

# COIN

COMMISSION OF INQUIRY NOW

Justice for victims of Catholic Clergy Sexual Assault in Victoria

20 August 2012

The Hon Georgie Crozier MLC,  
Chairman, Family and Community Development  
Committee, Parliament of Victoria, Spring Street  
MELBOURNE VIC 3000

Dear Ms Crozier,

**Inquiry into Handling of Child Abuse by Religious  
and other Organisations -  
*COIN Submission No 5:***

**“Vicarious Liability:  
Utilisation by the Roman Catholic Church of the doctrine of vicarious liability  
as a Defence to Civil Actions for Damages by Victims of Clergy Sexual Assault:  
Proposals for Reform”**

We write to briefly outline the state of the law in Victoria concerning vicarious liability as it applies to civil actions for damages by victims against the Catholic priests and their “employer” the Roman Catholic Church (“RCC”); and to suggest necessary reforms to the law in order to render justice to victims of sexually abused by RCC personnel.

**Independent Judicial Inquiry:** As previously stated, COIN considers that the Government’s choice to refer the issue of the sexual assault of children by personnel associated with the Roman Catholic Church (“RCC”), let alone by personnel from thousands of additional religious and other organisations, to a Parliamentary Committee for inquiry and report is inadequate and unworkable. COIN favors the commissioning of a properly empowered, independent, judicial inquiry into this problem. This issue will be addressed in a further submission.

Accordingly, COIN considers your Committee to be a “first step” towards the instigation of such a judicial inquiry. COIN thus recommends that the Committee, in its final Report, records and acknowledges its inadequacy; and recommends to government that such a further, independent judicial inquiry be forthwith commissioned.

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**Focus on the RCC** COIN considers that the Committee's Term of Reference are unworkable if thorough examination of this significant problem, and well-founded recommendations to government, are to occur. The Terms of Reference embrace thousands of religious, and other, organisations and would require many years to pursue: yet the Committee is required to report by 30 April 2013. Second, COIN considers RCC clergy, and the Church's hierarchy, to be the main perpetrators of sexual assault upon children and vulnerable adults in Victoria. Thus, in this submission, COIN focuses solely on the RCC, and encourages the Committee to do likewise, both as a matter of practical reality and in an endeavour to conduct a though, focused inquiry as compare to a superficial treatment of many organisations.

**Why is law reform necessary?** In the current state of Australian law, victims of sexual abuse by RCC personnel have no practical way of obtaining just compensation from the offender personally, the RCC, or anyone else. The consequences of this denial of simple justice, coupled with the Church's systematic rejection and denigration of victims both historically and today, is highlighted by the recent spate of twenty-six tragic suicides linked to sexual abuse perpetrated by two clergymen in Victoria.<sup>1</sup>

The proposed law reforms set out in this submission aim to achieve the following:

- A fair and practical avenue for legal redress for abuse suffered at the hands of Catholic priests and Church affiliates.
- A realistic alternative for victims to seek compensation to the currently operating RCC's internal procedures such as the Melbourne Response and Towards Healing. These internal settlement procedures have, in many cases over the past fifteen years, denied victims just compensation and prevented public knowledge and accountability of the pandemic nature of serial abuse by clerics.

This submission's focus is tort law -- specifically the law on vicarious liability. The submission does not offer a comprehensive examination of the problem. Instead, this submission is intended to advise the Committee and lawmakers on necessary initial steps to rectify this problem.

#### **Current state of the law in Australia**

**Who to sue?** Generally, a plaintiff is entitled to compensation from the tortfeasor for any tortious acts committed against him or her, or from the tortfeasor's employer if vicarious liability can be established. While this may seem straightforward, in the present context, it is not a simple matter of suing the alleged offender or his or her employer for damages.

