ They are registered with, and report to, Consumer Affairs Victoria. Some other Victorian not-for-profit organisations are incorporated as companies (including companies limited by guarantee). These are registered with, and regulated by, the Australian Securities and Investments Commission. Organisations can also be created by individual Acts of parliament, such as the *Brotherhood of St Laurence (Incorporation) Act 1971* (Vic) and the *Baptist Union Incorporation Act 1930* (Vic).

In Victoria, not-for-profit organisations are not required to incorporate. Such organisations are known as 'unincorporated associations'. The unincorporated association is a structure

⁴³ See Box 26.1 and see also the Ellis decision in Box 26.2.

⁴⁴ *The Associations Incorporation Reform Act 2012* (Vic). Commenced on 26 November 2012 and replaced the *Associations Incorporation Act 1981* (Vic).

that is generally not favoured by larger organisations as it makes individual members more vulnerable to personal liability. However, the Committee is aware that many religious non-government organisations are unincorporated associations.⁴⁵ This means they cannot be sued in their own name.⁴⁶ The complexity of religious structures can be seen in the Catholic and Anglican Church organisational diagrams in Appendix 7 and 8.

Finding 26.2

In Victoria, most not-for-profit non-government organisations are incorporated. This means they have a legal identity independent of their members and can be sued in their own name. However, not-for-profit organisations are not required to incorporate.

26.2. Addressing the legal identity of non-government organisations

Identifying an entity to sue can be a significant barrier to civil litigation by victims of criminal child abuse in organisations.

As indicated above, although many not-for-profit organisations in Victoria are incorporated, unincorporated associations can register as charities with the Australian Charities and Not-for-profits Commission (ACNC) (which commenced operations on 3 December 2012). They may also be regulated within the industry in which they operate (such as child care).⁴⁷ An unincorporated association can establish a legal structure to hold its funds and property. For example, there are a number of Victorian statutes whose purpose is to establish trustee corporations to hold property on behalf of religious organisations:

- *Anglican Trusts Corporations Act 1884* (Vic)
- *Coptic Orthodox Church (Victoria) Property Trust Act 2006* (Vic)
- *Presbyterian Trusts Act 1890* (Vic)
- *Roman Catholic Trusts Act 1907* (Vic)
- *The Salvation Army (Victoria) Property Trust Act 1930* (Vic).⁴⁸

45 Some evidence was received by the Committee regarding the ‘corporation sole’ structure. This is a structure utilised by religious organisations that consists of a single person who holds the property of the religious organisation, and ensures that property and powers are passed down to successors of the office. The corporation sole has in the past been considered to be a ‘perpetual office’ rather than an entity. Although this structure has been superseded by modern civil structures such as trusts and corporations, some religious organisations, for example in the United States, appear to use it to structure legal and financial affairs. Some American states that recognise the corporation sole by statute have enacted legislation which specifies that every corporation sole may sue and be sued. The Committee is not aware of the use of the structure in Victoria.

46 For example, the Catholic Church in its submission to the Inquiry cited the case of *Attorney-General (NSW) v Grant* [1976] 135 CLR 587. In which Gibbs J (at p 600) explained that ‘a church in Australia is a voluntary organisation of members bound together not only by common beliefs, but in some cases at least, by a consensual compact, which may confer rights and impose liabilities on the parties to it’. Submission S185, Catholic Church in Victoria, p. 80.

47 Australian Charities and Not-for-profits Commission *Factsheet: Regulation of charities in Victoria* (Vic). Accessed on 1 June 2013 from www.acnc.gov.au; Consumer Affairs Victoria *Should your club incorporate?* Accessed on 1 June 2013 from www.consumer.vic.gov.au.

48 *Submission S226A*, Law Institute of Victoria, p. 20. The Law Institute of Victoria explained that ‘the trustee corporation statutes provide for the incorporation of trustees who can acquire, take and hold church property. Any trusts created might then be registered on the ‘Successory Trust Register’ administered by the Victorian Registrar of Titles under the *Religious and Successory Trusts Act 1958* (Vic). Although the Successory Trust Register can be viewed by members of the public, only Trust representatives or the Supreme Court can inspect trust deeds.’

In contrast, some religious entities in Victoria have elected to become incorporated associations under various statutes. These include:

- *Brotherhood of St Laurence (Incorporation) Act 1971* (Vic)
- *Baptist Union Incorporation Act 1930* (Vic)
- *Lutheran Church of Australia Victorian District Incorporation Act 1971* (Vic)
- *Hungarian Reformed Church of Australia (Victorian District) Incorporation Act 1973* (Vic).

Some victims of criminal child abuse have tried to sue the trustee corporations that hold property on behalf of the religious organisation. But because such bodies are generally established to manage and administer property only, and are not engaged in supervising church members, the courts have found in other states that the trustee corporations cannot be held liable in cases of criminal child abuse.

An example is the case of *Trustees of the Roman Catholic Church v Ellis & Anor* (the Ellis decision), in which the claimant sought to sue the Trustees of the Roman Catholic Church for abuse perpetrated by a Catholic assistant priest (see Box 26.2). The NSW Court of Appeal held that the Trustees could not be sued because, at the time of the alleged abuse, there was ‘simply no evidence that the Trustees were involved in ... pastoral activities’.⁴⁹ The fact that the Trustees held and managed property for and on behalf of the Catholic Church did not make them subject to all legal claims associated with church activities,⁵⁰ including claims arising from the actions of one of its parish priests.

Box 26.2: Trustees of the Roman Catholic Church v Ellis & Anor [2007] NSWCA 117 (NSW Court of Appeal)

Ellis alleged that a Catholic assistant priest sexually abused him in the 1970s, while he was an altar server. Ellis sued Cardinal George Pell (then Archbishop of the Catholic Archdiocese of Sydney), the Trustees of the Roman Catholic Church for the Archdiocese of Sydney, and the alleged abuser. The abuser died before the court heard the case.

At trial, the judge dismissed the case against Cardinal Pell, on the basis that the archbishop could not be held liable for the acts of his predecessor, but found that there was an arguable case that the Trustees were the entity that the Roman Catholic Church in the Archdiocese of Sydney ‘adopted and put forward’ as its permanent corporate entity. The judge ordered that the statute of limitations be extended to allow Ellis to pursue the claim.

On appeal, the Trustees argued successfully that they were not the proper defendants in the case. The Court of Appeal held that the Trustees could not be sued because, at the time of the alleged abuse, there was ‘simply no evidence that the Trustees were involved in ... pastoral activities’.⁵¹

Source: Adapted from the *Trustees of the Roman Catholic Church vs Ellis & Anor* [2007] NSWCA 117

It appears that the legal status of unincorporated religious organisations is in conflict with public perception. For example, many people in the general community see the Catholic Church as having an identity, a recognised purpose and functions. The

49 *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117, paragraph 141.

50 As noted by Mason P in *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117, paragraph 149. See also *PAO v trustees of Roman Catholic Church of the Archdiocese of Sydney & Ors* [2011] NSWC 1216, paragraph 49.

51 *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117, paragraph 141.

community does not regard individuals or entities within the Catholic Church as being independent or separate from the authority of the Church. Indeed, the Catholic Church acted as a coherent body throughout its dealings with the Committee during this Inquiry. Nevertheless, the Committee acknowledges that the law in relation to the legal liability of unincorporated associations is clear. The Committee accepts for present purposes that the Catholic Church cannot be sued as a separate body in claims not associated with the trust activities, for example claims arising from criminal child abuse perpetrated by a parish priest or other religious personnel.

In a letter to the Committee, responding to Mr John Ellis's submission to the Inquiry, Cardinal George Pell commented directly on the Ellis case. Cardinal Pell confirmed that the Sydney Archdiocese told Mr Ellis that the Trustees were 'simply not involved in the appointment and supervision of priests.'⁵² He further noted that:

... this advice was disregarded leaving the Trustees, the Archdiocese and their lawyers no alternative but to respond to the claim that was brought by Mr Ellis and his representatives.⁵³

However, the Committee considered that this demonstrates the adoption of a strictly legalistic approach, which failed to address the issue of the genuine accountability of the Catholic Church and avoided dealing with Mr Ellis's claim on its merits. It is not to the point, contrary to what Cardinal Pell suggested, that Mr Ellis's claim was ultimately settled. The approach adopted by the Church is powerful evidence of the importance of protection of assets as a factor in the Catholic Church's response. Furthermore, it suggests a desire to ensure that accountability for wrongdoing is strictly confined to the individual perpetrator.

Inquiry participants heavily criticised organisations' use of the Ellis decision as a defence against civil claims. Mr James Boyle, for example, expressed the following view on the Catholic Church's use of the defence:

... they use what is known as the Ellis defence to say, 'You can sue us. We have never fought to avoid our legal responsibilities, except we have no legal responsibilities. We don't own the resources', or, 'We don't manage the priests'. Absolute nonsense. I see that the negation of the Ellis defence is a very important thing that should happen.⁵⁴

Similarly, the Australian Lawyers Alliance commented in its submission:

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.⁵⁵

The Committee found that the situation in the United States has resulted in a small number of very high settlements and a larger number of cases determined by court judgement. This larger number of court cases appears to be due to the fact that religious organisations in the United States are mostly incorporated and therefore victims are able to identify an entity that can be sued:

It may be said that as a rule, all Catholic educational and charitable institutions throughout the United States which have attained any importance or permanence are incorporated, usually under the provisions of general statutes for the incorporation

52 *Right of Reply*, Cardinal George Pell, Archbishop of Sydney, 31 July 2013, p. 2.

53 *Right of Reply*, Cardinal George Pell, Archbishop of Sydney, p. 2.

54 *Transcript of evidence*, Mr James Boyle, Melbourne, 15 March 2013, p. 4.

55 *Submission S011*, Australian Lawyers Alliance, p. 2.

of civil corporations.⁵⁶

The Committee acknowledges that there is a perception that unincorporated religious organisations (in particular the Catholic Church) have been structured deliberately to make themselves effectively immune from suit.⁵⁷ However, the Committee accepts that the statutory trusts were not established to avoid financial liability for criminal child abuse claims. Most of the statutory trusts were established in the early twentieth century, before any legal issues relating to criminal child abuse in organisations had come to light. As Ms Alice Palmer from the Law Institute of Victoria explained to the Committee:

... statutory trusts were created by Parliament in order to create a body to hold church property so that property could be held forever by that entity and get around the issues associated with having a number of different members of an unincorporated association over a period of time.⁵⁸

Similarly, Ms Angela Sdrinis of Ryan Carlisle Thomas acknowledged that:

Historically these property trusts were not invented by the churches to avoid legal liability; I am absolutely sure about that. They were created so that organisations, which are essentially a group of people coming together, had some legal status sufficient to allow them to deal with the property and financial requirements of the organisation. So the property trusts of themselves were not created as a sinister attempt to avoid liability.⁵⁹

Nevertheless, there is no doubt that the unincorporated structure of the Catholic Church has not only prevented victims of criminal child abuse from bringing legal claims against the Catholic Church as an entity. It has also been exploited by the Catholic Church to avoid financial liability. Ms Palmer went on to explain:

The problem that we see is that they get the benefit of holding onto property without then dealing with the flip side of that benefit, which is liability in the event that it is impossible to bring a claim against the church or any religious organisation and the property trusts effectively take advantage of that in denying liability or association.⁶⁰

There is some evidence that in the United States of America, where religious organisations including the Catholic Church are most commonly incorporated as 'non-profit corporations', victims are able to identify appropriate defendants to civil litigation in the Catholic Church.⁶¹

The Committee notes that the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2011* was introduced in the New South Wales Parliament in 2011, but has not been adopted.⁶² This proposed legislation sought to amend the relevant Catholic property trust statute in order to:

- deem the Trustees liable as if they were the relevant party against whom a case is brought

56 The Original Catholic Encyclopedia *Civil incorporation of Church Property*. Accessed on 10 August 2013 from <http://oce.catholic.com>.

57 See for example, *Submission S011*, Australian Lawyers Alliance, p. 2.

58 *Transcript of evidence*, Law Institute of Victoria, Melbourne, 17 December 2012, p. 5.

59 *Transcript of evidence*, Ryan Carlisle Thomas Lawyers, p. 7.

60 *Transcript of evidence*, Law Institute of Victoria, p. 5.

61 For example, the Committee is aware of 43 documented civil trials in the United States since the mid-1980s, however it notes that thousands of other cases that have been commenced did not proceed to trial: BishopAccountability.org *Documenting the abuse crisis in the Roman Catholic Church*.

62 Parliament of New South Wales *Parliament of New South Wales*. Accessed on 1 June 2013 from www.parliament.nsw.gov.au.

- ensure that the funds and property held in trust are available to satisfy any compensation awarded by a court.

Although the Victorian Government could consider adopting such legislation here, the Committee considers that this approach is not far-reaching enough. Amending specific legislation that establishes religious trusts is unlikely to resolve the broader issue of establishing the legal identity of unincorporated associations. This is because trust structures are used widely and for a variety of reasons, in both the for-profit and not-for-profit sectors.

