



**Law
Institute
Victoria**

28 February 2013

Family and Community Development Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

By email to: fdc@parliament.vic.gov.au

Dear 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 – supplementary submission

Thank you for the opportunity to give evidence at the hearing in this Inquiry on 17 December 2012. The following supplementary submission elaborates on matters addressed in our original submission of 21 September 2012 and responds to questions taken on notice at the hearing. It should be read together with our evidence and our submission of 21 September 2012.

Please contact Alice Palmer, Lawyer for the Administrative law and Human Rights Section, on (03) 9607 9311 or apalmer@liv.asn.au in relation to this submission.

Yours sincerely,

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Inquiry into the processes by which religious and other non-government organisations respond to the criminal abuse of children by personnel within their organisations – supplementary submission

To: Family and Community Development Committee

28 February 2013

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INTRODUCTION

The following supplementary submission elaborates on matters addressed in the Law Institute of Victoria (LIV) submission of 21 September 2012 and responds to questions taken on notice at the hearing in this Inquiry on 17 December 2012. It should be read together with our evidence and our submission of 21 September 2012 (LIV's September Submission).

We note that since making our submission and giving evidence, the Governor-General of the Commonwealth of Australia issued Letters Patent on Friday 11 January 2013 to appoint a six-member Royal Commission to investigate Institutional Responses to Child Sexual Abuse.¹ We will work with the Law Council of Australia in making a contribution to the Royal Commission. We would, however, welcome any steps taken by the Committee in this Inquiry to communicate our submissions to the Royal Commission.

EXECUTIVE SUMMARY

ELABORATION OF MATTERS IN LIV'S SEPTEMBER SUBMISSION

1. Independent statutory oversight body:

In the LIV's September Submission, we called for an independent statutory body to be established to (a) provide an external review mechanism for internal response processes of religious and other non-government organisations ('procedural review') and (b) claims for compensation (LIV recommendations 22 and 23). In this supplementary submission, the LIV emphasises that:

- 1) our proposal for a statutory oversight mechanism is not intended to create a substitute for the criminal and civil justice systems. We confirm our submission that impediments to criminal and civil redress must be addressed through law reform
- 2) a single body could properly administer both the procedural review and compensation functions. We accept, however, that it might be appropriate to divide the functions between two separate bodies
- 3) limiting the statutory body's jurisdiction to abuse of children in *religious* organisations could be justified but we would support extending the jurisdiction of the oversight body to abuse of children by personnel in all non-governmental organisations and, beyond the Committee's mandate if appropriate to state-run institutions and to abuse of all vulnerable people, such as adults with a disability, who are abused in a relevant organisation
- 4) we do not consider that the state could or should legislate to prohibit internal complaints processes. We do, however, maintain that the state – through a statutory oversight body – can prescribe appropriate procedures for internal processes and monitor compliance with those procedures. Any existing internal complaints processes that do not meet the prescribed procedures would necessarily have to be re-constituted to comply with the procedures
- 5) any party to an internal complaints process should be able to apply to the statutory oversight body for an assessment of whether the procedural standards have been met in a given internal complaints process and any recommendations as to how a failure to meet the standards could be rectified. This could either be a consensual process or required through a mechanism by which parties are required to seek from the statutory oversight body or another appropriate body an endorsement of a settlement reached through an internal complaints process (as is the case, for example, Supreme Court settlements reached with a person under a disability)
- 6) adjudication of compensation claims should be on a no costs basis (an unsuccessful complainant would not be required to meet the costs of the respondent organisation if his or her claim were ultimately unsuccessful) and claims could arise from unsuccessful attempts to reach a settlement through an internal process or independently of any internal complaints process. The statutory body could, in its compensation function, resemble the Irish Residential Institutions Redress Board (the Irish Redress Board) established by an Act of the Irish Parliament

¹ See further <http://www.childabuseroyalcommission.gov.au/Pages/default.aspx>

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- 7) Organisations within the statutory oversight body's jurisdiction should contribute to a fund to meet compensation awards, wholly or in part, approved or made by the body.
 - 8) in exercising the compensation function, the statutory oversight body could engage conferencing and other restorative justice techniques to resolve complaints in a sensitive and effective manner.

2. Mandatory reporting

In the LIV's September Submission, we recommended that religious personnel be required under criminal law to report to police a reasonable suspicion that a minor is being, or has been, physically or sexually abused by an individual within a religious or spiritual organisation (LIV recommendation 4). In this supplementary submission, the LIV emphasises that:

- 1) it would not oppose consideration of a mandatory reporting requirement that is broader than LIV recommendation 4, similar to the Irish *Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012* (Ireland) which requires reporting by any person, with respect to abuse of minors and vulnerable people by any person. We would not, however, consider it appropriate to include a threshold higher than 'reasonable suspicion', which we would understand not to include suspicions based on vague rumours or innuendo.
- 2) we would support a decision not to include an exception for religious confessions in any mandatory reporting requirement introduced in Victoria: in our view, neither freedom of religion nor the evidentiary privilege for religious confessions in court proceedings (s127 of the *Evidence Act 2008* (Vic)) requires an exception for religious confessions in a mandatory reporting requirement. Section 127 of the *Evidence Act 2008* (Vic) provides that a member of the clergy can refuse in any *court proceeding* to divulge a religious confession unless the communication was made for a criminal purpose. However, for the avoidance of doubt, it might be appropriate to introduce legislation abolishing any common law privilege that might apply to religious confessions prior to court proceedings. It might also be appropriate to provide that information obtained on the basis of information disclosed in a confession and reported to police will not attract the evidentiary privilege for religious confessions in court proceedings
- 3) if an exception were nevertheless included in any mandatory reporting requirement, s127 of the *Evidence Act 2008* (Vic) ought not apply in proceedings concerning child abuse, including proceedings arising from a reported suspicion, and a form of the balancing test proposed by the Australian Law Reform Commission should be used in its place
- 4) our proposal for a mandatory reporting requirement to be included in the *Crimes Act 1958*, requiring reports to the *police* as opposed to a child protection authority, is distinct from existing mandatory reporting requirements in the *Children Youth and Families Act*. The LIV agrees with Cummins Recommendation 44 that sections 182(1)(f)-(k) should be proclaimed and brought into effect and we defer to the Cummins Inquiry in its decision not to recommend extending those child protection reporting requirements to ministers of religion.
- 5) the proposed mandatory reporting requirement might assist in bringing evidence of any concealment of child abuse to light. It would be useful if the Committee could seek information as to the extent to which existing criminal provisions, such as s49A (facilitating sex offences), s325 (aiding and abetting) and s326 (concealing crimes for benefit) of the *Crimes Act 1958*, have been investigated or invoked against third parties alleged to have concealed child abuse by religious personnel in Victoria. Any barriers to initiating such investigations should be identified.
- 6) the *Whistleblower Protection Act 2001* has now been superseded by the *Protected Disclosure Act 2012* and the protections from reprisals and defamation referred to in the LIV's September Submission are now found in the *Protected Disclosure Act 2012*.

3. Limitation periods

The LIV's September Submission makes several recommendations with respect to limitation periods (recommendations 11 to 13). In this supplementary submission, the LIV wishes to:

- 1) clarify that our recommendation that 'the limitation period for personal injuries actions relating to criminal abuse of minors by personnel of religious organisations should be extended to allow persons to bring an action until they are 30 years of age' (LIV recommendation 12) applies to actions alleging that sexual or physical abuse by a 'close associate' occurred before 21 May 2003. Such actions currently become time barred when

a victim turns 24 years of age. Notwithstanding this recommendation, the LIV would not oppose alternative action being taken to address the inequities for victims of abuse prior to 21 May 2003, such as the removal of the relevant provision (s27N(4)) or the complete removal of limitation periods with respect to sexual abuse.

- 2) make a further recommendation that the *Limitation of Actions Act 1958* be amended to introduce a presumption in favour of extending the period of limitation for minors injured by close relatives or close associates.

QUESTIONS ON NOTICE FROM 17 DECEMBER 2012 HEARING

4. Overcoming barriers presented by 'confined-purpose statutory corporations'

Further to the question from the Hon. Mrs Coote at the Inquiry hearing of 17 December 2012, the Committee might wish to consider the new sub-sections 18(1) and (2) of the *Roman Catholic Church Trust Property Act 1936* (NSW) proposed by the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2012 (NSW)* (NSW Justice for Victims Bill) in developing any proposals for legislation to address any barriers in Victoria to suing 'confined-purpose statutory corporations' or statutory trusts established to hold church property. Reforms could be introduced into specific religious trust statutes, as is the case with the NSW Justice for Victims Bill. Alternatively, it might be possible to introduce provisions that would apply to all religious trust statutes in, for example, the *Religious and Successory Trusts Act 1958* (Vic).

5. Legislating for vicarious liability

Further to the question from the Hon. Mrs Coote at the Inquiry hearing of 17 December 2012, the Committee might wish to consider the new section 18(3) of the *Roman Catholic Church Trust Property Act 1936* (NSW) proposed by the NSW Justice for Victims Bill in developing any proposals for legislation to address issues around vicarious liability of religious bodies, modified to clarify when the relationship between an alleged abuser, such as a priest, and a church will be considered 'akin to employment'.

6. Reversing the onus of proof in applications to extend limitation periods

Further to the question from the Hon. Mr Wakeling at the Inquiry hearing of 17 December 2012, section 26(3)(b) of the *Victims Support and Rehabilitation Act 1996* (NSW) (which states that leave to extend the time in which applications for statutory compensation must be lodged 'should be given in cases of sexual assault, domestic violence or child abuse unless the Director is satisfied that there is no good reason to do so') could be used as a model in amending sections 23A and 27L of the *Limitation of Actions Act 1958* to provide that an application to a court for an extension of a period of limitation should be granted in cases of minors injured by close relatives or close associates unless the court is satisfied that there is no good reason to do so.

7. Options for the courts to structure proceedings to overcome barriers to redress

If church bodies implicated in criminal abuse of children were willing, as posited by the Hon. Mr O'Brien at the Inquiry hearing of 17 December 2012, to agree to terms on which civil law proceedings could be brought against them, consideration could be given to a relevant church body:

- creating or identifying an appropriate corporate defendant
- creating or identifying an appropriate entity or fund to meet any liabilities of the designated corporate defendant.
- undertaking not to contest vicarious liability, either on the basis that a given abuser is or was not an 'employee' or that the abusive acts were not 'in the course of employment'.
- undertaking not to rely on any applicable statutory limitation periods.

The LIV appreciates that a voluntary arrangement between church bodies and victims as to the basis upon which civil proceedings could be brought against a given church for criminal abuse of children might be more effective than legislative intervention. However, such arrangements are not guaranteed and present difficulties where there is a significant power imbalance between the parties.

8. Lessons from the James Hardie litigation

Further to the question from the Hon. Mr O'Brien at the Inquiry hearing of 17 December 2012, the LIV notes that the creation of the Foundation by James Hardie to fund successful compensation

awards against James Hardie entities was not designed to create a defendant in circumstances where a responsible entity could not be identified. In contrast, it is not clear that there will be a responsible entity in the context of church child abuse in whose shoes a newly-created fund created by a given church could stand without legislation deeming a given entity liable for claims.

9. Developments with the Irish mandatory reporting requirement

Further to the question from the Hon. Mr O'Brien at the Inquiry hearing of 17 December 2012, we are not aware of any developments with respect to the application of the *Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012* (Ireland). Specifically, we are not aware of any prosecutions under the mandatory reporting requirement since its entry into force in July 2012.

10. Case management strategies to facilitate discovery and preserve evidence

Further to the question from the Hon. Mr Wakeling at the Inquiry hearing of 17 December 2012, no legislative intervention is required to effect case management strategies noted in LIV recommendation 18: existing laws and court rules and practices appear to provide adequate scope for the court to introduce appropriate management of cases involving historical abuse of children.

Under the current regime, the LIV considers that civil cases involving historical abuse allegations could, for example, be addressed in a new special list and case managed by a specific judge in an individual docket system. The LIV would also support the appointment of, for example, judicial registrars or Associate Justices, to take on a role of early mediation for cases in a special list.

Case management is a judicial function that must be exercised by courts independently of the legislative and executive branches of government. The LIV would urge the Committee to recommend to the government that, in developing responses to barriers in civil litigation, they consult closely with the Chief Justice of the Supreme Court, the Chief Judge of the County Court and the Chief Magistrate of the Magistrates' Court of Victoria to establish what resources are required in each court to ensure that claims of historical child abuse can be fairly dealt with the minimum of delay.

ELABORATION OF MATTERS IN LIV'S SEPTEMBER SUBMISSION

1. Independent statutory oversight body

In the LIV's September Submission, our recommendation 22 called for an independent statutory body to provide an external review mechanism for internal response processes of religious and other non-government organisations. Our recommendation 23 suggests that the statutory oversight body could also consider claims for compensation made directly to it. We elaborate further on those recommendations below.