First, priests and other clergymen typically take a vow of poverty. This means they have little or no assets to satisfy a judgment order to pay damages made against them. Church

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<sup>1</sup> Nick McKenzie and Richard Baker, *Sex abuse led to 26 suicides says policeman* (2011) *The Age* <<http://www.theage.com.au/victoria/sex-abuse-led-to-26-suicides-says-policeman-20110729-1i4f0.html>> at 10 June 2012.

properties (for example, Diocese buildings) “owned” by the RCC are, in fact, held in legally separate property trusts established by legislation.<sup>2</sup>

Thus, one would think the pragmatic approach for the claimant would be to bring an action against the appropriate trustees who hold assets that may be made available to pay appropriate compensation. Such an action was brought in *Trustees of the Roman Catholic Church v Ellis*.<sup>3</sup> In *Ellis*, the claimant argued that the RCC trustees were directly and vicariously liable for a failure to implement adequate systems and controls to prevent clergy sexual abuse from occurring.

This argument, however, was rejected by the NSW Court of Appeal. The court held that the purpose of the trust was to solely to manage the properties and other financial interests of the Church. The trust could not be held liable for the actions of a priest that offended in the Archdiocese of the relevant trust.

His Honour Mason P stated:

*The fact that the trustees hold property for and on behalf of “the Church” ... cannot be inverted into the proposition that the trustees ... can be rendered subject to all legal claims associated with Church activities.*<sup>4</sup>

Thus the law in Australia makes it clear the RCC’s various trusts cannot be sued or held liable for sexual abuse perpetrated by a parish priest.

**Vicarious liability** The leading case in the area of vicarious liability in relation to child sexual assault is *New South Wales v Lepore*.<sup>5</sup> This case did not concern clergy abuse but abuse by a school teacher employed in a government school. The court in *Lepore* held that the school authority was not liable to the victim<sup>6</sup> as sexual assault was outside the perpetrator’s course of employment and thus vicarious liability could not be attributed to the offender’s employer. Similarly, as mentioned, the court in *Ellis* also refused to attach vicarious liability to the Church for the conduct of the relevant priest.

Furthermore, it has been argued by the RCC that priests are not employees of the Church and thus cannot be held vicariously liable. This argument was considered in *Ellis*. The court held that the trustees of the statutory property trust could not be considered employers of diocesan priests as the trustees were not involved in the appointment or removal of such priests.

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<sup>2</sup> For example, the Victorian legal entity for the Catholic Archdiocese of Melbourne is set up under the *Roman Catholic Trusts Act 1907* (Vic). See COIN’s separate submission concerning this trust legislation.

<sup>3</sup> [2007]NSWCA 117.

<sup>4</sup> *Ibid* at [149].

<sup>5</sup> (2003) 195 ALR 412.

<sup>6</sup> The victim was a student and the sexual assault was committed by a teacher employed by a school authority during school hours.

The appointment of the priest in *Ellis* was by the Bishop in charge of the relevant Diocese at the time. However, at the time of the trial, the relevant Bishop had been dead for some time. Thus no action could be initiated against him personally.

As a result of these cases, the legal position in Australia is that the RCC and all its limbs enjoys, in practice and in law, complete immunity from civil legal proceedings with regards to sexual abuse committed by clergymen. Even where evidence has been accepted that Church officials knew, or had reasonable grounds to suspect, that abuse had occurred and failed to prevent it, the courts have been unwilling to accept that the Church itself is the appropriate body to sue.

**Church's Private Compensation Schemes** The lack of access to compensation through the courts funnels victims into Church-operated in-house programs such as the *Melbourne Response* or *Towards Healing*. These programs conduct internal inquiries into complaints brought to them and are not publicly transparent or accountable. If compensation is offered to the victim, a Deed of Release with confidentiality clauses is required.