Some Inquiry participants recommended that Victoria amend its corporations law.⁶³ The law dealing with companies in Victoria is set out in Federal legislation (*Corporations Act 2001* (Cth)) and changes are a matter for the Federal Government.⁶⁴ The Committee notes, however, that any changes would need to be considered carefully, as the current legislation does not appear to include a clear mechanism for requiring or deeming incorporation.

The Committee's view is that Victoria needs a joint Victorian–Commonwealth approach to require non-government organisations to incorporate. For example, the Committee understands that administrative and financial incentives in the United States have made incorporation of religious non-government organisations commonplace. Similarly in Victoria, the Committee recommends that all service organisations funded by the Victorian Government be required to be incorporated as a condition of receiving any such funding. Furthermore, incorporation should constitute one of the eligibility criteria for Victorian Government tax exemptions for non-government organisations (including land tax, council rates and other entitlements).

Solicitors Ryan Carlisle Thomas, for example, recommended that:

... in recognising the difficulty that applicants have in taking civil action against unincorporated religious or charitable organisations, the Government examine whether it would be either an appropriate or a feasible incentive to incorporation, to make the availability of tax concessions to charitable, religious and not-for-profit organisations dependent on, or alternatively linked to, them being incorporated under the corporations act or under state incorporated associations statutes.⁶⁵

In Australia, the Federal Government has recently established a body to regulate charities—the ACNC. In its submission to the Inquiry, the ACNC advised that it would have a role in the regulation of matters being considered by this Inquiry. One of the responsibilities of the ACNC is to ensure that charities meet a minimum standard of governance.⁶⁶ The ACNC Amendment Regulation 2013 (No. 1), which sets out the minimum governance standards with which charities must comply, commenced operation on 1 July 2013. The ACNC explained that:

The ACNC may have legislative power to consider action if, by allowing the criminal abuse of children in its care:

- the charity committed a serious offence or serious breach of a law that would result in a breach of the pending governance standards

63 See for example, *Submission S193*, Lewis Holdway Lawyers, p. 16.

64 The Commonwealth power to legislate with respect to incorporation in Victoria is sourced from powers referred by Victoria to the Commonwealth.

65 *Submission S195*, Ryan Carlisle Thomas Lawyers, p. 8.

66 *Submission S423*, Australian Charities and Not-for-profits Commission, p. 8.

- a person responsible for governing the charity had breached their duty of care to the charity (including its beneficiaries) as required under the common law, statute and the pending governance standards
- the degree and extent of the harm caused meant that the charity would no longer be for the 'public benefit', as required under the legal definition of charity.⁶⁷

However, the ACNC pointed out that there are some significant limitations to its powers regarding bodies that are 'basic religious charities' as defined in the *Australian Charities and Not-for-profits Commission Act 2012* (Cth). The ACNC notes that:

The result of the definition of 'basic religious charity' is that, in cases of criminal abuse involving religious congregations or other purely religious organisations, that are not corporate structures, the ACNC could not rely on a breach of the governance standards to justify an investigation and could not suspend or remove a person on the governing body found to be in breach of those obligations.

The ACNC could, however, consider evidence of whether the harm caused by the congregation is such that it is no longer for the 'public benefit', and could revoke the registration of a religious congregation (including its access to tax concessions) in that event. However, this is a more difficult route than if the governance standards applied to such charities.⁶⁸

Finding 26.3

Trusts are used widely in Victoria in the for-profit and not-for-profit sectors. Amending specific statutes that establish trustee corporations for some organisations is unlikely to resolve the issue of establishing the legal identity of unincorporated associations and ensuring appropriate governance structures to address civil claims for criminal child abuse.

Finding 26.4

There is no evidence that non-government organisations have deliberately been structured to avoid liability for criminal child abuse claims. However, the lack of incorporation by non-government organisations that work with children can make it difficult for victims of abuse in organisational settings to identify an appropriate entity to sue for damages.

→ Recommendation 26.1

That the Victorian Government consider requiring non-government organisations to be incorporated and adequately insured where it funds them or provides them with tax exemptions and/or other entitlements.

→ Recommendation 26.2

That the Victorian Government work with the Australian Government to require religious and other non-government organisations that engage with children to adopt incorporated legal structures.

⁶⁷ *Submission S423*, Australian Charities and Not-for-profits Commission, p. 5.

⁶⁸ *Submission S423*, Australian Charities and Not-for-profits Commission, p. 7.

26.3. Statute of limitations

As outlined in Part B of this Report, many victims of criminal child abuse do not disclose their experiences or act on them until decades after the abuse. This has significant implications for seeking compensation or pursuing common-law actions, due in particular to the statutes of limitations.

The Australian Lawyers Alliance noted that victims commonly delay acting on the abuse for decades, for a variety of reasons:

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.⁶⁹

Particularly disadvantageous to victims are the ‘long-stop’ limitation provisions in the *Limitation of Actions Act 1958* (Vic). These set an absolute maximum period of 12 years from the time of the abuse (or in some cases from the age of 25 of the victim), regardless of whether the victim knew or understood that the criminal child abuse had caused them injury.

The extended 25 year long-stop period applies under the *Limitation of Actions Act* in cases where a child is injured by a parent or a person in a close relationship with the child’s parent.⁷⁰ It is arguable that personnel in non-government organisations could fall within this provision. The Committee notes that in response to the Inquiry, Archbishop Hart of the Catholic Archdiocese of Melbourne indicated that the Archdiocese would support extending the statute of limitations to run from the age of 25 years.⁷¹

However, because many victims of criminal child abuse fail to link their condition to the harm from abuse suffered many years before, and frequently do not identify or reveal this until well into adulthood, many victims of criminal child abuse are precluded from using the ‘long-stop’ provision. Therefore, even if the limitation period for claims arising out of criminal child abuse were extended to run from the age of 25, some victims, who do not reveal their abuse or link their condition to the harm such abuse caused, would not be able to initiate legal action, having passed the cut-off age.

The Committee heard that there is some discretion in applying the statute of limitations. Firstly, a defendant in a criminal child abuse case may choose not to use a limitation-of-action defence. Secondly, judges have discretion to extend the time limit in certain circumstances. However, the Committee considered that the discretion of the defendants and the courts regarding whether to argue or apply the limitation creates an imbalance that can work against claimants.

Statute of limitations—

in contrast to criminal matters, the statute of limitations in Victoria (the Limitation of Actions Act 1958 (Vic)) restricts the time within which a party can issue a civil case for compensation. In cases of criminal child abuse, the limitation period varies depending on the circumstances. Victims can be barred from bringing a civil claim in their teens, twenties or thirties. The statute of limitation rules are outlined in Box 26.3.

69 *Submission S011*, Australian Lawyers Alliance, p. 2.

70 *Limitation of Actions Act 1958* (Vic) s.271.

71 Archbishop Denis Hart, Letter to the Family & Community Development Committee, received 16 May 2013, p. 4.

Some organisations told the Committee they do not rely on the statute of limitations in considering claims settlement negotiations. As noted earlier, Captain Malcolm Roberts of the Salvation Army, for example, told the Committee that the Salvation Army has ‘never relied on limitations of action to avoid anything’.⁷² The evidence, however, indicates that other organisations have aggressively pursued the limitation defence in civil litigation cases involving claims of child sexual abuse.⁷³ The Committee considers that reliance by non-government organisations (and particularly religious ones) on the statute of limitations in such matters is wholly inappropriate.

Furthermore, the Committee heard that the existence of the limitation defence can influence settlement negotiations. The Law Institute of Victoria (LIV), for example, noted that ‘the Victorian government ... does not in practice refuse to engage in mediation or settlement discussions where a matter is statute barred.’⁷⁴ However, the LIV notes that a defendant may use the availability of a defence based on the fact that the action is statute barred as a reason to offer a lower settlement amount.

The Committee considers that the application or otherwise of the limitation period in respect of claims arising from criminal child abuse should not be at the discretion of the organisation or the court. Not only does this rely on the goodwill of the organisation in allowing a court claim to proceed, but the very existence of this statutory limitation undoubtedly strengthens the organisation’s bargaining position when settling a claim. Similarly, the Committee heard that despite the power of the court to grant an extension of time under the Limitation of Actions Act, applications for extensions of time are ‘hard fought’ and rarely successful.⁷⁵

It is greatly in the public interest to give victims access to the court system (described below). Therefore the Committee recommends that the Victorian Government should legislate to ensure that victims of criminal child abuse are able to issue civil claims relating to that abuse regardless of when the criminal child abuse occurred.

Finding 26.5

The application of the statute of limitations is currently at the discretion of the defence and judges. However, there is evidence that non-government organisations have aggressively pursued the limitation defence in civil trials. There is also evidence that the limitation defence adversely affects the bargaining position of victims in settlement negotiations for victims.

72 *Transcript of evidence*, Salvation Army, p. 16. Similarly, Archbishop Hart indicated that in the Melbourne Response and Towards Healing, the Archdiocese does not rely on the statute of limitations to prevent payment of compensation: *Transcript of evidence*, Catholic Archdiocese of Melbourne, p. 46.

73 For example, the Court in the case of *Ellis v Pell* [2006] NSWSC109. This case was required to make a determination on the application of the statute of limitations.

74 *Submission S226*, Law Institute of Victoria, p. 17.

75 *Submission S226*, Law Institute of Victoria, p. 25.

Box 26.3: Limitation of Actions Act 1985 (Vic)

In claims for personal injury to a minor, such as in the case of criminal child abuse, the limitation period is six years from the date on which the cause of action is 'discovered' by the victim, or 12 years after the date on which the act of abuse occurred (known as the 'long-stop' period), whichever is earlier.

In determining when a victim discovers they have a cause of action, the courts may take into account the delayed understanding of the harm caused by the abuse. Justice Osborn did this in the case of *GGG v YYY*. Furthermore, a court may suspend the period of limitations for a minor who is not in the care of a capable parent or guardian.

Nevertheless, the long-stop limitation period of 12 years from the date the abuse occurred means that a victim can be no more than 30 years old in order to be within the limit to bring a claim, and in many cases would be much younger.

The Limitation of Actions Act allows a longer limitation period if a child is injured by a parent or a person in a close relationship with the child's parent. In such cases, the cause of action may be discoverable when the victim turns 25 years of age or when the action is actually discoverable by the victim (whichever is later). The long-stop period for bringing such a case is 12 years from when the victim turns 25. This provision was introduced in 2003 following the 2002 *Review of the Law of Negligence* (known as the *Ipp Report*). This review recognised the delayed psychological effect of sexual or other abuse and the need to give victims 'a reasonable time to be free of the influence of the parent, guardian or potential defendant (as the case may be) before having to commence proceedings'. But even under this provision, a victim is likely to run out of time to bring a case between the ages of 31 and 37, although under transitional provisions this is likely to be limited to 24 years of age.

A victim may apply for an extension of time under the Limitation of Actions Act. However, the Committee heard that such applications may not succeed. The Law Institute of Victoria noted in its submission:

LIV members report that this process is typically difficult and hard-fought ... and is usually not successful without a claimant being able to provide a compelling reason for not commencing proceedings within the relevant time limit.⁷⁶

Source: Compiled by the Family and Community Development Committee.

The recent Victorian Supreme Court decision in *GGG v YYY* demonstrates the courts' preparedness to extend the limitation period in cases of criminal child abuse.⁷⁷ In that case, Justice Osborn awarded \$267,000 in total damages to a victim of criminal child abuse, despite a period of 33 years between the abuse taking place and the case coming to court. Justice Osborn was persuaded by the fact that the significant delay was caused by the plaintiff not being 'psychologically able to publicly acknowledge the fact of the abuse, and not relevantly aware of his psychiatric injury, until 2009.' Justice Osborn also decided that because the abuse 'occurred covertly and in the absence of others', the delay had not disadvantaged the defendant because it did not result in a loss of witnesses.⁷⁸

The Committee concluded that the Limitations of Actions Act does not allow enough time for victims to bring a case for criminal child abuse. Furthermore, the Committee considers that limiting the period during which a victim may bring a civil case for criminal child abuse does not serve the public interest.

⁷⁶ *Submission S226*, Law Institute of Victoria, p. 25

⁷⁷ *GGG v YYY* [2011] VSC 429.

⁷⁸ *GGG v YYY* [2011] VSC 429, paragraph 207.

Finding 26.6

Statutes of limitations disadvantage victims of child sexual abuse because these victims typically take decades to understand the harm arising from their abuse and to act on that understanding and decide to issue proceedings.