We will refer to the two possible functions of the independent statutory body as being respectively a 'procedural review' and 'compensation' function.

1.1 Supremacy and integrity of justice system maintained

The LIV emphasises that our proposal for a statutory oversight mechanism is not intended to create a substitute for the criminal and civil justice systems. We confirm our submission that impediments to criminal and civil redress must be addressed through law reform.² We note, however, that it would be appropriate to prevent duplicative claims and recovery.³

² Submission of the LIV to the Inquiry 21 September 2012 (LIV's September Submission) http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Law_Institute_of_Victoria.pdf

³ The *Residential Institutions Redress Act 2002* (Ireland), for example, contains provisions to prevent claimants from double recovery, http://www.rirb.ie/documents/act_13_2002.pdf.

1.2 Nature of the statutory oversight body

The LIV's submission in support of a statutory oversight body assumes that a single body could properly administer both the procedural review and compensation functions. We accept, however, that it might be appropriate to divide the functions between two separate bodies if, for example, it were considered that conflicts might arise between the functions which could not be managed within a single body or if any existing body were to assume one of the functions, leaving the second for a new body. The statutory oversight body should be independent of government and the institutions against which complaints are made.

We suggest that a new body, with staff properly trained and counseled in handling complaints of abuse, should be created. We accept, however, that an existing body might be capable of assuming one or both of these functions. Consideration could be given, for example, to whether an existing body, such as the Commission for Children and Young People, would be an appropriate institution to take on these roles.

1.3 Jurisdiction of the statutory oversight body

The LIV considers that limiting the statutory body's jurisdiction to abuse of children in *religious* organisations could be justified on the basis that victims of abuse by personnel in religious organisations face specific impediments to redress that are not necessarily experienced by victims of abuse in other organisations: as described in the LIV's September Submission, religious organisations can lack legal status to be sued and the overall context of religious faith can affect how victims address the harm done to them.

The LIV would, however, support extending the jurisdiction of the oversight body to abuse of children by personnel in all non-governmental organisations. Were it possible and appropriate to go beyond the mandate of the Committee's Inquiry, the LIV would also support extending the jurisdiction to abuse of children in state-run institutions. Beyond the Committee's mandate, we would also support including abuse of all vulnerable people, such as adults with a disability, who are abused in a relevant organisation.

Following is a diagram explaining the potential areas of jurisdiction. The central circle depicts a wide possible scope of the statutory oversight body's jurisdiction in terms of the type of abuse (sexual and physical), type of institution in which the abuse took place (religious, other non-governmental and state) and type of victim (child/minor and other vulnerable persons).

Section 7 states: "(2) A person who has received an award from a court or a settlement in respect of an action arising out of any circumstances which could give rise to an application before the Board shall not make an application to, or be heard by, the Board or be entitled to receive an award under this Act in respect of those circumstances.

(3) Where a court has made a determination in an action arising out of circumstances which could give rise to an application before the Board the plaintiff in that action shall not make an application to, or be heard by, the Board and shall not be entitled to receive an award under this Act in respect of those circumstances.

(4) The making of an application to the Board does not involve the waiver of any other right of action by the applicant."

Section 13 states: "(6) Where an applicant accepts an award (including an award reviewed under *section 15*) the applicant shall agree in writing to waive any right of action which he or she may otherwise have had against a public body or a person who has made a contribution under *section 23(5)* and to discontinue any other proceedings instituted by the applicant, against such public body or such person, that arise out of the circumstances of the application before the Board.

(7) An award shall not be paid to an applicant unless the applicant complies with *subsection (6)*."

Section 24 states: "Where an applicant has accepted an award made under *section 13* or *section 15* and has complied with *section 13(6)*, no cause of action or claim for indemnity and contribution or either of them, whether by third party procedure pursuant to section 27 of the Civil Liability Act, 1961 or otherwise, in any civil proceedings or otherwise, shall lie against the State or a public body if such proceedings arise out of the same, or substantially the same, acts complained of in an application made under this Act and in respect of which the applicant is a party."



Figure 1: Potential scope of jurisdiction of proposed statutory oversight body

1.4 Retaining internal complaints processes

With respect to procedural review, our recommendation 22 assumes that religious and other organisations will continue to consider claims for compensation for child abuse alleged against church personnel in accordance with an internal process. We note that some submissions to the Inquiry have called for the dissolution of such internal complaints processes, or some specific internal complaints processes, on the basis that they are inherently flawed.⁴ Some submissions suggest that some internal complaints processes undermine the criminal justice system.⁵

The LIV recognises that, for some victims of child abuse by religious personnel, an internal complaints process might be their preferred course for resolving their claims. They might have determined on the basis of independent and informed advice that other avenues are not available to them, for example because of legal impediments to their claims. They might also consider that an internal process will help to reconnect or maintain their relationship with their faith community. For others, exploring external avenues for recourse could be perceived as compromising their privacy and their future relationship with their faith community.

We do not think that the state could or should legislate to prohibit internal complaints processes. We do, however, maintain that the state – through a statutory oversight body – can prescribe appropriate procedures for internal processes, monitor compliance with those procedures and, possibly, refuse to recognise or enforce any resolutions reached as a result of procedures that do not comply with the prescribed requirements. Any existing internal complaints processes that do not meet the prescribed procedures would necessarily have to be re-constituted to comply with the procedures or risk not being legally enforceable.

⁴ See e.g. Submission to the Inquiry from Professor Desmond Cahill, recommendation (I)(1), p29, calling for Melbourne Response to be dissolved and replaced by a process under the direction of the Office of the Child Safety Commissioner http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Cahill_Pr_ofessor_Desmond.pdf; see also evidence given at hearing by Professor Desmond Cahill on 22 October 2012, hearing transcript p10 http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Transcripts/Professor_Des_Cahill_22-Oct-12.pdf.

⁵ See e.g. Submission of Victoria Police to the Inquiry http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Victoria_Police2.pdf.

1.5 Standards and mechanism for procedural review

In the LIV's September Submission, we suggest that the statutory oversight body could be charged with the task of prescribing standards for internal complaints processes (LIV recommendation 24).

We suggest that any standards would need to set out how procedural fairness should be afforded to the parties. Standards would also need to set out steps to be taken in the course of internal complaints processes to ensure that the civil and criminal justice systems are not circumvented or undermined, for example, by attempts to dissuade a victim from pursuing a criminal complaint, or encouraging disclosures that might undermine a subsequent criminal or civil complaint.

The statutory oversight body could also provide guidance as to appropriate levels of compensation.

The LIV's September Submission identifies examples of independent bodies created by statute to assess compliance of private bodies with prescribed procedures and standards. In particular, we note that '[i]n many settings – including discrimination law, employment law, health services, financial services and education – various complaint handling review agencies provide oversight of private sector organisations dealing with complaints.'⁶ The constitution and functions of these and other independent oversight bodies could be examined for the purposes of developing the features of a statutory oversight body for the internal handling of complaints of child abuse in religious and other organisations.

Any party to an internal complaints process could apply to the statutory oversight body for an assessment of whether the procedural standards have been met in a given case and any recommendations as to how a failure to meet the standards could be rectified. This could be a consensual process, where both parties consider it preferable to resolve the matter through an internal process but the complainant has concerns about how the process is being handled in a particular respect and seeks independent input as to how the process could be improved.

Alternatively, it might also be appropriate to provide a mechanism by which parties are required to seek from the statutory oversight body or another appropriate body⁷ an endorsement of a settlement reached through an internal complaints process. We note by way of analogy that settlements reached with a person under a disability in a Supreme Court proceeding must be approved by the Court.⁸ We also note the current practice in the Family Court of Australia whereby parties to a property settlement can apply to the Court for a consent order, making the settlement enforceable by the Court.⁹ Section 79(2) of the *Family Law Act 1975* (Cth) provides that the 'court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.' The *Family Law Act* does not define what is 'just and equitable': it is in the discretion of the judge and determined in accordance with the specific circumstances of each case.¹⁰

1.6 Compensation function

In addition to reviewing the procedures of internal complaints processes, the statutory body could also adjudicate compensation claims directly on a no costs basis: an unsuccessful complainant would not be required to meet the costs of the respondent organisation if his or her claim were

⁶ LIV's September Submission p 34; we cite to, for example, the Victorian Equal Opportunity and Human Rights Commission (*Equal Opportunity Act 2010* (Vic) Part 9), the Australian Human Rights Commission (*Australian Human Rights Commission Act 1986* (Cth) Part II Division 2, 3), the Overseas Students Ombudsman (*Ombudsman Act 1976* (Cth) Part IIC), the Energy and Water Ombudsman (Victoria) (Energy and Water Ombudsman of Victoria Limited Constitution cl 3), the Health Services Commissioner (*Health Services (Conciliation and Review) Act 1987* (Vic) Part 3, 4) and the Financial Services Ombudsman (Financial Ombudsman Service Constitution cl 12; Financial Ombudsman Service Terms of Reference).

⁷ Consideration would need to be given to whether the statutory oversight body can be conferred with powers to endorse settlements under constitutional law.

⁸ The *Supreme Court (General Civil Procedure) Rules 2005*, Order 15.08(1) provides: Where in a proceeding a claim is made by or on behalf of or against a person under disability, no compromise, payment of money or acceptance of an offer of compromise under Order 26, whenever entered into or made, shall so far as it relates to that claim be valid without the approval of the Court.

⁹ *Family Law Rules 2004* (Cth), Rule 10.15(1) provides that a party may apply for a consent order; *Family Law Act 1975* (Cth) Section 79(1)(a) – In property settlement proceedings, the court may make such order as it considers appropriate.

¹⁰ See e.g., *Hickey and Hickey and Attorney General for the Commonwealth of Australia (Intervener)* (2003) FLC 93-143.

ultimately unsuccessful. Claims might arise from unsuccessful attempts to reach a settlement through an internal process or independently of any internal consideration by the relevant religious organisation. The statutory body could, in its compensation function, resemble the Irish Residential Institutions Redress Board (the Irish Redress Board) established by an Act of the Irish Parliament.¹¹

The Irish Redress Board was created in 2002 to 'make fair and reasonable awards to persons who, as children, were abused while resident in industrial schools, reformatories and other institutions subject to state regulation or inspection'.¹² Receiving applications up until an extended date in September 2011, the Irish Redress Board has completed the processing of over 15,000 cases, making awards between €62,800 and €300,500 in accordance with an assessment of the severity of the abuse and injuries suffered.¹³ The Irish Redress Board is independent and is chaired by a retired judge. It can hold hearings and take evidence on oath.

Further research into the procedures and outcomes of the Irish Redress Board's awards,¹⁴ as well as any other independent legislative compensation regimes established in the context of child abuse by religious and other organisations, would need to be undertaken. Examples of bodies created in respect of compensation awards in other contexts – such as the Veterans Review Board¹⁵ – might also provide helpful precedents.

1.7 Funding

The LIV considers that religious organisations should contribute to a fund to meet compensation awards, wholly or in part, approved or made by a statutory oversight body in Victoria. If the jurisdiction were extended to all non-governmental organisations, the sources of funding the compensation scheme would also need to be extended to those organisations. We note in this regard that calls have been made for awards of the Irish Redress Board to be funded, at least in part, by religious congregations. It appears that Church funds are currently provided on a limited basis for support services to victims.¹⁶

1.8 Restorative justice

In the LIV's September Submission, we suggest that the statutory oversight body addresses matters in accordance with restorative justice.¹⁷ Several commentators have called for the

¹¹ *Residential Institutions Redress Act 2002* (Ireland) ; see also RIRB Newsletter Update August 2012 http://www.rirb.ie/updates_article.asp?NID=121.

¹² See RIRB website <http://www.rirb.ie/aboutus.asp>; see further the *Residential Institutions Redress Act 2002* (Ireland)

¹³ RIRB Newsletter Update August 2012 http://www.rirb.ie/updates_article.asp?NID=121; see also RIRB Annual Report 2010.

¹⁴ Compare concerns with the Irish inquiries, see . 'Judgement Day', Dateline, SBS 19 February 2013, <http://www.sbs.com.au/datetime/story/about/id/601616/n/Judgement-Day>.

¹⁵ See further <http://www.vrb.gov.au/>; see also Goldie Shea, *Redress Programs Relating to Institutional Child Abuse in Canada* (1999) Law Commission of Canada <http://www.lcc.gc.ca/en/themes/mr/ica/shea/redress/redress_main.asp> . In December 2003, Canada finalised its alternative dispute resolution process for Indian residential school claims: see Indian Residential Schools Resolution Canada, *Alternative Dispute Resolution* (2003) <http://www.irs-rgpi.gc.ca/english/dispute_resolution.html> .