This presents a conflict of interest, as the Church that seeks to deny or minimise liability is also conducting the investigations albeit through its "independent" commissioner (Commissioner Peter O'Callaghan QC, in the case of the *Melbourne Response*). These processes are not subject to any external supervision or review. This aspect was criticised by Cummins J in his recently released Report. His Honour concluded:

*"A private system of investigation and compensation, no matter how faithfully conducted, by definition cannot fulfil the responsibility of the State to investigate and prosecute crime. Crime is a public, not a private matter. The substantial number of established complaints of clerical sexual abuse found by Mr O'Callaghan (many of which are likely to relate to offences committed against children), reveal profound harm and any private process that attempts to address that harm that [sic] should be publicly assessed."*<sup>7</sup>

COIN agrees. In relation to investigations into the criminal abuse of children by "religious personnel", the Cummins Inquiry Report found that:<sup>8</sup>

*Any private system of investigation and compensation which has the tendency... to divert victims from recourse to the State, and to prevent abusers from being held responsible and punished by the State, is a system that should come under clear public scrutiny.*

Again, COIN supports these observations.

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<sup>7</sup> Cummins J etc, *Report of the Protecting Victoria's Vulnerable Children Inquiry*, (3 Vols, Vic Govt Printer, January 2012), Vol 2, p 356 at para 14.5.3. ("Cummins J Report").

<sup>8</sup> Cummins J, Report, p 356 at para 14.5.3. The Inquiry was tasked with investigating systemic problems in Victoria's child protection system. The Inquiry was conducted by a panel which consisted of Justice Philip Cummins, a former judge of the Supreme Court of Victoria.

The unwillingness of the courts to find the Church and/or its hierarchy vicariously liable and to pierce the corporate veil, and thus enable victims to receive proper compensation that they are entitled to by access to the Church's extensive assets, coupled with the inadequacies of the Church's internal investigation and compensation system, demands law reform.

**International developments** Recent developments of the common law in the United Kingdom offer a more progressive approach to the issue compared to the approach so far of Australian courts. However, to understand the landmark cases decided recently in the UK, it is important to broadly understand the principles upon which the recent decisions are based.

*Bazley v Curry*<sup>9</sup> (Supreme Court of Canada) has propagated a new (and expanded) test for vicarious liability. According to this test, the courts must consider:

1. Whether the tort was sufficiently connected with conduct authorised by the employer to justify imposing vicarious liability; and
2. Whether public policy is a relevant consideration when deciding whether to enforce a vicarious liability action

*Bazley v Curry* established what is known as the "close connection" test. The court said:<sup>10</sup>

*Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. (emphasis added)*

The court went further, saying:<sup>11</sup>

*Applying these general considerations to sexual abuse by employees, there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks.*

This decision was closely followed in *Lister v Hesley Hall* in the English House of Lords.<sup>12</sup> Lord Steyn held that the traditional Salmond test for vicarious liability was inadequate and strongly approved *Bazley v Curry*:<sup>13</sup>

*My Lords, I have been greatly assisted by the luminous and illuminating judgments of the Canadian Supreme Court in Bazley v Curry... Wherever such problems are considered in future in the common law world these judgments will be the starting point.*

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<sup>9</sup> [1999] 2 SCR 534.

<sup>10</sup> Ibid at [41].

<sup>11</sup> Ibid at [42].

<sup>12</sup> [2001] UKHL 22.

<sup>13</sup> Ibid at [27].

His Lordship continued:<sup>14</sup>

*The question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable*

**The *Maga* Case** This brief overview of the “close connection” test should enable a clearer understanding of the rationale behind *Maga*.<sup>15</sup> The English Court of Appeal held that there was a sufficiently close connection between Father Clonan’s employment as a priest at the Archdiocese and the abuse inflicted on the claimant by the Father such that it was fair and just to impose vicarious liability on the Archdiocese.

The court found that the priest’s intimate relationship with the victim was only possible because of his status and authority. This gave him ample opportunities to be alone with his victim without any suspicions being raised.<sup>16</sup>

The Canadian case *Jacobi v Griffiths*<sup>17</sup> was also considered and approved in *Maga*. In *Jacobi*, the Canadian Supreme Court held that to establish vicarious liability, the claimant must show that there was a material increase in the risk of harm occurring in the sense that the employment significantly contributed to the occurrence of the harm. As mentioned, the court in *Maga* was satisfied that this condition had been met and found that the sexual abuse of the claimant was so closely connected with Father Clonan’s employment as a priest that it would be fair and just to hold the Church vicariously liable.