26.3.1. Balancing the public interest of statutes of limitations

The Committee found that many of the public-interest arguments supporting a statute of limitations are unconvincing in the context of criminal child abuse. The public policy justifications for limitation periods for civil claims were outlined in the 2002 *Ipp report*:

- As time goes by, relevant evidence is likely to be lost.
- It is oppressive to a defendant to allow an action to be brought long after the circumstances that gave rise to it occurred.
- It is desirable for people to be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them after a certain time.
- The public interest requires that disputes be settled as quickly as possible.⁷⁹

However, the Committee determined that the lifelong consequences of criminal child abuse outweigh the public benefit of giving certainty to defendants and speeding up the litigation process. The Committee agreed with the finding of Justice La Forest of the Supreme Court of Canada in a case of criminal child abuse:

There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. In my view this is a singularly unpersuasive ground for a strict application of the statute of limitations in this context. While there are instances where the public interest is served by granting repose to certain classes of defendants ... there is absolutely no corresponding public benefit in protecting individuals who perpetrate incest from the consequences of their wrongful actions. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose.⁸⁰

Evidence provided to the Inquiry strongly supported this view. For example, Dr Wangmann told the Committee that justice is not served by applying the statute of limitations to cases of criminal child abuse:

The policy reasoning behind a statute of limitations is basically that there is a point where they move on, but surely the justice in these cases requires that we should at least hear the case on its merits, that the justice actually sits somewhere else in relation to the policy things that underpin a statute of limitations.⁸¹

Similarly, the Law Council of Australia in its 2011 review of limitation periods across Australia recommended that there should be a special limitation period for child

79 Panel of Eminent Persons to Review the Law of Negligence (the 'Ipp Committee') (2002) *Review of the law of negligence: Final report*. Canberra, Commonwealth of Australia, p. 86. These factors are based on a description by McHugh J in *Brisbane South Regional Health Authority v Taylor* [1996] 186 CLR 541, paragraph 552.

80 Quoted by Justice Osborne in *GGG v YYY* [2011] VSC 429, paragraph 187.

81 *Transcript of evidence*, Dr Jane Wangmann, p. 13. See also Lisa Sarvas (2012) 'Mixed messages on sexual assault and the statute of limitations: *Stingel v Clark*, the IPP "reforms" and an argument for change'. *Melbourne University Law Review*, Vol. 32, p. 609.

sexual abuse victims.⁸² The review advocated that the courts should be given a direct basis for extending statutes of limitations in child abuse cases.

The Committee considers that on balance it is not in the public interest to allow perpetrators of abuse or culpable organisations to avoid the consequences of their actions. Such avoidance contributes to an ongoing risk to children, such as in the case of Fr Kevin O'Donnell and Fr Gerald Ridsdale, whose crimes spanned several decades.⁸³

Archbishop Hart indicated to the Committee in May 2013 that the Catholic Archdiocese of Melbourne supports legislative reform to clarify that longer limitation periods apply in cases of criminal child abuse.⁸⁴ However, the Archbishop conceded only that the law should be amended to clarify the delay in commencing the long-stop limitation provisions until the victim turns 25. This extension would give victims until the age of 37 years at the latest to bring a claim. The Committee considers this extension to be inadequate, as many victims of abuse are incapable of issuing proceedings until much later in their lives.

Table 26.1 demonstrates how the public policy justifications in the *Ipp report* do not apply in the context of criminal child abuse.

Table 26.1: Lack of public policy justification for limitation of actions in cases of child abuse

Justification	Application to child abuse cases
Potential disadvantage to defendants due to loss of evidence.	In criminal child abuse cases, there is rarely a great deal of evidence, because the perpetrator is likely to take extensive precautions to ensure secrecy and to elicit the victim's silence. Accordingly, the argument that limitations statutes are needed because evidence is lost is not relevant in cases of criminal child abuse.
Delay may cause some difficulty for defendants in presenting their case.	In cases of criminal child abuse, the passage of time also significantly prejudices the victim's claim. Victims are likely to face even greater difficulty in proving the case, because they are unlikely to have the benefit of the records maintained by the organisation, nor any corroborating evidence to prove their claim.
The need to ensure certainty for defendants in arranging their affairs.	Given the harm and lifelong disadvantage caused to victims by criminal child abuse, as described throughout this Report, it is not desirable that perpetrators should be able to arrange their affairs as though they will never be held to account for their crime. In the case of organisations, the Committee understands that many settle claims of criminal child abuse despite the expiration of limitation periods and can therefore expect to allocate resources to dealing with such claims regardless of whether statutory limits apply.
Public interest in precluding cases that are not brought quickly.	The inability of victims to discover or attribute the harm they have suffered as a consequence of criminal child abuse results in their being unfairly prejudiced by limitation periods that do not take into account this reason in explaining the delay. The Victorian statute already takes account of delayed discoverability in the case of asbestos and tobacco claims, and the Committee considered that there is an analogy between such claims and the delay in discoverability of injury arising from criminal child abuse.

Source: Compiled by the Family and Community Development Committee.

82 Law Council of Australia (2011) *A model limitation period for personal injury actions in Australia: Position paper*. Canberra.

83 C. Foster & P. Kennedy (2011) *Hell on the way to heaven*. North Sydney, Random House Australia.

84 Archbishop Denis Hart, Letter to the Family & Community Development Committee, received 16 May 2013.

The Committee recognises that statutes of limitations for civil personal injury claims operate differently across Australian jurisdictions. This creates complexities and uncertainties across the nation and significant disparities for criminal child abuse victims.

Victoria's limitation periods relating to personal injury of children appear to favour victims more than those in some other Australian jurisdictions do. But the long-stop provision potentially disadvantages Victorian criminal child abuse victims, compared with victims from other jurisdictions.⁸⁵ Therefore, the Committee considers the Victorian Government should lead the way with model limitation provisions for criminal child abuse cases.⁸⁶

Finding 26.7

There is no public policy justification for applying limitation periods to civil cases relating to criminal child abuse.

26.3.2. The example of British Columbia's statute of limitations

The Committee recommends that the Victorian Government adopt the approach of some states in Canada in abolishing limitation periods for sexual assault civil actions.⁸⁷ An example is British Columbia's recently revised *Limitation Act [SBC 2012]*, which expressly prevents limitations periods from applying in sexual and physical assault cases involving minors (see Box 26.4).

British Columbia excluded sexual assault from its statute of limitations in 1992, in order to protect victims of childhood sexual abuse.⁸⁸ It added the exemption for physical assault of minors in the recent revision of the Limitation Act. In doing this, the British Columbian Government wished to further protect vulnerable people from the operation of limitation periods. The government rejected the suggestion that this action would open the floodgates for claims, recognising the practical difficulties inherent in pursuing civil litigation:

It is not anticipated that this exemption will open the floodgates for claims. This has not occurred in other provinces that have included exemptions for physical abuse. It would be unlikely that frivolous claims will be advanced due to the fact that it is difficult and expensive to pursue a civil damage claim.⁸⁹

The Committee considers there is policy justification to extend the exclusion to historical cases of child abuse, in light of the significant delay in reporting. Because

85 In most jurisdictions, victims generally have until the age of 21 to institute proceedings, however some jurisdictions do not have long-stop provisions and therefore could allow cases to proceed where the discovery of injury has been significantly delayed. Lisa Sarmas (2012) 'Mixed messages on sexual assault and the statute of limitations', p. 636; Law Council of Australia (2011) *A model limitation period for personal injury actions in Australia: Position paper*.

86 British Columbia, Manitoba, Newfoundland, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Saskatchewan and the Yukon: Ben Mathews (2004) 'Post-Ipp special limitation periods for cases of injury to a child by a parent or close associate: New jurisdictional gulfs'. *Torts Law Journal*, Vol. 12, No. 3, pp. 239–58, pp. 5, footnote 23. See also *Transcript of evidence*, Dr Jane Wangmann, p. 3.

87 British Columbia, Manitoba, Newfoundland, the Northwest Territories, Nova Scotia, Nunavut, Ontario, Saskatchewan and the Yukon: Ben Mathews (2004) 'Post-Ipp special limitation periods for cases of injury to a child by a parent or close associate', pp. 5, footnote 23. See also *Transcript of evidence*, Dr Jane Wangmann, p. 3.

88 British Columbia Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office (2010) *White Paper on Limitation Act reform: Finding the balance*.

89 British Columbia Ministry of Justice (2013) *New Limitation Act: Questions and answers*. Accessed on 26 June 2013 from www.ag.gov.bc.ca.

discretion to extend the limitation exists in relation to certain cases of criminal child abuse already, the limitation provisions could be regarded as a procedural bar to civil action in such cases rather than a substantive right of defendants to be protected from civil litigation. The evidence heard by the Committee certainly justifies the removal of this procedural bar for victims of child abuse.

Box 26.4: British Columbia's *Limitation Act* [SBC 2012]

Section 3(1) This Act does not apply to the following: [...]

- i) a claim relating to misconduct of a sexual nature, including, without limitation, sexual assault,
- ii) if the misconduct occurred while the claimant was a minor, and
- iii) whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period;
- (j) a claim relating to sexual assault, whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period;
- (k) a claim relating to assault or battery, whether or not the claimant's right to bring the court proceeding was at any time governed by a limitation period, if the assault or battery occurred while the claimant:
 - i) was a minor, or
 - ii) was living in an intimate and personal relationship with, or was in a relationship of financial, emotional, physical or other dependency with, a person who performed, contributed to, consented to or acquiesced in the assault or battery.

Source: British Columbia Limitation Act [SBC 2012]

Finding 26.8

Because reporting in cases of criminal child abuse is typically delayed for several decades, it is necessary to amend the *Limitation of Actions Act 1958* (Vic) to allow victims of criminal child abuse sufficient time to initiate civil legal action.

→ Recommendation 26.3

That the Victorian Government consider amending the *Limitation of Actions Act 1958* (Vic) to exclude criminal child abuse from the operation of the limitations period under that Act.

26.4. Direct liability of non-government organisations and duty of care

The Committee considered that non-government organisations have a duty of care to take reasonable steps to prevent criminal child abuse from taking place in their organisation.

The Committee identified that in the past non-government organisations have generally taken the approach that the responsibility for criminal child abuse in their organisation lies with the perpetrator of that abuse. While it accepts the attribution of responsibility to the perpetrator, the Committee nevertheless considers that organisations should also bear some responsibility in these cases.

Some non-government organisations have acknowledged responsibility in circumstances of specific knowledge of criminal child abuse, perpetrated by their member. For example, Cardinal Pell admitted that by their inaction, Bishop Ronald Mulkearns and Archbishop Frank Little allowed abuse to happen.⁹⁰ He also acknowledged that direct knowledge of criminal child abuse would give rise to a responsibility to act:

I am not responsible in law for the crimes that someone, say, a priest or an employee of the Catholic Church, has committed—technically. I am technically responsible if I was warned about this person and did nothing.⁹¹

However, the Committee considered that duty of care extends beyond the need to act based on direct knowledge.

Organisations' duty of care includes a responsibility to screen, monitor and keep records in order to take reasonable steps to prevent abuse of children by members who misuse the trust generated by their association with the non-government organisation.

The Committee found that non-government organisations not only rely on the reputation of their members, but those members gain that reputation substantially as a consequence of their relationship with the body concerned. Organisations hold out members, employees, volunteers and others who represent them in the community as credible and trustworthy individuals. Parents only entrust their children to the non-government organisation because of this special relationship of trust.

The special nature of the relationship between a religious organisation and its members was considered by Lord Justice Longmore of the England and Wales Court of Appeal in *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church*.⁹² In accepting that the priest in question was an employee of the archdiocese in question, Lord Justice Longmore stated:

Regardless of general policy considerations, however, it seems to me to be important to look at the nature of the employer in this particular case ... The Archdiocese is a Christian organisation doing its best to follow the precepts of its Founder ... Like many other religions, it has a special concern for the vulnerable and the oppressed ...

In the case of the Roman Catholic Church, this situation is further emphasised by its claim to be the authoritative source of Christian values. For centuries the Church has encouraged laypersons to look up to (and indeed revere) their priests. The Church clothes them in clerical garb and bestows on them their title Father, a title which Father Clonan was happy to use. It is difficult to think of a role nearer to that of a parent than that of a priest. In this circumstance the absence of any formal legal responsibility is almost beside the point.⁹³

While criminal child abuse is generally not perpetrated with the consent or even direct knowledge of non-government organisations, the perpetrators nevertheless rely on their reputation within the organisation in developing trusting relationships with children. Because of this special relationship of trust, an organisation has a

90 *Transcript of evidence*, Catholic Archdiocese of Sydney, p. 14.

91 *Transcript of evidence*, Catholic Archdiocese of Sydney, p. 18.

92 *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256.

93 *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256, paragraph 83.

duty of care to take reasonable steps to protect children from abuse by employees, volunteers and others whom it has engaged.

26.5. Duty of care and vicarious liability

The Committee was informed that in Australia, the civil law has not developed to recognise liability of non-government organisations described above for the criminal abuse of children perpetrated by their representatives. Although the law recognises that such organisations may owe a duty to ensure that reasonable care is taken, that duty does not extend to intentional or criminal acts perpetrated by their representatives.

However, as discussed in Part D, non-government organisations are responsible for creating special relationships of trust between their members and individuals in the broader community. Furthermore, perpetrators rely upon that trust created through their association with the organisation to establish relationships with victims, to offend against children and to prevent detection and reporting of the abuse. Organisations are aware of the vulnerability of children in their care and the fact that parents and others rely on the organisation and its members to look after the wellbeing of those children.

Therefore, the Committee found that organisations should have a clear legal duty to take appropriate measures to minimise the risk of abuse that arises because of the creation of relationships of trust for which they are responsible. The current legal position on the duty of organisations under the *Wrongs Act 1958* (Vic) and vicarious liability at common law are discussed below.