¹⁶ Ruairi Quinn Minister for Education and Skills, 'Standing up for abuse victims' Irish Examiner Monday, October 01, 2012 <http://www.irishexaminer.com/analysis/standing-up-for-abuse-victims-209338.html>; religious congregations have reportedly contributed to a statutory fund for support services to victims: "Contributions of up to €110 million, essentially the cash element of the offers made in the aftermath of the publication of the Ryan Report, by the religious congregations who were party to the 2002 Indemnity Agreement, will be available to the Statutory Fund. To date, contributions of €21.05m have been received towards the Fund. These and the remaining contributions to be received will be invested in an investment account to be established by the National Treasury Management Agency." Minister for Education and Skills, Press Release <http://www.education.ie/en/Press-Events/Press-Releases/2012-Press-Releases/17%20April.%202012%20-%20Minister%20Quinn%20welcomes%20the%20publication%20of%20Residential%20Institutions%20Statutory%20Fund%20Bill.html>; " Under the 2002 Indemnity Agreement, the 18 congregations involved agreed to provide a contribution of €128 million, comprising cash, property and counselling services. In 2009, they proposed putting up just over €100 million in cash and offered to transfer property, mainly in the health and education sectors, that they valued at €235.5 million, to various State agencies and voluntary organisations. Responding to these proposals, Minister Quinn acknowledged some progress had been made, but expressed his disappointment at the offers to date." Minister for Education and Skills, Press Release <http://www.education.ie/en/Press-Events/Press-Releases/2011-Press-Releases/PR11-07-05.html>

¹⁷ Restorative justice has been defined as: 'a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future: the Standing Committee of Attorneys-General "Restorative Justice & the Criminal Justice System in Australia and New Zealand: An Overview" [second paragraph]http://www.scaq.gov.au/lawlink/SCAG/l/scag.nsf/pages/scaq_restorativejustice

application of restorative justice techniques in the case of child abuse by personnel in religious organisations.¹⁸

In calling for alternative paths to justice for victims of sexual assault generally, particularly in cases of older offences,¹⁹ Justice Marcia Neave focusses on the restorative justice technique of 'conferencing' which she describes as one that:

'brings together the offender and the victim (or a representative of the victim) to discuss the circumstances of the offending, how the victim has been affected and how reparation could be made. The offender is required to implicitly or explicitly admit to the offending and to listen respectfully to a description of how it harmed the victim. The conference will be chaired by an independent person and the victim and offender will usually have others present to support them.'²⁰

Her Honour acknowledges that some people oppose the restorative justice approach on the basis that it allows criminals to avoid the full impact of the criminal law system.²¹ Her Honour also notes that caution should be exercised in employing restorative justice techniques until their impact on outcomes have been properly researched and assessed.²² She nevertheless concludes that:

'In my opinion, the criminal justice system cannot meet all the concerns of victims of sexual assault. For that reason, we should experiment with restorative justice approaches for sexual offenders. Such approaches would not be a substitute for the criminal law but would operate alongside it. The experimentation should be combined with a recognition that it may only be appropriate in some kinds of cases and should be accompanied by research on its outcomes.'²³

In exercising the compensation function, the statutory oversight body could engage conferencing and other restorative justice techniques to resolve complaints in a sensitive and effective manner.

2. Mandatory reporting

In the LIV's September Submission, we recommended that religious personnel be required under criminal law to report to police a reasonable suspicion that a minor is being, or has been, physically or sexually abused by an individual within a religious or spiritual organisation (LIV recommendation 4).

Our recommendation for mandatory reporting is consistent with Recommendation 47 of the Cummins Inquiry (see extract in Appendix, point 1)²⁴ except that we consider that:

- 1 the reporting obligation should apply where the suspected victim, though a child at the time of the suspected abuse, is an adult when the suspicion arises (LIV recommendation 5); and
- 2 if any exception is to be made for disclosures made during a confession, it should not be absolute and should allow for a balancing of the need for confidentiality against the need for disclosure (LIV recommendation 8).

¹⁸ See e.g. Paul Holdway and Ruth Baker 'Acting for Victims of Religious Sexual Assault: Challenges for Victorian Lawyers' (November 2010) *Law Institute Journal* 50. See also Peter Condliffe 'Practice what you preach: using restorative justice as an alternative to clergy abuse, *ADR Bulletin of Bond University DRC* (2009) 11 (6) Vol 11 No 6 November 2009.

¹⁹ Her Honour states that '[t]wo areas where conferencing might be added to the repertoire include as a diversion process for youthful sexual offenders and cases involving very old offences, where the likelihood of successful conviction is low.'

Justice Marcia Neave 'New Approaches to Sexual Offences' *AJIA Conference: Criminal Justice in Australia And New Zealand – Issues And Challenges for Judicial Administration*, 8 September 2011 para 30
<http://www.ajia.org.au/Criminal%20Justice%202011/Papers/Neave.pdf>.

²⁰ Ibid para 19.

²¹ Ibid para 22. See also Bronwyn Naylor, 'Effective Justice for Victims of Sexual Assault: Taking up the Debate on Alternative Pathways' (2010) 33 *University of New South Wales Law Journal* 662, 664 cited in Neave, *ibid*, fn 19.

²² Ibid para 28.

²³ Ibid para 27, footnotes omitted.

²⁴ The Honourable Philip Cummins (Chair), Emeritus Professor Dorothy Scott OAM, Mr Bill Scales AO *Report of the Protecting Victoria's Vulnerable Children Inquiry* (January 2012), (Cummins Inquiry Report)
<http://www.childprotectioninquiry.vic.gov.au/report-pvvc-inquiry.html>.

We wish to elaborate on several aspects of our recommendation for a new mandatory reporting requirement: the scope of the mandatory reporting requirement, the option of no exception for religious confessions and the introduction of a balancing test if an exception for religious confessions were included. We appreciate that there are different views as to the relevance of religious confessions in terms of revealing abuse of children by religious personnel.²⁵ However, we consider that the issue needs to be addressed in the context of our recommendation. We also wish to comment on other relevant recommendations made by the Cummins Inquiry, calls for new crimes of concealment to be introduced in Victoria and protections for people making reports.

2.1 Scope of mandatory reporting requirement

In the LIV's September Submission, we refer to a mandatory reporting requirement under Irish law as an example of what such a requirement might look like in Victoria (see extract in Appendix, point 2).²⁶ We note that the scope of the Irish law is broader than LIV recommendation 4, both in terms of who must report (any person), who is being abused (minors and vulnerable people) and who is abusing (any person). The Irish law, however, arguably has a higher threshold for reporting: 'knowledge or belief' as opposed to the 'reasonable suspicion' in LIV recommendation 4 and Cummins Inquiry Recommendation 47.

The LIV would not oppose consideration of a mandatory reporting requirement that is broader than LIV recommendation 4, along the lines of the Irish law. We would not, however, consider it appropriate to include a threshold higher than 'reasonable suspicion', which we would understand not to include suspicions based on vague rumours or innuendo. In the same way that the existing mandatory reporting requirement for child protection purposes requires the relevant professional to have formed a 'reasonable' belief that a child has or is at risk of being significantly harmed, a priest would be required to report only 'reasonable' suspicions of abuse. The priest would need to reflect on the basis for a suspicion arising from a confession to determine whether, on balance, it is a 'reasonable' one.

2.2 No exception for religious confessions: freedom of religion and scope of evidentiary privilege

We note that, in introducing a mandatory reporting requirement, the Victorian Parliament might decide not to include an exception for religious confessions. We understand that there is no exception for religious confessions in the mandatory reporting requirement in Ireland (see extract in Appendix, point 2).²⁷ We would support a decision not to include an exception for religious confessions in any Victorian equivalent. Two issues have been raised by commentators with respect to an exception for religious confessions: freedom of religion and the scope of the evidentiary privilege. We consider that neither requires an exception for religious confessions to be included in a mandatory reporting requirement.

2.2.1 Freedom of religion

The Cummins Inquiry Report noted the view expressed in one submission to the Inquiry that the 'imposition of an obligation to refer a crime to the police would ... be a 'draconian' measure and that [amongst other things] ... [t]he sanctity of the confessional in a religious context and its current recognition under the law must be respected'.²⁸ Calls by commentators and in submissions to the Inquiry for respect for the sanctity of the confessional are based, in part, on the human right to freedom of religion.²⁹

The human right to freedom of religion is expressed in the *International Covenant on Civil and Political Rights*, to which Australia is a party, and is expressed in equivalent language in Victoria's *Charter of Human Rights and Responsibilities Act 2006*. Freedom of religion is, however, like many

²⁵ See e.g. Barney Zwartz 'A debate about nothing: confession booth emptied long ago' *The Age* 16 November 2012, <http://www.theage.com.au/national/a-debate-about-nothing-confession-booth-emptied-long-ago-20121116-29gk3.html>

²⁶ *Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012* (Ireland) sections 2 and 3

²⁷ *Ibid.*

²⁸ Cummins Inquiry Report, above fn 24, p 354, summarizing O'Callaghan QC submission no. 2, part 1.

²⁹ See e.g. Greg Craven 'the Seal is Sacrosanct' *The Australian*, 19 November 2012, p 12.

other human rights, not absolute: it cannot be a shield to criminal conduct and, under Victorian law, it can be subject to 'reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors'.³⁰ The LIV considers that imposing a mandatory reporting requirement that does not exempt religious confessions could be demonstrably justified in Victoria.

As a matter of practice, clerics might decline to report suspicions of abuse arising from confessions if they consider that the rules of their religious order preclude disclosure.³¹ The law will, in those circumstances, be difficult to enforce. Difficulties in enforcement do not in our view, however, warrant an exception for religious confessions.

2.2.2 Scope of evidentiary privilege

The Cummins Inquiry Report appears to support an exception for religious confessions on the basis of the privilege for religious confessions in Victorian law. While the LIV agrees that the relationship between the mandatory reporting requirement and Victorian evidence laws that create a privilege for religious confessions in courts would need to be considered, we do not consider that the privilege *precludes* the introduction of a mandatory reporting requirement that does not exempt religious confessions.

Section 127 of the *Evidence Act 2008* (Vic) provides that a member of the clergy can refuse in any court proceeding to divulge a religious confession unless the communication was made for a criminal purpose (see Appendix, point 3). The privilege in s127 of the *Evidence Act* would not, in the LIV's view, preclude a mandatory reporting requirement applying *prior* to court proceedings.³² However, for the avoidance of doubt, it might be appropriate to introduce legislation abolishing any common law privilege that might apply to religious confessions prior to court proceedings.

If a priest were called as a witness in a court proceeding initiated after that priest has reported a reasonable suspicion of abuse, any attempt in the proceeding to elicit from the priest information obtained in the course of a confession could attract the privilege under s127 and be excluded by the court. Information revealed under the mandatory reporting requirement might, therefore, have to lead to the discovery of other evidence which would be admissible in court if it were to be capable of leading to a successful conviction. The mandatory reporting provision might have to provide expressly that information obtained on the basis of information disclosed in a confession will not attract the privilege in s127 of the *Evidence Act 2008* (ie no derivative immunity is available).

Requiring a cleric to report a reasonable suspicion of abuse arising from a confession would be similar to the rule applied to lawyers when they must decide whether to breach client confidentiality. Under Rule 3 of the *Professional Conduct and Practice Rules 2005* (Vic), a lawyer may disclose confidential client information if 'the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a serious criminal offence' (Rule 3.1.3). A claim of legal professional privilege (known as 'client legal privilege' under the *Evidence Act 2008*) is lost where, for example, the communication is made in furtherance of the commission of an offence or an act that attracts a civil penalty.³³

Information disclosed in a confession could result in further crimes being committed by the confessor or in some circumstances lead to the commission of a criminal offence by the cleric receiving the confession (eg s49A (facilitating sex offences), s325 (aiding and abetting) and s326 (concealing crimes for benefit) of the *Crimes Act 1958* (Vic)). In such circumstances, it is feasible

³⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 7(2).

³¹ We note the Submission to the Inquiry from the Catholic Church in Victoria claims that Irish priests have said they will ignore mandatory reporting requirement p27 and fn 58
http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Catholic_Church_in_Victoria.pdf

³² As noted in footnote 64 of the LIV's September Submission: 'J Heydon, *Cross on Evidence* (7th ed, 2004), [25315] states that there is no such privilege at common law and rebuts some bases for the refusal of a priest to testify (including that most authority is against the existence of the privilege)'

³³ Section 125 of the *Evidence Act 2008* (Vic).

that a cleric would decide that a suspicion of child abuse must be reported to police under a mandatory reporting requirement.

2.3 Balancing of competing considerations if exception included

We wish to clarify our submission that if, contrary to our proposal discussed in section 2.2 above, it were considered necessary to include an exception for religious confessions in a mandatory reporting requirement, it should allow for a balancing of the need for confidentiality against the need for disclosure.

