

27th August, 2012

Dr Janine Bush,
Executive Officer,
Family & Community Development Committee,
Victorian Parliament, Parliament House,
Spring Street,
MELBOURNE VIC 3002

**Re : Submission to the Parliamentary Committee Inquiry into
'the Processes by which religious and other non-government
organisations respond to the criminal abuse of children by
personnel within their organisations.'**

I make this submission on my own behalf and I do not require my submission to be confidential. I would be happy to give verbal evidence to the Committee at its public hearings.

My submission will concentrate on paragraphs 2 and 3 of the Terms of Reference in relation to law reform issues as to the (mandatory) reporting of suspected criminal abuse of children to State authorities and what changes to law or practices are required to help prevent criminal abuse of children by personnel in such organisations.

I was admitted to practice as a Barrister and Solicitor of the Supreme Court of Victoria on 2nd September 1985. I have also been admitted to practice as a Solicitor in the Supreme Courts of New South Wales (1989) and the Northern Territory (2010).

I have been a practising lawyer in Ballarat and district since 1986, except for the period between September 1999 and November 2006 when I was a Member of the Legislative Council (MLC) for Ballarat Province in State Parliament. During my parliamentary term as MLC for Ballarat Province, I was a deputy-chair and member of the Victorian Parliament Law Reform Committee.

1. The (mandatory) reporting of suspected criminal abuse of children to State authorities – - paragraph 2 in your Terms of Reference:

- 1.1 **The Report of the ‘Protecting Victoria’s Vulnerable Children’ Inquiry by the Honourable Phillip Cummins**, Emeritus Professor Dorothy Scott OAM and Mr Bill Scales AO (January 2012) made a number of recommendations in Chapter 14 : “Strengthening the law protecting children and young people. “ In particular :

Recommendation 39 : Victoria Police should change the brief authorisation process for allegations of child physical assault so that authorisation is conducted by a specialist senior officer.

Recommendation 41 : amending the ‘best interests principles’ to include ‘the need to protect the child from the crimes of physical and sexual abuse’ in section 10 (3) (a) of the Children, Youth and Families Act 2005.

Recommendation 47: The Crimes Act 1958 (Vic) should be amended to create a separate reporting duty where there is a reasonable suspicion of a child or young person (under 18) is being, or has been, physically or sexually abused by an individual within a religious or spiritual organisation.

This Recommendation 47 stated that the duty should extend to a minister of religion; and a person who holds office within, is employed by, is a member of, or a volunteer of a religious or spiritual organisation that provides services to, or has regular contact with, children and young people.

A ‘failure to report’ should attract a suitable penalty having regard to Section 326 of the Crimes Act 1958 (and section 493 of the Children, Youth and Families Act 2005).

The Recommendation 47 stated that ‘An exemption for information received during the rite of confession should be made.’

It is my submission that these recommended amendments to the Crimes Act and the Children, Youth and Families Act should be legislated by State Parliament.

Currently, section 326 of the Crimes Act provides for an offence headed ‘Concealing offences for benefit’ ... (1) where a person has committed a serious indictable offence, any other person who, knowing or believing that

the offence, or some other serious indictable offence, has been committed and that he has information which might be of material assistance in securing the prosecution or conviction of an offender for it, accepts any benefit for not disclosing that information shall be guilty of a summary offence and liable to level 8 imprisonment (1 year maximum).

1.2 **The Cummins Inquiry Recommendation for an exemption for information received during the rite of confession** does not sit comfortably with the 21st century's obligations of a humane and just society for the safety and welfare and rights of children and vulnerable persons.

In 2006 Victoria enacted the Charter of Human Rights and Responsibilities (Act 2006) and the Victims' Charter (by the Victims' Charter Act 2006) both of which are important for the protection and enhancement of human rights of all people and the rights of the child and vulnerable persons. These Charters commit the Government to have responsibility to protect, promote, respect and fulfil human rights.

In particular, Section 17 of the Charter of Human Rights and Responsibilities protects families as the fundamental group unit of society and are entitled to be protected by society and the State; And every child has the right, without discrimination, to such protection as is in his or her best interests. Section 24 provides for the right to a fair hearing before a competent, independent and impartial court or tribunal.

The Victims' Charter requires investigatory and prosecuting agencies to be mindful of the information and support service needs of persons adversely affected by crime, particularly the provision to victims of crime of information about the progress of investigations and prosecutions of their case.

The Sacrament of Penance and Reconciliation (commonly called the Sacrament or rite of Confession, reconciliation or penance) is one of the seven sacraments of the Catholic Church in which its faithful obtain Divine mercy for the sins committed against God and neighbour and are reconciled with the community of the church (*Lumen Gentium* 11, Canon Church Law 1422).