26.5.1. Non-delegable duty of care

A non-delegable duty of care is a duty owed to an individual or group to take reasonable care to ensure the safety and protection of the individual or group. Even if the care of the individual or group is given to a servant or agent, the duty itself (and liability for the breach of the duty) cannot be delegated to another person. The law has developed to include a number of recognised categories where a non-delegable duty is owed. The most relevant to this Inquiry is the duty of care owed by an education authority to its students. That duty cannot be delegated to a teacher.

Those to whom organisations or individuals owe this non-delegable duty are frequently in a more vulnerable position. For this reason there is an imbalance of power between the parties. The duty of care extends to making a party liable for the negligent acts of another, but does not extend to cases involving intentional or criminal wrongdoing causing the protected party to suffer damage.

In situations of criminal child abuse in an organisation, the argument that criminal child abuse is a breach of non-delegable duty of care by the organisation has not been successful in Australian courts. The majority of the High Court in *State of New South Wales v Lepore* decided that a non-delegable duty of care does not extend to liability for intentional

Non-delegable duty of care—a duty that requires a party to take reasonable care to ensure the safety of individuals, which cannot be assigned to someone else. An example is the relationship between a school authority and its students. A school authority has a duty to take reasonable care to ensure that any act or omission by a teacher does not cause reasonably foreseeable injury to students.⁹⁴

94 Fitzroy Legal Service *The Law Handbook Online*. Accessed on 29 May 2013 from www.lawhandbook.org.au (Chapter 6, Section 3).

acts such as criminal child abuse by an employee or volunteer. This case is discussed in more detail in relation to vicarious liability.

26.5.2. Vicarious liability

Victims of criminal child abuse in organisational settings have sued organisations on the basis that they are vicariously liable for harm caused to victims through the actions of their employees or personnel.⁹⁵ However, recent cases indicate that Australian courts are reluctant to hold an organisation vicariously liable for criminal child abuse perpetrated by its members. This is based on two reasons:

- Courts consider criminal child abuse a deliberate illegal act that cannot be regarded as being undertaken in the course of employment.
- Courts are reluctant to find vicarious liability exists where no employment or similar relationship exists between the organisation and the perpetrator, as in the case of some religious personnel.

Vicarious liability for deliberate criminal acts

The leading case in Australia on vicarious liability is the High Court case of *State of New South Wales v Lepore*.⁹⁷ In that case, a majority of the High Court was reluctant to conclude that an employer could ever be vicariously liable for the deliberate illegal acts of an employee.

Although Chief Justice Gleeson indicated that an employer may be vicariously liable for the acts of an employee, even where there has been serious misconduct, the other judges disagreed. The case failed to provide clear guidance on the question of when vicarious liability could be established in these circumstances.

In Victoria, courts have found that unauthorised actions of an employee do not fall within vicarious liability. The Victorian Court of Appeal recently decided in *Blake v JR Perry Nominees Pty Ltd* that an employer is not liable for the unauthorised actions of its employees, if the action was beyond the employer's reasonable control.⁹⁸ The court discussed a number of bases on which the employer could be vicariously liable, but rejected such liability in each instance. Similar difficulties are likely to be encountered in establishing vicarious liability for criminal abuse of children in organisations.

Vicarious liability—the legal liability of one person for the misconduct of another, despite the first person being free from fault. It has traditionally applied to employment of service and has been applied to some similar relationships such as contractors. However, vicarious liability does not apply in all types of relationships. At present vicarious liability generally applies only in employer–employee and contractor–principal relationships.⁹⁶

95 For example, as in the case of *State of New South Wales v Lepore* [2003] 212 CLR 511.

96 Queensland Law Reform Commission (1995) *Vicarious liability: Discussion paper WP 48*.

97 *State of New South Wales v Lepore* [2003] 212 CLR 511.

98 *Blake v JR Perry Nominees Pty Ltd* [2012] VSCA 122.

Box 26.5: Cases concerning vicarious liability for deliberate acts

State of New South Wales v Lepore (2003) 212 CLR 511 (High Court of Australia)

In 1978 a teacher in a government school sexually assaulted Lepore (aged seven) under the guise of punishment for misbehaviour. Lepore sought to recover damages from the State. The trial judge found that the State had not failed to exercise proper care. On appeal, the New South Wales (NSW) Court of Appeal held that non-delegable duty of care extended to ensuring that students are not injured (negligently or intentionally) at the hands of an employed teacher.

The High Court case joined the case of Lepore with the cases of Rich and Samin, who were victims of child sexual assault at a government school in rural Queensland in the 1960s. The High Court majority rejected the NSW Court of Appeal's approach to non-delegable duty of care. It decided instead that the appeal should be dealt with on the basis of vicarious liability. The High Court allowed the appeal in part and ordered a new trial in the District Court.

The majority of the High Court rejected the application of non-delegable duty of care, questioning the liability for intentional criminal acts in such circumstances. Rather, the majority considered that vicarious liability was the more appropriate way to view the responsibility of an organisation for criminal child abuse occurring within it. However, the majority expressed differing views on how vicarious liability should arise, being concerned not to make it too broad.

The High Court discussed the application of vicarious liability for criminal child abuse in organisational settings. However, the majority was divided as to whether an employer could ever be vicariously liable for a deliberate illegal act of an employee. Members of the court expressed different approaches to this issue. Some of the arguments suggested that vicarious liability could possibly be established in the following situations:

- if unauthorised acts are so connected with authorised acts to be regarded as a mode (although an improper mode) of doing an authorised act—as opposed to an independent act⁹⁹
- if a 'close connection' could be established between the unauthorised act and employment¹⁰⁰
- if the acts were done in the course of employment—three factors that negate vicarious liability include:
 - i) no fault on part of employer;
 - ii) person having no actual or apparent authority to do the act;
 - iii) act not in the course of employment (deliberate breach of contract of employment).¹⁰¹
- if the employment itself increases the risk of offending—where employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community.¹⁰²

99 As noted by C. J. Gleeson in *State of New South Wales v Lepore* [2003] 212 CLR 511, paragraph 42. See also J. Callinan at paragraph 352.

100 As noted by J. Gaudron in *State of New South Wales v Lepore* [2003] 212 CLR 511, paragraph 132.

101 As noted by Gummow and J. J. Hayne in *State of New South Wales v Lepore* [2003] 212 CLR 511, paragraph 204–42.

102 As noted by J. Kirby in *State of New South Wales v Lepore* [2003] 212 CLR 511, paragraph 316.

Box 26.5: Continued

Blake v JR Perry Nominees Pty Ltd [2012] VSCA 122 (Victorian Court of Appeal)

This case concerned the injury of a truck driver (Blake) by another driver (Jones) employed by JR Perry. The injury was caused by a practical joke, which Blake argued was motivated by boredom due to the drivers being required to wait a long time for refuelling. Blake sought to establish that JR Perry was vicariously liable for his injury. The case failed at first instance and Blake appealed to the Court of Appeal. The Court of Appeal held that vicarious liability was not established, because the act that caused the injury was beyond the reasonable control of the employer and was not sufficiently connected with Jones' employment as a truck driver for JR Perry.

As a consequence of the differing approaches expressed in the High Court, the law remains unclear on whether an organisation may ever be held vicariously liable for any acts of its members that are criminal child abuse.

Source: Adapted from the *State of New South Wales v Lepore* (2003) 212 CLR 511 (High Court of Australia), *Blake v JR Perry Nominees Pty Ltd* [2012] VSCA 122 (Victorian Court of Appeal)

Nature of the relationship and vicarious liability

The legal notion of vicarious liability is not confined to employment relationships. However, the courts have generally taken the view that a relationship similar to employment is needed in order to establish vicarious liability. If that relationship between a representative of an organisation and the organisation itself cannot be established, that is an additional hurdle for victims to overcome in holding the organisation liable. For example, where the perpetrator is one of the organisation's religious personnel, the courts have held that no relationship similar to employment exists.

The Committee concluded that, although there is no employment relationship, some members of religious or non-government organisations do have a relationship with characteristics similar to formal employment. Fr Kevin Dillon, for example, explained how it felt 'disengaging' when the Church considered him to be self-employed or a contractor:

It is genuinely meant to be a vocation and a sense of calling. To be told by the institution, 'No, you are not employed; you are self-employed or a contractor', is disengaging. I use that word because it comes up a lot in conversation. There is a sense of being cut off: 'If it doesn't suit us, we really don't want to know you'. I have been a priest for 44 years. I started studying for the priesthood in 1962. I have spent all my life in parishes, and I am grateful that I have. I would not call it an insult to be told that I am self-employed or a contractor, but I would call it disengaging. There is a sense of not belonging.¹⁰³

Fr Dillon suggested that for tax purposes, priests are seen as employees, and commented—'It seems that we are employees on one hand and we are not employees on the other.'¹⁰⁴

The Committee notes that religious personnel generally receive a salary or stipend from the diocese, order or congregation they represent, and are also usually provided with housing. They are considered employees for fringe benefits tax purposes and

¹⁰³ *Transcript of evidence*, Father Kevin Dillon, Geelong, 15 February 2013, p. 6.

¹⁰⁴ *Transcript of evidence*, Father Kevin Dillon, p. 6.

their income is subject to income tax.¹⁰⁵ Furthermore, the conditions of employment and the directions placed upon ministers of religion are often more demanding than that of ordinary employees. According to Sydney Archdiocese Vocation Centre:

A diocesan priest doesn't make vows. He promises a commitment to celibacy and obedience to his bishop when he becomes a deacon. He does not take a vow of poverty, but a diocesan priest receives a minimal salary enabling him to pay for his living expenses. Along with all committed Christians he is challenged to live simply.¹⁰⁶

This suggests that ministers of religion are far from independent of the religious organisation they represent.

Recent decisions in the United Kingdom suggest that it is possible to establish vicarious liability for criminal child abuse by religious personnel, despite the lack of any formal employment relationship.¹⁰⁷ This approach recognises that there is a sufficient connection between the risk of criminal child abuse and the opportunity for intimacy and power, the circumstances of which were created by the organisation.¹⁰⁸

Box 26.6: Cases concerning vicarious liability and the nature of the relationship

Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church [2010] EWCA Civ 256 (England and Wales Court of Appeal).

Fr Clonan, an assistant priest in the Catholic Church, abused Maga as a boy. Maga alleged that Fr Clonan's superiors had been aware of prior abuses by him but had taken no action. Initially the court found that the Birmingham Archdiocese was not vicariously liable for the abuse by Fr Clonan, and that the archdiocese owed no duty to Maga.

The Court of Appeal then took a different view. It held that Fr Clonan's sexual abuse was so closely connected with his employment as a priest at the church that it would be fair and just to hold the archdiocese vicariously liable. The court found that the priest's position of power and authority enabled him to establish an intimate relationship with the victim. This connection was strong enough to establish vicarious liability. The court held that because of the complaint, the priest's superior had a duty to keep a careful eye on Fr Clonan. The court found that if the superior had done this, 'he would have seen enough' to be persuaded that action had to be taken.¹⁰⁹

105 For example, religious practitioners who receive a stipend or other form of remuneration (including non-cash benefits) are employees for the purposes of the *Fringe Benefits Tax Assessment Act (FBTAA) 1986* (Cth). See section 136 and 221A of the FBTAA and Taxation Ruling 92/17.

106 Sydney Archdiocese Vocations *Vocation Centre: Frequently Asked Questions*. Accessed on 10 August 2013 from <http://www.vocationcentre.org.au/faqs/>.

107 For example, *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256 and *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871 and [2012] EWCA Civ 938 and *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others (Respondents)* [2012] UKSC 56 (United Kingdom Supreme Court). See also *Submission S226A*, Law Institute of Victoria, p. 23.

108 In contrast, Australia courts have not yet adopted this position. See for example, J. Gibbs in *Attorney-General (NSW) v Grant* [1976] 135 CLR 587, p. 600. Gibbs considered that 'a church in Australia is a voluntary organisation of members'.

109 *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256.

Box 26.6: Continued

JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust [2011] EWHC 2871 (High Court of England and Wales)

In this case, 'JGE' alleged that a Catholic priest, Fr Baldwin, raped her in a children's home in the early 1970s. Fr Baldwin died before the case was heard and JGE argued that the Trustees of the Portsmouth Roman Catholic Diocesan Trust should be held vicariously liable for Fr Baldwin's alleged abuse.

The initial judgement and the subsequent judgement of the Court of Appeal upheld the argument that in appointing the priest the Trustees of the Diocese created a risk of harm to others and should be vicariously liable for the abuse.

The Court accepted that priests and religious were not employees in the usual vicarious liability sense but were nevertheless akin to employees for the purposes of vicarious liability. Lord Justice Ward found that 'there is an organization called the Roman Catholic Church with the Pope in the head office, with its "regional offices" with their appointed bishops and with "local branches", the parishes with their appointed priests. This looks like a business and operates like a business'. The Court found that the remuneration, accountability and other requirements suggested a relationship of employment rather than that of an independent contractor.¹¹⁰

The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others (Respondents) [2012] UKSC 56 (United Kingdom Supreme Court)

This case involved an action by 170 men in respect of abuse they alleged to have been subjected to at a residential institution run by Brothers of the Christian Schools (an institute founded by the De La Salle Brothers). The case was brought against the organisation which took over the management of the school (the Middlesborough defendants) and also the De La Salle defendants on the basis of vicarious liability. In that case, the court extended the concept of vicarious liability, stating that 'it is fair, just and reasonable, by reason of the satisfaction of the relevant criteria, for the Institute to share with the Middlesborough defendants vicarious liability for the abuse committed by the brothers.'¹¹¹

Source: Adapted from the judgement of *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256, *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871, *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others (Respondents)* [2012] UKSC 56.