Victoria's laws on evidence were amended in 2008 after a significant period of national consultations aimed at developing uniform evidence laws across some Australian jurisdictions (*Evidence Act 2008* (Vic)). In the lead up to the amendments, the Australian Law Reform Commission recommended a broad 'confidential relationships privilege' which would include communications between a cleric and a member of the church. This proposal was supported by the Victorian Law Reform Commission.³⁴

As proposed by the Australian Law Reform Commission, the confidential relationships privilege would allow a 'court to consider all the circumstances in which the communication was made, and balance the need for confidentiality against the need for disclosure.'³⁵ Matters for a court to consider when deciding whether or not to permit a claim of privilege would include: 'the need for the evidence, the damage which would occur to the particular relationship by the enforced disclosure of confidential communications and the deterrent effect upon the formulation of similar relationships by the absence of a privilege.'³⁶

The Victorian Parliament declined to adopt the broad confidential relationships privilege and instead provided for different privileges, including a religious confessions privilege in s127 of the *Evidence Act 2008* (see Appendix, point 3). The LIV suggests, however, that in proceedings concerning child abuse, including those arising from mandatory reports, s127 ought not apply and that a form of the balancing test proposed by the Australian Law Reform Commission should be used in its place. The test would be engaged in court proceedings although consideration could be given to whether it could also be engaged in the application of the exception itself.

As noted in the LIV's September Submission, the LIV considers that 'the discretionary balancing test would be much fairer [than an absolute exemption for religious confessions] because it would allow for a weighing up of all relevant considerations including prejudice to the confessor and the confessee and the relevance and importance of the evidence to the matter at hand before exercising judgment about whether it should be admitted rather than there being a blanket [or] partial exclusion.'³⁷

2.4 Other recommendations in Cummins Inquiry

As noted in the LIV's September Submission,³⁸ under Part 4.4 of the *Children, Youth and Families Act 2005* (Vic), certain health professionals, registered teachers, school principals and the police are required to report to the Department of Human Services any reasonable belief formed in the course of their work that a child is in need of protection because the child has suffered (or is likely to suffer) significant harm as a result of physical injury or sexual abuse and the child's parents have not protected (or are unlikely to protect) the child from harm of that type (see Appendix, point 4). A failure to report attracts 10 penalty units, or \$1408 (in 2012/13).³⁹ This mandatory reporting requirement triggers child protection mechanisms. This existing requirement is distinct from the mandatory reporting requirement that we advocate in LIV recommendation 4, which we suggest be

³⁴ See fn 67 of the LIV's September Submission: Recommendation 13 of the Victorian Law Reform Commission, *Implementing the Uniform Evidence Act: Report* (February 2006) 31. Available at <http://www.lawreform.vic.gov.au/projects/evidence/implementing-uniform-evidence-act-report>.

³⁵ The Final Report, *Uniform Evidence Law* (ALRC Report 102), completed jointly by the ALRC, NSWLRC (Report 112) and VLRC (Final Report), December 2005, para 15.86 Available at <http://www.alrc.gov.au/publications/report-102>.

³⁶ Evidence (Interim) Report (ALRC Report 26) tabled 21 August 1985, para 909, available at <http://www.alrc.gov.au/report-26> and http://www.austlii.edu.au/au/other/alrc/publications/reports/26/Ch_38.html#Heading337.

³⁷ See LIV's September Submission, p21.

³⁸ *Ibid* p 17.

³⁹ See *Children, Youth and Families Act 2005* (Vic) ss 182, 184, 162(1)(c) and (d).

included in the *Crimes Act 1958*, requiring reports to the *police* as opposed to a child protection authority.

The *Children, Youth and Families Act* provides for other professions to be subject to the child protection reporting requirements in sections 182(1)(f)-(k), but these provisions are not yet in effect. Recommendation 44 of the Cummins Inquiry provides that '[t]he Victorian Government should progressively gazette those professions listed in sections 182(1)(f) - (k) of the *Children, Youth and Families Act 2005* that are not yet mandated, beginning with child care workers.' The Cummins Inquiry declines, however, to recommend that the child protection reporting requirements be extended to ministers of religion along the lines of equivalent legislation in South Australia.

The Cummins Inquiry explains that:

'the Inquiry considers that extending the mandatory reporting duty in this way could inappropriately extend the reach of section 182 of the [*Children Youth and Families*] Act. Section 182 currently applies to identified professional groups that have training in and would be expected to have frequent contact with children and young people. Not all ministers of religion will have frequent contact with young people. Extending mandatory reporting to all ministers of religion would extend the reporting categories beyond that initially contemplated by the [*Children and Young Persons*] and CYF Acts. It is accepted that there will be a number of people who are employees and volunteers of religious organisations who already, by virtue of their profession, belong to mandated groups including those yet to be gazetted, for example, teachers (who may also be ministers of religion). The key focus for any policy reform is to ensure that mandatory reporting facilitates the reporting of suspected abuse by people best able to recognise signs of suspected child abuse. The Inquiry does not advocate a general extension that could lead to a significant spike in reports with few resulting substantiations. This may be the likely result if a reporting duty similar to the South Australian legislation was [sic] introduced into the CYF Act.⁴⁰

The LIV agrees with Cummins Recommendation 44 that sections 182(1)(f)-(k) of the *Children Youth and Families Act* should be proclaimed and brought into effect. Moreover, we defer to the Cummins Inquiry in its decision not to recommend extending the child protection reporting requirements in the *Children Youth and Families Act* to ministers of religion. We would consider the matter further if specific law reforms were proposed.⁴¹

2.5 Existing criminal laws prohibiting the concealment of crimes

The Inquiry has heard evidence that people within church hierarchies have concealed abuse of children by religious personnel and moved alleged abusers to other positions within the organisation, including to positions outside Australia.⁴² Some submissions to the Inquiry call for new crimes to be introduced into the *Crimes Act 1958* (Vic), including the offence known at common law as 'misprision' which has been repealed in Victoria but is codified in New South Wales (see Appendix, point 5).⁴³

In the LIV's September Submission, we note several offences under Victoria's existing criminal law which might cover concealment of child abuse by a third party in certain circumstances, such as s49A (facilitating sex offences), s325 (aiding and abetting) and s326 (concealing crimes for benefit) of the *Crimes Act 1958* (Vic) (see Appendix, point 6). Like all criminal offences, these provisions attract a high burden of proof – that they be proven beyond reasonable doubt – which could be insurmountable particularly in cases of historical abuse by religious personnel. It would, however, be useful if the Committee could seek information as to the extent to which these or other existing criminal provisions have been investigated or invoked against third parties alleged to have

⁴⁰ Cummins Inquiry Report, above fn 24, p 351.

⁴¹ We note that the Roman Catholic Church in Victoria no longer objects to the extension of the child protection reporting requirements to ministers of religion: see submission to the Inquiry, above fn 31, p5.

⁴² See e.g. Submission to the Inquiry from Professor Patrick Parkinson AM http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Parkinson_Patrick.pdf.

⁴³ See submission to the Inquiry from Victoria Police, above fn 5.

concealed child abuse by religious personnel in Victoria. Any barriers to initiating such investigations should be identified.

In the LIV's view, the proposed mandatory reporting requirement (LIV recommendation 4) might assist in bringing evidence of concealment to light which could provide a basis for future prosecutions under Victoria's existing criminal laws.

2.6 Protections to facilitate reporting and redress

In the LIV's September Submission, we called for 'protections from reprisals and defamation actions, for example, for any disclosures made pursuant to the proposed mandatory reporting requirements, or in the context of [an] independent oversight mechanism' (LIV recommendation 6). We refer to examples of protections provided in other acts, such as the *Equal Opportunity Act 2010* (Vic) and the *Whistleblower Protection Act 2001* (Vic) (pp19-20). Please note that the *Whistleblower Protection Act 2001* has been superseded by the *Protected Disclosure Act 2012* and the protections referred to in the LIV's September Submission are now found in the *Protected Disclosure Act 2012*.

3. Limitation periods

The LIV considers that the impact of the *Limitations of Actions Act 1958* on victims of child abuse should be reviewed and amended to remove unjustified barriers to redress. We note that defendants might choose not to invoke a limitation of actions defence in proceedings against them – the Victorian government, for example, does not in practice refuse to engage in mediation or settlement discussions where a matter is statute barred although it might offer a reduced settlement amount to reflect the availability of the defence.⁴⁴ The LIV would not be satisfied, however, that any equivalent statement made by religious and other non-governmental organisations that they will not rely on the statute of limitations in defence of claims of child abuse would provide an adequate safeguard against the use of, in our view, an unjustified law.

The LIV's September Submission makes several recommendations with respect to limitation periods, including a call for a three-year moratorium on the availability of the defence in the case of abuse of children by personnel of religious and other organisations.⁴⁵ We wish to clarify one of our recommendations (LIV recommendation 12), and make a further recommendation, on limitation periods.

3.1 Extension to 30 years of age

In the LIV's September Submission, we recommended that 'the limitation period for personal injuries actions relating to criminal abuse of minors by personnel of religious organisations should be extended to allow persons to bring an action until they are 30 years of age – recognising that many abuse victims have not historically come forward until they are older.' (LIV recommendation 12). This is one of several recommendations we make with respect to limitation periods.

⁴⁴ This practice is consistent with the spirit of the Victorian Government's Model Litigant Guidelines <http://www.justice.vic.gov.au/resources/08676128-fa33-4fb0-a41e-4f2592f12a21/reviseidmodellitigantguidelines.pdf>. At the Commonwealth level, see Legal Services Directions <http://www.comlaw.gov.au/Details/F2010C00136> providing as an example of handling claims and conducting litigation in accordance with legal principle and practice '(a) acting in the Commonwealth's financial interest to defend fully and firmly claims brought against the Commonwealth where a defence is properly available, subject to the desirability of settling claims wherever possible and appropriate'.

⁴⁵ See e.g. Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2012 (NSW) Clause 20 (Suspension of bar to actions on basis of limitation period having elapsed) (1) Despite any provision of the *Limitation Act 1969*, an action on a cause of action for Church sexual abuse is maintainable if it commences during the suspension period, regardless of the date on which the cause of action first accrued. (2) In this section: *Church sexual abuse* means sexual abuse by a member of the Church's clergy, a Church official or a Church teacher in relation to a person who was, at the time of the sexual abuse, under the care of the Church. *suspension period* means the period commencing on the date of assent to the *Roman Catholic Church Trust Property Amendment (Justice for Victims) Act 2012* and ending on the second anniversary of that date.

See also California Code of Civil Procedure, Part 2, Title 2, Chapter 3, Section 340.1(c); Delaware Title 10 Courts and Judicial Procedure Part V, Chapter 81, section 8145 Civil suits for damages based upon sexual abuse of a minor by an adult.

We wish to clarify that the LIV recommendation 12 applies to actions falling under sections 271 and 27N(4) of the *Limitations of Actions Act 1958* (see extract in Appendix, point 7), namely actions alleging that sexual or physical abuse by a 'close associate' occurred before 21 May 2003.

On 21 May 2003,⁴⁶ the *Limitation of Actions Act* was amended to provide for a special limitation period for minors⁴⁷ injured by close relatives or 'close associates' (section 271). The amendment, in effect, extended the limitation period until a victim is 37 years of age for personal injury actions alleging that an act (e.g. sexual or physical abuse) occurred on or after 21 May 2003.⁴⁸

A 'close associate' is defined as a person whose relationship with a parent or guardian is such that the person could influence the parent or guardian not to bring an action on behalf of a minor against him or her, or the minor might be unwilling to disclose to the parent or guardian that they had been harmed by that person (s271(2)). Personnel in religious organisations could fall within the definition of a 'close associate'.

The special limitation period in section 271 for minors injured by close relatives or 'close associates' appears to apply only to actions for injuries occurring on or after 21 May 2003 (s27N(1)). Where an action is brought alleging injury caused to a minor before 21 May 2003, it would appear that the limitation period expires when a victim turns 24 years of age – i.e. 6 years after the victim turns 18 years old.⁴⁹

The effect of sections 271 and 27N(4) would appear to be that if, for example, a boy turned 10 years of age and was abused in April 2003, the limitation period would expire when he turned 24 years old (in April 2017). In contrast, if that 10 year old boy were abused two months later in June 2003, the limitation period might not expire until he turned 37 years old (in April 2030).

Our proposal to extend the limitation period to 30 years of age for actions brought alleging injury caused to a minor before 21 May 2003 would, in effect, extend the limitation period to 12 years from the time a person ceases to be a minor. We appreciate that this would retrospectively extend the limitation period by a further 6 years. We consider, however, that the circumstances of abuse by close associates – e.g. personnel in religious organisations – combined with the inequality introduced by sections 271 and 27N(4) for minors abused before 21 May 2003, warrants the retrospective amendment.

We note, in this regard, observations of Justice La Forest of the Supreme Court of Canada which were cited favourably in a judgment of Justice Osborn of the Supreme Court of Victoria when considering the rationale for limitation periods in the context of sexual 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, for example the cost of professional services if practitioners are exposed to unlimited liability, 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

⁴⁶ *Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003*, Assent: 16/06/2003: SG (No. 116) 16/6/2003 , Commencement: Ss 1, 2, 4-16, 19, 20 on 21/05/2003: s. 2(1), ss 3, 17, 18 on 01/01/2004: GG 18/12/2003 p. 3208

⁴⁷ A minor is a person under the age of 18 years, *Age of Majority Act 1977* (Vic) section 3.