By this sacrament Christians are freed from sins committed after baptism. The role of the priest is as a minister of Christ's mercy. He acts in persona Christi. Serious sins (mortal sins) must be confessed within at most a year. The intent of this sacrament is to provide healing for the soul as well as to regain the grace of God, lost by sin (see John 20:22 – 23 as the primary scriptural proof for the doctrine concerning this sacrament of confession).

Receiving the sacrament of penance from a priest is distinct from receiving from him pastoral counselling or psychotherapy, as both confidential processes have distinct roles in church life.

The Seal of Confession : for Catholic priests, the confidentiality of all statements made by penitents during the course of confession is absolute. The sacramental seal is inviolable; therefore it is absolutely forbidden for a confessor to betray in any way a penitent in words or in any manner and for any reason. Further, priests or anyone who witnesses or overhears the confession (say an interpreter, caregiver or aide of a person with a disability) may not reveal what they have learned during the confession to anyone, even under the threat of their own death or that of others. This is unique to the Seal of the Confessional.

Importantly, a priest or anyone who witnesses or overhears any part of the confession, who breaks that confidentiality incurs *latae sententiae* (Latin for 'sentence already passed' ie automatic) excommunication reserved to the Holy See (Code of Canon Law, 1388).

In a criminal matter, a priest may encourage the penitent to surrender to authorities but this is the extent of the leverage he wields over the penitent. The priest cannot make this a condition of absolution and he may not directly or indirectly disclose the matter to civil authorities himself.

Whilst the Rite of Confession is not one of the Terms of Reference for this Inquiry, **it is my submission** that the Catholic Church needs to revisit its Code of Canon Law in the light of the 21st century mores and obligations and especially to protect the rights of the child and vulnerable persons within our community.

Further, if the State Parliament was to enact amendments to section 326 of the Crimes Act 1958 (Vic) in line with the Irish Parliament's recent new legislation (see paragraph 1.4 below) and expand upon (and gazette) the mandated persons under the Children, Youth and Families Act 2005 then a potential offender could not use the Rite of Confession to avoid criminal prosecution and accountability.

1.3 Another Recommendation of the Cummins Report of 'Protecting Victoria's Vulnerable Children' (2012), is **Recommendation 44** :

- that the Victorian Government should progressively gazette those professions listed in Section 182 (1) (f) – (k) of the Children, Youth and Families Act 2005, that are not yet mandated to report.

The legislative test for mandatory reporting is when the gazetted professional has a 'belief formed on reasonable grounds that a child is in need of protection' on a ground set out in section 162 of the Act.

The only professions gazetted to mandatorily report are police, registered medical practitioners, registered nurses and school teachers. The mandatory report must be 'notified' or made to the Department of Human Services (Child Protection and Family Services Unit).

In 1993, mandatory reporting was first introduced in Victoria by amendments to the Children and Young Persons Act 1989 (amendment Section 64 (1A)). Teachers, doctors, nurses and police were mandated to report suspected cases of physical or sexual abuse of children.

This amendment happened after the violent death of an infant child at the hands of his stepfather, who was later convicted of murder and imprisoned.

The new 2005 Act (Children, Youth & Families Act) provided for the same mandated professionals and additional professional categories. However, the additional professional categories have still not been gazetted by an Order of the Governor in Council. These occupations are : licensed proprietors of a child-minding service, a youth and child welfare worker, a registered psychologist, a youth justice officer, a youth parole officer and other prescribed persons.

In 2010 to 2011, there were 55,718 notifications of child abuse in Victoria. 12,979 were investigated and 7,643 cases were substantiated. Police and teachers are the most frequent notifiers of child abuse. (see The Centre for Excellence in Child and Family Welfare Inc, Melbourne Victoria www.cfecfw.asn.au)

It is my submission that the other professions referred to in the Act should be gazetted by Order of the Governor in Council, as recommended by the Cummins Inquiry Recommendation 44 and as legislated for in the 2005 Act.

Also, consideration should be given to including in 'other prescribed persons' to be mandated, those professions of priests, ministers, pastors and deacons of religions including all personnel who are employed by or volunteer in the church and religious organisations.

1.4 ON 18 July 2012, the Irish Parliament (Tithe An Oireachtais/Houses of the Oireachtais in Dublin) passed legislation following the Report of the Ryan Commission. The Ryan Commission was established by an Act of the Irish

Parliament in 2004 to enquire into child abuse in Irish institutions for children mainly in residential schools operated by the Roman Catholic Church between 1975 and 2004. The Ryan Commission reported its findings in November 2009.