Existing legislative models for vicarious liability

The Committee identified that statutory models for establishing vicarious liability of organisations already exist in the equal opportunity area. In Victoria, vicarious liability has been legislated in the discrimination provisions of the *Equal Opportunity Act 2010* (Vic). This holds employers and those who engage agents under contract vicariously liable for discriminatory acts by employees or agents in the course of employment or while acting as an agent, unless reasonable precautions were taken to prevent the

110 *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871, paragraph 75–84.

111 *The Catholic Child Welfare Society and others (Appellants) v Various Claimants (FC) and The Institute of the Brothers of the Christian Schools and others (Respondents)* [2012] UKSC 56, paragraph 94.

behaviour (s.109, see Box 26.7). The Commonwealth *Sex Discrimination Act 1984* contains similar vicarious liability provisions (s.106, see Box 26.7).

The Victorian Equal Opportunity Act imposes a positive duty on organisations to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible. As noted by the Victorian Equal Opportunity and Human Rights Commission, ‘instead of allowing organisations to simply react to complaints of discrimination when they happen, the Act requires them to be proactive about discrimination and take steps to prevent discriminatory practices.’¹¹²

Box 26.7: Vicarious liability in discrimination legislation

Equal Opportunity Act 2010 (Vic)

s.109. Vicarious liability of employers and principals

If a person in the course of employment or while acting as an agent—

- (a) contravenes a provision of Part 4 or 6 or this Part [Discrimination provisions of the Act]; or
 - (b) engages in any conduct that would, if engaged in by the person’s employer or principal, contravene a provision of Part 4 or 6 or this Part—
- both the person and the employer or principal must be taken to have contravened the provision and a person may bring a dispute to the Commissioner for dispute resolution or make an application to the Tribunal against either or both of them.

Section 110. Exception to vicarious liability

An employer or principal is not vicariously liable for a contravention of a provision of Part 4 or 6 or this Part by an employee or agent if the employer or principal proves, on the balance of probabilities, that the employer or principal took reasonable precautions to prevent the employee or agent contravening this Act.

Sex Discrimination Act 1984 (Cth)

s.106. Vicarious liability, etc.

(1) Subject to subsection (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent:

- (a) an act that would, if it were done by the person, be unlawful under Division 1 or 2 of Part II (whether or not the act done by the employee or agent is unlawful under Division 1 or 2 of Part II); or
- (b) an act that is unlawful under Division 3 of Part II;

this Act applies in relation to that person as if that person had also done the act.

(2) Subsection (1) does not apply in relation to an act of a kind referred to in paragraph (1)(a) or (b) done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing acts of the kind referred to in that paragraph.

Source: Adapted from the *Equal Opportunity Act 2010 (Vic)*, *Sex Discrimination Act 1984 (Cth)*

112 Victorian Equal Opportunity and Human Rights Commission (2011) *Positive duty: Know your responsibilities*. Accessed on 26 June 2013 from www.humanrightscommission.vic.gov.au.

Finding 26.9

Because perpetrators of criminal child abuse in organisational settings derive their credibility from their association with the organisation, there is a need to recognise the legal obligation of organisations to reasonably ensure the safety of children who come into contact with their members. This includes implementing effective employment controls and adopting best practice in relation to risk management and prevention.

The Committee determined that there are two options for legislative change that would legally require organisations to take reasonable care to protect children from abuse by members of their organisation. The two possible options for reform are:

- legislating non-delegable duty of care in the Wrongs Act. For example, that organisations have a non-delegable duty to take reasonable care to prevent intentional injury to children in their care
- a provision regarding vicarious liability in the Wrongs Act based on the examples in the Victorian and Commonwealth discrimination legislation.

Both options could extend the duty of care to putting in place appropriate employment controls and adopting effective practices in risk management and prevention as identified in Part D of this report.

Organisations need to recognise that an abuser gains access to children by virtue of the abuser's relationship to, and membership of, the organisation, and because the organisation holds the abuser out to be a trustworthy person. This places an obligation on the organisation to take reasonable care to protect children exposed to risk because they are entrusted to the organisation. This obligation includes rigorous screening practices to ensure that only appropriate people have access to children, that risk management measures are undertaken, and that there exists an adequate system of monitoring and record keeping.

The Committee concluded that a legislative approach would encourage non-government organisations to take reasonable precautions and to strengthen preventive measures discussed in Part D of this Report.

→ Recommendation 26.4

That the Victorian Government undertake a review of the *Wrongs Act 1958 (Vic)* and identify whether legislative amendment could be made to ensure organisations are held accountable and have a legal duty to take reasonable care to prevent criminal child abuse.

Chapter 27

An alternative to civil litigation—the Victims of Crime Assistance Tribunal

AT A GLANCE

Background

In Victoria, government financial assistance through the Victims of Crime Assistance Tribunal (VOCAT) provides an alternative to civil litigation for victims of criminal child abuse.

Key findings

- VOCAT provides a viable alternative to civil litigation for victims of criminal child abuse because of its ability to provide an independent acknowledgement of harm, its non-adversarial approach, and the supports provided for victims.
- Limitations of VOCAT include the application of a two-year time limit on claims, the limited compensation available and the lack of ongoing financial support for victims.

Recommendation

- That the Victorian Government consider amending the *Victims of Crime Assistance Act 1996* (Vic) to specify that no time limits apply to applications for assistance by victims of criminal child abuse in organisational settings.

In Victoria, victims of crime may apply for government assistance through the Victims of Crime Assistance Tribunal (VOCAT) as an alternative to civil litigation. Victims of criminal child abuse in organisational settings fit into this category.

Although very few victims spoke about VOCAT, a number of Inquiry participants raised VOCAT as an alternative avenue to civil litigation for victims (the Law Institute of Victoria, South Eastern Centre for Sexual Assault and the Office of the Child Safety Commissioner).

Despite the small amount of evidence received, the Committee considered VOCAT a viable alternative to civil litigation for victims of criminal child abuse in non-government organisational settings and identified a number of improvements that take into account the specific needs of victims of child abuse.

The Committee also identified that some elements of VOCAT, such as its experience in supporting victims of crime, could be used in developing a new, independent alternative justice avenue for criminal child abuse in organisational contexts, as discussed in Chapter 28.

27.1. VOCAT's role and process

VOCAT administers Victoria's state-funded compensation scheme that assists victims to recover from a crime by providing financial assistance for expenses incurred, or reasonably likely to be incurred, as a direct result of the crime. It also provides financial assistance to secondary and related victims in certain circumstances.¹¹³ The scheme is funded from consolidated revenue.¹¹⁴

In order to make an application to VOCAT, a victim must establish that they have suffered from a criminal act of violence that directly resulted in injury or death. There is no need to identify, prosecute or establish the guilt of the offender, however the criminal act must have been reported to police within a reasonable time, unless there are special circumstances. The VOCAT process is shown in Figure 27.1.

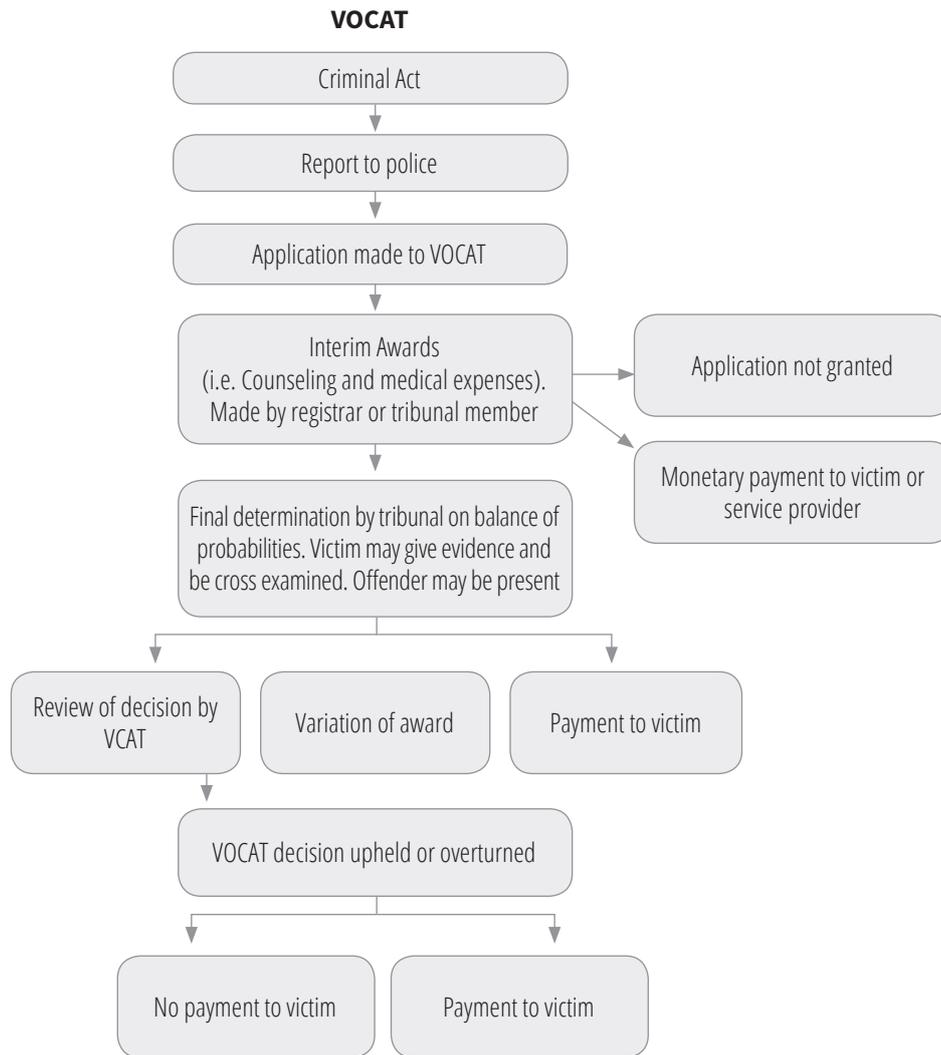
VOCAT can award the following types of assistance:

- Interim awards for immediate assistance such as medical and counselling fees.
- Assistance to cover expenses such as counselling and medical fees, loss of earnings, and other expenses in exceptional circumstances. Primary victims receive up to \$60,000 to cover expenses. Loss of earnings can make up a maximum of \$20,000 of this amount.
- Special financial assistance is available for pain and suffering (capped at \$10,000).

¹¹³ Financial assistance is provided to primary victims and, in certain circumstances, secondary victims (witnesses and parents/guardians) and related victims (close family and dependents). Victims of abuse may also apply for compensation under the *Sentencing Act 1991* (Vic) from an offender found guilty or convicted of a crime. However, the Committee is aware that this avenue relies on the perpetrator who is found guilty of a crime to pay compensation. In many cases this is not possible and in any event no such compensation has ever been applied in cases of child abuse in organisational settings. Accordingly, this avenue was not considered in detail by the Committee.

¹¹⁴ *Victims of Crime Assistance Act 1996* (Vic) s.69(1).

Figure 27.1: VOCAT process



Source: Adapted from the Department of Justice (2009) *Reviewing victims of crime compensation: sentencing orders and state-funded awards: Discussion paper*, p.20.

27.2. Independent acknowledgement of harm

The Committee determined that one of the strengths of Victoria’s approach to victims of crime compensation is that cases are determined by a magistrate.¹¹⁵ This gives authority and legitimacy to victims’ claims.

27.3. Non-adversarial approach

VOCAT provides an avenue for victims to tell their story to a tribunal member or have the matter dealt with administratively without having to attend a hearing. Although VOCAT makes a determination based on the civil standard of proof

115 However, victims can choose to have the matter determined by an administrative process rather than attending a hearing.

(the balance of probabilities), the applicant is rarely required to give evidence or be cross-examined.¹¹⁶

Victims can receive financial assistance through VOCAT even if the offender has not been identified or charged, and regardless of whether the perpetrator is convicted.

Also, VOCAT is not restricted by the limitations of civil litigation outlined in Chapter 26, such as the barriers to the establishment of liability or problems with identification of a legal entity. Furthermore, VOCAT is not required to consider the financial circumstances of the offender in awarding compensation. Similarly, the victim is not required to take action to recover funds from the offender.

Provided the Tribunal is satisfied that a crime has been perpetrated against the victim and that crime has been reported to police, financial assistance should be available to the victim.

27.4. Support for victims

Although VOCAT itself focuses on financial assistance, it is part of a broader government approach to victims of crime coordinated by the Victims Support Agency (VSA). The Committee observed that considerable government expertise in responding to victims of crime is available to support those who make applications to VOCAT. For example:

- The VSA, Victims Assistance and Counselling Program (VACP) and Victims of Crime Helpline already support victims and provide pathways to independent resolution of their claims through VOCAT and the courts.
- The VACP and VOCAT programs operate within the framework of a Victims' Charter, which is focused on ensuring respect for, engagement with, and informed choice of victims.
- The Victims' Charter Enquiries and Complaints Line provide an avenue for complaints about services within the victims of crime sphere.