⁴⁸ Reading sections 27E, 271 and 3 of the *Limitation of Actions Act 1958* together, the limitation period will expire between the ages of 31 and 37 years of age – i.e. a long-stop period of 12 years deemed to commence from 25 years of age – where a person alleges they were injured as a minor by a close relative or a close associate.

⁴⁹ Reading sections 27N(4) of the *Limitation of Actions Act 1958* together with sections 23 extending the limitation period in case of disability and section 3 defining disability to include a minor, with 'minor' being defined in the *Age of Majority Act 1977* (Vic) section 3 as a person under the age of 18 years. See *GGG v YYY* [2011] VSC 429 para 181 available at <http://www.austlii.edu.au/au/cases/vic/VSC/2011/429.html> but note *AM v KB* [2007] VSC 429 available at <http://www.austlii.edu.au/au/cases/vic/VSC/2007/429.html>. In some cases, the limitation period might expire at 21 years of age if the relevant provision does not apply.

go on with their life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose.⁵⁰

The LIV notes that, consistent with the reasoning of the Supreme Court of Canada, some people have called for the removal of s27N(4)⁵¹ or for the complete removal of limitation periods with respect to sexual abuse.⁵² We do not oppose these views and consider that they might be the preferred option for dealing with the barriers presented by limitation periods.⁵³

3.2 Presumption in favour of an extension of time in cases of child abuse

In addition, we wish to make a further recommendation that sections 23A and 27L of the *Limitation of Actions Act 1958* (see Appendix, point 7), concerning the matters to be considered in determining applications for extension of limitation periods, should be amended to introduce a presumption in favour of extending the period of limitation for minors injured by close relatives or close associates, consistent with s27L.

Sections 23A and 27L of the *Limitation of Actions Act 1958* could be amended, for example, to provide that an application to a court for an extension of a period of limitation should be granted in cases of minors injured by close relatives or close associates unless the court is satisfied that there is no good reason to do so. We note that such a provision is contained in section 26(3)(b) of the *Victims Support and Rehabilitation Act 1996* (NSW) which states that leave to extend the time in which applications for statutory compensation must be lodged 'should be given in cases of sexual assault, domestic violence or child abuse unless the Director is satisfied that there is no good reason to do so'.

Under sections 23A and 27K, providing for applications for extension of limitation periods, the onus is on the victim of abuse to make the case for an extension.⁵⁴ The onus can be a difficult one to satisfy,⁵⁵ particularly for victims of historic abuse or where the religious organisation has evidence relevant to the claim which is not made available to the victim.

The LIV considers that it would be appropriate to include a presumption in favour of victims, effectively reversing the onus of proof in applications for extension of limitation periods in cases alleging injury of minors by close relatives or close associates. The defendant should be required to state the case as to why an extension *should not* be provided rather than requiring the plaintiff to demonstrate why an extension *should* be granted. We refer again to the sentiments expressed in the Supreme Court of Canada as to why the public interest and fairness would be better served in cases of child sexual abuse by creating a presumption in favour of child victims of abuse.⁵⁶

⁵⁰ La Forest J for the majority of the Supreme Court of Canada in *M.(K.) v. M.(H.)* [1992] 3 S.C.R. 6. (La Forest, Gonthier, Cory and Iacobucci JJ) cited by Osborn J in *GGG v YYY* [2011] VSC 429, para 187. See also LIV September Submission page 25 on the rationale behind limitation periods in cases of child abuse.

⁵¹ See e.g. submission to the Inquiry from Ryan Carlisle Thomas Lawyers September 2012 calling for the removal of s27N(4) http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/57th/Child_Abuse_Inquiry/Submissions/Ryan_Carlisle_Thomas_Lawyers_R.pdf;

⁵² See also Archbishop of Melbourne, Denis Hart, reportedly stating that child sex abuse offenders should not be able to rely on limitation periods <http://www.smh.com.au/national/scrap-time-limits-on-child-sex-abuse-cases-urges-head-of-bishops-20121126-2a3mm.html>

⁵³ See also Lisa Sarmas "Mixed Messages on Sexual Assault and the Statute of Limitations: Stingel v Clark, the Ipp 'Reforms' and an Argument for Change" (2008) 32(2) *Melbourne University Law Review* 609 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/MelbULawRw/2008/18.html?stem=0&synonyms=0&query=loaa1958226%20s27n>; Ben Mathews, "Accessing the Scope of the Post-Ipp 'Close Associate' Special Limitation Period for Child Abuse Cases" (2004) 11 *James Cook University Law Review* 63 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/JCULawRw/2004/4.html?stem=0&synonyms=0&query=loaa1958226%20s27n#Heading260>

⁵⁴ See e.g. *GGG v YYY* [2011] VSC 429.

⁵⁵ See e.g. *Schofield, Paul v State of Victoria* [2009] VCC 1646 (15 December 2009) where an application to extend period of limitation pursuant to s. 27K Limitation of Actions Act 1958 was refused in respect of sexual assault alleged to have occurred in around 1967. See also LIV's September Submission fns 89 and 92.

⁵⁶ See above fn 50.

QUESTIONS ON NOTICE FROM 17 DECEMBER 2012 HEARING

Set out below are the LIV's responses to questions taken on notice at the Inquiry hearing on 17 December 2012. We have attempted to paraphrase the questions, based on the hearing transcript, and would be grateful if you could advise us if we have not properly represented the questions from the Committee.

4. Overcoming barriers presented by 'confined-purpose statutory corporations'

QoN1. Can you provide examples of the 'confined-purpose statutory corporations' noted in your recommendation 16? What would you propose by way of legislative response to address the inability to sue 'confined-purpose statutory corporations' or statutory trusts established to hold church property (per *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117)? (Mrs Coote)

4.1 Context

The LIV's September Submission recommends that 'the Committee should consider legislative options to remove the ability of religious organisations to rely on confined-purpose statutory corporations (established for the organisation's benefit, i.e. ownership or property) and anachronistic organisational and corporate structures to avoid liability in matters not related to property ownership, such as criminal abuse' (LIV recommendation 16). In preparing such reform proposals, the LIV also recommends that the 'Committee should examine and identify the legal status of different religious organisations, and their capacity to sue and be sued' (LIV recommendation 15).

The LIV's September Submission notes that: 'In Victoria and some other Australian states, statutory corporations (known as 'trustee corporations') are created for the express purpose of holding property on trust for ...[some] religious entities. The lack of any sort of legal entity to represent the Catholic Church, for example, historically led to the development of such corporations to hold the Church's assets and have perpetual succession, avoiding the problems that arose historically with titles to goods and land when Bishops and Archbishops passed away. These entities are defined by the legislation that establishes them, and their statutory purposes are precisely defined by the legislature – their role specifically encompasses the acquisition, disposal, holding, and dealing with property on behalf of the Church, but invariably does not extend to any other aspects of the Church's operation.'⁵⁷

Examples of statutes creating trustee corporations to hold church property in Victoria include the *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) and *The Salvation Army (Victoria) Property Trust Act 1930* (Vic).⁵⁸ There are also statutes that create trustee corporations for particular land.⁵⁹ 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.⁶⁰

⁵⁷ LIV's September Submission, footnotes omitted, pp 27-8.

⁵⁸ Further examples can be found by searching the database 'Victoria Law Today' at <http://www.legislation.vic.gov.au/>. See Peter MacFarlane & Simon Fisher *Churches Clergy and the Law* (Federation Press 1996) pp137-8.

⁵⁹ See e.g. *Wangaratta Church of England Land Act 1930*, *St James' Church Land Trusts Act 1891*, *Balaclava Methodist Church Land Act 1939*.

⁶⁰ *Religious and Successory Trusts Act 1958* s50.

The *Religious and Successory Trusts Act 1958* provides that:

27. How legal proceedings may be had with respect to property held on a registered trust

All legal proceedings whatever concerning any property held upon any registered trust may be had by or against the registered trustees for the time being in their proper names as such trustees, describing the trust so as to identify it with the proper trust in the Register of Successory Trusts; and no such proceedings shall be discontinued or abated by reason of any change in such trustees by death or otherwise, but shall continue by or against the remaining or succeeding trustees notwithstanding.

Establishing what has since been referred to as 'the *Ellis* defence',⁶¹ the New South Wales Court of Appeal found that the purpose of the statutory trustee corporation created to hold property for the Roman Catholic Church in Sydney⁶² was limited to 'the holding, management and disposal of property'⁶³ and did not extend to 'the ecclesiastical, liturgical or pastoral activities of the Archbishop' who had overseen the appointment of a priest alleged to have abused the plaintiff.⁶⁴ While the trustees might be liable in contract or tort to people employed by them, for example, to repair Church property or transfer trust property,⁶⁵ the Court found that the mere fact that they hold Church property does not make them liable for all claims associated with Church activities.⁶⁶

The trustee corporations created for certain religious bodies can be distinguished from those religious entities that elect to become incorporated associations, such as the *Brotherhood of St Laurence (Incorporation) Act 1971* (Vic), the *Baptist Union Incorporation Act 1930* (Vic), *Lutheran Church of Australia Victorian District Incorporation Act 1971* (Vic) and the *Hungarian Reformed Church of Australia (Victorian District) Incorporation Act 1973* (Vic). Like other incorporated associations, an incorporated religious association is liable to be sued for wrongs 'like any other body corporate which occupies property or employs individual persons in order to carry out its activities.'⁶⁷

4.2 Options for legislative reform

A Private Member's Public Bill, noted in the LIV's September Submission and expected to be considered by the New South Wales Parliament in 2013, contains provisions aimed, amongst other things, to overcome the inability to sue the trustee corporations established by statute in NSW to hold the property of the Roman Catholic Church.⁶⁸ In particular, the relevant parts of new section 18 of the *Roman Catholic Church Trust Property Act 1936* proposed by the NSW Justice for Victims Bill provide:

⁶¹ *Trustees of the Roman Catholic Church v Ellis & Anor* [2007] NSWCA 117 overturning in relevant part *J Ellis v Pell and the Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2006) NSWSC 109 per Patten AJ; leave to appeal to the High Court refused, see *Ellis v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] HCATrans 697.

⁶² *Roman Catholic Church Trust Property Act 1936* (NSW)

⁶³ Para 111 per Mason P, Ipp JA and McColl JA agreeing]

⁶⁴ Para 112 per Mason P.

⁶⁵ Paras 116, 120 per Mason P.

⁶⁶ Para 149 per Mason P.

⁶⁷ A S Sievers *Associations and Clubs in Australia and New Zealand* (Federation Press, 3rd edn 2010), p131 cf 39 ff concerning liability in tort of unincorporated associations. See also *Associations Incorporation Reform Act 2012* (Vic) section 29(2)(c) providing that an incorporated association may sue and be sued in its corporate name.

⁶⁸ In the LIV's September Submission, we referred to *Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2011* (footnote 109), introduced to the NSW Legislative Council by the Hon. David Shoebridge MLC on 15 September 2011, see

<http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/0/73CC52B622FAAD69CA25790C0012C745>. Mr Shoebridge has indicated that the Bill will be voted on in the NSW Parliament in 2013, see <http://www.theherald.com.au/story/1170156/opinion-hiding-behind-cloaks/?cs=308>. The 2012 version of the Bill - *The Roman Catholic Church Trust Property Amendment (Justice for Victims) Bill 2012* (amending the *Roman Catholic Church Trust Property Act 1936* No 24) - is available at <http://davidshoebridge.org.au/wp-content/uploads/2012/10/b2011-121-d21-Roman-Catholic-Church-Trust-Property.pdf> and the related consultation paper is available at <http://didh9atks0nwf.cloudfront.net/wp-content/uploads/2012/09/120613-Justice-for-Victims-CAMPAIGN-BOOKLET.pdf>. See generally <http://davidshoebridge.org.au/2012/10/27/justice-for-victims/>.

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

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

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

(b) the Bishop, and the Diocesan Consultors, of the diocese of the Church in which the abuse, or the majority of the abuse, is alleged to have occurred, in their capacity as trustees of Church trust property in that diocese, and

(c) if the regulations so provide, a body corporate established under the Roman Catholic Church Communities' Lands Act 1942:

(i) by which the relevant member of the clergy, official or teacher was employed, or

(ii) that was established as trustee of community land of any community of which the relevant member of the clergy, official or teacher was a part.