This new legislation creates an offence of 'withholding information' and it is called the 'Criminal Justice (Withholding of information on offences against children and vulnerable persons) Act, Number 24 of 2012.

Section 2(1) of this Act provides :

a person shall be guilty of an offence if

- (a) he or she knows or believes that an offence, that is a schedule 1 offence (which includes rape and sexual assault), has been committed by another person against a child, and
- (b) he or she has information which he or she knows or believes might be of material assistance in security the apprehension, prosecution or conviction of that other person for that offence.

Such a provision creates an offence for withholding of information or non-disclosure of information to police where an alleged sexual offence has been committed against a person who was a child at the time of the offence. Therefore, the mandatory reporting obligation continues where the victim is no longer a child and under the age of 18 years.

It is my submission that our Crimes Act 1958 should be amended to contain a similar provision creating an offence for withholding of information or non-disclosure of information to police, as the Irish Parliament has enacted.

2. Changes to the Law – paragraph 3 in your Terms of Reference :

2.1 It was reported in the Age newspaper on 26 July 2012 of a 'US church leader jailed over sex abuse cover-up'.

It was reported that the first US church official, a Roman Catholic monsignor, was convicted for covering up sex abuse claims against priests. The Monsignor William Lynn was the former secretary for clergy at the Archdiocese of Philadelphia, and he handled priest assignments and child sexual assault complaints from 1992 to 2004. He was accused of transferring problem priests in on the country's largest parishes and keeping complaints out of the public eye.

Judge Teresa Sarmina said that Monsignor Lynn was the first church official convicted for his handling of abuse claims.

A Jury convicted Monsignor Lynn, aged 61 years, in June 2012 of 'felony child endangerment' for his oversight of a priest who is serving a maximum of 5 years in prison after pleading guilty to sexually assaulting an alter boy in church in 1999.

The Age article also reported that Bishops have pledged to remove all accused priests from any public church work.

Whilst the legal system in the United States of America is different to our Westminster system, this reported case highlights the type of charge such as 'child endangerment' which could be enacted into our Crimes Act 1958 (Vic) in order to prevent the cover up of sex abuse claims against clergy and religious.

2.2 IN our Australian common law legal system the Church as such is not a legal entity and therefore cannot be sued by victims of crime alleged to have been criminally abused by priests and other religious persons.

Up until recently, the Australian common law has not considered priests and other religious as employees of the church they serve and for whom an employer would usually be vicariously responsible.

The High Court of Australia has held that an employer or like entity may never be able to be held vicariously liable for the intentional criminal acts of its employees. See *NSW v. Lepore (2003) HCA 4; 212 CLR 511*.

The traditional doctrine of vicarious liability is that an employer should only be held responsible for acts that occur within the scope of the actor or employee's engagement or employment.

The thorny legal issue of 'who is the priest employed by' has been dealt with by the England and Wales Court of Appeal in July 2012 (see *JGE v. Trustees of the Portsmouth Roman Catholic Diocesan (2012) EWCA Civ 938*). This case is discussed at 2.5 below.

2.3 Another inherent difficulty faced by victims is the difficulty in suing unincorporated associations. The Supreme Court of New South Wales handed down a decision on 4 May 2012 in the case of *PAE and Ors v. Grealy and Anor (2011) NSWSC 355*.

In this case there were five plaintiffs suing for alleged sexual abuse at the hands of Brother Grealy in 1974. The case was brought against Brother Grealy and also against the Trustees of the Roman Catholic Church for the Archdiocese of Sydney. It was alleged that the Trustees operated, managed and controlled the school in question, were responsible for the supervision of its teachers, were vicariously liable for the acts of Brother Grealy and had breached a non-delegable duty of care to the plaintiffs to exercise reasonable care for their safety.

However, in previous cases on the same issue of liability, the Trustees had established that there was no liability to be found : see *The Trustees of the Roman Catholic Church for the Archdiocese of Sydney v. Ellis (2007) NSWCA 117*. Here the Court of Appeal held that as an unincorporated association, the Trustees could not be sued in their own name at common law, as the Trustees did not exist as a juristic entity.

Whilst the Roman Catholic Church Trust Property Act 1936 (NSW) established a body corporate for each Roman Catholic diocese in NSW, that corporation dealt only with church property matters.

The appointment, management and removal of priests is a matter for Episcopal authority and not for the corporation (for church property matters) to deal with. The trustees were found not to be some sort of 'universal nominal defendant responsible in law to any and every claim for legal redress that a person might wish to bring against a Catholic in the Archdiocese.'