VOCAT will also usually cover legal fees incurred in making an application to the Tribunal.¹¹⁷ According to a 2009 review of VOCAT conducted by the Department of Justice, although funds can be sought to be recovered from the perpetrator, in practice this option has not been exercised.¹¹⁸

Finding 27.1

VOCAT provides a viable alternative to civil litigation for victims of criminal child abuse because of its ability to provide an independent acknowledgement of harm, its non-adversarial approach, and the supports provided for victims.

116 Department of Justice (2009) *Review of victims of crime compensation: Sentencing orders and state-funded awards: Discussion paper*.

117 Department of Justice (2010) *2010 Victims of Crime Compensation Review: Framework Report*.

118 Department of Justice (2010) *2010 Victims of Crime Compensation Review: Framework Report*, p. 27.

27.5. Limitations of VOCAT

The Committee heard little evidence from victims about their experience of VOCAT. Of the evidence received by the Committee, key areas of criticism related to:

- the application of limitation periods to claims
- limited compensation available through the process
- VOCAT's inability to accommodate victims who suffer ongoing or permanent injury
- the absence of a mechanism for organisations to contribute to the assistance paid to victims of criminal child abuse in those organisations.

Finding 27.2

Limitations of VOCAT include the application of a two-year time limit on claims, the limited compensation available and the lack of ongoing financial support for victims.

27.5.1. Application of limitation periods

The Committee heard some criticism of the two-year limitation period for bringing claims through VOCAT.¹¹⁹ An application to VOCAT for financial assistance must generally be made within two years of the crime occurring. However, the Committee notes that extensions of time have been granted in certain circumstances, including in criminal child abuse cases.¹²⁰ Considerations for granting an extension of time include, for example:

- the age of the applicant at the time of the alleged act of violence
- whether the applicant is intellectually disabled or mentally ill
- whether the alleged perpetrator was in a position of power, influence or trust in relation to the applicant.¹²¹

→ Recommendation 27.1

That the Victorian Government consider amending the *Victims of Crime Assistance Act 1996* (Vic) to specify that no time limits apply to applications for assistance by victims of criminal child abuse in organisational settings.

27.5.2. Limited compensation

Participants in the Inquiry told the Committee that compensation awarded through VOCAT is substantially less than the amount of damages that can be obtained in a successful civil claim. For example, the Law Institute of Victoria commented that:

A victim applying to VOCAT with the strongest possible claim might be awarded up to \$70,000 (that is, the maximum \$60,000 award plus \$10,000 in special financial assistance). If the same person were to succeed in a civil claim for the same abuse,

119 *Submission S226*, Law Institute of Victoria, p. 22.

120 Victims of Crime: Department of Justice (Victoria) *Compensation and expenses*. Accessed on 10 May 2013 from <http://www.victimsofcrime.vic.gov.au/>. See also Fitzroy Legal Service *The Law Handbook Online*.

121 *Victims of Crime Assistance Act 1996* (Vic) s.29(3).

if they suffered a substantial loss of earnings or significant pain and suffering, our members report that the damages could exceed \$200,000.¹²²

Furthermore, although claimants do not need to await trial in order to commence proceedings in VOCAT, claimants are obliged to refund the amount of assistance provided by VOCAT if they subsequently receive damages.¹²³

27.5.3. Lack of ongoing financial support of victims

A further limitation of VOCAT highlighted by Inquiry participants is its inability to assist victims who suffer ongoing or permanent injury. This is a significant limitation for criminal child abuse victims, many of whom suffer lifelong psychological harm. Many victims who participated in the Inquiry told the Committee that there was a strong need for long-term, ongoing support.

Mr Peter Blenkiron, for example, spoke of the need to provide a ‘safety net’ to support those who find it hard to maintain a consistent level of functioning. He gave the example of how the Department of Veterans’ Affairs (DVA) Repatriation Health Card can help in this regard:

I know a guy who is on it who came back from the Gulf War. He was suicidal for years. He got [the card]. He said, ‘It’s a safety net’ ... He works when he can. He might be able to do a day a week, some weeks ... He will do a day’s work, perhaps two, but then he will spend the rest of the week in bed. But he keeps trying; and when he falls, there is a safety net. If he becomes fully functional again, there is no problem; he can just start earning his own money. But if he falls again in three months time, the safety net drops back in.¹²⁴

The Committee identified that other compensation models, such as the Victorian Transport Accident Commission (TAC) and the DVA compensation schemes, could be useful models for meeting victims’ needs for ongoing support (for a further discussion of the DVA approach, see Section 28.2).

The TAC is a statutory scheme that provides compensation to individuals injured in a transport accident.¹²⁵ Victims may be entitled to compensation for medical and other services relating to the injury and common-law damages for serious injury due to an accident where someone else was at fault. The TAC also has the ability to pay income assistance on a temporary basis until the victim makes sufficient recovery to return to work.¹²⁶

Although the TAC scheme does not pay compensation indefinitely, it is designed to cater to the ongoing costs incurred by the victim in order to recover from their injury. These ongoing costs are partly funded by specific revenue from vehicle registration fees and insurance.

Government could consider a similar dedicated funding stream, paid for by contributions from non-government organisations to address the limited compensation under VOCAT. However, the Committee notes that there would be

¹²² *Submission S226*, Law Institute of Victoria, p. 22.

¹²³ *Victims of Crime Assistance Act 1996* (Vic) s.62.

¹²⁴ *Transcript of evidence*, Ballarat & District Group, p. 18.

¹²⁵ Some Inquiry participants referred to the TAC as a possible model of compensation. See for example *Submission S067*, Mr Andrew Collins, p. 3; *Submission S338A*, Mr Bernd Bartl, p. 7.

¹²⁶ *Transport Accident Act 1986* (Vic).

significant challenges in determining the level of any such contributions from various non-government organisations.

The TAC protocols recognise the role played by legal advisers and allows costs to be payable upon resolution of claims, even if legal proceedings have not been issued.¹²⁷

The Committee also noted that some other Australian jurisdictions require perpetrators to pay the compensation awarded under their victims of crime assistance processes. This could help VOCAT fund ongoing support of victims. In the context of criminal child abuse in organisations, the contribution ought to be made by the organisation as well as the perpetrator as a consequence of their breaches of duties and obligations to the victims.

27.5.4. Victims of crime schemes in other Australian jurisdictions

All Australian jurisdictions have victims of crime schemes (refer to Table 27.1). A recent review of these schemes by the Department of Justice showed that Victoria's approach provides outcomes that are comparable to, or better than, other jurisdictions.

However, victims of crime schemes in other Australian jurisdictions may offer lessons for Victoria in expanding the funding model to allow compensation for more serious and ongoing injuries from child abuse to be compensated. For example, several other jurisdictions impose a levy on offenders for the purpose of raising funds to compensate victims (for example, Queensland and South Australia).¹²⁸ In Victoria, VOCAT has the power to recoup compensation from offenders, although this has not been carried out in practice.¹²⁹

Another possible approach can be seen in the Victims of Crime Compensation Fund in South Australia. This fund accumulates money from a number of sources—confiscated proceeds of crime, a levy on convictions, traffic fines and funds provided by the Government. Any money awarded through Victims of Crime Compensation is drawn from the Victims of Crime Compensation Fund, which is administered by the Attorney-General's Department. The amount that a victim can claim depends, primarily, on the severity of their injuries.¹³⁰

127 *Transport Accident Commission Transport Accident Commission*. Accessed on 17 September 2013 from <http://www.tac.vic.gov.au>.

128 *Transport Accident Commission Transport Accident Commission*.

129 Department of Justice (2009) *Review of victims of crime compensation: Sentencing orders and state-funded awards: Discussion paper*.

130 Victim Support Service Incorporated *Victims of Crime Compensation*. Accessed on 29 July 2013 from <http://www.victimsa.org>.

Table 27.1: Government funded victim compensation schemes in Australia—Funding approaches

	Vic	ACT	NSW	NT	Qld	SA	Tas	WA
Maximum award	\$70,000	\$50,000	\$50,000	\$40,000	\$75,000	\$50,000	\$30,000 ¹³¹	\$75,000
Offender levy	No	Yes, \$50 for most offences.	Yes, ranges from \$60 to \$140.	Yes, ranges from \$10 to \$200 (\$200 for corporations).	No	Yes, ranges from \$20 to \$120.	Yes, ranges from \$20 to \$50.	No
A specific state-funded compensation fund	No, funded from consolidated revenue.	No	Yes, called the Victims Compensation Fund.	Yes, the Victims Assistance Fund.	No, funded from consolidated revenue.	Yes, the Victims of Crime Compensation Fund.	Yes, the Criminal Injuries Compensation Fund.	No, funded from consolidated revenue.
Can the state take action against the offender for repayment of state awards?	Yes, the state may apply to the court to order a convicted offender to pay the state the amount of assistance granted.	Yes, but last financial year this only occurred in seven cases.	Yes, state pursues recovery from the offender in every case where there is a relevant conviction.	Yes, the territory may bring an action in court against the offender to repay the amount awarded.	Yes, the debt is enforced under the Qld state penalties enforcement scheme when there is a relevant conviction.	Yes.	Yes, property may be restrained or forfeited to satisfy debt; an order may be enforced as a judgement.	

Source: Extract from Department of Justice (2009) *Reviewing victims of crime compensation: Sentencing orders and state-funded awards: Discussion Paper*, pp.59–60.

131 For one offence. \$50,000 for more than one offence.

Chapter 28

An independent alternative justice avenue for criminal child abuse victims

AT A GLANCE

Background

There is currently no alternative justice avenue for victims of child abuse in organisational settings that is paid for by non-government organisations and administered by the Victorian Government. Inquiry participants proposed a number of alternative justice models, including:

- a government-funded redress scheme
- a compensation scheme funded by non-government organisations
- a government compensation fund.

Key finding

The elements of a successful alternative justice approach include:

- independence and authority
- respect, engagement and support for victims
- contribution by non-government organisations
- opportunity for appeal and review.

Recommendation

That the Victorian Government review the functions of the Victims of Crime Assistance Tribunal (VOCAT) to consider its capacity to administer a specific scheme for victims of criminal child abuse that:

- enables victims and families to obtain resolution of claims arising from criminal child abuse in non-government organisations
- is established through consultation with relevant stakeholders, in particular victims
- encourages non-government organisations to voluntarily contribute a fee to administer the scheme
- ensures non-government organisations are responsible for the funding of compensation, needs and other supports at amounts agreed through the process.

Due to the limitations of the existing alternative justice avenues, the Committee determined that Victoria needs a state-run alternative justice avenue to resolve claims of criminal child abuse in organisational settings. Therefore, the Committee determined that a non-adversarial alternative approach is needed that:

- necessitates that the crime be reported to police
- provides a platform for helping victims of criminal child abuse to reconstruct their lives as much as possible
- supports victims through the process
- acknowledges what has occurred
- engages non-government organisations in providing acknowledgement and funding compensation and support
- provides an avenue through which families and communities affected by criminal child abuse can be supported and rehabilitated.
- Table 28.1 illustrates the current Victorian justice approaches and what the Committee determined is needed in the future.

Table 28.1: Victorian justice approaches relevant to child abuse in organisational settings—where Victoria is now and what is needed

Where we are now	What is needed
<p>Courts</p> <ul style="list-style-type: none"> • litigation • mediated settlements 	<p>Courts</p> <ul style="list-style-type: none"> • litigation • mediated settlements
<p>VOCAT</p> <ul style="list-style-type: none"> • State-funded compensation 	<p>VOCAT</p> <ul style="list-style-type: none"> • State-funded compensation
<p>Non-government approaches</p> <ul style="list-style-type: none"> • private settlement negotiation • private settlement determinations • pastoral support • counselling • apology 	<p>New independent alternative justice avenue</p> <ul style="list-style-type: none"> • independent dispute resolution to facilitate negotiation between victims and non-government organisations • financial, other compensation and counselling funded by non-government organisations
	<p>Non-government approaches</p> <ul style="list-style-type: none"> • pastoral support • apology

Source: Compiled by the Family and Community Development Committee.

This chapter outlines the necessary elements for a successful alternative justice avenue for victims of criminal child abuse in organisational settings, considers the proposed alternative justice models, and makes a case for a new Victorian independent dispute resolution body for victims of criminal child abuse in organisational settings.