(2) *In respect of any such proceedings, the relevant body corporate and its trustees are jointly and severally liable as if they were the member of the Church's clergy, the Church official or the Church teacher against whom the proceedings were also brought.⁶⁹*

The Committee might wish to consider the NSW Justice for Victims Bill in developing any proposals for legislation to address any barriers in Victoria to suing 'confined-purpose statutory corporations' or statutory trusts established to hold church property. Reforms could be introduced into specific religious trust statutes, as is the case with the NSW Justice for Victims Bill. Alternatively, it might be possible to introduce provisions that would apply to all religious trust statutes in, for example, the *Religious and Successory Trusts Act 1958* (Vic). In developing any proposals for reform, consideration would need to be given to the implications of such reforms for statutory trusts that are not created by religious orders and, possibly, non-statutory trusts.

5. Legislating for vicarious liability

QoN2: What would the LIV propose by way of legislation to provide for vicarious liability of religious organisations, as suggested in LIV recommendation 17? (Mrs Coote)

5.1 Context

LIV recommendation 17 suggests that the Committee 'considers options for legislative reforms to clarify when a religious organisation will be vicariously liable for criminal abuse of children by its personnel.'

Vicarious liability is the concept that liability for a wrongdoer's actions can attach to a third party who has control over the wrongdoer's conduct. The meaning of 'control' in this context can be notional – by virtue of the relationship between the wrongdoer and the third party – rather than actual.⁷⁰ The concept is typically applied in the case of an employment relationship where, for public policy reasons, the employer is deemed liable for wrongful acts done by an employee in the course of employment, including where the employee has engaged in a wrongful and unauthorised

⁶⁹ See also proposed section 19 of the Justice for Victims Bill (NSW) 'Judgments relating to sexual abuse by Church clergy, officials or teachers may be required to be paid from Trust funds'

⁷⁰ Halsbury's Laws of Australia TLA 33.6.600

mode of doing an act authorised by the employer.⁷¹ So, for example, the employer of a footballer could be vicariously liable for assault where the footballer bites another player in the course of defending the ball in a football game.⁷² Similarly, a dry cleaning service could be vicariously liable to a client if an employee steals a garment left with the employee for cleaning.⁷³

As noted in the LIV's September Submission, the extent to which a religious organisation can be vicariously liable in civil law for the criminal acts of its personnel is unclear in Australian law. At least two questions might arise in the case of child abuse by religious personnel:⁷⁴ (1) is the person 'employed' by the religious entity? (2) to what extent can abuse of a child by a person engaged by a religious entity to do acts that necessarily bring the person into contact with that child be considered 'within the course' of the acts the person has been engaged to do?

With respect to the first question, in the *Ellis* case, the NSW Court of Appeal did not consider it necessary 'to decide whether a priest in the Roman Catholic Church who is appointed to a Parish is an employee in the eye of the law or otherwise in a relationship apt to generate vicarious liability in his superior'⁷⁵ but said '[i]t is wrong to see holding an ecclesiastical office as necessarily incompatible with a legal relationship capable of giving rise to some incidents of an employment relationship'.⁷⁶ In the LIV's September Submission,⁷⁷ we note recent decisions in the United Kingdom finding that a lack of any formal employment relationship is not an impediment to imposing vicarious liability on a church for a priest's actions.

Specifically, in *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust*, the UK Court of Appeal⁷⁸ found that although there was no contract of service between a priest and the bishop appointing him,⁷⁹ there was a relationship between the priest and the bishop so close in character to one of employer/employee that it can fairly be said to be 'akin to employment'⁸⁰ and that 'it is just and fair to hold the employer vicariously liable',⁸¹ looking at it in terms of control. Control was viewed widely in terms of:⁸² nature of the organisation acting as a business;⁸³ integration of the priest into the organisational structure of the Church's enterprise;⁸⁴ and not acting as an independent contractor/entrepreneur.⁸⁵ The essence of being an employee was described as being 'paid a wage or salary to work under some, even if only slight, control of [an] employer in [the] employer's business for that business'.⁸⁶

With respect to the second question, an employer can be liable for the 'intentional torts' (such as assault) of an employee in certain circumstances⁸⁷ but it is not clear under Australian law when an employer can be liable on a vicarious basis for an employee's abuse of a child. The question of vicarious liability for child sexual abuse has been considered in cases in Canada and the United Kingdom, finding liability where the sexual abuse is 'so closely connected' with the wrongdoer's employment that it would 'fair and just' to hold the employer vicariously liable.⁸⁸ As noted in the

⁷¹ 'The first edition of Salmond's text *The Law of Torts* stated that "[a] master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master." Salmond, *The Law of Torts*, (1907) at 83 (original emphasis). See also *Hollis v Vabu Pty Ltd* [2001] HCA 44; (2001) 207 CLR 21 at 50-51 [72]- [74], 58-60 [94]-[100] per McHugh J who decided that case on agency principles.

⁷² See e.g. *Canterbury Bankstown Rugby League Football Club Ltd v Rogers* [1993] Aust Tort Reports 81-246.

⁷³ See *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716

⁷⁴ See *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 para 21

⁷⁵ *Ellis*, above fn 61, para 32, per Mason P

⁷⁶ *Ibid* para [33] per Mason P.

⁷⁷ LIV's September Submission p29.

⁷⁸ *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938 hearing an appeal from *JGE v The English Province of Our Lady of Charity and The Trustees of the Portsmouth Roman Catholic Diocesan Trust* [2011] EWHC 2871.

⁷⁹ Para [30] per Lord Justice Ward.

⁸⁰ Para [62] per Lord Justice Ward.

⁸¹ Para [73] per Lord Justice Ward.

⁸² Para [76] per Lord Justice Ward.

⁸³ Para [77] per Lord Justice Ward.

⁸⁴ Para [78] per Lord Justice Ward.

⁸⁵ Para [79] per Lord Justice Ward.

⁸⁶ Para [80] per Lord Justice Ward, with Lord Justice Davis agreeing in the result but concluding that the bishop had real and substantial responsibility for and control over the parish priest whom he had appointed, and Lord Justice Tomlinson dissenting.

⁸⁷ Halsbury's Laws of Australia TLA [33.6.630].

⁸⁸ *Lister v Heselley Hall Ltd* [2002] 1 AC 215, para 28 (Lord Steyn), [Lord Hutton agreeing [52] Lord Hobhouse of Woodborough concurring [para 63] and Lord Clyde considered the 'closeness' of the connection [37 and Lord Millet [70].

LIV's September Submission,⁸⁹ the High Court of Australia considered the question of vicarious liability in the case of a student who was sexually abused by a teacher employed by a school authority in the case of *New South Wales v Lepore*.⁹⁰ The Court was unable to form a concluded view on the question of vicarious liability for sexual abuse but a majority of the judges decided, for different reasons in separate and joint judgments, in favour of the school authority to allow the appeal in part and order a new trial.⁹¹ The NSW Court of Appeal in the *Ellis* case was willing to 'assume' that a priest's superiors at a given moment in time might 'on some basis be vicariously liable for his intentional torts'.⁹²

A 2012 decision of the Victorian Supreme Court of Appeal considered vicarious liability for unauthorised acts of an employee, *Blake v JR Perry Nominees Pty Ltd*.⁹³ The majority of the Court agreed with the lower court decision finding that an employer was not vicariously liable for an injury to a person caused by an employee's prank. Justice Neave, dissenting in the result, stated that there is no 'bright line rule for determining whether an employer will, or will not, be held liable for harm caused to a third party by the unauthorised acts of an employee'.⁹⁴ Contrary to the majority's conclusion in the case, Her Honour considered that the employee truck driver's 'boisterousness or skylarking'⁹⁵ 'occurred in the course of his employment, or was at least sufficiently incidental to the performance of his duty, to be regarded as falling within its scope. Further, if the *Lister* test accepted by Gleeson CJ and Kirby J in *Lepore* is applied, there was a 'sufficient connection' or a 'sufficiently close connection' between [the employee's] actions and his employment as to make it just that the respondent should be liable for the appellant's injury'.⁹⁶

5.2 Options for legislative reform

In the LIV's September Submission, we note that some statutory regimes provide for vicarious liability, such as the provisions in the *Equal Opportunity Act 2010* (Vic) (s.109).⁹⁷ We also note that new section 18 of the *Roman Catholic Church Trust Property Act 1936* proposed by the NSW Justice for Victims Bill has been drafted to address issues around vicarious liability. Section 18(3) of the Bill provides:

The court hearing such proceedings may extend the application of subsections (1) and (2) to a person who alleges sexual abuse by a member of the Church's clergy, a Church official or Church teacher and who was not at the time of the abuse under the care of the Church, but was so closely connected with the Church that the court believes it would be just to render the Church liable for the abuse, if proven.

The phrase 'was so closely connected with the Church that the court believes it would be just to render the Church liable for the abuse' appears intended to incorporate the UK authority as to when an employer can be liable for the 'intentional torts' (such as sexual assault) of an employee. The Committee could refer to s18 proposed in the Justice for Victims Bill in its consideration of options for legislative reform but it might also be necessary to include language to address the first aspect of vicarious liability, namely when the relationship between an alleged abuser, such as a priest, and a church will be considered 'akin to employment'.

⁸⁹ LIV September Submission p29

⁹⁰ [2003] HCA 4; 212 CLR 511

⁹¹ *New South Wales v Lepore* [2003] HCA 4; 212 CLR 511. Separate judgments decided the claim without resolving the question: some of the court considered that the employer could be vicariously liable as the abuse in question satisfied the 'sufficient connection' test (Gleeson CJ, Kirby J); others disagreed on the basis that the abuse was not within the scope of or sufficiently connected with the employee's authority (Gummow and Hayne JJ); Callinan J considered that there could not be any vicarious liability for a criminal act. See further Laura Hoyano, 'Ecclesiastical responsibility for clerical wrongdoing' (2010) 18 Tort L Rev 154; see also Jame Wangmann, "Liability for Institutional Child Sexual Assault: Where Does Lepore Leave Australia?" (2004) 28(1) *Melbourne University Law Review* 169 <http://www.austlii.edu.au/au/journals/MelbULawRw/2004/5.html#nB217>; Nafees Meah and Philip Petchey 'Liability of Churches and Religious Organisations for Sexual Abuse of Children by Ministers of Religion' (2005) 34 *Common Law World Review* 39

⁹² Para [33] although it ultimately found that the specific defendants – the subsequent Archbishop and the Trustees – were not liable.

⁹³ [2012] VSCA 122

⁹⁴ Para [2]

⁹⁵ Para [16]

⁹⁶ Para [34 footnotes omitted]

⁹⁷ LIV's September Submission pp 8 and 29.

6. Reversing the onus of proof in applications to extend limitation periods

QoN3: Could the LIV cite examples of any laws that reverse the onus of proof for applications to extend the limitation period in cases of child abuse? (Mr Wakeling)

Please see above section 3.2 which refers to section 26(3)(b) of the *Victims Support and Rehabilitation Act 1996* (NSW) which states that leave to extend the time in which applications for statutory compensation must be lodged 'should be given in cases of sexual assault, domestic violence or child abuse unless the Director is satisfied that there is no good reason to do so'.

Although not an example in respect of extending limitation periods, this provision could be used as a model in the context of amendments proposed by the LIV to sections 23A and 27L of the *Limitation of Actions Act 1958* to provide that an application to a court for an extension of a period of limitation should be granted in cases of minors injured by close relatives or close associates unless the court is satisfied that there is no good reason to do so.

7. Options for the courts to structure proceedings to overcome barriers to redress

QoN4: Could the LIV comment on any options for present proceedings or contemplated proceedings before the courts to be structured (by the relevant court, with the parties' consent, as opposed to being mandated by legislation) in a way that overcomes the barriers presented by corporate structure, vicarious liability and statute of limitations in cases of child abuse by religious personnel? (Mr O'Brien)

As indicated in the LIV September Submission, the LIV considers that legislative reform will be required to overcome the barriers presented by corporate structure, vicarious liability and statute of limitations in cases of child abuse by religious personnel. If, however, church bodies implicated in criminal abuse of children were willing, based on an acknowledgement of their 'moral responsibility' to victims of abuse,⁹⁸ to agree to terms on which civil law proceedings could be brought against them, consideration could be given to a relevant church entity:

- Creating or identifying an appropriate corporate defendant (e.g. designating a particular office holder against which claims of direct or vicarious liability can be made). The LIV has not examined the extent to which any given church is able, as a procedural matter on its own motion, to do this. Nor has the LIV examined whether the creation or identification of a corporate defendant could be made effective as a matter of legal liability.
- Creating or identifying an appropriate entity or fund to meet any liabilities of the designated corporate defendant. Sufficient funds to meet potential liabilities would need to be made available: funds should not be limited to a fixed amount or otherwise capped to accord with any limits on insurance.
- Undertaking not to contest vicarious liability, either on the basis that a given abuser is or was not an 'employee' or that the abusive acts were not 'in the course of employment'. The LIV is not aware of any precedents in this regard. We note, however, Victoria's civil procedure rules requiring legal practitioners to certify, on filing a claim in a court, that, 'on the factual and legal material available, (a) each allegation of fact in the document has a proper basis; (b) each denial in the document has a proper basis; (c) there is a proper basis for each non-admission in the document' (s42 *Civil Procedure Act 2010*) could at least preclude a church body from denying abuse has occurred where it has evidence that it has or is likely to have occurred.
- Undertaking not to rely on any applicable statutory limitation periods. We note in this regard that the State of Victoria in practice will not refuse to engage in mediation or settlement discussions where a matter is statute barred although it might offer a reduced settlement amount to reflect the availability of the defence.⁹⁹ This is only a practice – the

⁹⁸ these e.g. the Submission to the Inquiry from the Catholic Church of Victoria, above fn 31, p 81.