2.4 Another impediment for victims of religious child abuse is the Limitation of Actions period in these often historical contexts of the criminal offending in sexual abuse cases. The Australian Courts have generally taken a strict and inflexible approach to the law and not extended the time in which an action can be brought against the perpetrator.

See *HWC v. The Corporation of the Synod of the Diocese of Brisbane (2009) QCA 168* – Queensland Court of Appeal case.

In Victoria, the relevant limitation period for personal injury claims is 3 years from the date of discoverability (of the injury) or 12 years from the act or omission whichever expires first.

2.5 The common law has recently changed in England in a recent case handed down on 12th July 2012 by the England and Wales Court of Appeal.

See *JGE v. Trustees of the Portsmouth Roman Catholic Diocesan (2012) EWCA Civ 938*.

This is an important case that has ramifications in other areas of law. It has widened the scope of vicarious liability by extending it from well- established situations of employment relationships to those that are 'akin to employment'.

Lord Justice Davis of the Court of Appeal found that although the relationship between the Bishop and Father Baldwin was not an employment relationship or even a contractual relationship, it was sufficiently akin to that of employment, and at all events was one such whereby - given the degree of control and connection and given the objectives of the Bishop in the appointment of Father Baldwin which it was intended he should further and promote - vicarious liability in respect of his activities in the parish was capable of arising. It sufficed that the control and the connection arose under and are governed by canon law.

Permission to appeal to the Supreme Court was postponed until after the conclusion of a fully contested trial.

The facts, briefly, of this case are and as reported : the Trustees of the Portsmouth RC Diocesan Trust appealed a decision that found them to be vicariously liable in law for the alleged torts of a parish priest in the diocese (the deceased Father Baldwin). The claimant alleged that sexual abuse and assault perpetrated by the priest in a church were committed in the course of or were closely connected with his employment, for which they were vicariously liable for the sexual abuse and injury and damage suffered by the claimant.

The defence argued that responsibility rested with the parish priest at all material times and the Trustees were not vicariously liable for his acts or omissions : a priest is the holder of an office not an employee.

The appeal was dismissed by a majority of 2:1. (Lord Justice Tomlinson finding an insufficient element of control).

The leading judgment of Lord Justice Ward held :

- (i) unlike cases such as unfair dismissal and liability for income tax that require a true relationship of employer/employee be established, the concept of vicarious liability is fluid and should not be confined to the concrete demands of statutory construction;
- (ii) The broad test is whether the relationship of the defendant and the tortfeasor is so close in character to one of employer/employee that it is just and fair to hold the employer vicariously liable;

- (iii) Four cumulative factors are relevant to an assessment : the control test, the organisation test, the integration test and the entrepreneur test.
- (iv) Justice and fairness is then used as a salutary check on the conclusion, it is not a stand alone test for a conclusion : it is just because it strikes the proper balance between the unfairness of imposing strict liability and the unfairness of leaving the victim with no remedy.
- (v) It is not appropriate when asking whether the relationship is akin to employment what meaning an ordinary person would give the words because it is an emotive and unreliable test.

2.6 It is my submission that Victoria could defer to this England and Wales Court of Appeal case as very persuasive authority and introduce into our law an extension of the scope of vicarious liability of priests and other religious to that of a relationship 'akin to employment'.

2.7 Another amendment which was recommended (**Recommendation 43**) by the Cummins Inquiry (2012) is the amendment to section 215 (1) (c) of the Children Youth and Families Act 2005 . I support this recommended amendment.

This section requires the Children's Court, Family Division to apply the civil standard of proof the 'balance of probabilities' to evidence before it. It is recommended that that section should be amended to expressly override the considerations set out in Section 140 (2) of the Evidence Act 2008 and to disapply the *Briginshaw* qualification (1938 High Court decision) which requires a court to take into account the cause of action or defence, nature of the subject matter of the proceeding and the gravity of the matters alleged.

As it currently stands, the Children's Court, Family Division 'may inform itself on a matter in such manner as it thinks fit despite any rules of evidence to the contrary' : section 215 (1)(d). However, the Supreme Court of Victoria and the Court of Appeal has ruled in a number of cases that this section does not authorise a judicial officer to depart from the procedures followed by courts acting judicially, they do not authorise the application of 'palm tree justice' and a judge should be slow to invoke a power to dispense with compliance with rules of evidence where there is a real dispute about matters which go to the heart of the case and the over-riding obligation of the court is to accord procedural fairness.

DIANNE HADDEN,

27th August, 2012.