**Consequences of *Maga*** While the decision in *Maga* has great significance in that the English Court of Appeal was willing to attribute vicarious liability to the trustees of an Archdiocese, one further important issue of law remains unresolved.

The RCC did not, in that case, raise the defence commonly relied upon in Australia, that Father Clonan was not an “employee” of the Church. This is an established defence in the United Kingdom but the Church, for whatever reason, accepted on this occasion that Father Clonan was an employee of the Archdiocese of Birmingham. The upshot is that the law of vicarious liability, in this context, has not to date been fully tested in the United Kingdom or Australia.

***E v English Province of Our Lady of Charity and another*<sup>18</sup> (the *JGE* case)** The recent *JGE* case was another action for damages where vicarious liability had been claimed arising from alleged sexual abuse by a priest.<sup>19</sup> This time, however, the defendant argued that the priest was not an “employee” of the Church and thus it could not be vicariously liable. This argument was supported by evidence that no formal employment contract existed between the priest and the Church. Nor was the priest paid by the diocese; rather he relied

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<sup>14</sup> *ibid* at [28].

<sup>15</sup> *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256.

<sup>16</sup> For example, Father Clonan was given responsibility for youth work at the Church.

<sup>17</sup> (1999) 174 DLR (4th) 71.

<sup>18</sup> [2011] EWHC 2871.

<sup>19</sup> The vicarious liability in this instance was argued to be attached to the Bishop of the Roman Catholic Diocese of Portsmouth at the material time. However, the trustees of the Portsmouth Roman Catholic Diocesan Trust, for the purposes of the litigation, stood in place the Bishop.

upon donations. The Church also relied upon Canon Law to reinforce this position. The trial judge rejected the Church's argument. MacDuff J held that the priest:

*Father Baldwin was appointed by and on behalf of the defendant. He was so appointed in order to do their work; to undertake the ministry on behalf of the defendant for the benefit of the church. He was given the full authority of the defendants to fulfil that role.*<sup>20</sup>

His Honour found there to be a relationship between the Bishop and the priest to which vicarious liability could be attached.

This decision, like *Maga*, is a landmark decision for not only the United Kingdom but for all common law jurisdictions, including Victoria. These two recent cases suggest that victims of clergy sexual abuse may have a stronger foundation to reply upon if contemplating civil actions for damages against the RCC as the perpetrator's employer.

However, first, *JGE* is currently on appeal to the Court of Appeal and no judgment has been given at the time of writing. Second, the common law in Victoria remains as discussed above: flawed, uncertain, costly, and thus very inadequate from a victim's perspective.

### **Law reform in Australia**

The question arises: what can be done in Victoria to make the justice system responsive for victims? Two reforms, which aim to replicate the above developments in the United Kingdom, are suggested.

**(1) Reform of the Church's property trust legislation** The court in *Ellis* accepted the Church's submission that the trustee's activities were strictly concerned with property dealings and were "well removed from the matter of appointing, managing and disciplining priests".<sup>21</sup> Clearly, by sheltering trustees from the torts (and crimes) of priests, the law is denying victims substantial justice.

The Victorian *Roman Catholic Trusts Act 1907* must be amended to allow for actions against the trustees for wrongful acts committed by:

- i. Persons directly employed by the diocese for which the trust operates; and
- ii. Persons who are not formally employed by the diocese for which the trust operates but there exists a relationship between the person and the diocese FROM which a court could infer that an employer-employee relationship exists.<sup>22</sup>

A separate COIN submission discusses this option.

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<sup>20</sup> Above n 18 at [35].

<sup>21</sup> Above n 3 at [140].

<sup>22</sup> The *JGE* case should be used as a guide by the court to discern whether to attribute such a relationship. For example, if a priest had been delegated responsibility to carry out the Church's business then that is a strong indicator of an employment relationship.