⁹⁹ This practice is consistent with the spirit of the Victorian Government's Model Litigant Guidelines <http://www.justice.vic.gov.au/resources/08676128-fa33-4fb0-a41e-4f2592f12a21/revisedmodellitigantguidelines.pdf>. At the Commonwealth level, see Legal Services Directions <http://www.comlaw.gov.au/Details/F2010C00136> providing as an example of handling claims and conducting litigation in accordance with legal principle and practice '(a) acting in the

government cannot be compelled to relinquish a valid defence based on a statutory limitation period.

The LIV appreciates that a voluntary arrangement between church bodies and victims as to the basis upon which civil proceedings could be brought against a given church for criminal abuse of children might be more effective than legislative intervention but they are not guaranteed. Also, a voluntary arrangement is not without its own difficulties. In the absence of legislative reform, a victim's options will be either the current system, with all of its flaws, or the agreement with the church entity. In the circumstances and given the power difference between the churches and victims, the 'voluntary' nature of the arrangement would be tenuous.

8. Lessons from the James Hardie litigation

QoN5: Could the LIV give the Committee any information in relation to how the James Hardie litigation was set up and what role, if any, the LIV had in relation to that? (Mr O'Brien)

8.1 Context

The James Hardie group of companies in Australia has been the subject of civil claims for compensation from people who have suffered asbestos-related diseases after exposure to asbestos in James Hardie products.¹⁰⁰ To facilitate a decision to restructure the James Hardie group and move James Hardie businesses offshore, James Hardie established a 'Foundation' in Australia to fund any successful compensation claims for asbestos exposure. In return for a fixed amount of funds paid by James Hardie, the Foundation indemnified James Hardie against compensation claims.

Despite statements by James Hardie to the contrary, the initial funding arrangement with the Foundation was insufficient to meet compensation claims. Statements by the relevant James Hardie entity concerning the sufficiency of the initial funding arrangement, and the actions of James Hardie company directors, have been the subject of a special inquiry, proposals for legislative intervention to undo the corporate restructure, protracted court proceedings and a public 'shaming' campaign. In response, James Hardie entered into a new funding arrangement with the Foundation whereby the funding would no longer be limited to a fixed amount but to a percentage of profits from James Hardie's overseas business (no longer asbestos related).¹⁰¹

Although the Foundation is at risk of receiving no funds in the event that no profits are made by the James Hardie business, we understand that the change in the arrangement from a fixed amount to a percentage of profits provides better opportunities for full payments to be made to successful claimants.

8.2 Response

Although some of its members have been involved in representing the relevant parties, the LIV has had no involvement in the James Hardie litigation or the funding arrangements.

In the context of this Inquiry and the LIV's concerns about the structure of church bodies posing barriers to justice for victims of child abuse, it is important to note that the creation of the Foundation by James Hardie was not designed to create a defendant in civil claims in circumstances where a responsible entity could not be identified: plaintiff victims of asbestos exposure continue to direct their claims of wrongdoing at the relevant James Hardie entity that engaged in the business alleged to have harmed the plaintiff (such as the one-time James Hardie group subsidiary, James Hardie & Coy Pty Ltd, subsequently Amaca Pty Ltd, or Jsekarb Pty Ltd, subsequently Amaba Pty Ltd). A plaintiff in any given claim must still show that the relevant James

Commonwealth's financial interest to defend fully and firmly claims brought against the Commonwealth where a defence is properly available, subject to the desirability of settling claims wherever possible and appropriate'.

¹⁰⁰ We treat as distinct those claims from James Hardie workers for exposure in the course of their work for the James Hardie group. For detailed analysis of the James Hardie litigation see ACTU James Hardie Asbestos Victims Compensation Background Facts8 February 2007. See also Anil Hargovan 'Australian Securities and Investments Commission v Macdonald [No 11]: Corporate Governance Lessons from James Hardie; (2009) *Melbourne University Law Review* 984.

¹⁰¹ See e.g. ACTU James Hardie Asbestos Victims Compensation Background Facts8 February 2007.

Hardie entity was responsible for the wrongdoing at law. The Foundation merely stands in the shoes of that entity to meet any successful claims for compensation.

In the context of church child abuse, it is not clear that there will in all circumstances be a responsible entity in whose shoes a newly-created fund created by a given church could stand without legislation deeming a given entity liable for claims. We refer in this regard to our discussion of corporate structure of religious entities in the LIV's September Submission.¹⁰²

9. Developments with the Irish mandatory reporting requirement

QoN6: Could the LIV keep the Committee informed of any developments with respect to the application of the *Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012* (Ireland) (creating a mandatory reporting requirement)? (Mr O'Brien)

For context, please see section 4.1.2 of the LIV's September Submission.

We are not aware of any developments with respect to the application of the *Criminal Justice (Withholding of Information on Offences Against Children and Vulnerable Persons) Act 2012* (Ireland). Specifically, we are not aware of any prosecutions under the mandatory reporting requirement since its entry into force in July 2012.

10. Case management strategies to facilitate discovery and preserve evidence

QoN7: With reference to page 30 of the LIV September Submission and LIV recommendation 18 (that consideration be given to specific strategies for case-management of claims (in addition to those already in the *Civil Procedure Act 2010* (Vic)) concerning historical abuse of children by religious personnel to ensure early and efficient resolution of disputes concerning discovery and the availability of evidence), could the LIV elaborate on the kinds of strategies that could be employed? (Mr Wakeling)

10.1 Context

In Victoria, all civil litigation is now subject to the requirements of the *Civil Procedure Act 2010* (Vic). The Act prescribes an “**overarching purpose**” for all courts conducting civil litigation and “**overarching obligations**” on clients and their lawyers **to facilitate the just, efficient, timely and cost effective resolution** of the real issues in dispute (s7). The Act sets out a number of procedural reforms designed to achieve these objects (see Appendix point 8). The Act specifically provides for the enhancement of courts' case management powers, including in relation to discovery.

The LIV's recommendation 18 on the issue of case management in civil litigation should be understood as part of a wider concern that victims of historical child abuse are able to obtain a “**just, efficient, timely and cost effective**” resolution of their claims if they pursue a legal remedy in Victorian courts. There are several factors specific to the parties and the imbalance of power between them that can affect the prospects for a just, efficient, timely and cost effective resolution in the context of historical child abuse, including:

- **Parties' resources:** Australia's legal system is based on the common law adversarial system. One of the modern day realities of the adversarial system of justice in the area of civil claims is that for many, and in particular for individuals, the cost of obtaining a remedy before the law can be prohibitive. Litigants who have greater resources can be at a significant advantage over those who do not. Resources, in this context, include financial resources and the ability to engage more or more experienced lawyers. Resources can also include greater information about a case and more personnel or time to deal with it. Those who have lesser resources might suffer the added disadvantage of having a lot to lose if their claim proves unsuccessful, particularly if there is a risk they will be made to pay the other side's costs.

¹⁰² LIV's September Submission, section 4.2.2.

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- **Documentary evidence:** In the context of historical abuse of children by religious personnel, plaintiffs might be unlikely to have in their possession significant documentary evidence supporting their claim. A religious institution, in contrast, might have a broad range of documents that support a plaintiff's claim. For example, these might include documents that assist in identifying an alleged abuser (e.g. the names of people appointed to particular positions at a given time and place), documents concerning complaints against an alleged abuser or the institution's role in managing the complaints. Seemingly innocuous documents – such as receipts for payments of travel or medical expenses for an alleged abuser – could be highly relevant to proving a claim. A religious institution might have in its possession documents which clearly damage its or the alleged abuser's prospects of successfully defending a claim. The plaintiff might be completely unaware of the existence of these documents.
 - **Past statements:** In the context of internal complaints processes, people making complaints of historical abuse of children by religious personnel might make statements that prejudice their claims. If it is not made clear that any statements are 'without prejudice' to subsequent civil proceedings, an institution subsequently defending a claim might introduce the prejudicial statements into evidence. A plaintiff might have no recollection of making the statement and so its existence might be unknown at the time of commencing proceedings. A plaintiff might wish to contend that the manner in which the statement was elicited from, or made by, them made it procedurally unfair for the statement to later be relied on in court proceedings. Whether such statements will be allowed into evidence at trial might therefore be very material to the outcome of the case and significantly affect a plaintiff's decision to continue with a claim.
 - **Victims' vulnerability:** It is a fact of litigation that it is stressful, particularly for individuals and especially for parties involved in claims of historical child abuse who face specific vulnerabilities as a result of the abuse and in the context of trust in which it occurred. Cases need to be able to be handled justly and efficiently in a manner that causes the least distress to the parties.

There are also general aspects of all civil litigation that can affect the prospects for a just, efficient, timely and cost effective resolution in the context of historical child abuse, including as a result of the different approaches of any given party or court:

- **Different approaches of parties:** Despite the reforms intended with the introduction of the *Civil Procedure Act 2010*, the culture of litigation can take time to change. Whether or not in the two years since the Act was enacted there has been a change in culture of civil litigation away from past tactical adversarial practices towards facilitated resolution of disputes, there will remain both litigants and legal practitioners who adopt different approaches: the State of Victoria, for example, might take a conciliatory approach to litigation while any given institution might take a more defensive approach. Further, while courts can act on their own motion in practice it remains largely up to the parties to each case to bring a breach of the Act's requirements to the Court's attention by making application to the court. Therefore, the **overarching obligations** themselves operate in the context of an adversarial setting where if there is a breach it needs to be proved.
- **Different approaches of courts and judges:** In Victoria, a claim by a victim of historical child abuse for loss and damage could potentially be brought against the alleged perpetrator and institution in various different state courts.¹⁰³ The decision by a plaintiff whether to bring a claim in a particular court will be taken on the advice of the plaintiff's lawyer depending upon consideration of the amount and complexity of the claim and the costs scales in each jurisdiction.

One way to overcome these different approaches is for the courts to create **special lists** to hear particular kinds of cases. Different courts establish different lists and adopt tailored procedures to

¹⁰³ Although the civil limit of the Magistrates' Court is now \$100,000 for all matters including personal injury (with the ability for parties to consent to higher claims being brought in that court) it might be expected that most cases would be brought in the County Court or Supreme Court both of which have unlimited monetary jurisdiction for civil claims and both of which permit cases to be conducted with a civil jury.

deal with different types of claim. Judicial officers are often appointed to those lists because of their experience and expertise in the particular type of claim.¹⁰⁴

Both generally and within special lists, Courts have procedural powers under rules of court, inherent or implied jurisdiction, and under the *Civil Procedure Act 2010* (Vic) to manage cases in a particular way.

- **Case management:** Part 4.2 of the *Civil Procedure Act* gives the courts enhanced case management powers. These include, in addition to any other power the Court has under its rules of court or inherent, implied, common law or other statutory jurisdiction (as the case may be) the new statutory power ‘to give any direction or make any order it considers appropriate’ to ensure that a civil proceeding is managed and conducted in accordance with the overarching purpose, including giving any directions in the interests of the administration of justice or in the public interest.
- **Discovery:** Part 4.3 of the *Civil Procedure Act* specifically gives courts broad discovery powers to define the scope of disclosure and discovery of documents relevant to a given claim. The general rule is that unless a Court otherwise orders, discovery of documents is to be in accordance with the rules of court (s54). The general rule of discovery is that a party to civil litigation must provide to the other party a list of all documents in the person’s possession, custody or power (i.e. within their control, including in possession or custody of their agents) that are relevant to the issues in dispute.¹⁰⁵ The test of “relevance”, generally speaking, says that a document is discoverable if it is relevant to an issue in dispute in the proceeding and this includes in particular whether it is damaging of a party’s case or beneficial to a party’s case (or conversely damaging to an opponent’s case or beneficial to their case).¹⁰⁶ Specifically, Supreme Court Rule 29.01.1(3) requires that a party give discovery of documents (a) on which the party relies; (b) which adversely affect the party’s own case; (c) that adversely affect another party’s case; (d) that support another party’s case.¹⁰⁷

Due to the volume of discovery that now can occur (particularly with electronic communications and the duplication of documents often sent or forwarded electronically to different people), courts have for some time sought to exercise case management powers available to them to reduce the scope of discovery parties must give so as to limit the burgeoning legal costs that can be associated with making discovery. Over time courts have developed and adopted different practices and these include requiring parties to apply for discovery orders and to identify categories of documents on which they seek discovery from the other party or allowing for discovery of documents in tranches.