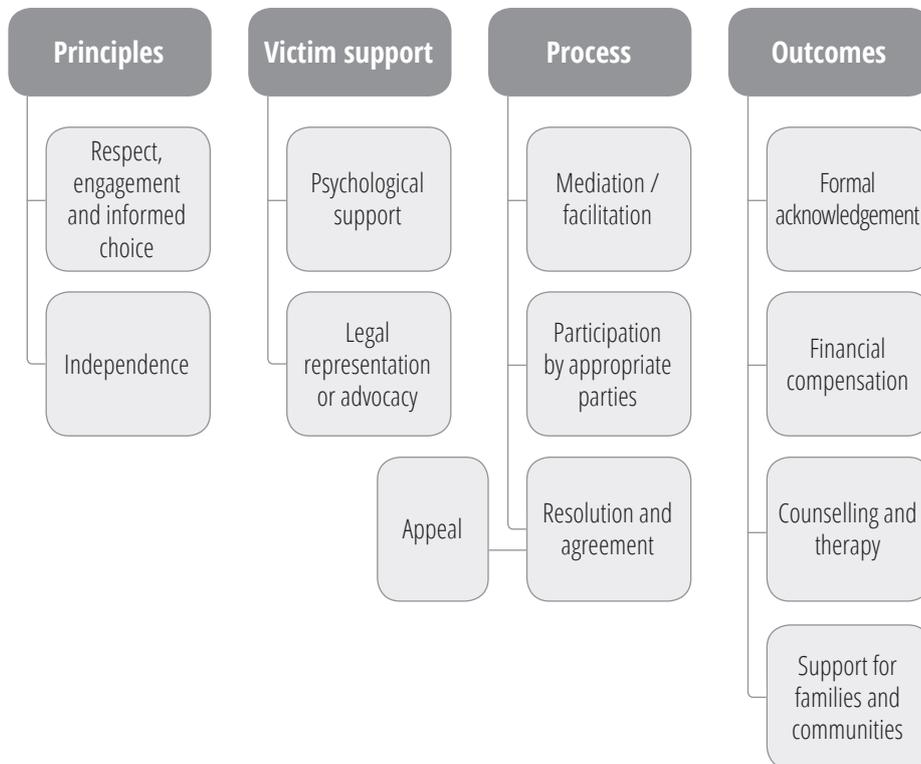
28.1. What elements are needed for a successful alternative justice approach?

Throughout the Inquiry, the Committee received and heard a large amount of evidence about what works and what does not work in resolving claims of criminal child abuse in non-government organisations. Based on its evidence and additional research, the Committee determined that a successful alternative justice avenue for victims of criminal child abuse in organisational settings must have the following features:

- It needs to be independent and have sufficient authority to ensure that the right parties come to the table to resolve claims.
- It needs to respect and properly engage victims in the process and support them throughout by ensuring access to counselling support and legal assistance.
- It needs to have a strong focus on the needs of victims, families and communities, and not be bound by legal parameters in determining outcomes that respond to the multiple needs of victims.
- As part of the process, relevant organisations need to take responsibility for delivering outcomes, including the funding of compensation and services.
- Should be able to continue regardless of a parallel investigation by police.
- There needs to be a clear avenue to appeal decisions.

These elements are illustrated in Figure 28.1. The Committee identified some key questions for the Victorian Government to consider when formulating an alternative justice approach, which it has noted throughout the following sections.

Figure 28.1: Elements of a successful alternative justice approach



Source: Compiled by the Family and Community Development Committee.

28.1.1. Independence and authority

The Committee heard that the independence of any alternative justice process is critical to its credibility with victims. As described throughout this Report, a perceived lack of independence was one of the key areas of criticism by victims who accessed the internal processes of non-government organisations. For examples, see Part F.

The Law Institute of Victoria also recommended the establishment of an independent body to deal with complaints:

We would support an oversight body to oversee the internal complaints processes of religious organisations and possibly to receive direct complaints and mediate those complaints in accordance with restorative justice principles.¹³²

Similarly, Berry Street recommended that the Government develop a model complaints process and reparations agreement for care leavers and establish an independent reparations board to manage the investigation of allegations.¹³³

There was also strong support for the process to have the authority to discover the relevant facts and the circumstances that allowed the abuse to occur. The Committee's research pointed also to the need for the process to be fair to all parties involved.¹³⁴

28.1.2. Respect, engagement and support

The Committee found no evidence that victims had been consulted or involved in the development of the existing non-government or civil approaches to justice. Inquiry participants told the Committee that many victims felt disempowered by existing justice avenues. The civil, statutory and organisational processes have provided little opportunity for victims to have a say on the process or outcomes they seek.

The Inquiry's evidence and research makes it clear that the process through which outcomes are achieved is critical for victims.¹³⁵ This has also been recognised internationally. For example, in its report on the Canadian responses to criminal child abuse in institutions, the Law Commission of Canada concluded that two fundamental values should guide any attempt to understand and respond to the needs of survivors of child abuse:

First, one must respect survivors and engage them to the fullest extent possible in any redress process. Second, survivors must be given access to information and support so that they can make informed choices about how to deal with their experience of abuse.¹³⁶

The involvement of victims has proven to be effective in designing state redress approaches in other jurisdictions. In Canada, for example, the success of the Grandview Agreement in meeting the needs of abuse victims has been largely

132 *Transcript of evidence*, Law Institute of Victoria, p. 2. See also *Submission S226A*, Law Institute of Victoria.

133 *Submission S262*, Berry Street, p. 14.

134 Fred Kaufman (2002) *Searching for justice: An independent review of Nova Scotia's response to reports of institutional abuse* Province of Nova Scotia, p. 455.

135 Reg Graycar & Jane Wangmann (2007) 'Redress packages for institutional child abuse: Exploring the Grandview Agreement as a case study in 'alternative' dispute resolution'. *University of Sydney, Legal studies research paper 07/50*.

136 Law Commission of Canada (2000) *Restoring dignity: Responding to child abuse in Canadian institutions*. Ottawa, Law Commission of Canada, p. 3.

attributed to the involvement of victims in its design. This is discussed further in Section 28.4.

The Committee learned that supporting victims through the process is critical. This includes encouraging people to have support persons present, and giving them access to funded legal and counselling services to support them throughout the process.

The Committee also saw a strong role for a relevant statutory body (as recommended in Part E) to make victims aware that they can apply to have claims resolved through the new avenue. Similarly, this statutory body should fulfill an educational role for non-government organisations, making them aware of their rights and responsibilities under the process.

28.1.3. The role of non-government organisations

The Committee heard that a critical part of any alternative justice scheme for victims of criminal child abuse in non-government organisational settings is the contribution by the relevant non-government organisation. For example, in relation to the Catholic Church, Mr Joseph Saric told the Committee:

The Catholic Church should be taken out of future rehabilitation schemes to help victims, except for providing extensive financial input to these schemes and developmental input on a best practice pastoral care program.¹³⁷

Some international approaches have established a precedent for the cocontribution by non-government organisations to victim compensation schemes. For example, the Committee is aware of state-operated redress schemes in Canada and Ireland that have adopted such a model.¹³⁸ However, the Committee considered that the way in which the contribution of non-government organisations is managed would be fundamental to the successful implementation of any alternative justice approach by the Victorian Government. This is discussed further in Section 28.2 and 28.5.

28.1.4. Opportunity for appeal and review

The Committee considered the ability to appeal decisions to be a critical element of any alternative justice avenue. This was highlighted by a number of Inquiry participants and the experience of victims who went through the Catholic Church processes and found they had no alternative but to accept the determinations offered. Fr Kevin Dillon, for example, was highly critical of the lack of an effective appeal avenue in the Catholic Church approach. He told the Committee:

There is no appeal. This is what we do; this is our decision—take it or leave it. If you do not like it, you can pursue it through the courts. We know how successful that can be; there are all sorts of ties and escape clauses.¹³⁹

The Commissioners when they appeared before the Committee relied on judicial review, including Order 56 of the Supreme Court Rules, as a response to the suggestion that there was no avenue of appeal from a decision of theirs or the Compensation Panel.¹⁴⁰ Whilst judicial review is theoretically available, this is not the same as an

¹³⁷ *Transcript of evidence*, Mr Joseph Saric, Geelong, 15 February 2013, p. 3.

¹³⁸ *Supplementary evidence*, Questions on notice, Dr Jane Wangmann, Lecturer, Faculty of Law, University of Technology Sydney, 19 December 2012.

¹³⁹ *Transcript of evidence*, Father Kevin Dillon, p. 3.

¹⁴⁰ *Transcript of evidence*, Melbourne Response, Melbourne, 30 April 2013, p.29.

automatic statutory appeal in a hierarchy of supervisory courts. Nor as a practical proposition does it constitute an appropriate forum for review on behalf of a victim. Rather than support the process, the suggestion that this is an avenue for recourse could be seen to constitute a criticism of it.

In addition, the process should be subject to regular audit and review, to ensure it continues to meet the needs of victims.

Finding 28.1

The elements of a successful alternative justice approach include:

- independence and authority
- respect, engagement and support for victims
- contribution by non-government organisations
- opportunity for appeal and review.

28.2. Proposed models of alternative justice

The Committee considered a number of alternative justice models proposed by Inquiry participants, including:

- government-funded redress scheme
- compensation scheme funded by non-government organisations
- government compensation fund.

Each of these models is discussed below.

28.2.1. Government-funded redress schemes

Statutory redress schemes relating to criminal child abuse in care have operated in Tasmania, Western Australia, Queensland and South Australia (outlined in Table 28.2 below).

Although these schemes have been limited to children who were wards of the State, many cases have involved care leavers who resided in institutions run by non-government organisations. Despite this, the Committee is not aware of any government-operated scheme in Australia that has been co-funded by the non-government organisations involved in the claims.

Although there was significant support among Inquiry participants for a state redress scheme, the Committee identified that such schemes have a number of limitations, particularly when responding to abuse in non-government organisations. For example, the 2010 *Review of government compensation payments* conducted by the Australian Parliament Senate Legal and Constitutional Committee identified the following limitations:

- Time limits and eligibility criteria imposed by redress schemes have meant that some claimants missed out.
- Because most schemes impose a limit on the quantum of compensation, for some victims the assistance was inadequate.

- Some victims found the application process traumatic.¹⁴¹

Table 28.2: Australian statutory redress schemes

Scheme	Period of operation	Eligibility criteria	Features
Tasmanian Government Abuse in State Care Review Program	Operated from 2005 to 2007—re- opened for new applications until 15 February 2013.	Children abused while in state care.	Initially payments capped at \$60,000. Claims from August 2008 capped at \$35,000.
Redress WA	Announced December 2007 and closed June 2011.	Children abused or neglected while in state care.	Four pillars of support: <ul style="list-style-type: none"> • an opportunity to make a police referral • a personal apology from Premier and Minister for Community Services • provision of support and counselling services • ex gratia payments (four broad levels, ranging from \$5,000 minimum to \$45,000 maximum).¹⁴²
Queensland Government Redress Scheme	Opened in May 2007 and closed September 2008.	Children abused or neglected while in institutional care.	Eligible applicants received an ex gratia payment, ranging from \$7,000 to \$40,000.
South Australian ex gratia compensation scheme	Announced in 2008—no closing date announced.	Children sexually abused while in state care.	Ex gratia compensation based on the severity of the abuse and seriousness of the harm suffered: up to \$30,000, or up to \$50,000 in extreme cases. ¹⁴³

Source: Compiled by the Family and Community Development Committee.

28.2.2. Compensation scheme funded by non-government organisations

Ireland and some Canadian provinces have established compensation schemes covering criminal child abuse in institutional settings, with joint funding from non-government organisations.

¹⁴¹ Senate Legal and Constitutional Affairs Committee (2010) *Review of government compensation payments*. Canberra, Australian Government.

¹⁴² Department for Families, Housing, Community Services and Indigenous Affairs *Find and Connect: Redress WA (2008–2011)*. Accessed on 2 May 2013 from <http://www.findandconnect.gov.au>.

¹⁴³ 2010 Application guidelines for ex gratia payments for former residents in state care who experienced sexual abuse as children.

The experience in Canada and Ireland highlights the challenges in engaging non-government organisations in government-operated compensation processes. In Canada, two government redress schemes, the Helpline Agreement and the Indian Residential Schools Settlement Agreement, involved co-contributions by religious organisations. In both cases, the non-participation of some religious entities in the operation of the scheme caused significant dissatisfaction and discrepancy in outcomes for victims.¹⁴⁴

The experience of the Irish Residential Institutions Redress Board (the Redress Board) highlights the potential pitfall of failing to source sufficient financial contributions for a government-operated redress scheme from non-government organisations.¹⁴⁵ The relatively low level of contributions by the religious organisations to the Irish redress scheme has not only been problematic for the Victorian Government, but has also disappointed victims and the community, who see the need for the Catholic Church to demonstrate its acknowledgment of responsibility by providing funds.

In Victoria, additional challenges will arise from the long-term operation of internal organisational protocols such as those of the Catholic and Anglican churches. A large number of settlements have already been negotiated under existing systems. Most of these are subject to legally binding agreements that prevent further claims by victims.

Although some organisations offered nominal support for a government-run approach funded by non-government organisations, the details would need to be carefully considered. For example, the Anglican Church told the Committee that it would only be open to contributing to a government-run scheme if consideration were given to the lower level of claims against the Anglican Church compared with other non-government organisations.¹⁴⁶

144 The Helpline Agreement was established to provide compensation to boys who had been abused while attending one of a number of training schools operated by two faith-based organisations. In his review of the scheme in 2002, retired judge Fred Kaufman noted that the non-participation of one of the faith-based organisations caused unequal access to compensation and disagreement between parties. Fred Kaufman (2002) *Searching for justice: An independent review of Nova Scotia's response to reports of institutional abuse*. In 2003, an alternative dispute resolution process was established for the Indian Residential School system (now superseded by the Indian Residential Schools Settlement Agreement). One of the main criticisms of this process was that some religious entities involved in the operation of the schools did not participate, causing unequal access to compensation for survivors. See the detailed critique of the 2003 alternative dispute resolution process by the Assembly of First Nations (2004) *Assembly of First Nations Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools*, available at http://epub.sub.uni-hamburg.de/epub/volltexte/2009/2889/pdf/Indian_Residential_Schools_Report.pdf.