**(2) Vicarious liability should be attached to the RCC property trustees** Simply making the various property trusts open to civil litigation for civil wrongs committed by clergymen would be fruitless if the courts still favoured the approach in *Lepore* and *Ellis* where the court refused to attach vicarious liability to the employer. Law reform following the principles laid out in the *Maga* and *JGE* cases is necessary as well.

The *Lepore* principle (where sexual abuse is outside the scope of employment) must be repealed by statute in favour of the adoption of the “close connection” test used by English and Canadian courts. That is, if the tort in question was so closely connected with the employment that it is fair and just to attach vicarious liability, then such liability should apply by force of statute.

In addition, the principle in *Jacobi v Griffiths*<sup>23</sup> must also be taken into account. If the appointment of a priest significantly increased the risk of harm occurring, then vicarious liability should be attached to the Archdiocese responsible for the appointment.

This is particularly relevant given that the RCC hierarchy is notorious for failing to discipline priests adequately or at all, for sexual abuse. As is widely known, if allegations of abuse are made against a priest, it is common Church practice to simply transfer the priest to another parish. Not only is this extremely irresponsible in the sense that the Church is attempting to cover up the incident(s), but it also puts the children of the priest’s new parishioners at great risk of harm. Such practices can no longer be tolerated. The proposed reform would require, by law, that the Church take responsibility for its actions – a stance it has, in Victoria and around the world, conspicuously and repeatedly failed to adopt of its own volition.

**Effect of law reform** The first point allows for the attachment of vicarious liability to the trustees for the wrongful acts of priests. The second point allows vicarious liability to be *successfully* argued by the claimant as was the case in *Maga* and *JGE*. The overall result is to provide victims an avenue to obtain just compensation that is established in law.

The Church will no longer be able to secrete its significant assets behind artificial legal corporate curtains and thus apply pressure to guide victims into the Church’s inadequate and ultimately self-serving internal compensation schemes such as Towards Healing and the Melbourne Response.

Allowing proceedings access to the court system may also direct public scrutiny to this contentious issue. The RCC’s covering up of incidents of abuse by utilising its internal processes leaves the public largely unaware of the suffering caused to victims and their families, and the Church’s inadequate responses. This suppression causes further grief, anger and frustration to victims and is evidenced, for example, in the tragic series of suicides that stemmed from abuse by two clergymen, Father Gerald Risdale and Christian Brother Robert Best, in the Ballarat Diocese in Victoria. Increased publicity of clergy abuse should

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<sup>23</sup> Above n 17.

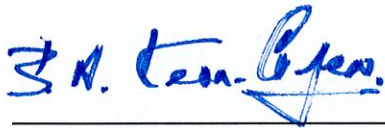


encourage the Church hierarchy to take responsibility and implement effective measures to prevent abuse occurring in the future.

Opponents of these reforms might argue that opening the trustees of Church assets to civil liability for damages will open the floodgates and severely disrupt the operation of the Church's many charitable activities. However, the greater public interest (even if such damage to the RCC's charitable works was demonstrated, which seems very unlikely) is that a society that cares for those most at risk must apply the law fairly, and ensure justice to victims of these appalling crimes upon the community's most vulnerable children. Victoria, and all its citizens, corporate and otherwise, of whatever station, operate under the rule of law and "every person and organisation... is subject to the same laws".<sup>24</sup>

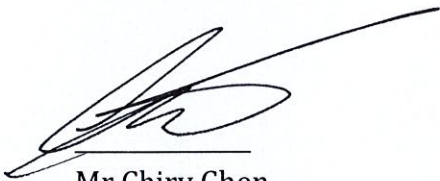
The Catholic Church, like any other person or organisation should not, in today's community, be exempt from direct or vicarious liability for the wrongful acts of its priests. Victoria should take progressive steps to match developments in the common law in other Commonwealth jurisdictions such as Canada and the United Kingdom.

Yours Faithfully,



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<sup>24</sup> *Butterworths Concise Australian Legal Dictionary* (3rd ed, 2004) 385.