Given that this Inquiry in Victoria has proven to be a forerunner to a now national Royal Commission into historical child abuse, it might be anticipated that more civil claims will be brought before courts of law as, with increased public knowledge, victims might gain confidence in their

¹⁰⁴ The Supreme Court’s trial division has 12 specialist lists including Major Torts (which handles any proceeding which is primarily of a tortious nature, for example substantial personal injuries and industrial torts) and Personal Injuries (which handles Transport Accident Act, Accident Compensation Act, VWA and terminal disease cases). In the Major Torts List, litigation is managed from the point of issue to referral to the Civil List for fixing for trial. It is not a hearing list. The Judges in charge supervise the overall running of the list in periodic directions hearings before the court before the case is referred for trial listing. The County Court currently divides its civil jurisdiction into two lists, the Commercial List and the Damages and Compensation List, the latter of which has seven divisions including a General Division and Serious Injury Division. The Court’s Directions Group manages the Administrative Mention and Directions Hearing systems in consultation with the Judge in Charge of each Division.

¹⁰⁵ See generally *Williams*, Civil Procedure Victoria [129.01.225]; Cairns, *Australian Civil Procedure* 4th ed, 1996 p 363; Supreme Court (General Civil Procedure) Rules 2005 (as amended), Order 29

¹⁰⁶ The County Court has a Practice Note PNCl 2-2012 for cases in its Damages and Compensation List (Application, Defamation, Family Property, General and Serious Injury Divisions) which provides:

Discovery and Interrogatories

23. In damages cases, leave to interrogate and to discover are also generally provided by the standard timetabling orders.

24. Where leave to seek discovery is granted, the Court will require discovery of certain minimum documents, that is, those documents it is “reasonable in the circumstances” to discover. Initially, it is for the parties to determine the question of reasonableness and the Court’s intervention should be sought only if they are unable to resolve the question.

¹⁰⁷ Note s 55, see Appendix, point 8.

ability to confront those who have done them harm in the past and also become aware that they might have rights to bring a legal claim in court. It might also be anticipated that Victoria will be a jurisdiction in which more early claims are commenced.

10.2 Response

It is highly desirable for parties to claims involving historical child abuse that there can be an expectation that there will be a consistent approach in the early (interlocutory) stages of a case, whatever court a party might be in, so that **different approaches between courts** are reduced and courts are in a position to address, justly and efficiently, **different approaches to litigation and other discrepancies between parties**.

The procedure and conduct of litigation should be:

- relatively predicable or at least not subject to considerable variance depending on what court the proceedings are in;
- conducted at an interlocutory level by judicial officers of the court with significant expertise and skill in cases of historical child abuse; and
- conducted at a trial level by judges with similar expertise and skill.

No legislative intervention is required to effect case management strategies: existing laws and court rules and practices appear to provide adequate scope for the courts to introduce appropriate management of cases involving historical abuse of children.

Under the current regime, the LIV considers that civil cases involving historical abuse allegations could, for example, be addressed in a new special list and case managed by a specific judge in an individual docket system.¹⁰⁸ The advantage of having these cases managed by a particular judge is that the judge and other court personnel become experienced with the unique nature of these cases. For example, proper discovery is essential to the success or failure of claims concerning historical child abuse. Defendants might be very resistant to making proper discovery and there can be many arguments about what is discoverable resulting in multiple directions hearings and ultimately a feeling that proper discovery has still not been made. If a special list were created, discovery could be dealt with at an early time and by the same judge who would become experienced in knowing what sort of documents might be expected to be available and how they might be relevant to the claim.

The LIV would also support the appointment of, for example, judicial registrars or Associate Justices, to take on a role of early mediation for cases in a special list. Early mediation by a specialist officer would be preferable in these cases rather than the adversarial process typical in litigation. It would mean that victims would feel that their cases were being taken seriously, that their stories were being heard and that the prospects of resolution at an earlier time would be enhanced. Judicial registrars would have the stature of being judicial officers (which is useful for litigants) and are more readily perceived as being separate from the judges of the court who might ultimately decide the case. They can have power to make procedural orders by consent of parties to mediation which can be helpful if a case does not settle but the parties have agreed upon matters that will assist the case to be brought on for trial. Often in mediation, things can be agreed at a procedural level that parties will oppose in applications in open court.

The LIV considers that having a special list would mean that a court would have some flexibility in how these cases were managed. For example, the judge could consider a restorative justice process in appropriate matters, deal with interlocutory issues at an early time, and ensure that the defendants were not using their relatively greater access to financial resources to delay and pressure plaintiffs into settling.

Case management is a judicial function that must be exercised by courts independently of the legislative and executive branches of government. However, the ability of courts to effectively

¹⁰⁸ See e.g. <http://www.fedcourt.gov.au/case-management-services/case-allocation/individual-docket-system>. Note too elements of existing fast track systems eg case summaries, scheduling conferences, fast-tracked and simpler procedures to determine interlocutory disputes, more efficient discovery, some of which are part of Commercial Court procedures (case management conferences, amended procedures re interlocutory applications, powers re discovery), see further <http://www.fedcourt.gov.au/case-management-services/case-allocation/fast-track-system>.

manage cases involves resources and a clear understanding by the executive and legislative branches of government of the needs of courts and of potential obstacles that can confront litigants in cases that they bring in courts. For example, Victorian courts seeing merit in establishing a specialist list or practice direction for these types of claim might not have the resources to establish specialist lists. Even with special lists, courts might not have resources to provide sufficient judicial officers, court staff and other court resources to ensure those lists or practice directions operate in a manner that, to the maximum extent possible, enables people bringing claims of historical child abuse to bring their cases quickly and fairly before the court.

Therefore, the LIV would urge the Committee to recommend to the government that, in developing responses to barriers in civil litigation, they consult closely with the Chief Justice of the Supreme Court, the Chief Judge of the County Court and the Chief Magistrate of the Magistrates' Court of Victoria to establish what resources are required in each court to ensure that claims of historical child abuse can be fairly dealt with the minimum of delay.

Some of the potential procedural obstacles confronting claims involving historical child abuse are considered in the contexts of the different scenarios below. Fair and efficient case management by well resourced courts can reduce and alleviate those obstacles. In certain cases, there might be a legal obstacle to achieving a successful outcome for a victim. In this situation it is better for all parties concerned, and not just the victim, to know as soon as possible whether the legal obstacle will or will not defeat a claim. This serves the parties' interests as well as the interests of the administration of justice.

Scenario 1 (preliminary discovery) - It is possible that a victim of historical child abuse does not know the name of the person who harmed them or is mistaken about the name of the institution they belonged to or the precise date when the abuse occurred. In contrast, a person who has committed abuse will know who he or she was. The institution in which such person worked will likely have documentary records of where they worked and for what period. It might also have records of whether there were any complaints made before, during or after the period in question.

Under existing rules of civil procedure it is possible to obtain preliminary discovery as well as discovery from a non-party.¹⁰⁹ The rules permit preliminary discovery (i.e. before issuing a claim) to identify a defendant (Rule 32.03) and also, in particular circumstances, to "enable the applicant to decide whether to commence a proceeding in the Court" (Rule 32.05). The rules permit discovery from a non-party on application of a party to an existing proceeding that is already on foot. The Court has the discretion to order that a person who is not a party "in respect of whom it appears ... has or is likely to have or has had or is likely to have had in that person's possession any document which relates to any question in the proceeding" to give discovery of any such document" (Rule 32.07).

The reason for the rule on preliminary discovery is to assist claimants without sufficient, precise information to launch a claim and to prevent the bringing of speculative suits. A person must have a reasonable cause to believe that they have or might have the right to obtain relief against the person they seek discovery from (i.e. they must have grounds to hold a view). However, a line is drawn between, on the one hand, being permitted preliminary discovery to enable a person to decide whether to sue, and on the other, to simply gather more evidence. If a person already has sufficient material to decide whether to sue, the person is therefore able to decide and is not entitled to preliminary discovery under the rule just to get more evidence. If the person already believes there is a cause of action, preliminary discovery is not available to enable the person to verify that belief or otherwise investigate the strength of the case. The procedure cannot be used to determine whether there is a cause of action against a third party.

In discovery (as when giving evidence) the privilege against self-incrimination is available to individuals who are required by the rules of court or court order to give discovery to another party. The privilege, when it applies, enables a person to object to providing a document or information which is otherwise discoverable where it might tend to incriminate him or her or make her or him liable to a civil penalty.

¹⁰⁹ See Order 32 of the *Supreme Court (General Civil Procedure) Rules* 2005.

The potential for objection and argument and therefore procedural obstacle in these types of early (interlocutory) applications is therefore evident in the above procedural requirements. In cases involving historical child abuse, consistent procedures in the hearing and determination of applications of this type is desirable, whether under the rules of court or enhanced powers under the *Civil Procedure Act 2010* (Vic) that enable a person seeking to make a claim based on historical child abuse:

- to quickly identify the name of the person who harmed them; and
- to quickly identify the correct name of the institution and also where the person was stationed during the period of time that the abuses are believed have occurred.

This can save time and cost for all parties as well as unnecessary anxiety.

One way courts might consider that this could be addressed is for there to be special case management within each court and the adoption of consistent procedural protocols across jurisdictions for the handling of applications for preliminary discovery.

Scenario 2 (discovery) - The institution for which an alleged abuser worked is likely to have documentary records of where they worked and for what period and also records of whether there were any complaints made before, during or after the period in question. The records might be reports prepared by the institution, or correspondence to or from the institution or to or from the person alleged to have committed the historical child abuse. The records might be general financial records of payments for particular expenses or telephone records which establish dates, times or places.

The institution might either:

- know it has this information and where it is;
- not know but be faced with the scenario that its records are not readily searchable;
- have destroyed this information (whether as part of document management programs or otherwise).

The case might turn on establishing facts from these records. This evidence might have significance in the case for different reasons. It might be the only evidence available to establish particular facts or it might corroborate other evidence.

The timely production of these documents in discovery can significantly affect the time and costs involved in litigation. It can significantly affect the result. Discovery of a particular document in and of itself might lead to a settlement and avoid the cost of a trial altogether.

In a particular case it might be that a category of document appears by a party to be of little evidentiary value. A party might therefore consider that the time and costs of providing discovery of that category of document are onerous because its relevance is marginal. A defendant might seek to rely on this as a justification for not giving discovery or giving only incomplete discovery. Often it is not clear whether parties have done this, even if they have provided a sworn "affidavit of documents" that states that all relevant documents have been discovered.

Other parties engage in tactics of disputing the relevance of clearly relevant documents, requiring their opponents to state the precise categories of documents that they want in the hope that this will exclude categories that contain damaging documents.

Other parties engage in tactics of hiding very relevant documents within volumes of marginally relevant or even irrelevant documents in the hope that they will not be found.

Sometimes it is difficult to know whether unfair tactics have been engaged in or these arguments are fair and reasonable until after an expensive application or series of applications to the Court.

Experienced judicial officers know the types of documents that are likely to exist in different sorts of case and the relevance and significance of different sorts of documents. They have often seen the tactics that are sometimes engaged in and can manage cases to limit them.

Scenario 3 (ruling evidence out) - If objection is taken at trial to the admissibility of particular evidence and the objection upheld, it will significantly alter the scope of other evidence that will need to be led to establish a key part of the case or might make the case not worth pursuing. Conversely, if an objection to evidence is not upheld, it might dramatically alter a party's prospects in the case.

Pretrial procedures that enable parties to identify what objections will be taken to evidence and for rulings to be made on objections ahead of trial might be desirable in appropriate cases to enable parties to prepare the evidence that they would otherwise not need to lead and to know whether they face significant obstacles.

Scenario 4 (defences) - A limitation of action or some other defence might be available to a defendant that, if taken, will defeat the proceeding.

Pretrial procedures that enable parties to identify what defences will be taken and for rulings to be made ahead of trial might be desirable in appropriate cases to enable parties to know if there are insurmountable obstacles ahead of trial.

As would be expected, with all of these examples, there exist procedures and rules that can address them. However, in the context of claims for abuse, with the significant stress and financial risk it can place on a victim bringing a claim, the litigation process itself can potentially be another source of emotional if not psychological harm to the victim. Steps that can be taken that reduce the variances in procedure between courts and which make the bringing of a case to court more straight forward (even if it means that the victim knows earlier that the victim's case might face significant prospects of losing) are to be encouraged.

Courts might choose to develop special case management procedures that require the parties to identify to the court at an early stage the contested issues in the case, the documents that are needed by way of discovery or whether legal defences or objections to evidence will be taken at trial. Early elucidation and, if appropriate, early determination of these issues ahead of trial might serve to prevent legal cases being prolonged, relieve uncertainty from litigation and promote early settlement. The Government should ensure that courts are adequately resourced to deal with these types of cases at an interlocutory and trial level as appropriate.