145 The Irish Residential Institutions Redress Board was established in 2002 to compensate former residents of industrial and reformatory schools, orphanages and children's homes who had suffered abuse. Most of these institutions were run by religious orders. Despite attempts by the Irish Government to split the contribution for its redress scheme with religious orders on a 50/50 basis, as at May 2012, the state had received only €126 million of the €1.47 billion compensation allocated. In 2009, following the report of the Commission to Inquire into Child Abuse (also known as the Ryan Report), congregations agreed to contribute more cash and property to the state to reduce the shortfall. However, legal and economic issues appear to have slowed the transfer of property to the state and reduced its benefit. *Supplementary evidence*, Questions on notice, Dr Jane Wangmann, Lecturer, Faculty of Law, University of Technology Sydney, 19 December 2012; Carl O'Brien 'Cost of State redress for abused up to nearly €1.5bn', *The Irish Times*, 4 May 2012; Parliamentary Debates, Minister for Education and Skills (Deputy Ruairi Quinn)—Residential Institutions Statutory Fund Bill 2012: Second Stage Dáil Éireann Debate, Dáil Éireann (Ireland), vol. 764, no. 3, 8 May 2012.

146 *Transcript of evidence*, Anglican Diocese of Melbourne, p. 23.

As Dr Jane Wangmann told the Committee, there is a need ‘for open and transparent negotiations and a commitment on behalf of those organisations to provide measures of redress at the outset.’¹⁴⁷

28.2.3. Government compensation fund

Some Inquiry participants supported the establishment of a government compensation fund for victims of criminal child abuse. In particular, several Inquiry participants referred to the Department of Veterans Affairs (DVA) and commented favourably on its dispute resolution process. Some participants suggested that the DVA response to returned service personnel and their families would be a good model for compensating victims of criminal child abuse.

The DVA compensates veterans and their families for injury, disease or death related to service. It does this through claims made to the Military Rehabilitation and Compensation Commission (MRCC). Decisions of the MRCC can be reviewed by the Veterans’ Review Board. The Veterans and Veterans’ Families Counselling Service (VVCS) provides free counselling and group programs to veterans and their families.¹⁴⁸

Mr Joseph Saric identified some components that could be modelled on the Department of Veterans’ Affairs scheme:

- educational programs for victims
- psychiatric support
- live-in and outpatient facilities
- specialist drug and alcohol programs
- financial counselling
- support for secondary victims and families.¹⁴⁹

The Committee heard that victims of criminal child abuse often suffer post-traumatic stress disorder (PTSD), which is discussed in Chapter 4 in Part B. Some Inquiry participants suggested that the Government could draw on DVA as best practice for assisting claimants who have PTSD.

As noted above, Inquiry participants also spoke positively about the DVA’s provision of health cards to veterans who have suffered injury or disease as a result of service in the Australian Defence Force. The DVA provides varying levels of support to eligible veterans, based on need and the person’s level of disability or injury. The highest level of support (‘gold card’) provides for all medical treatment and pharmaceutical benefits, some services and a financial supplement. The lower-level support card gives more limited benefits, aiming to alleviate costs associated with specific injuries.¹⁵⁰

For example, Mr Saric told the Committee:

As a Vietnam veteran who suffers from chronic PTSD and holds a gold card

¹⁴⁷ *Supplementary evidence*, Questions on notice, Dr Jane Wangmann, Lecturer, Faculty of Law, University of Technology Sydney, 19 December 2012, p.3.

¹⁴⁸ Department of Veterans Affairs *Welcome to the Department of Veterans Affairs*. Accessed on 30 July 2013 from <http://www.dva.gov.au/>.

¹⁴⁹ *Transcript of evidence*, Mr Joseph Saric, p. 4.

¹⁵⁰ Department of Veterans Affairs *Veterans’ Health Cards*. Accessed on 30 July 2013 from <http://www.dva.gov.au/>.

as a returned soldier with total and permanent disability since July 1997, it is my experience that the only way to move forward with the Catholic Church's response to victims of clergy sexual abuse is to adopt the Department of Veterans' Affairs and the Department of Repatriation's responses to returned soldiers and their families as a working model. This is Australia's best practice and could also serve Australian clergy victims. I have put this forward to the Committee as world best practice in caring for survivors through papers I provided to the Committee earlier this week.¹⁵¹

Mr Saric recommended that the Victorian Government draw on the work of the Australian Centre for Post-traumatic Mental Health which, he emphasised, already works with the Federal Government to inform best practice in response to PTSD and other significant traumas experienced by veterans.¹⁵²

Fr Kevin Dillon also noted that the DVA had some good practices for establishing support networks. For example, he explained how the DVA organised group gatherings for people to attend to discuss 'how they are going'.¹⁵³

The Committee concluded that Victoria can learn some important lessons from the DVA model when developing a scheme to compensate and support victims of criminal child abuse.

28.3. The case for a new, independent alternative justice avenue

As discussed in Chapter 24, the Committee determined that there is no dedicated organisation or body in Victoria that focuses on alternative resolution of claims between victims of criminal child abuse and non-government organisations. The Committee considered that an independent alternative avenue that draws on the expertise of VOCAT would be an effective basis for providing justice for these victims.

28.3.1. Utilising the expertise of VOCAT

The Committee considers that using VOCAT's expertise to support an independent service could be an effective and efficient basis for an alternative justice avenue for victims of criminal child abuse, for a number of reasons:

- VOCAT is independent and accountable, and is seen as credible by victims and support organisations.
- VOCAT judgements are delivered by magistrates. This gives an avenue for acknowledging the harm done to victims.
- VOCAT's framework for determining compensation could be built upon to develop a framework for mediated outcomes.
- Crucial victim support services are already largely in place.

In addition, placing an alternative justice scheme within a whole-of-government approach to victims of crime would enable the Victorian Government to respond to victims of criminal child abuse in an integrated way. Dr Wangmann, for example, warned against possibly compartmentalising the response to victims:

151 *Transcript of evidence*, Mr Joseph Saric, p. 4.

152 *Transcript of evidence*, Mr Joseph Saric, p. 4.

153 *Transcript of evidence*, Father Kevin Dillon, p. 4.

I think it is important to think about the way in which we tend to compartmentalise these actions. So Australia, in particular, has been very good at having inquiries at one stage, having an apology at another stage and talking about compensation at another stage. For survivors these are all integrated, and each time there is a gap between each stage it dilutes the importance of each mechanism. So we need to think about the way in which all of these components work together to provide an effective mechanism around reparation. So I do not think you can talk about reparation separately to an inquiry or a fact-finding process and separate from an apology.¹⁵⁴

An important challenge for the justice approach will be how to deal with any claims from victims who are dissatisfied with settlements that have already been negotiated under existing systems. The Committee heard that some victims were extremely dissatisfied with the amount of compensation awarded under internal organisational processes. However, most of these victims have signed release papers stating they had no further claim against the organisation.

As noted at the beginning of this part of the Report, the Committee was encouraged by the cooperation of non-government organisations throughout the Inquiry and notes that most undertook to comply with the Committee's recommendations. For example, as quoted earlier, Cardinal Pell indicated that:

I am certainly totally committed to improving the situation; I know the Holy Father is too. I know there are significant persons in the community and in the Church who believe, rightly, that we have failed ... We have done quite a deal. I commit myself to doing whatever further is required and appropriate so that we can bring a bit more peace.¹⁵⁵

The Committee considers that the willingness of organisations to engage with victims through the VOCAT dispute resolution process in order to review their existing settlements will demonstrate the genuineness or otherwise of such undertakings.

28.3.2. Determining outcomes

The Committee considers that an approach that responds flexibly to the needs of victims could potentially overcome some of the limitations of other avenues, including government redress schemes outlined in Section 28.2.¹⁵⁶

Although flexibility is important, the Committee recognises that there is a need for a consistent and transparent approach to determining outcomes. Many victims spoke of their dissatisfaction with the inconsistent compensation received by different victims in seemingly similar situations. It is therefore essential that the process includes:

- consistent eligibility criteria
- sensitive treatment of victims
- an assessment process that minimises trauma and supports victims throughout.

Furthermore, outcomes must reflect the severity of both the abuse and its impact on the victim. As described in Part B of this Report, abuse can affect different victims in different ways.

¹⁵⁴ *Transcript of evidence*, Dr Jane Wangmann, p. 5.

¹⁵⁵ *Transcript of evidence*, Catholic Archdiocese of Sydney, p. 57.

¹⁵⁶ Senate Legal and Constitutional Affairs Committee (2010) *Review of Government compensation payments*.

Provision could also be made for victims to choose the mode of compensation. For example, Fr Paul Walliker noted that compensation payments can affect social security payments. Creating a choice in whether to receive compensation in instalments or a lump sum may address such concerns.¹⁵⁷

28.4. Involving victims and organisations in the design of the alternative justice approach

It is essential that the Victorian Government involve victims in the process of designing an alternative justice avenue for criminal child abuse in organisational settings.

Inquiry participants emphasised the importance of this type of consultation with victims. For example, Fr Kevin Dillon explained:

I think if we are trying to help victims, surely they are the first people who need to be asked, 'How can we help you? What do you need? You have been through one of two systems. Were there any good things there that need to be retained?' The failings have been pretty well documented, but maybe there are some good things and good strategies that could be incorporated into something totally independent.¹⁵⁸

Involving victims and victim advocacy groups in the design and development of solutions for victims has led to successful outcomes in other jurisdictions. A good example of victim engagement is the Grandview Agreement in Canada. This was a settlement package for wards of the State who attended the Grandview Training School for Girls in Ontario, Canada, in the mid-1960s and early 1970s. A defining feature of the scheme was involving victims (represented by the Grandview Survivors Support Group) in the design of eligibility and adjudication processes. The Grandview Agreement was developed through negotiations between the Government and the Grandview Survivors Support Group, and was accepted by a vote of the women who participated in the process.¹⁵⁹

28.5. Role of non-government organisations

Given the nature and extent of the damage caused by criminal child abuse, it is critical that the non-government organisations that participated in this Inquiry endorse and implement the reforms recommended in this Report. This would be an important step towards improved child safety, and an essential act of good faith in easing and making amends for damage caused by those organisations to victims, their families and the broader community of Victoria.

The Committee acknowledges that many victims have already had their claims dealt with through existing avenues. Nevertheless, the Committee is strongly of the view that in light of evidence provided to this Inquiry, these victims should have an opportunity to have their claims revisited.

157 *Transcript of evidence*, Father Paul Walliker, Bendigo, 14 March 2013, p. 6.

158 *Transcript of evidence*, Father Kevin Dillon, p. 5.

159 Goldie Shea (1999) *Redress programs relating to institutional child abuse in Canada*. Ottawa, Law Commission of Canada, p. 29.

The Committee understands that victims are likely to face a number of barriers in having their claims revisited, not least of which is the fact that most would have signed release papers as a condition of their settlements with non-government organisations, stating they had no further claim against the organisation. The Committee considers the willingness of organisations to review these earlier settlements will be a measure of how genuine their undertakings are.

The community is well acquainted with a variety of organisations established to act as independent, dispute resolution bodies to which industry contributes towards the cost of its administration.

The Committee considers that the key question of independence could be addressed by extending VOCAT to include an independent dispute resolution mechanism with a strong focus on the needs of victims and families with compensation paid for by the non-government organisations in which criminal child abuse has occurred and not the people of Victoria.

→ Recommendation 28.1

That the Victorian Government review the functions of the Victims of Crime Assistance Tribunal (VOCAT) to consider its capacity to administer a specific scheme for victims of criminal child abuse that:

- enables victims and families to obtain resolution of claims arising from criminal child abuse in non-government organisations
- is established through consultation with relevant stakeholders, in particular victims
- encourages non-government organisations to voluntarily contribute a fee to administer the scheme
- ensures non-government organisations are responsible for the funding of compensation, needs and other supports at amounts agreed through the process.

Beyond the Inquiry—responsibilities

Throughout its deliberations and in the pages of this Report, the Committee has endeavoured to accurately and faithfully reflect the voices of those people who were criminally abused as children (and their families) and who had the courage to come forward to help the Committee with its Inquiry.

While mindful of the limitations in trying to repair the sometimes irreparable, having confronted and exposed the truth of these experiences, the community cannot ignore its obligations to assist the victims of criminal child abuse in non-government organisations and to provide greater protection for children in the future.

The Committee's recommendations are directed to the achievement of these objectives as far as reasonably possible.

The organisations and individuals who were at least morally complicit in the crimes with which the Inquiry has been concerned, cannot be permitted to make superficial and professionally constructed gestures of regret and effectively walk away.

Failure in either of these respects would constitute another reprehensible betrayal.

Adopted by the Family and Community Development Committee
55 St Andrews Place, East Melbourne
28 October 2013